



## *Washington Guide to Sustainable Viticulture*

# CONTRACTS I

## WHEN DO I NEED A WRITTEN CONTRACT AND WHY?

### CHECKLIST OF QUESTIONS TO ANSWER

#### **1. If you answer yes to any of the following questions, you should consider a written contract and may be required to have one.**

- Are there two or more parties involved?
- Are the parties promising to do or not to do something?
- Does the promise encompass time in excess of one year?
- Does the promise involve a guarantee of the debts of another?
- Does the promise involve a sale of goods over \$500?
- Does the promise involve the sale of an interest in real estate?
- Does my banker require a contract to satisfy new loan or refinancing requirements?
- Am I dealing with a new winery (or grower) with a questionable reputation?

#### **2. Why do I need a contract?**

- Written contracts provide good evidence of what was agreed to between all parties. In addition, the Statute of Frauds requires that certain types of contracts must be in writing to be enforceable.
  - To be performed in a period exceeding one year.
  - Guarantee of the debts of another.
  - Sale of goods over \$500.
  - Sales of an interest in real estate.
- The contract is a tool for achieving business objectives.
  - Good pricing and terms.
  - Good value to the other party.
  - Fair (i.e. both parties are satisfied).
  - Does not create adversary parties.
  - Clear understanding of the parties' agreement.

### **3. What questions do I need to answer as I prepare the contract?**

- What is the business risk the contract is intended to address?
  - Is the risk internal or external?
  - What is the probability of the risk?
  - What is the exposure to the risk?
- What is my plan for mitigating the risk?
  - Will a contract be the vehicle for managing/minimizing the risk?
  - Do I want to share or shift the risk involved?
  - Will the contract allocate the risk to the party best able to control or manage the risk?
- With whom am I dealing?
  - Have I evaluated the other party/parties?
    - Overall reputation
    - Reliability
    - Ethics
    - Financial health
  - Have I considered contracting with alternative parties?
  - Will a contract create or lead to a long-term, mutually-beneficial relationship?

### **Special thanks for their contributions:**

- Geoffrey G. Revelle, Stoel Rives, LLP, Seattle, Washington



# CONTRACTS II

## WHAT ARE THE COMPONENTS OF A GOOD CONTRACT?

### CHECKLIST OF QUESTIONS TO ANSWER

#### 1. Is my contract in writing?

- Written contract provides good evidence of what was agreed to between all parties.
- Statute of Frauds: Certain types of contracts must be in writing to be enforceable.
- Is the contract clear and complete?
- Are the industry terms of art defined so that a judge who is unfamiliar with the business can understand the contract?

#### 2. Does the contract address all that it could and should?

- Have all the what-if scenarios been addressed and answered?
- Does the contract cover more than the most likely or hoped-for outcomes?
- Does the contract cover potential disagreements – and identify a process for seeking resolution?
- Does the contract say what I intend for it to say?

#### 3. Have the parties been accurately identified? Does each party have a legal entity and is it being used?

#### 4. Have I considered applying for a [Grower's License](#)? (defined in Definitions)

## WHAT SHOULD I INCLUDE IN A GRAPE SALE CONTRACT?

#### 1. Vendors

- Who is the purchaser of the grapes?
- Who is the seller of the grapes?
- Is there to be a vineyard designation?

#### 2. Purchase/Sale of grapes

- Which grapes are involved in this transaction?
  - Vineyard designation
  - Block designations
  - Varieties
- What is the maximum/minimum quantity to be purchased/sold?
  - Stated amount
  - Entire output of grower



- Output of grower up to a cap
- What are the quality standards for the items being transacted?
  - Measurable factors (e.g. sugar content, acidity)
  - What are the sampling procedures?
  - Who has authority to conduct the sampling and measurements?
  - When will measurement take place?
  - What are the grounds for rejection?
- What are the fruit standards?
  - To what extent do either/both parties have a say on cultural practices? Am I excused for force majeure (i.e. events that occur outside the control of the grower)?
  - Crop drop issues
  - Who has harvest authority – date, procedures?
  - How will maturity be defined?
  - What are the guidelines for MOG (materials other than grapes) and leaves?

### **3. Price (fixed or formula)**

- How is price to be determined (e.g. fixed dollars per ton or formula)?
  - Tonnage.
  - Acreage.
- What adjustments are allowable for quality issues?
- When will the seller be paid?
- Will interest be accrued and paid if payment is not received when due?
- Are there taxes involved?

### **4. Form of Money (e.g. cash)**

### **5. Payment terms**

- Is all or a portion of payment to be made in advance of delivery?
- Is all or a portion of payment to be made at the time of delivery?
- When will the balance of payments be made?
- Will interest be paid when payments are staggered?

### **6. Transportation and Delivery**

- What is the delivery date or window of time for delivery?
- Will advance information be provided to the buyer/seller about grapes' maturity and expected harvest date?
- How and where will the grapes be delivered?
- Who pays delivery costs?
- At what point will title and risk of loss pass to the buyer?
- How are the grapes to be packaged and handled?
- Who will purchase insurance for what aspects?



