Grain And Seed Contracts For Farmers

AIMS
Agriculture Institute of Management in Saskatchewan

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Table of Contents

Table of Contents 2
Disclaimer 3
Introduction 4
Contracting Basics 4
Purpose of contracts 4
Types of Risk 6
Contract Types 8
Cautions 8
Commentary on Precedent 1: Marketing Contract (Guaranteed Delivery) 11
Precedent 1 Guaranteed Delivery Contract ..... GD-i
Commentary on Precedent 2: Production Contract (Grower Supplied Inputs) 13
Precedent 2 Production Contract (Grower Supplied Inputs) ..... PC-i
Commentary on Precedent 3: Basis Contract 15
Precedent 3 Basis Contract ..... BC-i
Commentary on Precedent 4: Technology Use Agreement 17
Precedent 4 Technology Use Agreement ..... TUA-i
Commentary on Precedent 5: Generic Agreement of Purchase and Sale after Harvest 19
Precedent 5 Sale of Crops (after harvest) ..... SC-i
Conclusion 21
Glossary 22

Disclaimer

Note: These materials are prepared for general information only. While believed to be accurate as at the date of publication, readers are responsible for confirming information for their own circumstances prior to acting. Nothing in this publication is intended to be legal advice for any specific situations. Specific circumstances should be discussed with the proper advisors before taking any action.

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Questions and comments on this publication are welcomed. Please send them to the author at craig.zawada@wmcz.com

Introduction

Contracts. Everyone knows what they are, everyone enters into them. They are sometimes the subject of weeks or months of negotiation. Other times, they happen in the blink of an eye.

But below the everyday exterior is a vast area of law, psychology and economics. Few areas of law are so accessible to the general public, yet have such subtle variations beyond even the skill of many lawyers.

Contracting is crucial for farmers. There are many reasons. Low prices are a factor, of course, because losses are even tougher to withstand in today's difficult agriculture environment. There are other things too, such as increasing exposure to specialty crops, which mean that producers need to take a more active role when entering into agreements. Economic relationships are more interdependent, meaning that agreements have to link many parties.

This book is the second in a series devoted to assisting producers with contract issues. *A Farmer's Guide to Production Contracts*, published in 2003, identified individual clauses which were suitable, and some which were inappropriate, for producers. This book picks up where that one left off, but now the focus is on full contracts.

This further step is important. Individual clauses are useful, but they are still only pieces of the puzzle. Contracts can only be understood as a whole because of the degree of give and take involved.

This concept is key, and some of the points will be repeated in this book, but the reader is strongly urged to read the first Guide as well. It is available at http://www.csale.usask.ca/PDFDocuments/farmerGuideProdContracts.pdf or at http://www.sccd.sk.ca/aims/

Even entire contracts are not the whole story. Contracts are only one tool which fits into the broader area of risk management. It is tempting to see the contract as a final objective. In reality, it is only a way to accomplish something else. In almost all cases, that goal is to minimize risk. But there are many other tools to help accomplish the objective, including insurance, research and due diligence. Producers need to use all the weapons at their disposal to protect their business.

The other elements of risk management will have to wait for another publication. In this book, contracts will be the focus. These are not all of the types which farmers will be faced with, nor are they necessarily the best. They will, however, help start a strong risk management system.

Contracts are the foundation of a strong risk management system.

Contracting Basics

Purpose of contracts

Contracts are important to any kind of business, including farming. They can be dozens of pages long, or based on a handshake. In any case, though, the basic principle is the same: they are an agreement reached between two or more parties, with consideration granted. "Consideration" means the value given up to enter into an agreement. It might be money, grain, a promise **not** to do something, or anything else of value.

Contracts fill three roles:

- *They provide certainty*. A properly worded contract lets each party know what they will be obtaining, and what they will be surrendering. How much detail this requires is up to the parties.
- *They help avoid and settle disputes*. Contracts force parties to think about issues beforehand. This means that they can turn their minds to avoiding problems, or setting up methods to resolve disagreements. This often avoids arguments altogether. Contracts may also include a way of quickly resolving disputes, such as mediation or arbitration.
- *They balance the risks.* In an ideal contract, each party should feel it has received at least as much as it has given away. This is not always accomplished, of course, but an important role of a contract is that each side can decide what is most important to them.

Every contract balances risk and reward. This was stated in the earlier Guide, but it bears repeating: **expect that an advantage in one area will mean getting less in another.** Contracts are a complex blend of variables, and the contractors have to determine which are the most important to them.

Gaining a contract advantage in one area usually requires getting less in another.

Here is an example. A producer has two potential buyers of grain. One buyer has been in business for 60 years, is financially solid, but has a reputation of paying the bare minimum price. The other buyer was formed only a few months ago, and is paying a 10% premium over spot grain prices. Which one should the farmer sell to?

There is no right or wrong answer; it is the producer's choice whether it takes the stability of the first buyer, with less risk of default. Alternatively, it can choose the higher prices of the second company, realizing that without a track record, there may be a higher risk of the company not being in business after harvest to pay the contract.

What the producer should **not** do is expect to get everything, in this case, high prices **and** financial stability. Almost everything in life involves scarce resources, and offering more in one area usually takes resources away from another. Parties will distinguish themselves by promoting certain aspects of their product or business practices. This almost always results in a cost somewhere else. This is nothing more than the principle that "there is no free lunch", but it definitely applies to contracting.

More importantly, a contract that is completely one-sided rarely works out. A party that gains nothing from an agreement will have little incentive to complete its obligations. The lack of a reasonable return may even threaten its very existence. Recognize that the other party needs to get something out of the contract as well.

This does not mean that anybody should surrender and accept everything that is proposed in a contract. Be tough when bargaining – but be fair.

Some look at contracts as sacred documents that can always be protected

through a lawsuit if there is a breach. This is dangerous thinking, for a few of reasons. First, litigation is expensive. Paying legal fees, to say nothing of the time and distraction, will usually eliminate the profit margin from any agreement. It is far better to work with someone reputable that will be inclined to work with you, not against you.

Risk comes in many forms, but can never be completely eliminated.

Secondly, a lawsuit does not help one bit against judgment proof parties. A judgment proof party is someone who cannot, or will not, pay a judgment. "Success" in a lawsuit does not just mean getting a favourable judgment. Usually that is only half the battle. It is up to the winning party to collect that judgment, and it is often a tough, expensive and long process. If the defendant has no money, the judgment is only a piece of paper. If the defendant declares bankruptcy, the judgment can be worthless. If the defendant's assets are exempt from seizure, or if it hides the assets, it may be impossible to recover any of the judgment. This is why so many lawsuits are settled out of court, even when the case is reasonably strong. It recognizes that one can win yet still be unable to collect. Even settling a lawsuit has its costs, so the best approach is to avoid it in the first place.

Finally, and this will be repeated throughout the book, contracts do not magically guarantee results. Their strength rests on the good-faith and goodwill of the parties. Things can work out with a reputable party and a bad contract. When it is the other way around, though, even the good contract will not save you.

Types of Risk

Because contracts are a way of balancing risk, a producer has to understand the threats involved.

"Risk" is not a single aspect. It comes in many different forms. Some of these can be controlled, some can be managed, and some are best avoided altogether. Here are some examples:

1. *Price risk*. This is the chance that prices will decrease. This risk is often considerable and difficult to predict. It can also incorporate sub-elements, such as "basis risk" (the difference between local and future prices) and "spread risk" (the change between nearby and distant future prices).
2. *Production risk*. This includes any possibility that could affect the ability to grow and deliver a crop. Weather is a major production risk, but many other factors could be included, such as the farmer's personal health.
3. *Counter party risk*. The risk that the other side to a contract will be unable to perform is counter party risk. This is especially important for credit sale arrangements; a buyer's insolvency could mean no payment at all, despite having delivered the crop.
4. *Control risk*. Some contracts require several stages of decision making after signing. There is a risk, for example, that market activity will cause the net return to become unacceptable before

you have an opportunity to react. This is control risk.

