# Grape and Wine Sales Contract – A U.S. Perspective

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# Overview

1. U.S. legal framework considerations
2. Basic provisions
   - "Big 3" – price, quantity and quality
   - Other terms of sale
   - Term and termination
   - Boilerplate and other
3. Special statutory considerations (CA)
4. Other thoughts

# U.S. legal framework

- Constitutional framework
  - Constitution (interpreted by the courts), over
  - Statutes, over
  - Regulations
- Common-law background like the UK, and unlike Continental Europe
  - Gives judges relatively more power in making (“interpreting”) the law
  - Exception – Louisiana

# U.S. legal framework

- Federal system
  - Federal law is superior if Congress desires this result, but
    - Congress leaves many areas unregulated
    - Congress prefers to let states legislate *in addition to* federal law
  - Law of contracts and sale of goods primarily dictated by state law, not federal law
- America's love-hate relationship with alcohol – though not a strictly legal point – also comes into play
  - Wine exists in a heavily-regulated environment
  - Many laws that regulate wine date from the end of National Prohibition in the 1930s

# U.S. legal framework

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- Civil trials in the U.S. still employ juries as the primary fact finder
  - Makes contract disputes less predictable, more emotion-laden
  - Particular uncertainty surrounds damages/awards
  - “Equities” likely matter more to a jury than a judge
- Generous factual “discovery” of documents, witnesses, etc.
  - Drives up litigation costs
  - Makes it very hard to keep anything from the trier-of-fact
- “American rule” on legal fees
  - In the U.S., the default rule is that each litigant bears its own costs
  - Thus, the cost of defending even of weak case must factor into litigation calculations

# Basic provisions – the “big three”



- Three most fundamental contract issues
  1. Price
  2. Quantity
  3. Quality
- Of course, all three interact in complex ways

# Basic provisions – price

- Pricing per ton
  - Tied to quality measures (*e.g.*, brix content)
  - Subject to adjustment for
    - Flaws; *e.g.*, mold, low sugar, etc.
    - Delivery/payment requirements
- Per acre (usually where winery has more control over farming practices)
- Per retail price (less common)
- Average pricing based on published agricultural board reports
- For long-term contracts, escalation of price often addressed

# Basic provisions – quantity

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- Most common grape supply agreements call for specific quantities
- Requirements contract
  - UCC 2-306
  - Grower to use best efforts to supply winemaker’s reasonable needs
- Output contract
  - Winemaker takes grower’s entire output

# Basic provisions – quality



- Inherently subjective, yet contract drafters try mightily to make quality measures as objective as possible
- Many possible quality measures
  - Sugar content (brix)
  - Acidity
  - Taste (highly subjective)
- Specificity in terms of the vineyard (or parts of the vineyard) may help limit disputes over grape quality

# Basic provisions – price/quality interaction

- Tie pricing to quantity per acre to help preserve grape quality
- Tie acceptance and payment to quality; *e.g.*
  - Specify minimum brix at harvest levels
  - Other specific acceptance criteria
- Consider an expedited dispute resolution mechanism "at the scales" to quickly resolve quality disputes that lead to payment disputes
- In the alternative (if winemaker has the flexibility), consider sliding price scale based on quality factors

# Basic provisions – other “terms of sale”

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- Delivery requirements
- Passage of title and risk of loss
- Right to inspect/reject
- Payment
  – Typically net 30 days after harvest ends
  – Beware California laws on payment of the grower (addressed later)
- Creditor rights
  – Statutory “grower’s lien”
  – UCC lien rights

# Basic provisions – term and termination

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- Term – range from single purchases to long-term agreements
- Termination
  - Both parties usually limited in their ability to walk away from longer-term agreements, at least early in the term
- Dispute resolution
  - Consider ADR mechanisms like mediation or arbitration
- Choice of law
- Choice of forum (if not established by ADR mechanism)
- Damages and costs
  - limitations
  - liquidated damages
  - Fee shifting

# Basic provisions – boilerplate

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- Representations and warranties
- *Force majuere*
- Amendment and no oral modification
- Non-waiver
- Not to be construed against drafter
- Notice requirements
- Severability of provisions
- Execute in counterparts
- Integration clause/entire agreement

# Provisions – some “bells and whistles”

- Approval mechanisms for changes in ownership, limitations on assignment
- Requirement to meet and confer for a vineyard/farming practices plan
- Use of vineyard/grower name/intellectual property
- Winemaker’s right to re-sell the grapes

