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## PARTIES TO THE CONTRACT, CONTRACT FORMATION AND CONTRACT FORM

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### ZERO DRAFT FOR SOLICITING COMMENTS

The following draft chapter is meant to serve as a basis for soliciting comments from interested stakeholders during a series of internet-based and in-person consultation events during fall 2014. When moving forward and revising the draft chapter, the Working Group will consider all comments received.

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## PARTIES TO THE CONTRACT, CONTRACT FORMATION AND CONTRACT FORM

1. This Chapter explores the form and formation of an agricultural production contract, as well as the parties to the contract. Below, Part I\* introduces the range of parties that may be involved in an agricultural production contract. Part II\* provides an overview of contract formation, including the key elements of offer, acceptance and confirmation. Part III\* discusses the form and content of an agricultural production contract.

### I. Parties to the Contract

2. Often, one single producer will be engaged toward one contractor under a bilateral relationship reflected by their contract. However, other entities may also participate in the arrangement, creating a multiparty contract. In other situations, third-party entities could deal with one of the parties on the basis of a separate but linked contract that is instrumental for the performance of the central agricultural production contract. Below, Parts A and B\* identify the two key parties that undertake the characteristic obligations under this type of contract, i.e. an agricultural producer and a contractor. Part C\* provides an overview of other parties who may participate in the contract, have an interest in it or otherwise influence its conclusion and performance.

3. Several issues should be kept in mind throughout this section, particularly regarding the intersection between agricultural production contracts and national legislation. Thus, the way in which a contracting party is qualified under domestic law – as an individual or a collective entity – has important consequences regarding the legal regime that will apply to it and to its dealings with third parties. In countries that have enacted special legislation for agricultural production contracts, the nature of the parties serves indeed as one element defining the scope of this contract type. The concepts of agricultural producer and contractor presented below refer to the economic and legal position under a production contract, but not to the status that may be recognised under domestic laws or regulations for special purposes, such as subsidies or licences.

4. In addition, it should be reminded that domestic law governs issues regarding the capacity of natural and legal persons to conduct economic activities and to enter into an agreement. The form and legal structure of each party will determine its obligations under tax law or corporate law, which are not addressed here. It may be noted however that production contracts sometimes contain clauses spelling out that the producer, the contractor or both, have duly complied with such duties, together with a warranty for noncompliance.<sup>1</sup>

#### A. The agricultural producer

##### 1. Distinctive features

5. An agricultural producer<sup>2</sup> may be defined in various ways, and even within a particular country particular laws and regulations may apply different criteria depending on their context or purpose. This is notably the case in areas of particular importance such as land tenure and management, eligibility for financial subsidies, applicable tax regimes, social security schemes, possible special status under competition law, as well as environmental, health and hygiene regulations. However, two criteria in particular are generally relevant to characterise an agricultural producer, namely the nature of the produced goods and of the activity itself.

(a) Agricultural production

6. Depending on the country, the concept of “agriculture” may relate to the utilization of land, forest, marine and freshwater resources. Very often it refers to obtaining primary products from identified sectors, typically crop cultivation – with possible further specification such as horticulture, floriculture, viticulture –, animal husbandry, forestry and aquaculture, as well as products directly derived from these activities such as milk, honey, and silk. In many countries, an analytical approach focuses rather on the control of a “biological cycle,” a concept referring to one or several operations carried out with a view to the biological development of vegetal and animal products.

7. Domestic rules governing agricultural production contracts may either be general or apply to specific products such as poultry, vegetables, or milk. In this latter situation, specific provisions addressing contractual relations may be found in an act regulating a particular commodity,<sup>3</sup> or may constitute a whole act or instrument by themselves – such as a standard mandatory form contract.<sup>4</sup>

(b) Producing as a professional activity

8. Another criterion which is generally used to qualify an agricultural producer under domestic law assumes that the producer, whatever its size and structure, carries out the production on an independent and professional basis. As mentioned in the Introduction\*, employees fall outside of this scope and are therefore not within the purview of this Guide. The professional purpose of the activity may be defined in various manners. First, it may refer to the producer as an “entrepreneur,” or to its undertaking as an “enterprise,” which implies an organised activity involving a level of financial risk. Second, there may be reference to the economic purpose of the activity as including the sale of the products or an exchange of goods and services. Lastly, definitions may exclude production intended exclusively for family or household consumption.

9. An agricultural activity typically takes place over a certain portion of land or in installations that are under the producer’s control and management. This control may involve actual ownership or rights of use, together with related rights under the domestic law. The producer may also lease the land from a private or a public entity. In many jurisdictions and in developing countries in particular, individuals or communities often live on land without holding any formal title, under traditional or customary forms of tenure. Whatever their nature, the possibility for a producer to rely on secure tenure rights will enable it to safely engage in a production activity and to contract on a sound basis.

(c) Legal status of agricultural producers

10. Domestic laws may apply different rules to agricultural producers depending on the nature of their activity or their legal status, generally affording greater legal protection when producers are not engaged in commercial activities. The basis for protection depends on the legal system and the particular country.

11. Many countries distinguish a “civil” and a “commercial” body of law, and regulate most aspects of the status and activity of producers under the general rules of the “civil” law. However, when producers act under certain corporate structures, “commercial” rules would apply. Agricultural producers subject to civil rules would be entitled to process or market their products only as ancillary to production activities. Besides fiscal benefits, a “civil” status would involve the application of special rules in matters such as agricultural land leases, insolvency or jurisdiction of courts. Regarding contract law, irrespective of whether the other party also has a “civil law” status or is a business entity, the general part of the law of obligations will apply rather than the special commercial law rules governing transactions among merchants.

12. In many other jurisdictions, the status of agricultural producer would not be subject to a particular body of law compared to other activities. Rather, a distinction would be drawn between a person occasionally involved in dealing with agricultural products and having no or scarce experience or knowledge regarding the particular commodity sold or market concerned, and a producer acting on a commercial basis, having knowledge or skills with regard to certain practices or goods, or an experienced professional involved in transactions in the ordinary course of its business. If the producer is characterised as a “merchant,” rules applicable to commercial activities will govern contract formation, performance and remedies. For example, a merchant will generally be subject to implied warranties regarding the quality of the goods delivered under a sale. Also, subject to special regulation, it may not be required to comply with the written form requirement. Furthermore, merchants may not benefit from the extended protection granted to non-commercial parties by special legislation on unfair terms and practices or statutes of fraud.

## 2. Forms for conducting an agricultural production activity

13. Producers may carry out their activity on an individual or collective basis. As agriculture develops as an income-earning and profit-making activity, the ways in which producers organize themselves are increasingly captured by legal formality. Institutional forms and legal structures may be the same that are available for other sectors or activities, but in most countries, there are legal forms specifically designed for agricultural producers. Each particular form entails a range of different rights and obligations, and may have a decisive influence on the management and the potential development of the activity from a business perspective. For the purpose of this Chapter, the common legal forms that producers may take will be classified into two broad categories, depending on whether they represent a legal structure for exploiting a single undertaking or whether they are used as a pool of several undertakings.

### (a) Individual producers

14. Around the world, the agricultural sector is typically made up of small to medium-sized entities, most being family-managed undertakings. Accordingly, while encouraging the development of large entities to respond to increased productivity needs, many countries also implement public policies to sustain small and medium scale enterprises. Particular attention is paid to small and micro enterprises and to empowering specific categories of persons, such as women or young entrepreneurs. Available policy options in this realm include simplifying and reducing the costs of the formalities required to open and operate an activity, thus encouraging producers to acquire a formal status either as individual entrepreneurs or under a corporate form.

#### (i) Natural persons and partnerships

15. Individual producers generally operate through small production structures in terms of capital size, number of workers employed and volumes of production. In most parts of the world, farming businesses are not required to incorporate under a specific legal form. However, registration is most often required to obtain permits, licenses or public certifications needed for certain types of production. Registration comes with certain obligations such as tax and accounting liabilities, but also affords a certain level of protection, typically by giving access to social security benefits and public programmes geared toward the formal sector. Some countries where the informal sector prevails have thus implemented simple registration procedures providing a certain level of legal recognition that may facilitate access to credit by formal banking institutions and to other forms of State support.

16. In an agricultural undertaking owned and operated by one individual, the personal and professional capacity and assets form one single entity, to which the creditors may have access to

secure payment of the debts contracted for the agricultural production. The producer as well as the producer's family may be exposed to substantial risks. Depending on the applicable law however, certain items of the household property, or the land itself, may be protected from attachment in debt recovery proceedings. Furthermore, in addition to the risks inherent in agricultural activity such as weather constraints, an undertaking operated by an individual is exposed to risks related to the owner's physical condition and wellbeing.

17. Often, two or more individual producers join their capital and skills to carry out a revenue generating activity, appearing as a single entity but having no separate legal personality. Many such situations may arise in practice, for example within a family or a group of neighbours. This type of undertaking, recognised as a partnership under most legal systems, would be considered as jointly held by the partners. Absent a specific agreement, partners would share profits and losses equally, each incurring joint and several liability for the other's decisions, debts and defaults. This feature may entail risks, but would also have a peer monitoring effect within the producers. Certain forms may allow members to participate with a limited liability.

18. While not legally required, a written agreement is generally useful to govern the relations between the partners regarding matters such as capital contributions, allocation of profits and losses, duties and management responsibilities. A written agreement brings the added benefit of clarity from the contractor's perspective, in particular regarding the status of the person authorised to contract and deal on behalf of the group.

#### (ii) Corporate structures

19. Corporate structures are particularly suitable for collective holding of capital and represent widespread forms of farming. Simple corporate structures such as the limited liability company may be preferred for smaller groups of investors. In many countries, individual producers also have the option to incorporate as a single-owner company. Under a corporate form, the continuity of the activity can be facilitated by the transfer of company shares, including for example upon the death of a shareholder. Setting up a company creates an independent legal entity, thus separating the owners' personal assets – typically the land – from the company's assets, and limiting the owners' liability for the company's debts. It must be noted however that incorporating a limited liability company would not shield the producer against all liability. Creditors often seek to obtain a personal guarantee for the debts or other obligations under the contract, for example by obtaining a bill of exchange signed by the producer, or a mortgage over non-farm assets, when this is allowed under domestic law.

20. Many countries have special corporate structures for small undertakings with a limited number of producers – for example up to ten members, typically relatives, family members or neighbours – either personally and directly involved in the production by providing labour in addition to capital, or admitting also other non-producer physical persons. These special types of producer organisations may be limited in their ability to carry out activities considered to be of a "commercial" nature, such as trading or processing the product, except within certain limits. Limitations of this nature may be one of the reasons why contract farming arrangements are a suitable vehicle for the distribution of agricultural products and the better integration of producers in value chains.

#### (b) Producer organisations

21. Agricultural producers may also join the resources of their respective production units, without however losing their individual autonomy, by creating producer organisations such as associations or cooperatives.<sup>5</sup> In the context of this Guide, the concept of producer organisations is intended broadly to include any form where the production of individual producers is managed and/or marketed

collectively. Among the available forms, associations and cooperatives may be seen as the most widespread categories of organisations that could participate as a party in a production relationship, although a large number of different designations and forms may also be found in practice and under national law.