These and other types of risk all need to be accounted for when contracting. More importantly, the producer needs to assess which areas of risk:

(a) *are the most likely.* While it is *possible* that an asteroid will hit your field, it is hardly something to keep you awake at night.

(b) *could have the biggest impact on the farm*. There should not be a lot of time devoted to a problem that can be solved in 5 minutes with a $10 part, even if it will likely happen. On the other hand, a preventable problem which could lead to a $500,000 loss should be at least anticipated, even if it is unlikely. Insurance is often used to cover these rare but expensive events.

(c) *are the most important to them*. Everyone will have a different risk tolerance, and their circumstances will affect things. For instance, you might take more risk if you are living alone than if you have a spouse and children to provide for. Usually we will make these decisions subconsciously, but we should always be deciding what is really important.

In comparing two equally probable risks, one which could cost $1,000 and the other $100,000, it is obvious which should have the most attention paid to it. This is not always done, however. It is human nature to overestimate the impact of certain risks, and underestimate others. Statistics prove beyond a doubt that it is far more dangerous to drive a car than it is to fly. Few people fear driving, though. Our instinctive reactions are not always accurate, and we should always be examining our motives and most of all, the hard facts.

Contract Types

There are an infinite number of contracts in modern life, and agriculture is no exception. A producer may enter into many contracts in a single day, ranging from buying a combine to selling grain, installing new computer software or buying a soft drink.

It is impossible to discuss every type of contract, so this book covers only a few. It also looks only at grain and seed contracts. Some of the points may be applicable to livestock or other farming ventures, but that is not the focus.

Even within the few forms included here, however, there are many, many ways that things can vary. Some of these are because of terms negotiated by the parties. Others are purely stylistic. Different authors can come up with contracts that look completely different but have similar application. The author of this book does not claim that these contract forms are the best. They are just one way of accomplishing a given task.

With all of this variability, what is the point of even looking at sample contracts? Here are some reasons:

1. *They provide context.* Last year's Guide included sample clauses that were important, but it also pointed out that contracts involve give and take. A favourable clause in one area might have to be balanced by an unfavourable one elsewhere. Looking at a whole contract helps identify how this can work.
2. *They provide a starting point.* Few contracts are built from scratch, without some input from previous experience. Some of the terms in these precedents may not fit individual situations, but the overall structure can build a framework.
3. *They provide ideas.* Experienced lawyers still look to precedents. They want to see different approaches and solutions, to best tailor them to a situation. Even if you never draft a contract, looking at as many agreements as possible will show you the alternatives.

Precedent contracts give context, a starting point, and provide ideas.

Of course there are many cases when these precedents will not be usable or appropriate. When a producer is dealing with a large grain buying company, the farmer will usually have to accept the buyer's standard contract. Changes might be requested, but unless there is a clear conflict, or the producer has an especially strong bargaining position (for example, if the particular crop is in very short supply), the agreement will usually be "take it or leave it."

Therefore, these sample contracts will be most useful for more specialized transactions, such as sales between producers and smaller buyers, or for specialty crops.

Cautions

We run into contracts all the time, so it can be easy to treat them casually. They all seem to use similar language. Because the wording appears to be repeated, and it is so easy to cut and paste terms

using a computer, it seems that preparing one should not be hard.

The standard disclaimer is that all contracts should be prepared by a lawyer. That advice is often ignored, and that is the contractor's choice. Assembling a contract, however, is like putting together the brakes on a car. The individual clauses are parts that can be assembled to form a contract. Likewise, one can look to a parts shelf and take components that, put together, will look like a fully functional brake. Whether one wants to risk using it, though, is up to the individual.

Precedents always have to be used with caution.

If a contract that you have put together fails, you have no one to blame but yourself. If an expert does it, though, not only do you have some extra assurance that things are done right, you also have a claim against him or her if there has been negligence. This protection alone can make the extra cost worth it.

And the cost is not as high as it might seem. Think of the old TV commercial for oil filters: "You can pay me now, or you can pay me later". Paying later, through litigating a failed contract, is far more expensive. In fact, your legal advisor may be able to suggest alternatives (such as tax planning) that can actually save money.

Remember this: **precedent contracts cannot be applied to every situation in a cookie cutter approach.** The number of variables in a transaction is almost infinite, and even a small change can make a contract term inapplicable or dangerous. These agreements should be approached in the same way that any lawyer uses precedents – as a starting point that can then be revised and tailored to individual circumstances.

This may smack of self-interest, coming from a lawyer, but it cannot be recommended too strongly that legal advice be obtained before entering into any significant contract. Just as a non-farming lawyer might be able to raise some kind of crop, but might not do a very efficient job, most producers do not have the training, and most of all the experience, to know where trouble could arise in a contract.

The message is to use these materials at your own risk.

These agreements have been drafted more from the producer's point of view than most standard form contracts. That is because most standard forms are drawn by buyers, who will obviously protect their own interests. Despite this, the sample agreements are not completely slanted in the producer's favour. Some judgment has been made to make the contracts "fair" to all concerned. Fairness is a slippery concept, but it goes back to comments made earlier in this book. If a contract is too one-sided, there is less incentive for the aggrieved party to perform, causing extra costs for everyone involved.

The commentary for each of these sample contracts will discuss the major provisions. It will not explain the meaning behind every clause, though. Even an entire law career does not teach someone everything there is to know about wording (and besides, court decisions can change the interpretation at any time). If there is a question of

what a clause does or means, ask your lawyer.

Finally, read the commentary for all of the precedents. Many clauses are repeated in different contracts, but are only discussed for one agreement.

With those caveats in mind, let's look at the precedents.

Commentary on Precedent 1: Marketing Contract (Guaranteed Delivery)

One of the most common forms of production contracts is a "marketing contract." Known by various names, such as "deferred delivery contract," or "guaranteed delivery agreement," this type of contract reduces the producer's risk of price declines, while helping the buyer plan inventories after harvest.

To accomplish this, a Marketing Contract is signed in advance of harvest, often when seed is purchased in the spring. This is not always the case, of course. A producer may see high prices at any time during the year and want to lock in.

As with any deferred payment arrangement, the producer should be careful with whom it is dealing. Obtaining a high price in April will be worth exactly nothing if the buyer is out of business in October. Of course, the seller will still have the crop to market to other sources, but options may be less appealing, and there may be storage costs until a buyer is found.

The ability to avoid long-term storage on the farm is often stated to be an advantage for Marketing Contracts. This is true to a point, since the farmer will have a specific delivery period to plan for. It should be made clear, however, what the delivery period is. The buyer might retain too much control over when delivery can be called for, so that the farmer is at its mercy.

Marketing contracts provide price stability for both parties.

Grading is one of the biggest issues in grain delivery contracts, because it is subjective and difficult to pin down in advance. For certain crops, well defined standards can be used, and the variation is relatively small. In other cases, independent organizations such as the Canadian Grain Commission have testing procedures to use. This precedent uses that process.

For more specialized crops, however, there may not be a good independent measure of quality. In such cases, it is important to set out the requirements within the contract in as much detail as possible. In addition, there should be a well drafted set of rules to resolve any disputes.

The best defence against such problems is to deal with reputable parties. If there is a long pattern of dealing and trust, there should be fewer serious disagreements. Never forget that a contract is only a piece of paper, highly dependent on the good faith of the participants.