# Statutory considerations

- Recall – in the U.S. federal system, most law on contracts and the sale of goods governed at the state level
- California, an agricultural state that produces approximately 90% of all U.S. wine, has enacted special legislation protecting winegrape growers
- California agricultural "producer" licensing (in addition to the licensing requirements under federal and state alcohol beverage laws)
  - Gives authorities an enforcement tool to enforce grape contract regulations discussed in the next several slides
  - Provides growers with an alternative administrative remedy against winemakers

# Statutory considerations (CA) – reporting

- Mandatory reporting for California-licensed “processors”
- Reporting by
  - Tons purchased
  - Varietal
  - Price (with exclusions for related transactions, etc.)
  - Brix
- Reported each February 10 (preliminary) and March 10 (final)
- Facilitates pricing discussions by providing a benchmark measure of California harvest output and pricing

# Statutory considerations (CA) – pricing and payment

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- Grape purchase contracts must set a final price on or before the January 10 following delivery of the grapes
  - Any failure to abide by this requirement renders the contract “illegal and unenforceable”
  - Courts have held that *either* the grower or winemaker can invoke the law to render a contract unenforceable – *Somerset Importers v. Continental Vintners*, 790 F.2d 775 (9th Cir. 1986)
- Full cash payment requirements

# Statutory considerations (CA) – contract enforcement

- Breach of grower-winemaker contracts not simply a civil matter, but also the subject of criminal and administrative remedies
  – "failure of the processor to make payment for any farm product within the time that is specified for payment in the contract for sale"
  – "failure of a processor who contracts to a producer's crop to fulfill the terms of the contract"
  – "charge that a processor may be insolvent or in an unsound financial condition"
- Government remedies can be initiated by a complaint, or by the California Department of Agriculture ("Department") on its own
- Complaints must be filed within 9 months from the date full payment was due

# Statutory considerations (CA) – contract enforcement

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- Department can investigate and grant remedies
- Department looses jurisdiction if parties notify it that they have agreed to an alternative dispute mechanism (*e.g.*, mediation, arbitration) to resolve certain disputes
  - Department regains jurisdiction if the alternative dispute mechanism, "without reasonable cause," fails to adjudicate the matter within 90 days of the notice to the Department
  - Department also regains jurisdiction if a party refuses to comply with the alternative dispute mechanism resolution

# Statutory considerations (CA) – remedies

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- Misdemeanor criminal offense
  - If process not properly licensed
  - Failure to pay licensing fees
  - Failure “cash buying producer” to pay in cash of the full agreed price at the time of obtaining possession or control of the agricultural products
  - Failure to pay within 20 days of delivery if producer pays and grower makes a written demand for payment
  - Wrongfully place liens on agricultural commodities
- Department can recover its investigative costs in some circumstances
- Department also has the power to obtain injunctions in California courts

# Other thoughts – a long history of litigation

- U.S. published case law involving the sale of grapes for winemaking and the sale of wine go back a century
  - Even National Prohibition did not stop the litigation; *e.g.*, *Flores v. Basso*, 201 N.W. 875 (Mich. S. Ct., 1924) (breach of contract for non-delivery of Zinfandel grapes by California seller to Detroit buyer)
- Recent case law focused on
  - Improper rejection of crop for subjective reasons; *e.g.*, *Allied Grape Growers v. Bronco Wine Company*, 201 Cal. App. 3d 432 (1988)
  - Unapproved changes in vineyard ownership; *e.g.*, *Chow v. Kendall-Jackson Wine Estates*, 2007 Ca. App. Unpub. LEXIS 2680
  - The interaction of California's statutory scheme in private grower-winemaker disputes; *e.g.*, *Somerset Importers v. Continental Vintners*, 790 F.2d 775 (9th Cir. 1986)

# Other thoughts

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- Today most grower-winemaker relationships governed by written contracts
  - 1999 UC Agricultural Issues Center comprehensive study concluded that 90% of all growers surveyed produced grapes under contract, mostly written
  - Source: Goodhue, Heien, Lee and Summer, *Contract use widespread in wine grape industry*, California Agriculture, Vol. 56, No. 3 (2002)
- Software developments may help growers and winemakers better manage contracts and relationships

# Thank you for your time and attention

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