



Understanding the issue of control in grape contracts

Designing agreements that protect the rights of growers and buyers

Grape contracts used to be made on a handshake and the reputation of the parties involved. If reduced to writing, they were often limited to one-page letters setting forth the varietal, vineyard source, term and price per ton. As the wine industry continues to mature, growers and buyers are increasingly turning to detailed contracts containing multi-page exhibits on "Viticultural Practices" or "Quality Standards."

The question is not whether a handshake is better than a ten-page agreement but whether or not the agreement meets your needs. One way to analyze grape contract issues is to focus on control: who controls the viticulture, who decides how much fruit to drop and who decides when to harvest.

The more the grower controls these decisions, the more right the buyer should have to reject grapes that do not meet the agreed-upon standards. However, today buyers are increasingly asking for more control of the viticultural practices and harvest parameters – even the planting or replanting of the vineyard itself. If buyers demand and exercise such control, they should bear responsibility for their decisions.

Focusing on the issue of control, here are some tips:

1) Giving up control can be good for the grower; and taking control can be good for the buyer. The more the buyer dictates viticultural practices and harvest requirements, the less right the buyer should have to reject the grapes. If the buyer has the right to determine the time and date of harvest, then the buyer should bear responsibility for picking too early or picking too late. If the buyer demands that crop loads not exceed four tons per acre, then the grower should ensure that grape prices reflect this limitation. The buyer can also benefit from taking more control. The buyer gains fruit that meets its quality parameters and enhances its ability to plan harvest operations. However, even the best plans and provisions should leave some flexibility for growers to preserve fruit quality and react quickly when required to do so by nature, such as unusual frost conditions, unexpected rains or excessive early heat.

2) Make acceptance criteria as objective as possible. Disputes over payment or rejection of grapes often are framed in terms of quality issues, even if the underlying reasons are economic or market-driven. The more subjective and detailed the quality standards, the more likely a buyer could use these stan-

dards as a basis for not accepting delivery, not paying full price or terminating the contract. If a buyer wants to – or needs to – get out of a contract, the buyer will look for grounds to terminate, or claim performance is excused. The tighter and more objective the criteria is in a contract, the less likely such "hooks" can be found to avoid performance or terminate the contract.

3) Have a quick and sensible dispute resolution process in place to avoid disputes at the scale. If the grape contract allows for the buyer to reject grapes at the scale for anything other than purely objective matters, consider designating a mutually agreed upon, independent third party to make a conclusive determination at the time of delivery.

4) Avoid "best efforts" obligations; "commercially reasonable" efforts are better. "Best efforts" can be construed to mean a party must do anything possible, whether commercially reasonable or not.

5) If payment risk is a concern, a grower could shorten payment terms or consider taking a security interest in addition to the automatic statutory growers lien. A security interest perfected under the Uniform Commercial Code (UCC) will give the grower the rights of a secured party under the

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UCC. A security interest would extend to products and proceeds of the grapes, which may not be covered by the statutory growers lien.

6) If the vineyard name will be used on the bottle, include contract provisions to license the vineyard name as a trademark and to allow the grower to exercise quality control. When it comes to the issue of quality control, actual control is what counts. The right to control is not enough. At a minimum, taste the wines each year and keep records of having done so. If the grower wants to maintain a high quality of wine under the name, make sure the grower has the right to terminate the license to use the vineyard name – short of terminating the entire contract – if the grower determines that wine quality is not up to par.

As the wine industry continues to mature, so do relationships between growers and buyers. Care must be taken to ensure that the rights of both growers and buyers are protected. Our wine industry practice is dedicated to helping clients understand changes occurring in this marketplace so they can be prepared to meet these challenges and carefully navigate through evolving contractual arrangements.

ABOUT THE AUTHOR



FARELLA BRAUN + MARTEL LLP
ATTORNEYS AT LAW



David E. Stoll

David E. Stoll is a business transactions and intellectual property partner at Farella Braun + Martel. He advises wineries and vineyard owners on a variety of legal matters, including grape contracts, mergers and acquisitions and consulting arrangements. He also provides strategic advice regarding the use and protection of wine-related trademarks and trade names, including the names of wineries, wine brands, proprietary names and vineyard designations.

Mr. Stoll advises a variety of clients on development, exploitation and protection of intellectual property. His principal areas of focus are technology licensing, intellectual property counseling and trademark and copyright protection. In addition, he also represents start-up and emerging growth companies in connection with corporate and LLC formation, governance and financing strategies, mergers and acquisitions, as well as strategic partnering and technology-sharing arrangements.

Farella Braun + Martel represents clients in sophisticated business transactions and high-stakes commercial, civil and criminal litigation. The firm is known for its imaginative legal solutions and the dynamism and intellectual creativity of the legal staff. The attorneys in each practice group work cohesively in interdisciplinary teams to advance the clients' objectives in the most effective, coordinated and efficient manner.

FARELLA BRAUN + MARTEL LLP

235 Montgomery St., San Francisco, CA 94104 • 415-954-4400
899 Adams St., St. Helena, CA 94574 • 707-967-4000
www.fbm.com