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## Dispute Resolution

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### CHAPTER QUICK TIPS

#### **Arbitration Is Generally Bad For Farmers**

If a contract offer includes an arbitration provision, you should most likely try to delete it. Arbitration is often prohibitively expensive for farmers compared to public court actions. Arbitration provisions can be replaced with a provision stating that disputes will be resolved in the courts of your state.

#### **Try To Resolve Disputes In Your State**

If travel to the venue (place where disputes are resolved) selected in the contract is prohibitively expensive, it could prevent you from getting the benefit of legal remedies to which you might be entitled. Furthermore, it could prevent you from successfully defending a lawsuit if the buyer decides to sue you. If possible, it is best if the contract allows you to resolve disputes in your state.



# DISPUTE RESOLUTION

Many contracts contain provisions detailing what should happen in case of a dispute.

## Where will the dispute be resolved?

It is very common for a contract to include a provision selecting the geographical location or court where any dispute related to the contract must be decided. Sometimes the parties agree on a state where the disputes will be resolved, and sometimes they even agree on a specific district or county. The location of a legal dispute is often referred to as the “venue.”



### Example: Venue Provision

Venue of any legal proceeding related to the Agreement shall be in Dane County, Wisconsin.

Or:

All claims, disputes, and lawsuits arising out of or in connection with this Contract shall be resolved or adjudicated in the city of Houston in the State of Texas. The parties waive any jurisdictional or venue arguments to the contrary.

## Distant Venues Can Be a Problem

The venue, or the location where a dispute will be resolved, can be problematic for farmers if it is far away. The travel expenses associated with a lawsuit in a distant location can be very burdensome. Also, lawsuits can require a party to make frequent court appearances. Although judges

will sometimes allow appearances by phone for particular parts of the litigation, in-person appearances are generally required. Additionally, if you have hired a local attorney, you would likely have to pay for the expense of his or her travel to another state. You would probably also have to bear the expense if your attorney must associate with an attorney located in the state in which the dispute must be resolved (often required by courts for out-of-state attorneys).

If travel to the venue selected in the contract is prohibitively expensive, it could prevent you from getting the benefit of legal remedies to which you might be entitled. Furthermore, it could prevent you from successfully defending a lawsuit if the buyer decides to sue you.

**Example: Better Venue Provision**

All claims, disputes, and lawsuits arising out of or in connection with this agreement shall be resolved or adjudicated in the courts of the state where Grower either lives or farms.



**Which state's laws should apply?**

Organic contracts often include language selecting which state's laws should be used to govern and interpret the meaning of the contract. These provisions are included in part to prevent or simplify court battles over which state's laws should apply. Additionally, a savvy buyer might pick a state with laws that are more business-friendly than farmer-friendly. For example, many corporations write contracts requiring disputes to be resolved under Delaware law because Delaware is famously friendly to corporations.

**Choice of Law**

The selection of which state's laws should apply in a dispute is often called "choice of law."



Example: Choice of Law

The parties expressly agree that this Agreement shall be governed by, interpreted under, and construed and enforced in accordance with the laws of the state of Delaware.

Or:

This Contract and incorporated documents are governed by and shall be construed in accordance with the laws of the state in which the products are to be delivered or the services are to be performed.

How Choice of Law Can Affect You

At the beginning of a lawsuit, the choice of law for a contract will likely affect you less than the choice of venue, because it is unlikely to add extra expense to the legal proceedings. However, the actual outcome of a contract dispute that ends up in court could be very different depending on which state's laws govern the contract. Therefore, you may want to think about whether you are willing to give up the protection of your state's laws if they are farmer-friendly. (See Chapter 12, pages 12–13 through 12–15, for a description of some state law protections for agricultural contracts.)

The contract might also say that a particular state's version of the Uniform Commercial Code (U.C.C.) applies to the contract. Please see Chapter 12, page 12–13, for a more thorough discussion of the U.C.C. and its relationship to each state.



Example: Better Choice of Law Provision

Governing Law: The parties expressly agree that this Agreement shall be governed by, interpreted under, and construed and enforced in accordance with the laws of the state where the Grower lives or farms.

## **Does your contract require arbitration?**

Arbitration is a decision-making process in which a person who is not involved in a dispute (an arbitrator) makes a decision after hearing from both sides. This decision is usually binding on the parties, and it generally may not be appealed to a state or federal court. Additionally, if you sign a contract with an arbitration clause, the buyer will generally be able to stop any public court proceedings you may initiate and have your lawsuit moved to private arbitration.

### **Example: Arbitration Provision**

The parties to this contract agree that the sole remedy for resolution of any and all disagreements or disputes arising under or related to this contract shall be through arbitration proceedings pursuant to the American Arbitration Association (AAA) rules. The decision and award determined through such arbitration shall be final and binding upon the Buyer and Seller. Judgment upon the arbitration award may be entered and enforced in any court having jurisdiction thereof.



By and large, binding arbitration clauses are bad for farmers. Binding arbitration limits the remedies available to farmers and usually prevents farmers from raising legal claims in state or federal courts. Moreover, arbitration can involve large fees that can altogether prevent farmers from pursuing their legal claims or rights under the contract. These fees can include mandatory filing fees, administrative fees, and expensive arbitrator hourly rates. Furthermore, arbitration is usually a confidential procedure, meaning that even if you win, your victory cannot be used as a helpful precedent for future lawsuits against that buyer or other buyers.

Additionally, compared to going to court, your procedural rights are often limited in arbitration. For example, your right to discovery (the process of asking an opposing party for information and documents critical to proving your case against them) is often extremely limited in arbitration. Moreover, if you agree to an arbitration clause, you are waiving any right to have your case heard before a jury of your peers. Finally, arbitration

generally does not allow for a class action approach to the resolution of a dispute with a buyer.