Like the rest of the contracts in this book, this agreement calls for arbitration in the case of a dispute. This is something that should be carefully considered. Arbitration is a process where disputes are not settled by a judge in a court, but by a mutually agreed person or persons using a more streamlined process. Arbitration is theoretically a faster and cheaper way of resolving disputes. It sometimes helps a farmer, because the producer may have less financial resources. This is not a hard and fast rule. In some cases, court might be preferable to arbitration, and so the

disadvantages of arbitration should be considered.

As is the case with all the precedents included here, the variable terms are grouped at the beginning so they can be inserted as necessary. Be as precise as possible. If more room is needed, refer to it in a separate schedule attached to the agreement. Whenever something is not applicable, do not leave it blank. Stroke it out, or insert "N/A" or the like. Anything that is left blank might be filled in later, and it is hard to prove when that was done.

This contract is more producer friendly than most, because Marketing Contracts are usually drafted by the buyer, from their point of view. Yet it is not completely one sided. An example is paragraph 10, which requires notice to the Buyer if delivery seems unlikely. The Buyer in this case has some discretion on what to do. The Administration Fee should still be set at a reasonable value.

There may be terms or situations which go outside the standard contract. In such a case, customized terms can be included in Schedule "A". Legal terminology is not necessary, but remember that the terms may have to be interpreted some day. Therefore, describe the intent of the parties as precisely as possible.

Finally, the contract needs to be signed. The date should be inserted, and the parties will sign where indicated.

Witnesses to signatures are almost never a strict requirement, but they are called for here. Their purpose is to provide evidence if a party claims to have not signed. They should be someone as independent from the party as possible (for instance, NOT their relative or business colleague).

Corporations should affix their corporate seal. If you are signing on behalf of your own corporation, be extra vigilant that you are signing as a corporation, and not accepting the obligations personally.

One signed copy is technically sufficient, although contractors will usually each want to have their own signed copy. And once you have your own, don't throw it away! It could be crucial to compare yours against the other side's if there is a question of changes made after signing.

Precedent 1
Guaranteed Delivery Contract

WARNING: Be sure you understand the effect of this agreement, and its clauses, before using it. Refer to the Commentary, and seek legal advice where necessary.

Between:

_____
_____
_____
_____
(full name and address of Grower)
(**"Grower"**)

And

_____
_____
_____
_____
(full name and address of Buyer)
(**"Buyer"**)

1. The Buyer agrees to buy, and the Grower agrees to sell, agricultural produce as follows, subject to the attached Terms and Conditions:

Product	*(Full description of product)*
Quality	*(Provide a complete description of the character and quality to be delivered)*
Quantity	_____ *tonnes*
Delivery Location	_____, *SK*
Delivery Period	_____, *20__ to* _____, *20__*
Delivery Window (s. 2)	_____ *days from the day Buyer calls for delivery*
Price	*$ (including taxes)*
Price Deductions	*$*
Extra Delivery Rate (s. 3)	$ /tonne
Extra Storage Fee (s. 3)	$ /tonne

Payment Deadline (s. 5)	_____ days after delivery
Administration Fee (s. 10)	$ /tonne
Screenings Owner (s. 12)	Grower / Seller *(Circle one)*

Date: _____

_____ _____
Grower Witness

_____ _____
Buyer Witness

Terms and Conditions

2. Grower agrees to deliver to the Delivery Location, at the Grower's expense, the Quantity of the Product during the Delivery Period as directed by the Buyer. The Product shall be delivered within the Delivery Window, or by the end of the Delivery Period, whichever is earlier.

3. If the Delivery Location is unable to accept delivery for any reason, the Buyer may:

a) designate an alternate Delivery Location, and reimburse the Grower for any additional costs of delivery at the Extra Delivery Rate for each additional kilometre; or

b) with the prior consent of the Grower, pay the Grower the Extra Storage Fee per tonne for every month, or portion thereof, after the last day of the Delivery Period until delivery.

4. If the Buyer fails to accept the Product at the Delivery Location (or any agreed alternate location) after delivery, the Grower may, at its option:

a) agree to extend the Delivery Period upon such terms as it may deem acceptable; or

b) treat this agreement as repudiated by the Buyer, and resell the Product on such terms as it may consider necessary. In such case, the Buyer shall be liable for damages to the Grower equal to the Price plus reasonable costs incurred by the Grower in arranging for resale, less any amounts recovered by the resale of the Product.

5. The Buyer shall pay the Price, less Price Deductions, to the Grower by the Payment Deadline.

6. All deliveries shall meet or exceed the Quality. In the event that there is a dispute regarding the Quality, a representative sample of the Product shall be forwarded to the Canadian Grain Commission, whose decision shall be binding on the parties. If such procedure is not available, a mutually agreed third party shall perform the grading, and the determination shall be binding on the parties.

7. Delivery of the Product shall be subject to reasonable dockage. If there is a dispute as to the level of dockage, a representative sample of the Product shall be forwarded to a mutually agreed third party, and the determination shall be binding on the parties.

8. If the Product does not meet the Quality, the Grower may elect to provide Product to the Buyer which does meet or exceed the Quality, or to accept payment from the Buyer for Product of the quality so delivered, at the Buyer's prevailing prices at the time.

9. The Product shall be at the Grower's risk until delivery.

10. Grower will immediately advise the Buyer if it believes that delivery of the Quantity and Quality of the Product will not be able to be made in the Delivery Period. The Buyer may grant the Grower an extension of the Delivery Period, or require the Grower to pay to the Buyer the difference between the Price and the actual cost to the Buyer to replace the quantity and quality of Product not delivered, together with the Administration Fee for each tonne of the Quantity not delivered.

11. Grower shall not sell or agree to sell to any other person any Product which would impair Grower's ability to fulfill its obligations under this agreement. Grower shall keep the Product free and clear of all liens, security interests and encumbrances and shall transfer clear title of the Product to the Buyer.

12. Screenings and foreign material removed from the Product shall become the property of the Screenings Owner.

13. This agreement shall benefit and be binding on the parties and their respective heirs, personal representatives, successors and permitted assigns.

14. If the Grower or the Buyer shall be more than one person, their obligations under this agreement shall be joint and several. Singular terms include the plural and vice versa. Masculine, feminine or neuter gender terms include each other.

15. This agreement shall be governed by the laws of Saskatchewan, Canada.

16. This agreement may not be assigned by either party without the prior written consent of the other party.

17. Time shall be of the essence.

18. If any portion of this agreement is found to be illegal, invalid or unenforceable by any court having jurisdiction, that portion will be deemed deleted from this agreement and the remainder shall be valid and binding as if the deleted provision were not included.

19. This agreement is the entire agreement between the parties with respect to the matters referred to herein. There are no other representations, warranties or collateral agreements, express or implied except as contained in this agreement.

20. Capitalized words and terms used in this agreement have the meanings specified in section 1.

21. The terms and conditions contained in Schedule "A" (if any) are incorporated into this agreement.

22. Any disputes under this agreement shall be referred to a single arbitrator, with the provisions of *The Arbitration Act, 1992* (Saskatchewan) to apply.

SCHEDULE "A"

Further Terms and Conditions

(If there are no further terms, write "N/A")

Commentary on Precedent 2: Production Contract (Grower Supplied Inputs)

While the term "production contract" can refer to any agreement where agricultural products are bought and sold, there is another narrower meaning. It is a contract where a specific quantity is not specified in the agreement. Instead, the buyer agrees to purchase all of the production of the farmer of a particular crop, or from a particular acreage.

Production contracts are typically used with higher value crops.

Again, these contracts can differ, but they usually share some common elements. In most cases, they involve higher value crops, rather than bare commodities. Certified seed is often sold and grown through Production Contracts. More recently, GM crops are handled the same way, either with or without Technology Use Agreements (discussed later in this book).