22. When producers join efforts under an adequate legal form provided by the law they are able, as a group, to seek commercial financing, conclude insurance contracts, hire labour, apply for public subsidies or other public policy programmes, develop certification schemes, own shares in other legal entities, and take various other steps to build, strengthen and increase production capacity. An organisation with legal personality can buy, hold and sell immovable or movable property, be a party to a contract and act in legal proceedings.

23. The legal formalisation of a producer organisation generally requires a certain level of maturity of the group in terms of internal cohesion, minimum technical and financial capacities and management, and awareness regarding the objectives and the means to be implemented. Also, the formation and operation of a legal entity have implications in terms of costs and liabilities. In response, certain countries have adopted simple legal forms intended for groups with small-scale producer membership that would allow them to engage in formal dealings with buyers. Special programmes and policies are implemented both by public actors and by non-governmental organisations to foster and sustain small producer organisations. It is also worth noting that several private sector participants dealing with such organisations, especially under the fair trade or equitable trade schemes, have focused on the empowerment of small producers by undertaking specific obligations in their contractual relationships, for example by providing extension services and support to the community.

24. Members of traditional communities or indigenous groups may produce collectively and deliver products to contractors under agricultural production contracts. Certain countries recognise by statute a legal personality to designated customary bodies or traditional communities. A community could function as a producer organisation, with members having their own assets and the head of the community being authorised to enter into contracts for the community, or members could also have common ownership over the community property. Most often there would be no written documents evidencing title or relations within the community, but there would be a general knowledge inside it about title or identification of the community or its members. Often, people dealing with the community such as contractors may also possess this knowledge.

25. Different types of organisations may also have an important advocacy role. Under the generally recognised principle of freedom of association, contractors should not restrict a producer's rights to join or contract with a producer association. Similarly, contractors should not engage in retaliatory or discriminatory practices towards producers exerting such rights. This type of conduct would be sanctioned under domestic law and is expressly condemned as an unfair practice under specific legislation on production contracts.<sup>6</sup> Under such legislation, the protection afforded to producers to join an association is further strengthened by the prohibition on inserting confidentiality clauses in contracts and their consequent invalidity.

#### (i) Non-profit entities

26. Agricultural non-profit entities may play a role in enhancing their members' capacities in information, management, training and extension services, research, advocacy and others. They may also provide services for the organisation of production by receiving and distributing inputs, performing land preparation services, and monitoring contract performance through quality control. They may act as facilitators in dealings between producers and the contractor and sometimes also toward other parties, such as a bank providing credit to producers, or a government entity administering a public

development scheme. Depending on their particular form, entities in this category may come close to a cooperative. However, because of their non-profit identity and purpose, voluntary associations, self-help groups and similar entities are not authorised to distribute profits to members. Note that in a number of countries, non-profit entities are entitled to conduct revenue-generating activities under certain conditions, while in others this capacity is very restricted.

27. The relations between the entity and its members and the operating rules are set by its internal statutes, while the legal capacity of the association and scope of liability towards third parties are determined by national law. The authority of a legal representative to deal with third parties and undertake obligations on behalf of members is based on the authority conferred by the members, under the statutes. Sometimes, it is also reflected in the production contract itself.<sup>7</sup> The association may be a party to a production contract, undertaking specific obligations in its own name as a facilitator, in addition to acting as an agent regarding members' obligations toward the contractor.

28. Producers may also join informally, without registering or complying with formal requirements provided for by the law or without formally defining the relationships between members and how they will be represented. This may result in a high level of uncertainty when one person deals with a contractor on behalf of a group of producers. This may be the case when one leading producer aggregates the production of its neighbours, delivers the inputs supplied by the contractor, and then makes payment to the other producers. Whether the leading producer acts on behalf of the group as a single entity or on behalf of each of the individual producers needs to be clarified in advance, since a default by one member will have different implications. In certain situations, the person acting on behalf of the group could be personally responsible for defaults by group members. Usages within the group and implied authority will be relevant in this context.

#### (ii) Cooperatives

29. Cooperatives are economic entities that combine commercial and not-for-profit features, and play a major role in the economic and rural development of most countries around the world. In certain geographical areas and for particular commodities, agricultural cooperatives gather very large numbers of producers and manage most of the production. They may, however, take several forms depending on their membership, object and activities.<sup>8</sup> Cooperatives are economic entities that may combine commercial and non-for-profit features depending on the legal system. They also vary considerably in size as well as in technical and economic capacities.

30. An agricultural cooperative may perform different tasks. It may market the production of its members or even organise the production process itself. Moreover, cooperatives sometimes provide services such as planning, technical assistance, access to equipment, supply of inputs, and quality control. As the cooperative acquires more business and financial strength, activities and services to members could expand to include for example group certification or obtaining third party certification, developing specialised products and labels, and engaging in downstream activities such as pre-processing, transformation and packaging. These activities may often be undertaken through commercial subsidiaries or based on contract alliances and networks, thus achieving vertical and/or horizontal integration. Cooperatives may also gather associations of producers rather than just individual ones.

31. In many countries, cooperatives are regulated by a special legal regime, and particular rules may apply to those engaged in agriculture or in the production of specific commodities. In other countries, cooperatives come under the general rules governing corporate bodies, sometimes adapted in light of the cooperative principles. Internal statutes regulate the relationship between the cooperative and its members based on their participation as financial shareholders and primary – and sometimes exclusive – beneficiaries or users. Based on this duality, in certain countries the relationship between



members and the cooperative is viewed as sui generis in nature, and cooperative rules would apply to issues such as transfer of ownership, the price, the duration of the contract, and remedies for non-performance.

32. The parties involved may have different roles, obligations and risk allocations, depending on the purpose and membership reflected in the statute of the cooperative and its business strategy for dealing with buyers of the produce. When the cooperative gathers members producing together – for example on jointly owned or controlled agricultural plots –, the cooperative will enter into a production contract in its own name. In this situation, it would be directly responsible for the obligations toward the contractor and non-compliance by individual members would be dealt with internally under the cooperative's rules.

33. Members producing individually or grouped under associations may join in a cooperative for the marketing or exporting of their produce. The role and liabilities of the cooperative would vary depending on its statutes and the applicable law, and depending on whether it acquires title to the produce from the members or acts as their agent. In the latter case, the acts validly entered into by the cooperative as an agent bind directly the members under a production contract, while the cooperative will respond directly of the acts performed in its own name. On the other hand, when the cooperative acquires title over the produce delivered by its members in order to resell it or process it, the services provided by the cooperative to members often correspond to those typically delivered by a contractor under a production contract. However, it is important to note that a commercial firm buying the produce may also provide direct services to producers, conceptually bypassing the cooperative. In such a case, the various participants – producer(s), association(s) and/or cooperative and/or commercial buyer – would share obligations and responsibilities in the manner spelled out in the relevant contracts.

#### B. The contractor

34. For the purposes of this Guide, the contractor is the party commissioning the production from the producer and providing a certain degree of guidance, such as the supply of inputs, services, finance and control over the production process. Typically, the contractor will be an entity that manufactures or processes the produce, and then sells it either to the final consumer, as it occurs increasingly with supermarket brands, or to other chain participants for further processing and onward sale along the supply chain.<sup>9</sup> The contractor could also be a wholesaler or an exporter. Besides commercial entities, other types of contractors may be involved such as cooperatives and, in particular occasions, public entities. In countries where certain commodities are publicly regulated and cannot be traded directly between private parties, special exemptions may allow producers to enter into contracts with commercial contractors.

35. The contractor's legal form will be relevant in several different ways. It may determine the rules applicable to its relationship with the producer, as part of the definition of the type of contract regulated by certain national laws. Its capacity will generally have an influence on the characteristics and balance of its contracts with agricultural producers. Its legal location may also be relevant to determine the law applicable to the production contract.

#### 1. Private corporate structures

36. The contractor will often be a business entity, carrying out its activities on a commercial basis. Certain laws dealing with agricultural production contracts define this type of contract in part by referring to this commercial status, designating the contractor as a "processor," "industrial" party, or "agribusiness." Such laws may require its incorporation under a particular form characterised as a

“commercial” entity.<sup>10</sup> Under certain laws, a contractor entering into a contract farming agreement may be designated as an integrator, a buyer, a financier or some other term.<sup>11</sup>

37. Contractors may vary widely in size, business formats, and ownership. For example, they may be small businesses dealing with limited numbers of producers and supplying buyers in the local market. However, they could also be entities conducting large-scale operations for domestic or export markets. As food supply chains are highly concentrated and operate globally, the contractor would frequently be part of a corporation or a group having an international reach. The relationships, strategies and bases for coordination between the single entities of the group may rely on various institutional forms and contractual structures. Very often, a transnational corporation would operate locally through a jointly owned company based on foreign and local capital shares, incorporated or registered in the country where the production takes place. The contractor may also be a foreign company operating directly from its main office situated abroad or operating through a local branch. In the latter case, the rules applicable to that entity may require a close attention as they may vary from country to country.

38. Under a traditional format, the company would be totally owned and controlled by commercial investors. For certain entities however, social concerns underpin business objectives, forming the basis of so-called social companies. Such a company would often be formed by a producer organisation developing activities down the supply chain in coordination with the production. In other cases, producer organisations would take a share in the capital of a company entering into a joint venture with other equity investors, possibly including public entities. The capital formation will influence the company's strategy, operating methods and dealings with producers.

39. A cooperative may also act as a contractor under an agricultural production contract. As seen above, in many instances members would supply their produce and transfer title thereto to the cooperative on an exclusive basis, while receiving a variety of services. Depending on domestic law, relations between members and the cooperative would either be regulated by special cooperative law or by general contract law subject to certain adaptations reflecting the cooperative principles. When a cooperative deals with non-members, it would do so as a contractor on the basis of general contract law or the applicable specific legislation.

## 2. Public entities

40. Most often, public government entities are not directly involved as a party to an agricultural production contract, and instead are involved as interested third parties, as explored further in Section \_\_\_\_ below\*. But, in some cases, a public entity could participate as a contractor in an agricultural production contract. Public entities are institutional buyers of agricultural products intended for schools, hospitals, the military or other needs in the context of public services. International humanitarian agencies delivering food under emergency assistance programmes are also major purchasers of agricultural commodities. While most of this supply is obtained on spot markets, an increasing attention is given in many countries to coordination with the production stage. On the one hand, this derives from the general concern to keep a closer control over the products' quality, with the frequent requirement that producers be certified or supply certified products, and in certain contexts also that they be covered by product liability insurance. On the other hand, it serves as a basis for targeted policies in support of certain categories of producers, for example to provide stable markets under sustainable terms for local small producers or family farming.

41. In many cases, however, a public agency would contract with a private partner selected through the appropriate procedures to deliver the service, including organising the procurement and supply in accordance with designated requirements. Under this formula, while the public entity would set the standards, it would not be directly involved in contracts with individual producers. They would be

concluded by a private contractor, either a commercial company or a not-for-profit entity delivering benefits for the community rather than solely pursuing a private interest.