## 7. Duration of contract

- Will the contract be for one sale, one year, or multiple years? (If multiple years, the contract needs to be notarized per the Statute of Frauds).
- What is the value of the contract being long-term? Short term?
- What are the risks of the contract being long-term? Short term?

## 8. Termination of contract

- Is the contract set up to expire after a set period of time?
- Is the contract set up for automatic renewal? If yes, what are the options for either party to get out of the contract?
- Can the contract be terminated early for breach of contract, if not cured after notice?
- Can the contract be terminated early under any other special conditions?
- Can the contract be terminated early for convenience, if a long notification period takes place?

## 9. Representations and Warranties

- Does the contract include a statement of fact about the quality and/or title of the goods?
- Express warranty – Is it communicated by affirmation, promise, description, or sample?
- Implied warranty – These warranties are implied in the contract by law.
  - Merchantability – This is implied if the seller is a merchant (i.e. deals in the goods).
  - Title – It is implied that title to the goods is clear.
  - Purpose – It is implied that the goods will be fit for buyer's particular purpose if such is known in advance.
- Warranty disclaimers – If an implied warranty is being disclaimed, has it been done conspicuously?
- Have remedies been identified should there be a Breach of Warranty?
  - Is a specific remedy defined in the contract (e.g. price reduction)?
  - Can product be rejected?
  - Can product be replaced?
  - Can a party collect for damages? This is typically the default remedy if the contract does not specify another remedy.

## 10. Liability limitations

- Have consequential damages been excluded?
  - Direct damages refer to the difference in value between what was contracted for and what was received.
  - Consequential damages are more remote and can be significantly large (e.g. buyer's lost profits from not being able to resell goods).
- Have damages been limited to a specific dollar amount or to a function of dollars spent to date on the contract?
- Has a time limit shorter than the statute of limitations been imposed during which any lawsuit must be brought?



## 11. Security Interest

- Will the buyer grant the seller a security interest (per Article 9A of the Uniform Commercial Code)?
- With respect to the “issue of perfection,” has a UCC- been filed with the UCC Division of the Department of Licensing in the state where the buyer is organized?

## 12. Indemnifications

- Is there an agreement to/not to compensate the other party for loss or damage, or to pay/not pay a claim brought against the other by a third party?

## 13. Have boilerplate logistical issues been addressed?

- What is the choice of law?
- Which courts will have jurisdiction?
- Where is the venue of any litigation?
- Who will pay attorneys’ fees?
- Is the contract assignable or non-assignable?
- Can product be substituted?
- Has a merger clause been included?

## 14. Dispute resolution

- Has a process been identified for striving to reach resolution?
- Talk first (i.e. before suing)
- Mediation
- Arbitration

## 15. Signature block

- Did everyone sign in a representative capacity (i.e. name and title)?
- Did everyone date the contract?

### Potential risks For Grape Sellers

- Crop failure
- Low quality
- No buyer
- Price falls
- Buyer does not pay
- Unavailability of labor (e.g. inadequate supply, strikes)
- Rising costs of production

### Potential risks For Grape Buyers

- Potential risks For Grape Buyers
- No sellers
- Low quality
- Price rises
- Wine market falls



Key Terms & Acronyms	<b>Definitions/Explanations</b>
Arbitration	<p>An alternative dispute resolution method by which an independent, neutral third person(s) ("arbitrator") is appointed to hear and consider the merits of the dispute and renders a final and binding decision called an "award." This mini-trial process is similar to the litigation process as it involves adjudication, except that the parties choose their arbitrator(s) and the manner in which the arbitration will proceed.</p> <p>The arbitration may be agreed to by the parties, may be required by a provision in a contract for settling disputes, or may be provided for under statute. Usually contract-required arbitration may be converted into a legal judgment on petition to the court, unless some party has protested that there has been a gross injustice, collusion or fraud.</p>
Assignability	<p>The opportunity to transfer to another person any asset such as real property or a valuable right such as a contract or promissory note.</p>
Contract	<p>An agreement between persons that obligates each party to do or not to do certain things. Technically, a valid contract requires an offer and an acceptance of that offer, and consideration. An "express" contract is one in which all elements (offer, acceptance, consideration) are specifically stated and the terms are stated, as compared to an "implied" contract in which the existence of the contract is assumed by the circumstances.</p>