The buyer will usually want some assurances that the end product will be of high quality. To ensure this, it might want to provide the seed or other inputs to the producer. Sometimes this is just an extra profit element to the buyer, but it also can serve as an effective financing tool for the producer, if payment does not have to be made until delivery of the crop. This book's precedent allows the farmer to use inputs from any source (section 12).

To ensure high quality, there will also be extra requirements regarding growing practices. These can be seen in section 4. Some contracts go much further, but farmers will want to avoid expensive extra practices as much as possible.

In addition to the husbandry practices, there might be inspection rights. This precedent includes an inspection clause (section 16), allowing the buyer to check the crop while growing or after harvest. This can be deleted, but buyers will commonly want this right.

As with Marketing Contracts, special attention needs to be paid to defining quality. The Production Contract will usually provide the minimum quality requirements upon delivery, and if these are not met, the buyer may be able to discount the price, or reject the product entirely. The farmer needs to ensure that the quality measurement is as certain as can be, and if there is a dispute, that there is a clear procedure to follow.

Quantity is not usually guaranteed (section 5), but some Production Contracts put the farmer on the hook if production is less than a certain amount. Do not agree to this unless there is a corresponding adjustment to price. In other words, the farmer should be paid more per tonne overall to compensate him or her for accepting the risk of inadequate production. If there is a complete crop failure, the buyer sometimes bears all the costs, including the cost of the seed. In other cases, the buyer may want reimbursement for the seed if there is a crop failure.

Some Production Contracts restrict the farmer from producing any of the same crop on other land owned by the producer. The reason for this is measurement – it is harder for a buyer to confirm that all the production from

given acreage was delivered if it could have been co-mingled with another crop. Sometimes this additional production is completely barred, and in other cases, the buyer is given a right of first refusal on the excess. Be sure that this is properly understood.

For the same reason, the "Acres to be Planted" definition should include an accurate description of the land where the crop will be growing. If less than 100% of the production is to be provided, the appropriate percentage can be included in "Production to be Delivered."

Most contracts are drafted by buyers, so it is rare to see a clause setting out the grower's rights on non-acceptance. This type of clause is included in section 7. It gives the Grower the choice of extending the Delivery Period, or treating the contract as ended and claiming damages. The clause could go further and specifically define the damages, although it is difficult to predict these accurately.

As was the case with the Marketing Contract, the Buyer or Grower can be designated as the owner of any screenings obtained from the crop. Standard contracts usually give this to the buyer, because it is easier, but consider otherwise if there could be significant value in the tailings.

Section 28 is new, and deals with extra damages. In Canada, parties that have suffered a contract breach are put back into the position that they would have been but for the breach. In other words, if they lost $9,000 in profits because of the breach, and could not sell the product elsewhere, their damages are $9,000 (There is a duty to mitigate one's damages. One cannot sit back and allow damages to multiply if they can reasonably be avoided). It is very rare to see punitive damages in this country, but sometimes you will see what are called "consequential damages".

Consequential damages are costs that indirectly flow from a breach. Suppose a software manufacturer leaves a bug in a spreadsheet program. Someone uses the program to calculate a tender bid, and the bug causes the tender to understate costs by a million dollars, so that the user loses that amount of money on the tendered agreement. The loss is said to be consequential to the programming defect. Since there can be so many interdependent contracts, consequential damages are difficult to foresee, but they can also be enormous.

Section 28 excludes, among other things, consequential damages. This could favour the farmer, if a failure to deliver caused the buyer to suffer a big penalty from a processor for failure to deliver. On the other hand, it could work against the producer where a buyer's failed acceptance caused cash flow problems for the farmer, and as a result the farm went bankrupt. Therefore, the potential for loss should be carefully considered before leaving this clause in.

Consequential damages often dwarf the amount of normal damages.

Contracts will sometimes include a "time of the essence clause" (section 21). Under contract law, parties often have a reasonable time to complete their obligations. Making time of the essence ensures that the specified date is the ultimate deadline, without extension. Including a time of the essence clause is usually recommended.

Precedent 2
Production Contract (Grower Supplied Inputs)

***WARNING: Be sure you understand the effect of this agreement, and its clauses, before using it. Refer to the Commentary, and seek legal advice where necessary*.**

Between:

_____
_____
_____
_____
(full name and address of Grower)
(“**Grower**”)

And

_____
_____
_____
_____
(full name and address of Buyer)
(“**Buyer**”)

1. Grower shall produce and deliver a crop from seed purchased from the Buyer, and Buyer agrees to buy as described below, subject to the attached Terms and Conditions:

Product	*Full description of product*
Minimum Specifications	*The specifications should be described in as much detail as possible, including grading and dockage limits*
Acres to be Planted	_____ *acres, located at* _____ *(include legal description of lands)*
Production to be Delivered	_____ *percent of production from the Acres to be Planted*
Delivery Location	_____, *SK*

Delivery Period	*_____, 20__ to _____, 20__*
Delivery Window	*_____ days from the day Buyer calls for delivery*
Price	*$ (including taxes)*
Price Deductions	*$*
Other Inputs	*Full description of fertilizer, herbicides or other inputs to be purchased from Buyer, including prices. If none, enter N/A.*
Payment Deadline (s. 3)	_____ days after delivery
Extra Delivery Rate (s. 6)	$ /tonne
Extra Storage Fee (s. 6)	$ /tonne
Administration Fee (s. 13)	$ /tonne
Screenings Owner (s. 15)	Grower / Seller *(Circle one)*

Date: _____

_____ _____
Grower Witness

_____ _____
Buyer Witness

Terms and Conditions

2. Grower agrees to deliver to the Delivery Location, at the Grower's expense, the Quantity of the Product during the Delivery Period as directed by the Buyer. The Product shall be delivered within the Delivery Window, or by the end of the Delivery Period, whichever is earlier.

3. The Buyer shall pay the Price, less the Price Deductions, to the Grower by the Payment Deadline.

4. Grower shall produce the highest quality product possible and meet the Minimum Specifications. Grower shall:

a) take all reasonable measures to prevent contaminants during growing and handling of the Product;

b) keep harvest, handling and storage equipment free of mixtures of commodities and foreign materials;

c) utilize good husbandry practices, customary within Saskatchewan for the Product.

5. Provided that Grower has used its best efforts to produce the Product, Grower shall not be liable to deliver any quantity of Product other than the Production to be Delivered.

6 If the Delivery Location is unable to accept delivery for any reason, the Buyer may:

a) designate an alternate Delivery Location, and reimburse the Grower for any additional costs of delivery at the Extra Delivery Rate for each additional kilometre; or

b) with the prior consent of the Grower, pay the Grower the Extra Storage Fee per tonne for every month, or portion thereof, after the last day of the Delivery Period until delivery.

7. If the Buyer fails to accept the Product at the Delivery Location (or any agreed alternate location) after delivery, the Grower may, at its option:

a) agree to extend the Delivery Period upon such terms as it may deem acceptable; or

b) treat this agreement as repudiated by the Buyer, and resell the Product on such terms as it may consider necessary. In such case, the Buyer shall be liable for damages to the Grower equal to the Price plus reasonable costs incurred by the Grower in arranging for resale, less any amounts recovered by the resale of the Product.

8. All deliveries shall meet or exceed the Minimum Specifications. In the event that there is a dispute regarding the Minimum Specifications, a representative sample of the Product shall be forwarded to the Canadian Grain Commission, whose decision shall be binding on the parties. If such procedure is not available, a mutually agreed third party shall perform the grading, and the determination shall be binding on the parties.