42. Under other situations, the relationship could be established directly between a public agency and the producer, thus potentially reducing transaction costs, as no intermediary is involved. Many countries apply special rules to public procurement, including competitive bidding processes to select the contracting party. However, informal direct contracting may also be possible for certain categories of products or purchases below certain amounts. In either case particular requirements may apply, with implications notably on contract formation and price. The legal status and regime for such dealings would vary depending on the country. Usually, under common law systems, general contract law would remain applicable, except for special provisions provided for by the relevant public regulations. Under civil law systems, the public entity may be deemed to act in a private capacity, its contracts being private in nature and therefore governed by general contract law, or contracts may be seen as special acts governed entirely by public regulations or administrative law.

### C. Other parties interested in an agricultural production contract

43. Beside the situation where certain entities act in representation of one of the parties, for example a producer organisation concluding a contract on behalf of individual producers, many parties other than the producer and the contractor may participate in the agricultural production contract, have an influence on it or be affected by the production relationship. These parties may be classified under three broad categories, namely supply chain participants, interested third parties and public entities.

#### 1. Value chain participants

44. Value chain participants include various entities adding value to the final product along the supply chain, from its conception through production, transformation and handling, up until final consumption, for instance by providing goods, finance, services, information, and know-how, thereby contributing to the production process. Participants may be linked through institutional or contractual relations. The agricultural production contract participates in the operation of the supply chain with direct linkages to its other structures and participants, and is in turn subject to the influence and tensions exerted by those participants.

##### (a) Various linkages between participants

45. The parties to an agricultural production contract may be linked to other participants of the value chain in many patterns. Under a multiparty contract, the other party or parties intervene directly in the production and the role and level of responsibility of each participant will most often be specified in the contract, together with the possible effects of one party's breach on the other parties' contractual relationships.

46. Other parties may be bound to the producer or contractor under separate arrangements, aimed at helping them perform their obligations under the production contract. This will be the case for example for workers hired by the producer or for providers of goods – for example seeds – or services – transport or harvesting – retained by the contractor to perform its obligations toward the producer. As employees, subcontractors or agents, each of these parties would in principle be responsible only toward its own contracting party.

47. In certain situations however, the intervention of a specific third party may be required or provided for by the production contract, making the contractual relationships interdependent. This could be the case when the contract requires the producer to purchase the inputs from a designated

supplier, or when the producer is required to provide a personal guarantee to a third party to secure its obligations under the contract. In these situations, contractual relationships are linked, meaning that non-performance or defective performance under one contract will determine and may create a cause of non-performance of the related contract.

48. Finally, in the context of supply chains, while participants share common interests and implement compliance mechanisms through standards applied by contract across the chain, remedies for non-performance generally flow either from the mandatory provisions of the applicable legal system, or from the contract itself and hence subject to the parties' will and bargaining power. The legal concepts and practical consequences of the parties' autonomy and privity of contract on the one hand, and the coherent structure of the supply chain on the other are likely to create tensions. However, certain legal systems may recognise the effects that certain obligations between the parties to the production contract would have on third parties, based on extra-contractual liability,<sup>12</sup> on the contract,<sup>13</sup> or on legal doctrine, for example in third party beneficiary contracts.

#### (b) Types of participants

49. Various parties are or may be relevant to an agricultural production contract, depending on their particular situation and the features of the local market. In highly integrated relationships, the contractor provides most of the goods and services required to carry out the production, while in other circumstances other participants will play a more active role.

50. As global supply chains become increasingly consumer-driven, the requirements applied at the final consumer level have a strong effect on the content of the obligations of the various participants along the chain. At the international level, safety and quality standards or corporate social responsibility requirements in developed markets are often higher than those applied in countries where the production takes place, affecting in certain situations the availability of an alternative market for the product. Variations occurring on the final consumer market are also likely to play a major role – together with other factors – in the supply chain dynamics, and may have important implications on the equilibrium of existing production contracts based on terms referring to other economic conditions, especially regarding the price.

51. Except when the contractor produces and delivers the inputs to the producer, physical inputs such as seeds and planting material, young animals and animal feed, chemical and veterinary products are purchased from third-party suppliers, generally on credit terms. The contractor may purchase the inputs for delivery to the producer, or may require the producer to purchase the inputs from a specific supplier or with no limitation. In certain cases, inputs may be subject to third-party intellectual property rights.<sup>14</sup>

52. Service providers will often act as subcontractors for one of the parties. For example, the producer may subcontract with a third party which harvests the crop, or the contractor may subcontract with a third party to conduct site monitoring during the production process. This situation may also arise where the technology to be applied under a particular production process is protected by third-party intellectual property rights.

53. The production contract will very often serve as a vehicle for producers and contractors to obtain credit and/or financing from microfinance institutions, commercial banks, social lending institutions, or government entities under public schemes. Guarantee of payment may be built on the contract, for example if the producer receives advances from the credit institution against a lien over future revenues generated under the contract. The contractor would stand as a guarantor toward the bank for the producer, or based on the producer's rights assignment to the benefit of the bank, the contractor could make direct payments to it in discharge of the producer's debt.

54. Certain production contracts would organise a close monitoring of the parties' performance, linking the release of credit or loans to the producer, for example for the purchase of inputs, to notice by the contractor or other party intervening as facilitator.<sup>15</sup> This type of situations is frequent when the production contract is part of a government-sponsored development programme through which financial support provided either by a public or by a private banking institution is guaranteed by the government.

55. Insurance plays an important role to mitigate risks. It may cover a large number of hazards, such as fire, theft, disease or natural calamities, damage to property or injury of third parties on the facilities, as well as the life or health of the main actors performing the contract. Because of the risks involved, insurance that covers damage to or loss of the crop or the animals may seldom be available. Even when available, premiums may be unaffordable for many producers, especially smallholders.

56. In certain countries, it may be mandatory for the parties to take out particular insurance coverage, and production contracts may also provide for specific obligations in this regard. Insurance products are typically provided by private entities and may also be offered by large cooperative or mutual entities or microfinance providers. Public policy schemes exist in a number of countries, providing guarantee mechanisms to private insurance services or subsidizing minimum insurance coverage, generally linking it to credit granted under public schemes. Beyond insurance schemes, large-scale natural calamities may be covered by special State interventions offering some level of compensation for agricultural losses.

57. Third party verification provides the parties with an independent and expert assessment of the product's conformity at delivery – which may also apply to the inputs delivered by the contractor – and, as the case may be, at critical stages of the production process. This verification may be provided for in the contract itself and may be carried out by a technical body offering the required guarantees of impartiality and skills. It may also be provided by public entities such as commodity boards, non-governmental entities or private entities. The parties may also decide to resort to third party verification after a disagreement arises on the conformity of the produce.

58. Third party verification may be based on certification schemes and particular sets of standards. While compliance with mandatory standards is monitored through public enforcement mechanisms, compliance with private voluntary standards relies on a certification contract with an accredited body. Sometimes, the contractor covers the costs of certification for the producer, to ensure that its production can bear the label corresponding to the standard against which it was successfully certified; but, many times the costs of certification actually fall on the producer. The certification procedure is determined by each standard scheme and involves several controls taking place over periods of time, such as on-site inspections, taking samples for chemical or biological tests, auditing, and reviewing documents. When irregularities are found and standards are infringed, the certification scheme generally provides for a series of measures that the certifying body is entitled to apply, from corrective instructions to sanctions leading potentially to a denial or withdrawal of the certification. When dealing with contractor's remedies under the production contract, an appropriate alignment or coordination with the enforcement mechanisms provided by the certification scheme will be necessary.

59. Extension services generally aim to strengthen producers' capacities by supporting the creation and operation of producer organisations, the development of agronomic and management skills, or access to information on market conditions. Those services may also include facilitating relations with contractors by helping identify potential parties, and negotiate and draft the contract. During the production, extension services may support better compliance and provide assistance when disagreements arise between the parties.

60. Extension services are generally provided by producer organisations, non-governmental organisations or public entities as a part of social and economic development programmes for particular

rural areas. Special development programmes may often focus on certain categories of producers, such as women, indigenous communities, and poor and landless producers. Under certain circumstances, contractors may also provide extension services, especially when they are committed to fair trade standards.

## 2. Interested third parties

61. Other parties may hold interests that could affect the ability of the parties to perform under a production contract. The producer's tenure rights and its entitlement to use the land may be uncertain or precarious. If those rights are challenged, the producer may not be able to perform under the contract. Similarly, when the producer leases the land, the landowner will generally need to be informed of certain elements, or may have to authorise them, such as the particular crop grown on the land and cultivation practices, or facilities built to carry out the production. Under particular circumstances based on the contract or the law, the landowner may have a claim on the crop itself, such as a lien for unpaid rent. Production contracts often include a clause concerning the producer's title to the land, and sometimes the landowner may sign it itself. Other creditors, typically banking institutions, may claim rights over the land when the producer has granted a pledge over it for finance and has not complied with its repayment obligations.

62. Also, the rights held by the contractor's creditors may affect the producer's rights deriving from a production contract. This may occur for example in the case of a contractor's insolvency, when the producer's rights to payment for the production rank second to the third party creditors' right over the proceeds of the sale of the produce. Certain domestic laws would however provide special protection to the producer by affording it a priority right.

63. The parties to the production contract usually cannot modify, dispose of or otherwise affect the rights of third parties. However, it is in the interest of both producer and contractor to ensure clarity in their respective rights and, when appropriate, settle the priority issues that may arise. Special clauses may be included in the production contract or under separate agreements providing a waiver of rights over the crop or a transfer of the right to payment. It must be noted that terms in the contract involving designated third parties would not affect rights that may possibly be claimed by other third parties.

## II. Contract Formation

64. A contract consists of the parties' legal obligations resulting from their agreement. The concepts of offer and acceptance have traditionally been used to determine whether and when the parties have reached an agreement, a contract being concluded either when an offer is accepted or when the parties' conduct is sufficient to demonstrate their agreement.<sup>16</sup> The process of formation of the contract has a crucial importance in building the contractual relationship since it shapes the obligations which will bind the parties over the duration of the agreement. The characteristics of the parties and their respective economic position and bargaining power play a major role in the balance of the contract.

65. The formation of the contract includes a series of stages and aspects, which include negotiations and preliminary exchange of information, delivery of an offer and the acceptance of the offer, and the making of the contract proper. As a common best practice, the whole contract formation process should be carried out in a fair and transparent manner and in good faith.<sup>17</sup> Good faith may involve applying – or refraining from adopting – certain conduct rules, and may also have certain implications as regards the level of information that should be communicated to the producer.