Key Terms & Acronyms	<b>Definitions/Explanations</b>
Damages	<p>The amount of money a plaintiff (the person suing) may be awarded in a lawsuit. Some of the more common types of damages include:</p> <ul style="list-style-type: none"> <li>• Special damages are those actually caused by the injury and include medical and hospital bills, ambulance charges, loss of wages, property repair or replacement costs or loss of money due on a contract.</li> <li>• General damages, which are presumed to be a result of the other party's actions, are subjective both in nature and determination of value of damages. These include pain and suffering, future problems and crippling effect of an injury, loss of ability to perform various acts, shortening of life span, mental anguish, loss of companionship, loss of reputation (in a libel suit, for example), humiliation from scars, loss of anticipated business and other harm.</li> <li>• Exemplary (or punitive) damages combine punishment and the setting of public example. Exemplary damages may be awarded when the defendant acted in a malicious, violent, oppressive, fraudulent, wanton or grossly reckless way in causing the special and general damages to the plaintiff, but are not allowed in some states, including Washington.</li> <li>• Liquidated damages are those pre-set by the parties in a contract to be awarded in case one party defaults as in breach of contract.</li> <li>• Direct damages refer to a cash compensation ordered by a court to offset losses or suffering caused by another's fault or negligence.</li> <li>• Consequential damages are damages claimed or awarded in a lawsuit, that were caused as a direct foreseeable result of wrongdoing.</li> </ul>
Express Warranty	<p>A written statement or guarantee of good quality of merchandise, clear title to real estate, or that a fact stated in a contract is true. An "express warranty" is a definite written statement.</p>
Implied Warranty	<p>A guarantee implied by law even when not stated in the contract of good quality merchandise or clear title to real estate, for example. An "implied warranty" is based on the circumstances surrounding the sale or the creation of the contract.</p>





Key Terms & Acronyms	<b>Definitions/Explanations</b>
Indemnification	Refers to a guarantee against specified loss that another might suffer. Example: If a contract between two parties has an indemnification clause, then, in settling a dispute over a contract, one of them may agree to pay any claims made by third parties that may arise from the contract, holding the other harmless.
Jurisdiction	Refers to a court's authority to judge over a situation usually acquired in one of three ways: 1) over acts committed in a defined territory, 2) over certain types of cases, or 3) over certain persons.
Mediation	Refers to the attempt to settle a legal dispute through active participation of a third party (mediator) who works to find points of agreement and convince those in conflict to settle their dispute. Mediation differs from arbitration, in which the third party (arbitrator) acts much like a judge and decides the case. A mediator has no authority to make a decision in the matter. The result of a successful mediation is called a "settlement."
Merchantability	Refers to a product being of high enough quality to make it fit for sale. To be merchantable an article for sale must be usable for the purpose it is made. It must be of average worth (not necessarily special) in the marketplace and must not be broken, unworkable, damaged, contaminated or flawed.
Merger and Integrated Clauses	This is the entire agreement between the parties concerning its subject matter. This agreement supersedes all prior discussions and can only be modified in a writing signed by all parties to this agreement.
Perfected Security Interest	Security interest granted via specifically defined collateral (e.g. cash proceeds, non-cash proceeds, accounts receivable, etc per (RCW 62.9A)). In addition the Uniform Commercial Code (UCC- ) has been filed in the state in which the buyer is organized.



Key Terms & Acronyms	<b>Definitions/Explanations</b>
Remedy	A remedy provides the means to achieve justice in any matter in which legal rights are involved. Remedies may be ordered by the court, granted by judgment after trial or hearing, by agreement (settlement) between the person claiming harm and the person he/she believes has caused it, or by the automatic operation of law. Some remedies require that certain acts be performed or prohibited, others involve payment of money to cover loss due to injury or breach of contract, and still others require a court's declaration of the rights of the parties and an order to honor them.
Title	Ownership of property that stands against the right of anyone else to claim the property.
WSLCB Grower's License	<p>"A grower's license authorizes the agricultural product grower to contract for the manufacturing of wine from the grower's own agricultural product, store wine in bulk made from agricultural products produced by the holder of this license, and to sell wine in bulk made from the grower's own agricultural products to a winery or distillery in the state of Washington or to export in bulk for sale out-of-state." (RCW 66.24.520 <a href="#">Grower's license</a>)</p> <p>In the case of a grower 'repossessing' wine from a buyer in default of a contract, the license permits the grower to take title to the wine.</p>

Note: additional definitions can be accessed via on-line law dictionaries.

Two examples include:

- Duhaime's Law Dictionary <http://www.duhaime.org/diction.htm>
- Law.com dictionary <http://dictionary.law.com/>



## KEY KNOWLEDGE AREAS

A longer contract of seven to ten years is especially good when growers plant grapes for a specific winery request (i.e. unique variety that may be a difficult sell to main-stream wineries).

What should be included in a good contract?

- Vendors (purchaser, seller, vineyard designation)

- Purchase/sale of grapes (vineyard, block or variety of grapes that are involved, maximum and minimum quantity, quality standards, fruit standards)

- Price (determined by tonnage or acreage)

- Form of money

- Payment terms

- Transportation and delivery (how and where are grapes to be delivered, who provides and pays for delivery, expected harvest date-hard to estimate because of weather variation)

- Duration of contract (one sale, one year, or multiple years)

- Termination of contract (early termination)

- Representations and Warranties (express and implied warranties, disclaimers)

- Liability limitations (direct and consequential damages)

- Security interest

- Indemnifications

- \*Logistical issues (choice of law, payment of attorney fees, merger clause)

- Dispute resolution (talk, mediation, arbitration)

- Evergreen clause (automatic renewal)

- Signature block (proper signage and dating of contract)

*\* Growers may want to stipulate in the contract that any legal fees incurred to enforce the contract terms be paid by the losing party. Often, when growers try to recover money from the sale of their grapes, recovery costs (attorney and legal fees involved) exceed or equal the original amount owed to the grower.*