**If your contract offer includes an arbitration provision, you should try to delete it. It can be replaced with a provision stating that disputes will be resolved in the courts of your state.**

However, if you feel that you must accept a contract offer with an arbitration provision, it is important to make sure you have the answers to the following questions:

- Who may serve as the arbitrator in case of dispute?
- How will the arbitrator be selected?
- Where will the arbitration take place?
- Will the arbitration be binding (meaning that both you and the buyer must abide by the decision of the arbitrator)?
- Will you be allowed to appeal the arbitrator's decision if it is unfavorable to you? (Generally, arbitrator decisions cannot be appealed.)
- Will you be allowed through the arbitration process to obtain the documents or other evidence from the buyer that you need to prove your position in the dispute?
- Who will pay for the cost of the arbitration?
- If one side loses, will they have to cover the full cost of the arbitration?
- Will the loser also have to cover the other party's attorneys' fees and costs for the arbitration, or will each side cover their own costs?

All of these questions should be answered before you sign an organic contract with an arbitration provision.

**Contracts for Poultry and Swine Producers Must Include Arbitration Opt-Out Language**

Under the federal Packers and Stockyards Act, a livestock contract that requires the use of arbitration to resolve any controversy arising under it must contain a provision disclosing that a poultry or swine producer, prior to entering the contract, may opt out of the arbitration provision.

**Specialty Arbitration and Associated Rules**

Some organic contracts may require that arbitration be conducted by and under the rules of an organization dedicated to one type of commodity. These specialty arbitration organizations generally each have their own arbitration rules. For example, organic seed contracts might call for arbitration under the International Seed Testing Association (ITSA) rules, and organic grain contracts might call for National Grain and Feed Association arbitration rules to apply.

Although a specialty arbitration organization may offer the benefit that it is familiar with the market for a particular commodity, all of the downsides of general arbitration typically also apply in specialty arbitration, including potentially prohibitive expenses, required confidentiality, and limited procedural rights.

Regardless of which set of arbitration rules your contract calls for, if you are considering agreeing to binding arbitration, make sure to obtain and read a copy of the rules and procedures that will govern any disputes between you and the buyer. Or, consult an attorney who can help you understand the rules.

**Does your contract require mediation of disputes?**

Contracts might include a clause requiring the parties to attempt mediation or to make good faith attempts to settle disputes prior to filing a lawsuit or proceeding to arbitration. These clauses can be helpful to farmers because they can provide an opportunity for resolving a dispute outside of the more expensive court and arbitration processes. If your contract does not have a mediation clause, consider trying to include one.

Questions to Consider Regarding Mediation Include:

- Who may serve as the mediator?
- How will the mediator be selected?
- Where will the mediation take place?
- Who will pay for the cost of the mediation?
- Are the parties intending to exit mediation with a signed settlement agreement? (If there is no signed agreement between the parties, the agreement reached in mediation may be difficult to enforce; either party could decide not to follow the agreement at any time, and the other party would have difficulty proving that there was in fact an agreement.)
- What is the next step if the mediation is unsuccessful?
- Are the parties willing to participate in more than one mediation session?
- Must representatives of each party with settlement authority be present at the mediation?
- Must the mediation be conducted in person, or might the mediation be conducted via conference call?
- It is helpful for these questions to be answered in the text of the contract to help the mediation process run smoothly.

**Does the contract discuss who might have to pay attorney fees or costs?**

Contracts often include provisions stating that if there is a legal dispute related the contract, the party who loses the dispute will be required to pay the winner's legal fees and costs. This is called "fee-shifting," and can be dangerous for farmers because buyers may hire expensive lawyers to help ensure a win in court. In addition to attorney fees, costs can include court filing fees, copying fees, travel expenses, costs to hire expert witnesses, and more. These expenses can add up quickly, especially in a complicated contract dispute.

**Example: Fee-Shifting “Loser Pays”**

In any proceeding to enforce the terms of this agreement, the prevailing party shall be entitled to recover from the losing party its reasonable attorney fees and direct costs incurred by the prevailing party.



Since you cannot control how much money a buyer might spend in a legal battle, you may wish to agree that each side will pay their own legal fees—no matter who wins.

**Example: Better Attorney Fees and Costs Provision**

In the event of a dispute related to the contract, each side shall pay its own attorney fees and costs.



If the buyer will not agree to a provision requiring each party to pay their own legal fees, at minimum the contract should make clear that whoever loses must pay the other party's legal fees. It is not advisable to sign a contract in which only you are required to pay the buyer's legal fees, and not vice versa.

**Does the contract mention “liquidated damages” or other penalties?**

Liquidated damages are a predetermined amount of money that must be paid if a party fails to perform a contract promise. As a general rule, liquidated damages should not exceed the estimated value that the injured party would have received under the contract if the contract were fully performed.<sup>1</sup> If the liquidated damages are too high, a court might not enforce the provision, or might reduce the amount of damages.

Consider whether you want to sign a contract that would require you to pay a set amount of money to a buyer if you breach the contract. You might want to attempt to delete the provision, or you might attempt to

negotiate a lower amount. Alternatively, you might decide to negotiate a substitute for cash damages. For example, you might pledge a future crop to the buyer instead of cash because it might be easier for you to deliver a crop than cash.

In general, be cautious when signing a contract with a liquidated damages provision (or any cash penalties, for that matter).

## **CHAPTER 10 — ENDNOTE**

<sup>1</sup> U.C.C. § 2-718 (1977).