9. Delivery of the Product shall be subject to reasonable dockage. If there is a dispute as to the level of dockage, a representative sample of the Product shall be forwarded to a mutually agreed third party, and the determination shall be binding on the parties.

10. If the Product does not meet the Minimum Specifications, the Grower may elect to provide Product to the Buyer which does meet the Quality, or to accept payment from the Buyer for Product of the quality so delivered, at the Buyer's prevailing prices at the time.

11. The Product shall be at the Grower's risk until delivery.

12. Grower may use fertilizers, pesticides, herbicides and other inputs to produce the Product, unless specifically provided otherwise in this agreement. Unless otherwise provided, Grower may obtain such inputs from any source.

13. Grower will immediately advise the Buyer if it believes that delivery of the Product will not be able to be made in the Delivery Period. The Buyer may grant the Grower an extension of the Delivery Period, or require the Grower to pay to the Buyer the difference between the Price and the actual cost to the Buyer to replace the quantity and quality of Product not delivered, together with the Administration Fee for each tonne of the Quantity not delivered.

14. Grower shall keep the Product free and clear of all liens, security interests and encumbrances and shall transfer clear title of the Product to the Buyer.

15. Screenings and foreign material removed from the Product shall become the property of the Screenings Owner.

16. Buyer may inspect the Product, whether as a standing crop, harvested Product, or in storage facilities, provided that reasonable prior notice is given to the Grower and the inspection is done during reasonable times.

17. This agreement shall benefit and be binding on the parties and their respective heirs, personal representatives, successors and permitted assigns.

18. If the Grower or the Buyer shall be more than one person, their obligations under this agreement shall be joint and several. Singular terms include the plural and vice versa. Masculine, feminine or neuter gender terms include each other.

19. This agreement shall be governed by the laws of Saskatchewan, Canada.

20. This agreement may not be assigned by either party without the prior written consent of the other party.

21. Time shall be of the essence.

22. If any portion of this agreement is found to be illegal, invalid or unenforceable by any court having jurisdiction, that portion will be deemed deleted from this agreement and the remainder shall be valid and binding as if the deleted provision were not included.

23. This agreement is the entire agreement between the parties with respect to the matters referred to herein. There are no other representations, warranties or collateral agreements, express or implied except as contained in this agreement.

24. Capitalized words and terms used in this agreement have the meanings specified in section 1.

25. The terms and conditions contained in Schedule “A” (if any) are incorporated into this agreement.

26. Any disputes under this agreement shall be referred to a single arbitrator, with the provisions of *The Arbitration Act, 1992* (Saskatchewan) to apply.

27. Grower is an independent contractor and nothing in this agreement shall make Grower an employee, agent or partner of Buyer.

28. Neither party shall be liable for special, consequential, punitive, exemplary or indirect damages and the measure of damages shall be without regard to the cause relative thereto and whether or not caused by or resulting from the negligence of such party.

SCHEDULE “A”

Further Terms and Conditions

(If there are no further terms, write "N/A")

Commentary on Precedent 3: Basis Contract

Basis contracts are the most complicated agreement discussed here, from a financial point of view. It is extremely unlikely that this precedent will be used as is. Situations can differ too much. More than any of the other sample contracts, this Basis Contract should be seen as an informational guide only.

A simple Basis Contract is straightforward. It relies on the difference between the current cash price and the representative futures price. For example, suppose that the current cash price is $200 per tonne. The nearest futures price is $230 per tonne. The "basis" is the difference, or $30/tonne. The terminology is that the basis is "$30 under the futures".

Basis contracts manage only a small portion of the total price risk.

With a Basis Contract, you lock in the basis only, but leave the future price open until a later date. Again, we can use a very simple example where the agreed basis is $30, and the producer has until June 20, 2005 to select a price. At any time before June 20, 2005, the farmer can lock in, and price becomes the cash price at that lock-in date plus the agreed basis.

This is a very simple example. More complex Basis Contracts can allow rolling over of contracts into new futures periods, automatic triggering upon reaching a target price and payment of a portion of the funds on delivery, among other variables. The precedent in this book does not deal with most of these complexities, although it does allow for partial payment on deliveries.

Basis Contracts are popular, but they are often misunderstood. For one thing, they manage only a small portion of the price risk. They do not prevent losses if the (cash) price goes down. They just protect the bonus over the prevailing cash price. Thus, you might use a Basis Contract if the basis is inordinately high, but it still does not protect your overall cash position.

Basis varies through the year, depending on the crop cycle. The basis is often at its lowest at harvest, because of the high supplies, and it will firm up as seeding approaches.

The bottom line is that Basis Contracts are not to be used unless the risks are completely understood and are manageable. There are other ways of managing overall price risk besides a Basis Contract, and they may be more appropriate. These include futures contracts and price hedging.

Not surprisingly, a Basis Contract includes many more variables than an ordinary guaranteed delivery contract. The Price Calculation Formula needs to be determined, and this can be as simple or as complex as the parties want. Here are some of the other terms used in the precedent:

- *Expiry Date*: This is the last day that the farmer has to lock in a pricing date. The Expiry Date is NOT the same as the Pricing Date. As long as the decision is made before the Expiry Date, the producer can choose a Pricing Date in the future. Suppose that the Expiry Date is June 30, 2005. On June 25, 2005,

the cash price of the crop is $400/tonne. The producer can elect that price. Or, if the farmer believes that the price will be higher in the future, a date of, say, August 25, 2005 might be chosen, and whatever the cash price is on that day will govern. Remember that the price could just as easily go down by August 25, and there is no protection against that risk in this contract.

- *Advance Percentage*: This is a portion of the price that is paid upon delivery, even though the pricing date may be locked in later. This provides some protection to the Grower in the event the Buyer becomes insolvent. The balance is paid after the final price can be determined.
- *Buyer Fax*: Any time there are elections that need to be made, such as locking in a price, notification becomes important. In this contract, this can be done in person (the best), or by a fax to this number. Whenever giving notice by fax, it is always recommended to follow up to ensure the communication was received. Verbal notifications alone are dangerous, and should never be relied upon.

Precedent 3
Basis Contract

WARNING: Be sure you understand the effect of this agreement, and its clauses, before using it. Refer to the Commentary, and seek legal advice where necessary.

Between:

_____
_____
_____
_____
(full name and address of Grower)
(“**Grower**”)

And

_____
_____
_____
_____
(full name and address of Buyer)
(“**Buyer**”)

1. The Buyer agrees to buy, and the Grower agrees to sell, agricultural produce as follows, subject to the attached Terms and Conditions:

Product	*(Full description of product)*
Quality	*(Provide a complete description of the character and quality to be delivered)*
Quantity	_____ *tonnes*
Delivery Location	_____, *SK*
Delivery Period	_____, *20__ to* _____, *20__*
Basis	*$*

Price Calculation Formula	*(include formula for calculation of price, and whether taxes are included)*
Expiry Date (s. 2)	_____, *20__*
Buyer Fax (s. 2)	*( ) - (phone number, included area code)*
Delivery Window (s. 3)	_____ *days from the day Buyer calls for delivery*
Price Deductions	*$*
Payment Deadline (s. 4)	_____ days after the Pricing Date
Advance Percentage (s. 4)	____ *%*
Extra Delivery Rate (s. 5)	$ /tonne
Extra Storage Fee (s. 5)	$ /tonne
Administration Fee (s. 11)	$ /tonne
Screenings Owner (s. 13)	Buyer / Grower (*Circle one)*

Date: _____

_____ _____
Grower Witness

_____ _____
Buyer Witness

Terms and Conditions

2. The Grower shall elect a pricing determination date ("the Pricing Date") on or before the Expiry Date. The price ("the Price") shall be calculated using the Price Calculation Formula as of the Pricing Date. The Grower shall elect the Pricing Date by attending at the Delivery Location and advising in writing, or by faxing notification to the Buyer Fax. The Pricing Date shall be deemed to have been elected on the date of signing any notification (in the case of attending at the Delivery Location) or on the date printed on the fax by the Buyer's fax machine (in the case of delivery to the Buyer Fax).