## A. Offer and acceptance

66. In the context of an agricultural production contract, the offer containing the prospective terms of the agreement typically comes from the contractor. With a view to leaving the opportunity to the producer to fully appraise the content of the future agreement, it is a recommended practice in many contexts that an offer be presented in writing with sufficient time before signing the agreement, so that the producer may review the proposed conditions thoroughly and, as the case may be, consult with informed persons or entities.<sup>18</sup> A written offer may even be required under certain legislations and, in such cases, to be valid the content of the offer should reflect the content of the final agreement.<sup>19</sup>

67. Because its mere acceptance is sufficient to form the contract, the offer must be sufficiently descriptive and definite to encompass the terms of the agreement.<sup>20</sup> Courts will not enforce contracts in which the parties' intentions are not expressed and are incapable of being determined through offer and acceptance. Vagueness, indefiniteness and uncertainty with respect to any of the essential terms of the agreement may render the contract unenforceable.<sup>21</sup> As a general rule, the material terms of subject matter, price, payment terms, quantity, quality, and duration must be sufficiently definite such that the respective promises and performance of each party is reasonably certain.<sup>22</sup> In jurisdictions with special rules on agricultural production contracts, these descriptive terms must be fully included in the written document given to the producer for signature.<sup>23</sup>

68. However, all agreements will have some degree of vagueness and indefiniteness due to uncertainties in language and communication, especially in international transactions involving multiple languages. Although certainly not in accordance with the good production contract practices discussed above, seemingly essential terms, such as the precise description of the goods,<sup>24</sup> price,<sup>25</sup> and time<sup>26</sup> or place of performance,<sup>27</sup> may in some circumstances be omitted from the offer without rendering it insufficiently definite.<sup>28</sup> A court may enforce the agreement as long as the parties intended to be bound by it and the missing terms are determinable through interpretation of other contract language, reference to the parties' established practices,<sup>29</sup> or application of the principles of good faith, fair dealing and reasonableness.<sup>30</sup>

69. In the event that a written agreement is totally silent as to quantity, oral evidence cannot be used to fill this gap.<sup>31</sup> Open-quantity contracts present particular difficulties. For example, a contract for the sale of goods may define the quantity by reference to a contractor's requirements or a producer's production. In such circumstances, exclusivity may be considered a prerequisite for the enforcement of the agreement.<sup>32</sup> However, where the quantity term is merely imprecise, as opposed to wholly absent, courts may rely on parol evidence to supply the required precision.<sup>33</sup> Since some agricultural production contracts may qualify as output or requirement contracts, care should be taken to specify the quantity and potential exclusivity.

70. Preliminary negotiations refer to the bargaining communications and other events involving the parties prior to the acceptance of an offer. Accordingly, every offer is part of the preliminary negotiations until it is accepted. In protracted negotiations, courts will examine every offer, counteroffer and action of the parties to determine if they have reached an agreement on complete and definite terms capable of being understood by the court.<sup>34</sup>

71. Whether a preliminary communication is an operative offer capable of acceptance or merely a step in preliminary negotiations is an issue to be carefully considered in the agricultural production context, especially in situations of disparate bargaining power. Mere statements of intentions, estimates, advertisements or circular letters, price quotations and preliminary agreements such as "agreements to agree" or "agreements to negotiate" may appear to the lay person as definitive offers or binding contracts. In attempting to decipher the legal effect of these communications, courts have looked to a variety of factors: the ordinary meaning of the language used; the parties' history of

dealing;<sup>35</sup> the degree of targeting of the communication;<sup>36</sup> local and trade usages; the parties' social relationship; the objective completeness of the bargain's terms; the subject matter of the agreement; and the foreseeability that the recipient of the information will act in reliance on the communication.<sup>37</sup>

72. Agreements to agree may suffer from indefiniteness with respect to the finality of terms and the intention of the parties to be legally bound. In some circumstances, the parties may have finalized the terms, but lack the intent to be bound until a final writing is drafted and signed at some later date.<sup>38</sup> In other scenarios, the parties will conclude separate agreements on a series of terms over the course of negotiations, but no contract will be formed as long as an essential term is still subject to negotiation. The preliminary agreements are rather considered as part of the negotiations leading to what may or may not be a final offer.<sup>39</sup>

73. On the other hand, negotiations may take place in an informal context that incorporates non-verbal communication, a history of dealings, custom and other circumstances. The parties may leave some terms for future discussions, not viewing them as essential to the bargain. Accordingly, if it is clear that the parties intended to be bound, the court may uphold the agreement.<sup>40</sup> Partial performance by one or both parties may be strong evidence of such an intent.<sup>41</sup>

74. Additional negotiations may also occur after the formation of an initial contract. On a related aspect, it may be noted that parties sometimes insert "entire agreement clauses"<sup>42</sup> according to which the single contract document reflects the entire agreement of the parties to the exclusion of any separate document or agreement. This kind of clause aims at enhancing parties' certainty regarding their rights and obligations.

75. Under general contract law, mere acceptance of an offer by the offeree is sufficient to form the contract. A statement – or under certain legal systems a conduct – by the offeree indicating agreement to an offer constitutes its acceptance.<sup>43</sup> In circumstances where the start of performance would be a reasonable mode of acceptance, the offeree should provide actual notice of acceptance to the offeror within a reasonable time thereafter.<sup>44</sup> Although this performance may render the offer irrevocable, the failure to provide notice of acceptance may entitle the offeror to treat the offer as lapsed.<sup>45</sup>

76. The applicable law may require for a contract to be perfected that additional requirements be complied with. This is typically the case when the contract is subject to approval by a government authority.<sup>46</sup> In certain contexts, third parties' consent may be required, for example the owner of the land where the production is to take place. Also, the consent of the spouse may be required. Customary law may impose specific formalities for the contract to be valid. For example, the consent of the representative of the community may be required for acts of disposition. Replies to offers that contain additions, limitations or other modifications are generally viewed as rejections of the initial offer and constitute a counter-offer.<sup>47</sup> Considerable debate exists as to the effect of a reply accepting the offer while proposing conditions that do not materially<sup>48</sup> alter its terms. As a general rule, unless the offeror objects to the discrepancy without undue delay, a contract is concluded, including the modifications contained in the acceptance.<sup>49</sup> However, if the offeror objects to the modifications, and parties still proceed with performance, it is unclear which terms apply – those included in the initial offer or those of the purported acceptance or counteroffer.<sup>50</sup>

#### D. Capacity and consent

77.

78. For an agricultural production contract to be valid and enforceable, the parties, whether natural persons or legal entities,<sup>51</sup> must have legal capacity when entering into it. Mandatory provisions of domestic law govern issues regarding legal capacity.<sup>52</sup>



79. As an additional validity requirement, parties must have given valid consent at the time of contract formation. Defects of consent and relative remedies are governed by mandatory provisions of domestic law.

80. One potentially sensitive issue in the context of agricultural production contracts is whether the producer had a sufficient understanding of the terms of the contract and of its implications when entering into the agreement. Lack of informed consent may amount to a defect in consent, for example it may be interpreted as a mistake, either of fact or of law,<sup>53</sup> or fraud<sup>54</sup> making the contract avoidable, or allowing for other remedies. The circumstances of the dealings of the parties, and the individual situation of the producer will play a determining role in assessing whether in the particular case, the producer's informed consent was indeed absent, what particular ground can be invoked under the applicable law, and the consequences regarding the contract and the available remedies.

81. One particularly relevant aspect in this context is, for the producer, the capacity to understand the terms of the contract based on literacy or language. In fact, illiteracy and language barriers are common obstacles to informed consent by producers.<sup>55</sup> Third-party facilitators have an important role in the negotiation process to ensure that contract terms are explained and drafted in a language accessible to producers.<sup>56</sup> Contractors should make sure that in the particular circumstances producers understand the terms of their future engagement.

Under this perspective, a contract should not impose upon the producer a general prohibition to disclose the terms and conditions agreed to in the contract, to the effect of preventing the producer from consulting third parties such as an attorney who could advise the producer on the fairness of the agreement and the material and legal risks it involves. Consequently, certain legal systems have expressly outlawed general confidentiality clauses. When they are not expressly outlawed, they may be declared unfair on the basis of general contract law.

82. Other relevant aspects regard the producer's effective access to information elements surrounding the contract, and its ability to assess their implications on the overall relationship and its particular position. Whether and to what extent the contractor may have an obligation to provide such information may vary. Under certain legal systems, based on the general principle of good faith,<sup>57</sup> the contractor would indeed be under a duty to provide certain elements of information before formalizing the agreement.<sup>58</sup> This objective can also be obtained by sector-specific legislation which sets out mandatory form and content requirements. The information that a party should disclose will also be commensurate to its relative importance for the other party, of which the first party was or ought to have been aware. This consideration is of particular relevance for contractors dealing with smallholders who are inexperienced and unsophisticated in negotiating contracts, and may not have easy access to the relevant information surrounding the contract.

83. As regards the risks involved, these may vary from direct effects to complex consequences, and it would generally be for the producer to evaluate them. There, the individual capacity and experience of the producer will be essential as a variety of issues may be involved in e.g. the agronomical, financial and legal fields. In this context again, facilitators may play a very important role, also in strengthening the capacities of the producers. Again, certain specific legislation does require the contract to disclose the risks for the producer deriving from the contract. Whether a lack of awareness, misunderstanding or mistake regarding particular implications or risks – in particular regarding profitability – do in fact amount to a lack of informed consent shall therefore be assessed on a case-by-case basis, based on the applicable law and the factual circumstances.<sup>59</sup>

84. It may be noted that certain regulations provide for specific mechanisms aiming at affording an enhanced protection to producers in the process of contract formation. For example, certain regulations afford producers the right to cancel the contract within a given period (typically three days) after the conclusion of the contract. The producer may exercise this right after having fully

considered the implications of the contract, and possibly after being advised by a third party. The regulations require for the contract to disclose the producer's right to cancel, the method a producer must follow to cancel, and the deadline for canceling the contract.

85. With a view to building successful relations in the long term, good practices would recommend for the contractor to act in a transparent manner and provide to the producer prior to the conclusion of the contract any information which is relevant not only for the performance of the contract but also as regards the essential implications and potential risks that may derive for the producer. Contracts induced by fraud, mistake or duress may also be voidable by the aggrieved party.<sup>60</sup> With respect to mistake, the erroneous belief must relate to the facts prevailing at the time of contract formation, not to a party's prediction or judgment about the future.<sup>61</sup> Thus, an incorrect judgment regarding future crop prices, production yields or weather conditions does not give rise to a mistake rendering the agricultural production contract voidable. Moreover, the effect of the mistake must be such that enforcement would give rise to unconscionability or the other party must be at fault for the mistake.<sup>62</sup> Similarly, a misrepresentation by one party may rise to a fraudulent level if it is intended to induce assent from the other party.<sup>63</sup>

86. Improper pressure during the bargaining process in the form of duress or undue influence may make the contract voidable.<sup>64</sup> A threat that presents to the aggrieved party no reasonable alternative but to manifest assent to the bargain could emanate from the other party or from an entity external to the negotiations. In some instances, economic duress or business compulsion may qualify as an improper threat.<sup>65</sup> However, if the other contracting party is unaware of the improper pressure and has acted in material reliance to the contract, avoidance by the victim is precluded.<sup>66</sup> Undue influence may arise in situations where one party is under the domination of another or, by virtue of the relationship, may reasonably assume that the person will not engage in negotiations inconsistent with the aggrieved party's welfare.<sup>67</sup> In the agricultural context, changing market conditions could, in certain circumstances, lead to claims of economic duress, for example in cases of threat to put the supplier out of business.<sup>68</sup> The party claiming duress must demonstrate that its acceptance of contract terms was involuntary, and that circumstances provided no alternative and were the result of the other party's wrongful acts.<sup>69</sup> Wrongful acts may include threats to put one out of business or deprive of livelihood, or threats to institute criminal or regulatory actions, in order to secure a private benefit.<sup>70</sup>

#### E. Role of third parties in contract formation

87. As seen in the section dealing with the different stakeholders relevant for agricultural production contracts (see \_\_\_\*), different entities may take part in the contract itself or have an interest in the contract farming operation and be otherwise involved. When entities other than the contractor and the producer are part of the agreement, such as a public entity or a finance provider, the terms of the contract are generally dependent upon the conditions imposed by this entity or submitted for its approval.

