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Important Details

CHAPTER QUICK TIPS

A Merger Provision Means You Can’t Rely on Agreements Made Prior to Entering into the Contract Agreement

If your contract has a merger provision, you cannot rely upon any oral or written agreements made before the contract was signed. Put another way, if you agree to a merger provision, you agree that the black and white terms of the contract are the only rules of the contract relationship – unless you and the buyer later agree in writing to change the rules.

Prohibition of Assignment Means You Can’t Transfer Your Obligations to Another Farmer

Assignment involves transferring a party’s duties and rights under the contract to another individual or business entity. If you are prohibited from assigning the contract, you cannot arrange for another organic farmer to fulfill your contract promises for you.

IMPORTANT DETAILS

The types of provisions discussed in this chapter are common contract provisions (often referred to by non-lawyers as "standard" or "boilerplate" contract terms). These legal details can seem unimportant and removed from to the main purpose of the contract. However, if a problem or disagreement arises, and you end up in court or in another dispute resolution process, the provisions discussed below could have a very significant impact on the outcome.

Does the contract prohibit assignment?

Assignment means transferring a party's duties and rights under the contract to another individual or business entity. If you are prohibited from assigning the contract, you cannot arrange for another organic farmer to fulfill your contract promises for you.

Parties usually want to include a prohibition on assignment because:

(1) they don't want the disruption associated with a new, potentially unknown contract partner, and/or

(2) they have a strong preference for working with the particular person or company performing the contract.

In the organic farming context, a buyer could be particularly interested in contracting specifically for your organically produced crop or livestock because the buyer knows and trusts your practices. Assigning the contract to another certified organic producer, even someone fully capable of delivering the contracted product, might leave the buyer uncertain whether they will get the same quality product that you would have supplied. Likewise, if a buyer you have built a relationship with assigns its contract rights to another company, you might not have the same level of confidence in the new buyer's grading standards or payment practices.

Prohibition on Assignment Could Cause Problems

A provision prohibiting assignment of your contract rights and obligations could be a problem if you are considering transferring ownership of your farm at any time during the life of the contract (which could be quite a long time, especially if the contract renews automatically). If so, you should think about negotiating language allowing assignment.

If you are worried that you may not be able to fulfill the contract for some other reason (such as serious illness or foreclosure), you may also want to negotiate assignment privileges. The negotiated language could allow assignment to specific individuals (such as your adult child or children) or to any other entity or individual without limit.

Sometimes, contracts include language prohibiting assignment unless the non-assigning party gives written permission. This is better than an all-out prohibition on assignment, but can still be somewhat risky because the party can always refuse permission.

Assigning Payment

Assignment of contract rights can also involve assigning payment under the contract to a third party. For example, a farmer could assign payments under a contract to a lender or other creditor, such as an input supplier. To have more flexibility in obtaining operating credit, you may want to negotiate with the buyer to allow all or a portion of the payment owed to you to be paid directly to your creditor(s) through such an assignment.

Does the contract have a "merger" or "entire agreement" provision?

A "merger" provision or "entire agreement" provision states that the written contract is a complete statement of the terms of the agreement that completely replaces (or "supersedes") any prior or additional terms, representations, or agreements. The effect of this kind of provision is to formally state that your entire relationship is detailed by the written contract, and by the written contract alone. The merger provision means you cannot rely upon any papers that are not incorporated by the contract, and you cannot rely upon any oral conversations or emails. Put another way, if you agree to a merger provision, you agree that the black-and-white terms of the contract are the only rules of the contract relationship.

Example: Merger Provision

This Contract contains the entire agreement between the parties, with respect to the subject matter hereof, and supersedes and merges all prior negotiations, letters of intent, or understandings between the parties, whether written or oral. There are no conditions to this Contract that are not set forth herein.

Merger provisions are very common and most likely should not be a problem. This is particularly true because, even without a merger provision, you most likely may not rely on agreements outside of the written contract. As discussed earlier in this guide, it is always smart to put everything in writing, including anything the buyer says about the contract during negotiations, as well as any changes you make to the contract during the life of the contract. (See Chapter 1 for more detail.)

Does the contract state that waiver of a contract promise does not constitute permanent waiver?

Example: Single Waiver Does Not Mean Permanent Waiver

The failure of either party to require the performance of any provision hereof or the waiver by either party of any default hereunder will in no manner affect such party's right at any later time to enforce such provision.