3. Grower agrees to deliver to the Delivery Location, at the Grower's expense, the Quantity of the Product during the Delivery Period as directed by the Buyer. The Product shall be delivered within the Delivery Window, or by the end of the Delivery Period, whichever is earlier.

4. The Buyer shall pay the Grower:

a) upon delivery of the Product, the sum of the Price and the Basis for the Quantity multiplied by the Advance Percentage, with the Price calculated for the purposes of this subsection (a) as if the actual day of delivery is the Pricing Date; and

b) by the Payment Deadline, the sum of the Price and the Basis for Quantity of the Product delivered, less any amount paid under subsection (a) and less the Price Deductions.

5. If the Delivery Location is unable to accept delivery for any reason, the Buyer may:

c) designate an alternate Delivery Location, and reimburse the Grower for any additional costs of delivery at the Extra Delivery Rate for each additional kilometre; or

d) with the prior consent of the Grower, pay the Grower the Extra Storage Fee per tonne for every month, or portion thereof, after the last day of the Delivery Period until delivery.

6. If the Buyer fails to accept the Product at the Delivery Location (or any agreed alternate location) after delivery as agreed, the Grower may at its option:

a) agree to extend the Delivery Period upon such terms as it may deem acceptable; or

b) treat the contract as repudiated by the Buyer, and resell the Product on such terms as it may consider necessary. In such case, the Buyer shall be liable for damages to the Grower equal to the Price plus reasonable costs incurred by the Grower in arranging for resale, less any amounts recovered by the resale of the Product.

7. All deliveries shall meet or exceed the Quality. In the event that there is a dispute regarding the Quality, a representative sample of the Product shall be forwarded to the Canadian Grain Commission, whose decision shall be binding on the parties. If such procedure is not available, a mutually agreed third party shall perform the grading, and the determination shall be binding on the parties.

8. Delivery of the Product shall be subject to reasonable dockage. If there is a dispute as to the level of dockage, a representative sample of the Product shall be forwarded to a mutually agreed third party, and the determination shall be binding on the parties.

9. If the Product does not meet the Quality, the Grower may elect to provide Product to the Buyer which does meet or exceed the Quality, or to accept payment from the Buyer for Product of the quality so delivered, at the Buyer's prevailing prices at the time.

10. The Product shall be at the Grower's risk until delivery.

11. Grower will immediately advise the Buyer if it believes that delivery of the Quantity and Quality of the Product will not be able to be made in the Delivery Period. The Buyer may grant the Grower an extension of the Delivery Period, or require the Grower to pay to the Buyer the difference between the Price and the actual cost to the Buyer to replace the quantity and quality of Product not delivered, together with the Administration Fee for each tonne of the Quantity not delivered.

12. Grower shall not sell or agree to sell to any other person any Product which would impair Grower's ability to fulfill its obligations under this agreement. Grower shall keep the Product free and clear of all liens, security interests and encumbrances and shall transfer clear title of the Product to the Buyer.

13. Screenings and foreign material removed from the Product shall become the property of the Screenings Owner.

14. This agreement shall benefit and be binding on the parties and their respective heirs, personal representatives, successors and permitted assigns.

15. If the Grower or the Buyer shall be more than one person, their obligations under this agreement shall be joint and several. Singular terms includes the plural and vice versa. Masculine, feminine or neuter gender terms include each other.

16. This agreement shall be governed by the laws of Saskatchewan, Canada.

17. This agreement may not be assigned by either party without the prior written consent of the other party.

18. Time shall be of the essence.

19. If any portion of this agreement is found to be illegal, invalid or unenforceable by any court having jurisdiction, that portion will be deemed deleted from this agreement and the remainder shall be valid and binding as if the deleted provision were not included.

20. This agreement is the entire agreement between the parties with respect to the matters referred to herein. There are no other representations, warranties or collateral agreements, express or implied except as contained in this agreement.

21. Capitalized words and terms used in this agreement have the meanings specified in section 1.

22. The terms and conditions contained in Schedule "A" (if any) are incorporated into this agreement.

23. Any disputes under this agreement shall be referred to a single arbitrator, with the provisions of *The Arbitration Act, 1992* (Saskatchewan) to apply.

SCHEDULE "A"

Further Terms and Conditions

(If there are no further terms, write "N/A")

Commentary on Precedent 4: Technology Use Agreement

Even more so than basis contracts, producers are unlikely to be drafting TUA's for their own use. How many farmers, after all, have developed genetically modified crops? Seed companies will not use anything but their own form of contract.

Nonetheless, this precedent is an example of dulling the rough edges from TUA's currently used by major seed companies. Because changes will not be made, this may be an academic exercise. It is useful, though, because it can help illustrate what parts of standard TUA's are troublesome. The producer then has to decide whether the benefits outweigh the disadvantages.

What is a TUA? It combines a Production Contract, where the buyer supplies the seed, with an intellectual property license. An IP license is merely a consent to infringe on the monopoly that the rights holder may have. For example, a seed developer might have Plant Breeders' Rights, or a patent, which entitles them to a period of time where they are the only ones allowed to sell or use the seed. The license gives others the ability to use the seed, under terms defined by the license.

TUA's go beyond standard production agreements. First, they routinely prohibit retaining seed for subsequent years. There are several reasons for this, but most importantly, it is the primary way that the rights holder can protect their investment and the monopoly for subsequent years. If the product becomes too widely dispersed, they risk losing their monopoly altogether. Therefore, there will never be any negotiation on this point.

Another common feature is "tying" of other inputs. For example, a glyphosate resistant brand of canola might be marketed together with that company's brand of herbicide. There may be nothing wrong with this, but remember to keep flexibility at a maximum so that excessively high prices are not charged on some of the inputs.

Extra inspection rights typically go along with TUA's. This is common in production contracts (and is included in the Production Contract precedent in this book), but TUA inspection rights go much further. They may explicitly permit testing for genetic character, and may need more disclosure of information from the grower. In addition, they can go past the current growing season, so that the technology owner can continue to inspect and test for years after. This is designed to prevent the farmer from retaining seed and growing it outside of the license, but it means that a TUA can have long term effects. No inspection rights have been included in this agreement.

Genetically modified crops introduce a host of new risk factors.

GM crops are, of course, a hot button issue in many quarters and farmers face risks ranging from protests to contamination of neighbouring crops. For this reason, there is no restriction on consequential damages in this contract, but the issue needs to be carefully reviewed. This is a perfect example of the law being able to do only so much. *Perhaps* a lawsuit can help if a GM crop was not properly licensed for production. *Perhaps* suing the seed

developer because a crop has volunteered itself throughout a farm could succeed. But remember that the producer will be going against a party that has vast legal resources, and that this will be uncharted territory for the courts. Only the farmer can decide if the risk is worth the extra profits, but recognize that there are significant non-agricultural risks when growing GM crops. This is not intended to be a value judgment on GM crops. It simply reflects the existing legal and social environments.

This particular precedent differs from a Production Contract (and most TUA's), because it allows the farmer to sell the grain anywhere. As pointed out above, this is highly unlikely in practice.

Some may feel that this precedent TUA does not go far enough in favour of a producer. That is a fair comment, but that is not a contract issue, it is an intellectual property issue. As long as seed developers have a monopoly granted by the *Patent Act* or *Plant Breeders' Rights Act*, they are able to impose whatever terms they wish, subject only to the power of the market. That is an issue beyond the scope of this book.