##### 1. Producer organisations

88. In many contract farming schemes, contractors deal with individual producers. Most transactions are based on predetermined terms and conditions which are set by the contractor in contracts of adhesion, and leave little or no opportunity for negotiation by the producers. On the

contrary, dealings with producer organisations which imply larger volumes of delivery of produce and lower transaction costs for the contractor are likely to allow for higher negotiation capabilities on the producers' side. Producer associations or unions, when sufficiently representative, may have an important advocacy role and strengthen the position of members in dealing with contractors. In certain contexts, contract terms are agreed at the inter-professional level between producer organisations and buyers on a commodity basis and for a specific area and duration, which would form a model or standard agreement that individual contracts may or should comply with.

## 2. Facilitators

89. Depending on the particular environment, different entities may act as a facilitator, such as government entities, producer associations and non-governmental organisations, development agencies and individuals. Facilitators may have an especially important role in assisting the parties in setting mutually-advantageous conditions, in particular by providing support and advice to producers before and at the time the contract is concluded, so that they fully understand the terms of the agreement. Facilitators should not decide for the parties but may have a mandate to represent either the contractor or the producer in negotiating with the other party and signing the contract.<sup>71</sup> They may act as witnesses when informal agreements are concluded.

## 3. Public authorities

90. Where sector-specific legislation is in place, a public entity may have extended authority in bringing the parties to the production contract together and in monitoring the conclusion process of the contract, often subject to specific form and detailed content requirements, including review and approval of the contract, with procedures varying in each system. Certain systems provide for a formal registration of contracts (with the payment of related fees),<sup>72</sup> with different public policy purposes. One possible application is publicity towards potential third-party buyers that a particular producer is under an exclusivity contract with another contractor.<sup>73</sup> Depending on the legal system, the submission for public review may be voluntary<sup>74</sup> with a view to providing certainty regarding the contract's conformity with form requirements.

## 4. Intermediaries

91. Most contract farming arrangements are negotiated and/or concluded by a person who represents and acts on behalf of either the producer or the contractor. A contract concluded by a representative or an agent is binding upon the party represented. Matters regarding the form of the authority, and the consequences of an intermediary acting beyond the scope of its authority are dealt with under representation and agency rules under domestic law. Such rules differ greatly among legal systems and within each legal system the rules may also vary.

92. For a producer, in certain circumstances, distinguishing between a representative of a company (employee or agent) and an autonomous entrepreneur acting as a subcontractor for a company may not be easy. However this has important legal consequences as it implies different

liabilities and remedies. When an entrepreneur is autonomously engaged as a main party to the contract farming arrangement, it would take over the risks deriving from the producers' or its own failure and would be linked under a separate supply contract to the company. On the contrary, a mere intermediary would undertake no personal responsibility for the obligations under the contract farming agreement.<sup>75</sup> This points to the importance of establishing with certainty the status of the person negotiating and concluding the contract: unless it can be clearly inferred from the circumstances, the particular context and history of relationships, it is recommended to obtain formal documentation regarding the identity of the person and its actual authority to represent the other party.

93. As seen above, producers may also be represented for example by a producer organisation or a facilitator who acts on its behalf. Again, the authority to this effect should be clearly set.

94. Under this perspective, it would be advisable that, when undersigning the contract farming agreement, the employee or agent specifies its status and does not only sign in its own name but adds language such as "for and on behalf of" followed by the principal's name, so as to avoid any risk of being held personally liable under the contract. Some more detailed wording may be inserted in the contract farming agreement itself.<sup>76</sup>

### III. Contract Form and Content

As a starting principle, contracts are not subject to any requirement as to form or content.<sup>77</sup>

#### A. Contract form

95. In most cases, the contract will take the form of a written agreement – either a single, comprehensive document or a series of emails, invoices and other correspondence. When one party has limited literacy, an oral explanation may accompany such an agreement.<sup>78</sup> On occasion, due to industry usages, local practices, the desires of the parties or other circumstances, the production contract will be an oral or "handshake" agreement, concluded without any documentation.<sup>79</sup>

96. As a matter of good contracting practice, written contracts are encouraged as a means to improve the clarity, completeness, enforceability and effectiveness of the parties' agreement.<sup>80</sup> Care should be taken to ensure that contracting parties with limited literacy skills fully understand the terms,<sup>81</sup> for example by having a neutral third party read the written contract aloud before its signature. Similarly, when the parties conclude an oral agreement, they should do so in the presence of a third party having no economic interest in their relationship.<sup>82</sup> This may help overcome the difficulties in enforcing oral contracts by making it easier to prove the terms agreed to by the parties.<sup>83</sup>

97. The fundamental principle of freedom of contract provides that parties are free to enter into a contract and to determine its specific content.<sup>84</sup> In an effort to reduce transaction costs,<sup>85</sup> contractors very often make an offer to enter into an agricultural production contract to multiple producers on standard forms, using standard terms, and incorporating by reference standards contained in other documents. Since producers often bear the administrative costs of contracting, they may also appreciate standardized contracts, especially if they know that their peers have entered into the same arrangement that fits within a cultural pattern.<sup>86</sup>

98. However, the legal freedom to enter into any contract may be overshadowed by the lack of economic freedom to negotiate specific terms or reject a lawful, yet economically unbalanced contract.<sup>87</sup> There is a concern that non-negotiable “contracts of adhesion” are often drafted to protect the stronger party, thereby impairing the realization of the reasonable economic expectations of the non-drafting adhering party.<sup>88</sup> Accordingly, courts generally apply a rule to interpret any ambiguity against the contract drafter.<sup>89</sup> Conversely, where a literal-minded reading of a contractual term would give a party more than is reasonable with respect to the contract as a whole, the court may adopt a more liberal interpretation.<sup>90</sup> In instances of gross disparity, the affected party may avoid the contract or ask a court to modify it in accordance with reasonable commercial standards of fair dealing.<sup>91</sup> (See Chapter XX (Remedies) for further discussion\*). Of course, this litigation-based concept of producer protection raises underlying issues regarding practical accessibility to the courts and, especially for smallholders, the discounted value of relief available after the fact.<sup>92</sup>

99. In light of the potential disparity of economic power between the parties, unequal information, and anti-competitive practices,<sup>93</sup> some jurisdictions have enacted specific regulations regarding the required form of agricultural production contracts in an effort to improve the functioning of agricultural supply chains.<sup>94</sup> Due to the variety of domestic legal traditions, legal rules and norms governing agricultural production contracts, jurisdiction-specific rules may be found in civil codes, agrarian codes, general contract legislation, specific agricultural contract legislation, as well as sector- or product-specific legislation.<sup>95</sup> The specific requirements thus implemented range from readability standards to the substantive terms of the agreement.<sup>96</sup>

100. To mitigate possible misunderstandings, contracts should be written in a language familiar to both parties<sup>97</sup> and should avoid complex and unclear terms, so that a producer of average education and experience in the given region can understand them. Some jurisdictions specify typeface sizes and require the use of sections, captions and indices to facilitate the understanding of longer documents.<sup>98</sup> The use of technical terms may be outlawed unless they are customarily used by producers in the ordinary course of business.<sup>99</sup>

101. Agricultural production contracts may specify production or handling standards, or include other technical terms. In such situations, some jurisdictions require that the contract provide a full explanation of these special provisions within the written document signed by the parties,<sup>100</sup> and that any documents incorporated by reference be attached to it.<sup>101</sup> Other disclosure requirements may compel the contractor to specifically disclose the material risks to the producer.<sup>102</sup> Again, these obligations regarding contract form go beyond general contract law to minimize misunderstandings and anti-competitive practices arising due to disparity of economic power or unequal information between the parties.

## B. Contract content

102. Under general contract law, minimum content requirements apply for a contract to be valid. These generally refer to a sufficient identification of the parties and the object of the agreement.

103. Rules specifically applicable to agricultural production contracts generally impose additional content requirements in the interest of transparency and providing information to the parties regarding a number of essential aspects. These relate to the content and extent of the core obligations of the parties, and may cover other aspects which are determinant in the overall balance of benefits and risks deriving from the agreement.

104. Certain regulations go into great detail regarding the matters for the parties to include in the contract. This is in particular the case when model forms of contracts are imposed upon the parties.

In such cases, procedural protection (i.e. the parties' obligation to include a provision dealing with a certain matter) may be combined with substantive protection (i.e. the parties' obligation to include a provision with a certain content).<sup>103</sup> A number of systems also require that the parties should specify available mechanisms for dispute resolution, sometimes requiring the parties to have recourse to mediation prior to turning to any binding mechanism<sup>104</sup>

105. Subject to any specific applicable legislation, it is in the interest of the parties to address in a complete and detailed manner the relevant elements of their contractual relationship. Hence, most agricultural production contracts contain provisions to this effect.

106. Although agricultural production contracts may take many forms in order to account for the diversity of products, legal jurisdictions and social norms, several important components are present in most written arrangements to enhance transparency and convey complete information.

107. Parties. Most contracts start with an identification of the parties. In the agricultural context, this usually includes the name and contact information of the producer and contractor. In addition, it may include a description of the land or livestock under production with respect to the particular contract, specifying for example the number of acres, geographic location or specific livestock. For a more thorough discussion of the parties to a production contract, including third parties, producers' associations and government regulators, see Chapter \_\_\*.

108. Purpose. This clause outlines, often very succinctly, the reason underlying the contract, for example "Agreement to Grow Tomatoes." It may identify the commodity to be produced by the producer and purchased by the contractor. An Agreement and Consideration Clause may be embedded within this section of the contract to summarize or at least acknowledge the respective promises of the parties, thus establishing the required contract consideration or cause.

109. Identification of the Production Site. Contracts typically identify the production site. Regarding land, the particular size and location of the contracted tract (generally determined on the basis of land registries) may determine the content and scope of the parties' obligations, for example when the delivery and purchase obligations refer to the whole production from the designated plot.

110. Obligations of the parties. The agreement should specify the obligations of both the producer and contractor, and in fact, most of an agricultural production contract typically consists of obligations of the parties. In a written document, these may be in separate sections. Common producer obligations may include production and handling requirements, use and payment of specific inputs to meet market requirements, location and timing of delivery, quality standards, and whether it is a volume (i.e., quantity) or acre contract. Production obligations may also include compliance with the contractor's intellectual property rights such as trade secrets and patented or protected seeds. Contractor obligations often include specifications or provision of production inputs such as seeds, chemicals and land, technical assistance services, production oversight, communication of product quality testing standards, and delivery acceptance. For a complete discussion of the parties obligations, see Chapter \_\_\*.

111. An important part of the parties' obligations, the price and terms of payment go to the heart of the parties' bargain and are worth a separate mention here. Accordingly, a contract will usually stipulate the price to be paid or contain a provision for its subsequent determination. In the absence of a specific agreement by the parties, the court may infer a reasonable price.<sup>105</sup> As a matter of good practice, the contract should have a clear and transparent method for determining the price. Other provisions include specifications on when and in what form the contractor will transfer payment to the producer.<sup>106</sup> For further discussion of price and payment terms, see Chapter \_\_\*.