If a party fails to meet some requirement in a contract and the other party does not object, the failure to object is considered a "waiver" of the requirement. For example, a landlord might accept late payment on a lease, or a buyer might accept a different quality, variety, or quantity of product than intended. Parties might waive a contract requirement for many reasons. For example, they might not consider the violation significant; they might be dependent on the ongoing contract relationship

and not want to risk termination; the other party might be having difficulty, and so they choose to be lenient; or they might have simply failed to notice the violation.

Because waiver of a violation means that the contract relationship will continue, a question can arise as to whether the "waived" requirement is still a requirement going forward. To address this question and preserve a party's right to enforce all contract terms, even if the terms have been waived in the past, contracts often include a provision which states that a waiver or failure to enforce a requirement has no effect on the waiving party's right to enforce the requirement in the future. Buyers who include a provision like this in organic contracts want to make sure that, if they are lenient about something early in the relationship, the farmer will still be bound by the contract requirements going forward.

For example, a contract might require you to make a delivery on the first of the month, and might also provide that the buyer can cancel immediately if you deliver after the third day of the month. Let's say you consistently deliver on the fifth day of the month for six months. The buyer never complains. Then, in the seventh month, you deliver on the fifth day again. This time, the buyer cancels the contract, pointing to the provision allowing them to cancel if you deliver after the third day of the month. A "no waiver" provision in the contract would prevent you from arguing that, since the buyer allowed you to deliver on the fifth of each month for so long, the buyer can't now say that the fifth of the month is a violation and cancel the contract. In fact, the "no waiver" provision allows the buyer to do exactly that—at one point treat a violation of the contract as unimportant, but later hold you to the exact language of the contract.

As the above example shows, a "no waiver" provision can be risky if you have become accustomed to a modified interpretation of the contract, and the buyer suddenly decides to enforce the exact requirements. Basically, what you need to remember is that even if a buyer has allowed you to stray from the terms of the contract in the past, you are always at risk if you stray in the same way in the future—especially if you have signed a contract that expressly states there will be no waiver of contract terms.

Does the contract have a "severability" provision?

A severability provision generally states that if one part of the contract is found to be invalid or unenforceable (usually by a judge), the rest of the contract would remain in effect. Sometimes these provisions also include language stating that the parties agree to make reasonable efforts to substitute a valid provision that implements the basic intent of the provision that was held to be invalid.

This type of provision helps prevent a whole contract from being ruled invalid when the problem can be limited to a single provision or provisions. By explicitly stating that the different parts of the contract are independent of each other and can be separated as needed, the intent of the severability clause is to maintain as much of the original contract language as possible.

As long as you understand how severability works, it is unlikely that this type of provision will cause a problem for most farmers.

Example: Severability Provision

Severability: All provisions of this Agreement, and all portions of such provisions, are intended to be, and shall be, independent and severable. If a court finds any provision of this Agreement invalid or unenforceable, the remainder of this Agreement shall be interpreted so as best to effect the intent of the parties.

Does the contract state that you and the buyer prepared the contract together?

It is a basic rule of contract interpretation that if it is not clear what a particular provision means, and each party would benefit from a different possible meaning, the meaning that benefits the party who did not write the contract should be used. This is called "interpreting against the drafter." The reasoning is that the person who wrote the contract had the opportunity to use the words they wanted and say exactly what they intended to say; if the drafter had wanted their interpretation of the unclear language to have effect, they should have written it clearly.

To get around this rule of contract interpretation, many commercial contracts include a provision stating the contract was mutually prepared. By signing a contract with such a provision, non-drafting parties agree that they are equally responsible for all of the contract language and give up the claim to have any unclear provision interpreted in their favor.

If you and a buyer truly prepare a contract together through a series of negotiations, that is fantastic. If that is the case, this type of provision is accurate and will not pose a problem. If, however, as is more common, you were handed a pre-printed contract drawn up by the buyer alone,

you might be a little concerned about signing a contract that says you prepared it together.

Example: Mutual Preparation of Contract Provision

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Buyer and Seller agree this agreement was
prepared mutually by both parties; no
uncertainty or ambiguity shall be construed
against either party.
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You might think about whether you would like to maintain the slight advantage over the buyer that you might have in court if a dispute arises and the contract does not include a mutual preparation provision. However, the presence or absence of such a provision would probably not have a significant effect on the outcome of a dispute. In many circumstances, the slight advantage of not having such a provision would likely not make much difference. Furthermore, even if the contract does have a mutual preparation provision, the judge might still inquire about the actual circumstances of the contract preparation and take that into account when interpreting unclear provisions.

Thus, although it may be more advantageous to sign a contract without a mutual preparation provision, this kind of provision is unlikely to create significant risk.