Precedent 4
Technology Use Agreement

WARNING: Be sure you understand the effect of this agreement, and its clauses, before using it. Refer to the Commentary, and seek legal advice where necessary.

Between:

_____
_____
_____
_____
(full name and address of Grower)
(“**Grower**”)

And

_____
_____
_____
_____
(full name and address of Owner)
(“**Owner**”)

1. The Grower agrees to purchase Seed, and the Owner agrees to sell, subject to the attached Terms and Conditions:

Seed	*(Full description of product)*
Seed Fee (s. 3)	*(Full details of price to be paid by Grower, and whether taxes are payable)*
Payment Date (s. 3)	_____, *20__*

Date: _____

_____ Grower

_____ Witness

_____ Buyer

_____ Witness

Terms and Conditions

2. Owner grants a license to the Grower to use the Seed for planting one and only one crop for resale.

3. The Grower agrees to pay the Seed Fee to the Owner by the Payment Date.

4. Grower agrees not to save seed produced from the Seed for the purpose of replanting, nor shall the Grower give or transfer any Seed or seed produced from it to any other person.

5. Grower may use such herbicides, pesticides, fertilizers and other products or inputs in connection with planting, growing and harvesting of the Seed as it considers desirable.

6. Owner warrants:

> a) the tolerance of the Seed to herbicides and pesticides sold by it or its agents to the Grower, provided that those herbicides and pesticides are applied at specified rates and according to labeled instructions;
>
> b) that the Seed is of good and marketable quality, suitable for its intended use to produce a crop for consumption;
>
> c) that it has obtained all necessary regulatory and governmental permits, approvals and other consents required to permit the Seed to be grown in Canada, and to permit the sale in Canada of produce grown from the Seed.

7. Owner agrees to indemnify and hold harmless Grower from any claims, debts, actions, liabilities or obligations arising from the claim of any third party that the Seed infringes on intellectual property rights, or for damages resulting from the introduction or dissemination of the Seed or resulting products into the environment.

8. This agreement shall benefit and be binding on the parties and their respective heirs, personal representatives, successors and permitted assigns.

9. If the Grower or the Owner shall be more than one person, their obligations under this agreement shall be joint and several. Singular terms include the plural and vice versa. Masculine, feminine or neuter gender terms include each other.

10. This agreement shall be governed by the laws of Saskatchewan, Canada.

11. This agreement may not be assigned by either party without the prior written consent of the other party.

12. Time shall be of the essence.

13. If any portion of this agreement is found to be illegal, invalid or unenforceable by any court having jurisdiction, that portion will be deemed deleted from this agreement and the remainder shall be valid and binding as if the deleted provision were not included.

14. This agreement is the entire agreement between the parties with respect to the matters referred to herein. There are no other representations, warranties or collateral agreements, express or implied except as contained in this agreement.

15. Capitalized words and terms used in this agreement have the meanings specified in section 1.

16. The terms and conditions contained in Schedule “A” (if any) are incorporated into this agreement.

17. Any disputes under this agreement shall be referred to a single arbitrator, with the provisions of *The Arbitration Act, 1992* (Saskatchewan) to apply.

18. Grower is an independent contractor and nothing in this agreement shall make Grower an employee, agent or partner of Owner.

SCHEDULE "A"

Further Terms and Conditions

(If there are no further terms, write "N/A")

Commentary on Precedent 5: Generic Agreement of Purchase and Sale after Harvest

While agricultural contracting is unique in many ways, at times it becomes much like any other commercial transaction. The sale of agricultural produce after harvest falls into this category. The basic contractual principles for selling a carload of grain, or a trailer full of doorknobs, are similar.

They are similar because they are both governed by what is called "Sale of Goods" law. Sale of Goods is one of the oldest types of law, and has developed unique principles over hundreds of years. Unfortunately, not all of these principles are obvious, or are well-understood by the general public.

There are some key areas of Sale of Goods law. The first is implied warranties. Most provinces, including Saskatchewan, have a *Sale of Goods Act* which implies certain warranties. This includes things like the goods being suitable for their intended purpose, that they will coincide with any description provided, and so on. If one does not want those warranties to apply, they must be excluded by the written contract. An example of an exclusion clause is in section 13 of this contract.

Sale of Goods law is built around descriptions, samples, intended uses and so on. Keep in mind that it was designed to facilitate far-flung transactions, where parties could not inspect the actual shipment, or where the amounts involved were so large as to make it impractical. In such a case, the seller may provide a sample to the buyer, and then warrant that the shipment will be of the same quality. This is what the buyer will want, of course. The seller will want more leeway, or may not want to give a warranty at all. The result will depend on the negotiating skills and power of the parties.

Another important principle is when title passes. Title passage defines when the risk of loss changes, and when the responsibility for costs shifts. A number of customary terms have arisen around this, such as "FOB *location*", or "C.O.D." (cash on delivery). FOB, which means "free on board", designates a location where title passes. If a contract refers to "FOB Vancouver Grain Terminal," it means that once the product arrives at that Terminal, it becomes the responsibility of the buyer. Until that time, the seller pays the transportation and insurance costs, and bears the risk of loss if the product is damaged, destroyed or lost. Subtle changes in title passage can mean significant costs, so these need to be carefully considered.

The time when title to property passes can affect costs to the buyer or seller.

This precedent avoids those terms for the most part. It specifically provides who is to pay freight, and it also tries to tie down a time when title does pass. This can be modified as needed.

This contract, more than any other in this book, tries to reach a balance between the buyer and seller. A farmer might just as likely be a buyer under this arrangement (for seed, for example) so neither side is given a clear advantage. There are, however, many buyer

friendly clauses, such as sections 3 and 5.

For warranties, there is a choice as to how far to go. The first section 8 provides some standard warranties that a seller might provide. On the other hand, the second version of section 8 provides for an "as is" sale, with almost no warranties. There are an almost infinite number of ways that the buyer or seller can be favoured by adjusting these and other provisions. Legal advice is (again) highly recommended.

Precedent 5
Sale of Crops (after harvest)

WARNING: Be sure you understand the effect of this agreement, and its clauses, before using it. Refer to the Commentary, and seek legal advice where necessary.

Between:

_____
_____
_____
_____
(full name and address of Seller)
(“**Seller**”)

And

_____
_____
_____
_____
(full name and address of Buyer)
(“**Buyer**”)

1. The Buyer agrees to buy, and the Seller agrees to sell, farm products delivered as follows, subject to the Terms and Conditions:

Product	*(Full description of product)*
Quality	*(Provide a complete description of the character and quality to be delivered)*
Quantity	_____ tonnes
Delivery Location	_____, *SK*
Price	$ (including taxes)
Freight paid by	Seller / Buyer (*Circle one*)
Title Passage Date:	Shipment / Delivery / Other: _____ (*Circle one)*
Delivery Date	_____, 20__

Payment Deadline (s. 14)	_____ days after the Pricing Date

Date: _____

_____ _____
Seller Witness

_____ _____
Buyer Witness

Terms and Conditions

2. All Product shall meet or exceed the Quality, except as approved in writing by the Buyer prior to shipment or delivery.

3. All Product shall be delivered to the Delivery Location by the Delivery Date and shall be subject to the Buyer's inspection and acceptance, and the Buyer may accept part of a shipment without prejudice to its right to reject unordered, defective or non-conforming Product included in that shipment.

4. The Buyer shall notify the Seller in writing of the rejection of any Product, setting out in that notice the reason for their rejection.