112. Similarly, the provision of inputs is an aspect of obligations that is worth a separate mention. The agreement should reasonably identify the physical inputs. There is no set rule on how this is

done, but it is common to refer to the inputs by technical specifications or commercial brands. Regardless of how the inputs are described in the agreement, as with all terms of the agreement, they must be described with enough specificity to allow enforceability.

113. Inputs are an essential term of the agreement if the inputs are to be provided by the contractor. Unless the inputs prices are set or regulated (for example, to prevent excessive prices) by government regulation, this is a term to be agreed upon by the parties. As an essential term to the agreement, the failure to set or have a basis to determine the price of the inputs) could result in a failure of assent.

114. Determination of the price of the contractor's inputs is an important matter, which should be clearly explained in the contract. It should be done with due consideration to the corresponding market prices, as well as to the pricing mechanism which will govern payments to be owed by the contractor to the purchaser. Because the cost of the inputs is often related to the payment to the producer for produce, a well-drafted agreement will logically connect the description and pricing of the inputs with the overall payment terms of the agreement so that all aspects of costs and payments can be compared easily. Failure to do so may subject the contractor to a different payment scheme based on default terms that were not contemplated by the parties.

115. Excuses. Agricultural production contracts are particularly vulnerable to occurrences that make performance impossible or significantly more challenging than what was envisaged at the time of entering into the contract. The contract may specify the risk of loss for force majeure events or change of circumstances and, if available, insurance obligations. For further discussion of excuses for non-performance, see Chapter \_\_\_\*.

116. Remedies. The contract may include designated remedies in the event that one party fails to meet its obligations under the contract. Here it is worth briefly repeating that in the event of overreaching by one party, yielding a gross disparity in the obligations, the aggrieved party may seek to avoid or reform the contract.<sup>107</sup> See Chapter \_\_\_\* on Remedies for further discussion.

117. Other related elements found in agricultural production contracts include disclaimers of warranties, often accompanying the supply of inputs by the contractor,<sup>108</sup> as well as limitations on damages and liability between parties arising from the contract, allocation of responsibility for waste disposal, potential environmental liabilities, responsibility for obtaining and complying with public permits, provisions for successors and the assignment of rights, contract renewal provisions, and entirety clauses prohibiting oral modifications of the underlying agreement.<sup>109</sup>

118. Duration. The duration of the contract may vary depending on the production cycle and the applicable law.<sup>110</sup> For contracts stating no specific duration, the contract term may be implied based on the type of crop. For example, a contract to grow maize – an annual crop – is implicitly limited to a single year.<sup>111</sup> On the other hand, contracts imposing a substantial financial obligation on one party, generally the producer, may imply a more durable relationship and an expectation of renewal and continued purchasing by the contractor.<sup>112</sup>

119. Renewal. Renewal may result from a separate express agreement to extend the duration of the existing contract, from an automatic provision incorporated in the initial contract, or tacitly from the continued behaviour of the parties after the expiration of the fixed term.<sup>113</sup> Oral contracts extending beyond one year may, in some jurisdictions, trigger a requirement that contracts performed over more than one year be in writing.<sup>114</sup>

120. Termination. Contract termination discharges the parties from their respective obligations flowing from the agreement. It may happen automatically, by agreement of the parties, or under a right arising from the non-performance of the other party. To increase clarity and certainty, production contracts should specify the situations and procedural requirements, such as a notice

period, for contract termination.<sup>115</sup> They can also provide for different remedies in case one party breaches its contractual obligations. For a complete discussion of contract duration, renewal and termination, see Chapter \_\_\_\*.

121. Dispute Resolution. Although parties do not enter into a production contract with the intention of engaging in a dispute, external factors such as weather, disease or market conditions may expose the parties to risk, hardship and the resulting potential for disputes.<sup>116</sup> Accordingly, production contracts should incorporate at the outset methods for dispute resolution and choice of law provisions. Common forms include judicial proceedings, arbitration and mediation. These provisions add important procedural certainty to contract interpretation, execution and resolution.<sup>117</sup> For further discussion on dispute resolution mechanisms, see Chapter \_\_\_\*.

122. Signature. In written contracts, there should be a distinct section that, in addition to the signature of the parties, includes the date and place of contract formation. As a good practice, the parties should sign in the presence of a witness and include its signature on the document.<sup>118</sup>

#### Consequences of breach of required form or content

123. Whenever the applicable law requires an agricultural production contract to be made in writing or imposes other requirements as to form (e.g. sufficient readability) or as to substantive content (such as the inclusion of clauses addressing specific obligations of the parties), it would generally also specify the consequences of noncompliance with such requirements.

124. Regarding written form, it may be set as a condition for the contract to be valid,<sup>119</sup> in which case the contract will be declared void if the requirement is breached. Alternatively, when the writing requirement serves evidential purposes only, the existence and content of the contract can be established by any means available under the law.<sup>120</sup>

125. If the applicable law is silent regarding the consequences of the breach of a form requirement, depending on the legal system, methods of interpretation differ. One widespread trend is to consider the freedom of contracting an overarching principle and to interpret strictly any exception to the principle, such as formal requirements, with the consequence that the written form may be considered as serving purposes of evidence or publicity only.<sup>121</sup>

126. Breach of other formal requirements may result in a variety of sanctions depending on the applicable law: from avoidance of the contract as a whole,<sup>122</sup> to civil<sup>123</sup> and administrative penalties (fines<sup>124</sup> or cancellation of the contractor's license or the contractor's entitlement to benefits under the publicly-supported contract farming scheme). Certain systems would allow revision of the contract by the court.<sup>125</sup>

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\* Sample contracts cited in this document have been collected from the FAO Contract Farming Resource Centre at: <http://www.fao.org/ag/ags/contract-farming/toolkit/en/>

<sup>1</sup> Sample contract of cabbage seed growing in Australia, clauses 1-5.

<sup>2</sup> This concept is to be included in the Glossary

<sup>3</sup> Cf. Tanzania, The crops laws (miscellaneous amendments) Act, 2009, with a dedicated article dealing with contract farming, for every commodity governed under the Act, i.e. tea, coffee, sisal, cotton, tobacco, pyrethrum and sugar cane

<sup>4</sup> Cf. for example: in the USA, Iowa law covers commodities defined to include livestock, raw milk, and crops; Kansas law covers poultry production contracts; Wisconsin law addresses "vegetable procurement contracts"; in France, Arrêté du 15 mars 1988 relatif à l'homologation d'un contrat type d'intégration pour l'élevage à façon de



veaux de boucherie; Arrêté du 15 mars 1988 relatif à l'homologation d'un contrat type d'intégration pour la production de volailles de chair à façon.

<sup>5</sup> A “producer organisation” is sometimes found as a defined concept under domestic law to designate entities representing categories of agricultural producers generally on a territorial and/or commodity basis. The producer organisation is entitled to participate in policy decisions and negotiate with market participants such as buyers and other agri-businesses. In certain countries, organisations such as cooperatives have a preponderant role in organising production for particular or large categories of commodities, often sharing regulatory powers with government boards to decide on production quota, quality, prices and other factors.

<sup>6</sup> See US Model Producer Protection Act Section 9; Iowa Act, Section 9.

<sup>7</sup> See Sample contract for sugar beets in South Africa:

“1.1.18 “Growers’ Association” means the association formed to collectively represent the Growers;

3. GROWERS’ ASSOCIATION – 3.1 The Grower shall be entitled to monitor and take part in the business of the Processor together with other Growers as a collective through the Growers’ Association to the extent and in the manner set out in this Contract. Accordingly, the Grower hereby irrevocably authorises the Growers’ Association to represent him in relation to his dealings with the Processor, the intention being that the Processor will have dealings not with a multitude of Growers participating in the sugar beet project but with only the Growers’ Association representing all Growers. 3.2 The Grower shall procure that the Growers’ Association shall represent his interests under this Contract in accordance with its terms and subject to its conditions. 3.3 It is anticipated that the Growers’ Association will appoint 1 (one) individual who shall be responsible for communicating with the Grower and generally dealing with the Grower in relation to any concerns which the Grower may have, such individual hereinafter being known as the “Growers’ Representative.”

<sup>8</sup> According to the fundamental principles on which is based the universally recognised co-operative identity, co-operatives are independent entities, formed by members on a voluntary and open membership, to meet their common economic, social and cultural needs and aspirations, through a jointly owned and democratically controlled enterprise. Education, training and information, cooperation among cooperatives and concern for the community are other fundamental values upon pertaining to the cooperative identity. See the 1995 International Cooperative Alliance Statement on the Cooperative Identity; the 2001 United Nations Guidelines aimed at creating a supportive environment for the development of cooperatives and the International Labour Organisation (ILO) Promotion of Cooperatives Recommendation, 2002.

<sup>9</sup> Particular types of transactions where the final consumer (either individually or collectively through a cooperative for example) deals directly with agricultural producers are not in the scope of this Guide.

<sup>10</sup> See e.g. USA Minnesota Act: ““Contractor” means a person who in the ordinary course of business buys agricultural commodities [...] or who contracts with a producer to grow or raise agricultural commodities [...].” Under French law, under an “integration contract” the contractor must be incorporated as “an industrial or commercial company” (Art. 326-1(1)); Panama law (art. 134) refers to an agreement involving “an agribusiness party”; when contractor does not meet this requirement, the contract would not fall under the characterisation of the type of contract regulated under the specific act.

<sup>11</sup> Tanzania – The crops laws (miscellaneous amendments) Act, 2009 (applicable for regulated commodities, i.e. tea, coffee, sisal, cotton, tobacco, pyrethrum, sugar cane: “contract fanning” means farming under agreements between cotton growers, farmers or producers on the one part and financiers including [xxx] buyers, [...] investors or bankers on the other part”.

Under certain transactions, agricultural credit institutions would provide loans together with support for the production such as inputs and equipment. See: High Court of South Africa (Bophuthatswana Provincial Division) Case No. 75/04 - Lichtenburg Graa Trustees (EDMS) BEPERK v. PJ & ilm Boerdery y(EMS) BEPERK, 30 Sep. 2004 where the characterization of the contract as a sale or as a loan was discussed.

<sup>12</sup> EU Directive 85/374/EEC of 25 July 1985.

<sup>13</sup> For example - France Cass. 1re civ., 22 févr. 2000, n° 378D, Coopérative agricole de la vallée moyenne de la Loire [CAVML] c/ Groupement agricole d'exploitation en commun [GAEC] Touzeau frères et autres : Juris-Data n° 000700.

<sup>14</sup> In view of the potential impact of third party supplier relationships over the agricultural production contract, this paragraph would probably need to be further developed.

<sup>15</sup> Contract sample for the production of cotton in Kenya - Obligations of CODA – 5.7

<sup>16</sup> UNIDROIT Principles of International Commercial Contracts, Article 2.1.1 (2010).