5. Defective or non-conforming Product shall be held by the Buyer at the Seller's risk for the Seller's instruction, and may be sold or otherwise disposed of by the Buyer on behalf of the Seller where no instruction is received from the Seller within 30 days of the Buyer notifying the Seller in writing of its rejection of the Product.

6. Payment for any Product shipped is without prejudice to the Buyer's right to inspect and reject that Product.

7. Where defective or non-conforming Product is delivered, the Buyer may cancel its order.

NOTE: Use only <u>one</u> of the following for section 8. If the second option is used, there should not be any description for "Quality" in section 1:

Buyer Friendly:

8. The Seller warrants that:

a) it has the right to sell the Product;

b) the Buyer will have and enjoy quiet possession of the Product after the Title Passage Date;

c) The Product is now and at closing will be free from any charge or encumbrance in favour of any third party, except for charges and encumbrances to which the Buyer has expressly consented;

d) The Product when delivered will correspond with the Quality; and

e) Any warranty and covenant specifically made by the Seller to the Buyer shall be deemed to constitute a condition of this agreement.

-or-

Seller Friendly:

8. a) The Product is sold to the Buyer on the terms "As Is", and the Seller gives no warranty or representation of any kind whatsoever as to the kind, size, weight, quality, character, description or condition of the Product, the merchantability of the Product, or its fitness for any particular purpose.

b) Without limiting subsection (a), the condition and use of the Product shall be at the sole risk of the Buyer.

c) The Buyer confirms that it is purchasing the Product solely on the basis of its own inspection and testing of the Product.

d) The Seller expressly disclaims all express and implied warranties relating to the Product, including any implied warranty of merchantability or fitness for a particular purpose.

9. Where any warranty made by the Seller is false or misleading in any material respect or where the Seller defaults in the performance of this agreement, the Buyer may elect to:

a) treat the default as a repudiation of the agreement by the Seller and terminate the Buyer's obligations hereunder and sue for damages; or

b) continue the agreement in effect, accept the Product, and sue for damages.

10. In exercising its rights, the Buyer may elect to receive part of the Product to be delivered under this agreement without affecting its right to reject other Product to be delivered.

11. Where there is a default by the Seller, the Buyer may waive that default by written notice, and where the Buyer waives the default, the position of the parties shall be as if the default had not occurred. A waiver of a default shall not affect the rights of the Buyer with respect to any subsequent default, whether similar or not.

12. The Seller's warranties shall remain in effect for a period of one (1) year from the date of closing.

13. Except as expressly provided in this agreement, the Seller excludes all express or implied warranties, conditions and obligations of the Seller, whether statutory or otherwise, concerning the Quality or their fitness for any purpose.

14. The Buyer shall pay the Seller for the Product by the Payment Deadline.

15. The Product shall be at the Seller's risk until the Delivery Date.

16. This agreement shall benefit and be binding on the parties and their respective heirs, personal representatives, successors and permitted assigns.

17. If the Seller or the Buyer shall be more than one person, their obligations under this agreement shall be joint and several. Singular terms includes the plural and vice versa. Masculine, feminine or neuter gender terms include each other.

18. This agreement shall be governed by the laws of Saskatchewan, Canada.

19. This agreement may not be assigned by either party without the prior written consent of the other party.

20. Time shall be of the essence.

21. If any portion of this agreement is found to be illegal, invalid or unenforceable by any court having jurisdiction, that portion will be deemed deleted from this agreement and the remainder shall be valid and binding as if the deleted provision were not included.

22. This agreement is the entire agreement between the parties with respect to the matters referred to herein. There are no other representations, warranties or collateral agreements, express or implied except as contained in this agreement.

23. Capitalized words and terms used in this agreement have the meanings specified in section 1.

24. The terms and conditions contained in Schedule “A” (if any) are incorporated into this agreement.

25. Any disputes under this agreement shall be referred to a single arbitrator, with the provisions of *The Arbitration Act, 1992* (Saskatchewan) to apply.

SCHEDULE “A”

Further Terms and Conditions

(If there are no further terms, write "N/A")

Conclusion

Contracts are not the "black letter" law that many people think. They are subject to incredible subtlety, infinite variation, and interpretation that depends as much on the positions and actions of the parties as the actual words they use.

With this in mind, it is impossible to create a one-size-fits-all agreement for something as complex as agriculture law. It would be foolhardy to apply these precedents to a situation unchanged without considering their terms carefully, and more importantly, understanding the impact of the clauses.

They can be particularly useful, though, as a comparison to other documents that are typically presented to producers. Without a point of comparison, normal standard forms look harmless. It is only when a more producer friendly precedent is reviewed that one can see the effects that small changes can have.

Particularly where there has been long and hard bargaining, there is a tendency to forget about the contract after signing. In most cases, however, the contracting phase continues long after it is signed. Communication is very important to effective risk management. As a producer, you will want to continually monitor the performance status, and keep the other side apprised if there are problems.

Most of all, do not forget to deal with other risk management tools. Insurance, environmental monitoring and even equipment maintenance are all important to the continuing health of the farm. They are not exciting, and sometimes they can be downright unpleasant to deal with. Despite this, avoiding them will probably bring even more unpleasant consequences.

When those things you can control are taken care of, the things outside your control seem a bit more manageable. Most of all, it helps ensure the ongoing health of your farm operation. Good luck!

Glossary

ADR	See *Alternative dispute resolution*
Alternative dispute resolution	A variety of procedures that are used to resolve conflicts without resorting to traditional litigation or court systems. Some examples include *mediation* and *arbitration.*
Arbitration	A process in which a disagreement between two or more parties is resolved by impartial individuals, called arbitrators, to avoid costly and lengthy litigation.
Basis	The difference in price between current deliveries, and what the crop is worth at a particular date on the futures market.
Basis Risk	The risk that the *basis* will change over time, causing a loss to the producer.
Boilerplate	A standard form or clause used in a legal contract
Consequential damages	A loss which does not arise directly from a breach of contract, but indirectly.
Consideration	The value or benefit that is granted by a party to a contract
GM	Genetically modified crops. Sometimes called GE (genetically engineered) and GMO (genetically modified organism).
Guarantee	A contract where one person agrees to assume some or all of the legal obligations of another.
Intellectual Property, or IP	Literally, value derived from the mind. It usually refers to technology which is protected by various legal means, including patents, copyrights and trade-marks.
Judgment proof party	A person who, for any number of reasons, can not or will not pay a judgment levied against it. This could be because of lack of money, exemptions, or fraudulent hiding of assets.

Liquidated damages	An amount agreed by the parties to be a genuine pre-estimate of damages should there be a breach.
Marketing contract	Sometimes called a deferred delivery contract. This allows a producer to lock in a price for crop in exchange for a promise to deliver it by a certain date
Mediation	An informal, non-binding process intended to resolve conflicts, without resorting to arbitration or litigation, by using an impartial third party to facilitate discussion and agreement.
Plant Breeders' Rights	A system, governed by *The Plant Breeder's Rights Act* in Canada, that provides a patent-like monopoly to seed developers for new varieties of seed and grain.
Production contract	Although it can refer to any kind of grain delivery contract, production contracts also refer to an agreement to grow a crop on behalf of a person who may provide inputs and other assistance.
Security Interest	A claim taken by a secured lender against property of a borrower to help ensure payment of a debt. A land mortgage is a common form of security interest.
Spread Risk	The risk that the difference between current cash prices, or nearby futures and distant futures, will decrease.
Technology use agreement	Permission granted to a producer to use particular technology, usually genetically modified crops, under specific conditions. Sometimes called Technology Licensing Agreement, or a license.
Time of essence clause	A clause that helps ensure that obligations to be done by a particular date must be done no later than that date, or risk breaching the contract.
Unilateral action	A right that can be exercised by one person to a contract, without the consent of the other(s).