<sup>17</sup> Even when no positive obligation of good faith bears upon the parties during the negotiations, they should not act in bad faith. See: UNIDROIT Principles 2010: Art. 2.1.15 (negotiations in bad faith) “(2) [However,] a party who negotiates or breaks off negotiations in bad faith is liable for the losses caused to the other party”. Cf. also “Vertical relationships in the Food Supply Chain: Principles of Good Practice”, proposed by core members of B2B platform, General Principle C – “Fair dealing: contracting parties should deal with each other responsibly, in good faith and with professional diligence”.

<sup>18</sup> In the context of Lao PR, see the recommendation in NAFES, *Guidelines for Facilitating Fair Contract Farming*, June 2012, p.26, § 3.3.6.2: “Once a contract agreement is drafted, it should be circulated to the producers before signing for their feedback and suggestions. In soliciting comments and suggestion one of the most important things is the participation of the stakeholders for feedbacks. Participation includes receiving sufficient information, attending in discussion and participating in decision making. All stakeholders should receive a copy of draft contract in advance before discussion so that they have

*enough time to review the contract. All the comments and suggestion should be discussed, negotiate to come to an agreement, and revised in the final contract agreement document”.*

<sup>19</sup> 505 Illinois Compiled Statutes § 17/20 ; Minnesota Statutes Annotated § 17.943(1).

For another example of the requirement of a written offer, see Art.. R. 631-9 Rural and Fishery Code (French Decree n° 2010-1753, December 30th, 2010, in the dairy sector): *“the offer of a sales contract of cow’s milk delivered on the French territory must be in writing and must comply with the requirements of article R. 631-10”.*

When legislations of Member States of the European Union require the drafting of a written offer, such a document must contain mandatory provisions. Indeed, according to Art. 148 EU Regulation 1308/2013: *“Where a Member State decides that [...] first purchasers must make a written offer for a contract for the delivery of raw milk by the farmers [...] such offer for a contract shall fulfill the conditions laid down in [the next paragraph]”*

<sup>20</sup> UNIDROIT Principles of International Commercial Contracts, Article 2.1.2, comment 1 (2010).

<sup>21</sup> Corbin on Contracts § 4.1 (1993).

<sup>22</sup> J.D. Calamari & J.M. Perillo, The Law of Contracts, § 2-13, at 43-44 (2d ed. 1977).

<sup>23</sup> 505 Illinois Compiled Statutes § 17/20; Minnesota Statutes Annotated § 17.943(1).

<sup>24</sup> Corbin on Contracts § 4.6 (1993).

<sup>25</sup> UNIDROIT Principles of International Commercial Contracts, Article 5.1.7 (2010); Restatement (2d) of Contracts § 33 cmt. e.

<sup>26</sup> UNIDROIT Principles of International Commercial Contracts, Article 6.1.1 (2010).

<sup>27</sup> UNIDROIT Principles of International Commercial Contracts, Article 6.1.6 (2010).

<sup>28</sup> Uniform Commercial Code § 2-201

<sup>29</sup> United Nations Convention on Contracts for the International Sale of Goods, Article 9 (2010). Restatement (2d) of Contracts § 33 cmt. a.

<sup>30</sup> UNIDROIT Principles of International Commercial Contracts, Article 2.1.2, comment 1 (2010). But see, <sup>30</sup> United Nations Convention on Contracts for the International Sale of Goods, Article 14(1) (2010) (stating that an offer is sufficiently definite if it indicates the good and at least implicitly makes provisions for determining the quantity and price).

<sup>31</sup> Alaska Independent Fishermen’s Marketing Ass’n v. New England Fish Co., 548 P.2d 348 (Wash. App. 1976).

<sup>32</sup> Allen Blair, “You Don’t Have to be Ludwig Wittgenstein”: How Llewellyn’s Concept of Agreement Should Change the Law of Open-Quantity Contracts, 37 Seton Hall Law Review 67, 97-98 (2006).

<sup>33</sup> PMC Corp. v. Houston Wire & Cable Co., 797 A.2d 125, 128-29 (N.H. 2002) (finding an expectation to purchase “a major share” or “major portion” of its requirements sufficient to satisfy the statute of frauds).

<sup>34</sup> Corbin on Contracts §§ 4.1, 2.1 (1993).

<sup>35</sup> United Nations Convention on Contracts for the International Sale of Goods, Article 9(1) (2010).

<sup>36</sup> United Nations Convention on Contracts for the International Sale of Goods, Article 14(1) (2010).

<sup>37</sup> Corbin on Contracts § 2.2 (1993).

<sup>38</sup> Corbin on Contracts § 2.9 (1993).

<sup>39</sup> Corbin on Contracts § 2.8 (1993).

<sup>40</sup> Corbin on Contracts § 2.8 (1993).

<sup>41</sup> Corbin on Contracts § 2.9 (1993).

<sup>42</sup> See for example: sample contract of paddy in India, *“This Agreement contains the agreement of the parties with respect to the subject matter hereof and supersedes all prior agreements whether written or oral between the Parties with respect thereto”.* – Sample contract of roots and tubers in Jamaica: *“This contract contains the terms of the entire agreement between the parties thereunto and cannot be modified nor added to by any agreement not expressly stated herein”.*

<sup>43</sup> United Nations Convention on Contracts for the International Sale of Goods, Article 18(1) (2010).

<sup>44</sup> Uniform Commercial Code § 2-206(2).

<sup>45</sup> Corbin on Contracts § 3.8 (1993).

<sup>46</sup> Art. 4.9 Philippine DAR Administrative Order n° 09-06: *“the AVA contract shall take effect only upon receipt by the contracting parties of the PARC or PARC ExCom [public authority] resolution approving such contract, or upon the affixing of the PARO’s signature as a witness or nominal party to the contract. The absence of PARC or PARC ExCom approval or signature of the PARO shall render the said AVA contract null and void”.*

<sup>47</sup> United Nations Convention on Contracts for the International Sale of Goods, Article 19(1) (2010).

<sup>48</sup> Material terms include price, payment, quality and quantity of goods, place and time of delivery, potential liability of one party to the other, and the settlement of disputes. United Nations Convention on Contracts for the International Sale of Goods, Article 19(3) (2010).

<sup>49</sup> United Nations Convention on Contracts for the International Sale of Goods, Article 19(2) (2010). However, if the party to an existing contract proposes a modification, the silence of the receiver is not considered acceptance to the modification. Rather the contract continues without change. Corbin on Contract § 3.18 (1993).

<sup>50</sup> Corbin on Contracts § 3.37 (1993).

<sup>51</sup> It may be noted, that concerning legal persons, it is important to distinguish capacity and authority of the legal representative. cf. supra the section on Intermediaries.

<sup>52</sup> Depending on the legal system, the concept of capacity varies. For example, French law distinguishes capacity which refers to the ability to own and to exercise rights, from insanity (when a person suffers from a mental disability or is intoxicated) which relates to a lack of a lucid consent required for the contract to be valid.

<sup>53</sup> See UNIDROIT Principles 2010: Art. 3.2.1 (Definition of mistake): “*Mistake is an erroneous assumption relating to facts or to law existing when the contract was concluded*”.

The concept of mistake is approached very diversely depending on the legal system. For example, In English law, mistake is not a ground to avoid the contract when the mistake relates to the essential characteristics of the object of the contract or to surrounding facts: it is legally relevant only if it is shared by both parties and renders the contract impossible. In German law, a party may avoid a contract because of a mistake as to the facts that was not caused by the other party, nor known to him, provided that the error was as to a quality considered essential in business (§ 119(2) BGB), though if the other party either knew nor had any reason to know of the mistake, the avoiding party may have to compensate the other’s reliance losses (§ 122 BGB). In French and Belgian law, a contract may be avoided on the ground of mistake even if the error was not provoked by the other party or even known to it, provided that the error was to the substance of the object of the contract (e.g. to its essential qualities normally expected by the parties) or some matter that had entered the contractual sphere. In French law, mistake as to the value or to the economic profitability of the foreseen operation are not grounds for avoidance.

<sup>54</sup> In English law, there is no duty to disclose facts, and there will be a remedy only if the information provided is incorrect or positively misleading (“misrepresentation”). Conversely in French and German law, there may be fraud by keeping silent when there was a duty to disclose.

<sup>55</sup> In many countries where contract farming takes place, there is a high level of illiteracy. UNIDROIT Secretariat, *Report on First Meeting of the UNIDROIT Working Group for the preparation of a Legal Guide on Contract Farming*, Study 80 A, Doc. 2, January 2013, § 44, p. 8.

<sup>56</sup> For an example of a legislation dealing with this issue, see Art. 4.7 Philippine DAR Administrative Order n° 09-06: “*The terms and conditions of the AVA contract shall be fully known to all parties. If warranted, the parties may translate the contract into the local dialect known to the ARBs. It shall be the responsibility of the concerned DAR field officials to ensure that the ARBs are made fully aware of and understand the options available to them, including their rights and obligations under the AVA contract*”.

<sup>57</sup> It may be noted that, depending on the legal system, unintentional breach of an obligation to act in good faith may result in damages and not in the avoidance of the contract. See also UNIDROIT Principles 2010: Art. 3.2.4. allowing for a remedy for non-performance when the circumstances permit so.

<sup>58</sup> The Brazilian bill n° 330 goes a step further by providing an example of a positive obligation for the contractor to disclose information prior to the making of the contract: Art. 8 provides that the integrating agricultural firm is under a duty to prepare every three months a pre-contractual information document for prospective producers; this document must report detailed technical and financial information, as well as the parties’ obligations and allocation of liabilities reflected in the standard agreement.

<sup>59</sup> See in this regard the approach taken by certain courts in France regarding mistake and the expected profitability – referred to in footnote 47.

<sup>60</sup> Restatement (Second) of Contracts §7.

<sup>61</sup> Restatement (Second) of Contracts § 151.

<sup>62</sup> Restatement (Second) of Contracts § 153.

<sup>63</sup> Restatement (Second) of Contracts § 162.

<sup>64</sup> Restatement (Second) of Contracts § 175.

<sup>65</sup> Restatement (Second) of Contracts § 176.

<sup>66</sup> Restatement (Second) of Contracts § 175(2).

<sup>67</sup> Restatement (Second) of Contracts § 177.

<sup>68</sup> *Jamestown Farmers Elevator, Inc. v. General Mills*, 552 F.2d 1285 (8<sup>th</sup> Cir. 1977) (alleging threats by defendant to put the plaintiff out of business).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> For a description of the role facilitators in Lao PR, see NAFES, *Guidelines for Facilitating Fair Contract Farming*, June 2012, p. 28, § 3.3.7

<sup>72</sup> The requirement of registration exists in countries where contract farming is highly regulated such as India, Tanzania (in the framework of Boards that are qualified for certain products), Philippines (in the framework of agrarian reforms) and Morocco (in the framework of development projects).

<sup>73</sup> Such publicity is intended to reduce side selling opportunities for producers, and to shift the responsibility onto other buyers contracting with the producer obliged under the registered contract.

<sup>74</sup> Minnesota Statutes Annotated § 17.944.

<sup>75</sup> See NAFES, *Guidelines for Facilitating Fair Contract Farming*, June 2012, p. 7 et seq. In Lao PR, the following examples are provided of investor’s representatives: head of village, head of farmer group, relatives, acquaintance or a respected well-known senior person in the village; also Government agencies. Conversely, another type of “intermediary” is described as “traders” who “*have written and/or verbal agreement with investors and producers for buying and selling. Traders and investors may share investment in contract and trader buys products from producers to deliver to the investor*”.

- <sup>76</sup> Cf. sample contract United States of America - Weaner Pig Supply and Purchase Agreement “14. AUTHORITY TO ENTER INTO THIS AGREEMENT. Each person executing this agreement represents and warrants that this agreement has been duly and validly authorized by such person's principal, if any, and that all necessary action has been taken, and that this agreement constitutes the valid and binding obligation of the parties hereto enforceable in accordance with its terms.”
- <sup>77</sup> UNIDROIT Principles of International Commercial Contracts, Article 1.2 (2010).
- <sup>78</sup> UNIDROIT Principles of International Commercial Contracts, Article 1.2 (2010); United States ex rel Fed. Corp. v. Commercial Mechanical Contractors, 707 F.2d ‘ ‘ 24 (10<sup>th</sup> Cir. 1982).
- <sup>79</sup> United Nations Convention on Contracts for the International Sale of Goods, Article 11 (2010).
- <sup>80</sup> Robert A. Feldman & Raymond T. Nimmer, Drafting Effective Contracts: A Practitioner’s Guide § 1.01; Caterina Pultrone, An Overview of Contract Farming: Legal Issues and Challenges, XVII Uniform Law Review 263, 283 (2012).
- <sup>81</sup> Food and Agriculture Organization of the United Nations (FAO), Guiding principles for responsible contract farming operations 2 (2012); UNIDROIT Principles of International Commercial Contracts, Article 3.2.7(1)(a) (2010).
- <sup>82</sup> Food and Agriculture Organization of the United Nations (FAO), Guiding principles for responsible contract farming operations 2 (2012).
- <sup>83</sup> Neil Hamilton, Farmers Legal Guide to Production Contracts, at 12 (1995).
- <sup>84</sup> UNIDROIT Principles of International Commercial Contracts, Article 1.1 (2010).
- <sup>85</sup> Transaction costs may include the time and effort of individualized bargaining, simplifying internal administration, facilitating planning and reducing risk to a calculable quantity. Nicholas S. Wilson, Freedom of Contract and Adhesion Contracts, 14 International and Comparative Law Quarterly 172, 176 (1965).
- <sup>86</sup> Philip Shuchman, Consumer Credit by Adhesion Contracts, 35 Temple Law Quarterly 125, 131 (1962).
- <sup>87</sup> Respectively *gestaltungsfreiheit* and *abschlussfreiheit*. Arthur Lenhoff, Contracts of Adhesion and the Freedom on Contract: A Comparative Study in the Light of American and Foreign Law, 36 Tulane Law Review 481, 482 (1962).
- <sup>88</sup> Corbin on Contracts § 1.4 (1993).
- <sup>89</sup> Restatement (2d) of Contracts § 206; Shuchman, *supra* note 9, at 133.
- <sup>90</sup> Corbin on Contracts § 1.1 (citing *Tantleff v. Truscelli*, 110 A.D.2d 240 (NY 2<sup>nd</sup> Dept. 1985) and noting the phrase *fiat justitia ruat coelum* (“when the skies begin to fall, Justice removes the blindfold from her eyes and tilts the scales”) for the principle that courts may reject enforcement of even clear language in a contract on the basis of a shifting premise of reasonableness.
- <sup>91</sup> UNIDROIT Principles of International Commercial Contracts, Article 3.2.7 (2010). Provisions of mass-produced standardized agreements are not automatically given effect if they are at variance with the reasonable expectations of the party who did not prepare the document. Corbin on Contracts § 1.1 (citing *Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co.*, 682 P.2d 388 (Ariz. 1984)) (1993).
- <sup>92</sup> Larry Bates, Administrative Regulation of the Terms in Form Contracts: A Comparative Analysis of Consumer Protection, 16 Emory Law Review 1, 45 (2002).
- <sup>93</sup> Carlos A. da Silva, The Growing Role of Contract Farming in Agri-food Systems Development: Drivers, Theory and Practice, at 3 (2005) (citing Chen et al, Changes in Food Retailing in Asia: Implications of Supermarket Procurement Practices for Farmers and Traditional Marketing Systems, FAO AGSF Occasional Paper No. 8 (2005)).
- <sup>94</sup> Spain: Law 2/2000 on standard contracts of agrifood products (Ley 2/2000 sobre contratos tipo de productos agroalimentarios) and implementing Real Decreto 686/2000. Italy: Law NO. 102/2005 for the Regulation of agrifood markets (Regolazione dei mercati agroalimentari). France: The Law for the modernization of agriculture of 27 July 2010 (Loi de modernization de l’agriculture LMA). Iowa: Commodity Production Contracts, IA Code § 202.
- <sup>95</sup> Caterina Pultrone, An Overview of Contract Farming: Legal Issues and Challenges, 17 Uniform Law Review 263, 267 (2012).
- <sup>96</sup> Although outside of the terms of the contract form, the state of Iowa established a rather unique and powerful statutory provision that provides for an agricultural lien placing the farmer with super priority over other debtors of the contractor in the event the contractor is insolvent. Iowa Code (§579B).
- <sup>97</sup> Food and Agriculture Organization of the United Nations (FAO), Guiding principles for responsible contract farming operations 2 (2012).
- <sup>98</sup> 505 Illinois Compiled Statutes § 17/20 & § 17/25 (Readability of Production Contracts); Minnesota Statutes Annotated § 17.943(1).
- <sup>99</sup> Minnesota Statutes Annotated § 17.943(3).
- <sup>100</sup> 505 Illinois Compiled Statutes § 17/35; Spain Law 2/2000 (Article 3) on standard contracts of agrifood products (Ley 2/2000 sobre contratos tipo de productos agroalimentarios)
- <sup>101</sup> 505 Illinois Compiled Statutes § 17/35.
- <sup>102</sup> France Rural and Fishery Code, Article 326-6.
- <sup>103</sup> This is notably the case regarding the regulations relating to livestock production contracts, where parties engage in complex obligations and need an increased level of certainty regarding technical and legal aspects. E.g. Belgian law of April 1<sup>st</sup>, 1976 on vertical integration in the sector of animal production (“Belgian law”); Art. 4(3) Catalan law 2/2005; French Decrees of March 15<sup>th</sup>, 1988 approving a standard integration contract for veal calf production, and a standard integration contract for poultry production.

- <sup>104</sup> Art. 9 Moroccan law n° 04-12;
- <sup>105</sup> UNIDROIT Principles of International Commercial Contracts, Article 5.1.7 (2010).
- <sup>106</sup> Caterina Pultrone, An Overview of Contract Farming: Legal Issues and Challenges, 17 Uniform Law Review 263, 280 (2012).
- <sup>107</sup> James J. White, Robert S. Summers & Robert A. Hillman, Uniform Commercial Code § 5:1 (6<sup>th</sup> ed., 2013); UNIDROIT Principles of International Commercial Contracts, Article 3.2.7 (2010).
- <sup>108</sup> Neil Hamilton, Farmers Legal Guide to Production Contracts, at 43 (1995).
- <sup>109</sup> United Nations Convention on Contracts for the International Sale of Goods, Article 29 (2010).
- <sup>110</sup> For example, Belgian national legislation limits contracts to no more than three years. Belgian law Art. 5(2).
- <sup>111</sup> Neil Hamilton, Farmers Legal Guide to Production Contracts, at 35 (1995); Cr. Cataluña law 2/2005 Art. 4(2).
- <sup>112</sup> EU Regulation 261/2012, Art. 185f; Minnesota Statutes Annotated § 17.92 (Recapture of Capital Investment Required by and Agricultural Contract).
- <sup>113</sup> See Generally, Subha Narasimhan, Relationship or Boundary? Handling Successive Contracts, 77 California Law Review 1077 (1989); France Rural and Fishery Code, Article 631-24.
- <sup>114</sup> Restatement (2d) of Contracts § 130 (Illustration 4).
- <sup>115</sup> UNIDROIT Principles of International Commercial Contracts, Articles 5.1.8, 7.3.2 (2010).
- <sup>116</sup> Neil Hamilton, Farmers Legal Guide to Production Contracts, at 1 (1995); UNIDROIT Principles of International Commercial Contracts, Article 6.2.2 (2010).
- <sup>117</sup> Caterina Pultrone, An Overview of Contract Farming: Legal Issues and Challenges, 17 Uniform Law Review 263, 281 (2012).
- <sup>118</sup> Caterina Pultrone, An Overview of Contract Farming: Legal Issues and Challenges, 17 Uniform Law Review 263, 281 (2012).
- <sup>119</sup> Art. L. 326-6 Rural and Fishery Code (French law n° 64-678): If the contract does not specify the price to be paid, the duration of the contract and the object of the obligations of supply of products or services, then it is voidable. It implies the nullity of a verbal contract or nullity of the contract when the prescribed clauses are not sufficiently detailed.
- <sup>120</sup> Art. 2 Belgian law: The contract and its modification must be written. In case of breach of this requirement, the producer can provide evidence of the existence of the contract, of its terms and of its modifications by any means offered by the law, including witnesses and presumption.
- Art. 8, 2° of Spanish law BOCG 10A37-1 art. 8, 2°, provides: “*En ningún caso, el requisito de forma exigido lo es de existencia y validez del contrato*”.
- <sup>121</sup> M. Fontaine, *Le processus de formation du contrat: Contributions comparatives et interdisciplinaires à l’harmonisation du droit européen*, LGDJ, éd. 2002, p. 629, n° 26.
- <sup>122</sup> Art. 4(3) Catalan law 2/2005: Oral contracts shall be void. – Art. L. 326-6 French Rural and Fishery Code: The contract is voidable, also when the prescribed clauses are not sufficiently detailed; most recent French case law has considered that this remedy being in the producer’s interest, only the producer can claim it (*nullité relative*, as opposed to *nullité absolue* when public policy is involved: this distinction involves different time limits to bring the action under the rules of civil procedure); as a consequence, an integration contract has been considered legally binding although it had been concluded orally, since the producer was not challenging its validity.
- <sup>123</sup> Iowa Producer Protection Act, Section 13: Civil penalties may be due for unfair practices.
- <sup>124</sup> Art. 24, 1° Spanish law BOCG 10A37-1: “*Las infracciones en materia de contratación alimentaria previstas en esta norma serán sancionadas con multas de acuerdo con la siguiente graduación: a) Infracciones leves, hasta 3.000 euros b) Infracciones graves, entre 3.001 euros y 100.000 euros c) Infracciones muy graves, entre 100.001 y 1.000.000 euros*”.
- French Decree n° 2010-1753, December 30<sup>th</sup>, 2010, in the dairy sector: the absence of a written offer including mandatory clauses, or an offer written in breach of the model contract, will be subject to the administrative fine of article L. 631-25 of the French Rural and Fishery Code.
- <sup>125</sup> Under Minnesota Act, section 17.944, Subd. 8, Reformation: “(a) *In addition to the remedies provided in section 8.31, a court [...] may change the terms of the contract or limit a provision to avoid an unfair result [...]*”.