

Alternative dispute resolution in the contract field in the wine industry^{1, 2}

Augustin Weiss-Maurin

ABSTRACT

A recent trend in business is to settle contract disputes by other alternative ways, by other means than going to court. Then, it could appear interesting to understand why? What are these alternatives and which ones are the most efficient. For an easier reading, we are going to focus in this paper only on the contract dispute in the wine area. To do so, we find out five different alternatives methods of settlement among the most used extra-judicial ways of contract issues solving. After a brief description of each one, we compared these five ways regarding six relevant criteria specific to the wine area. This deep and close analysis allows us to affirm that the rent a judge program is the most efficient way to solve a contract dispute arisen in the wine industry.

Key words: Mediation, Rent-a-Judge program, Arbitration, Summary jury trial, Negotiation, Quality, Unfair Clause, Unpredictable

INTRODUCTION

Problem recognition, definition and evaluation

In all the steps of the wine industry, as in all the industry, the final objective will be to sell. It could to sell grape, wine, bottle, services or knowledge. We currently live in a world where all our interactions are governed by a whole set of rules, laws and treaties. If you want to buy or sell something you will need a well-made contract and moreover it will be compulsory to respect what you accepted by signing this contract. It happens that one of the contractors does not respect his commitments. Indeed, in the wine business this kind of conflicts arises

¹ Editor's note: Student papers are authored by graduate or undergraduate students based on coursework at accredited universities or training programs. This paper was prepared as a deliverable for the course "International Contract Management" facilitated by Dr Paul D. Giammalvo of PT Mitratata Citragraha, Jakarta, Indonesia as an Adjunct Professor under contract to SKEMA Business School for the program Master of Science in Project and Programme Management and Business Development. <http://www.skema.edu/programmes/masters-of-science>. For more information on this global program (Lille and Paris in France; Belo Horizonte in Brazil), contact Dr Paul Gardiner, Global Programme Director, at paul.gardiner@skema.edu.

² How to cite this paper: Weiss-Maurin, A. (2018). Alternative dispute resolution in the contract field in the wine industry, *PM World Journal*, Volume VII, Issue IX - September.

frequently since the results of your work in this field is not really predictable. In fact, all depends of the whim of Mother Nature. Thus it's hard to establish, for instance, a relevant price per kilogram for the grape since the quality of it depends of the weather, the rain, quality of soil, sun shining... and not only of the kind of work furnished. That's why, by custom, the "Force Majeure" case is rarely used.

In case of disagreement the first way to settle the problem for the other party of the contract is to go straight to the judicial court. However, these last decades and even maybe these last centuries the reputation and the public image has taken a bigger and bigger importance in the wine industry. Thus, often, in case of failure of the contracts obligations the contractors prefer a more discreet way to settle their conflicts. Instead of a public judicial case they will prefer other solutions.

These one are often cheaper, could be confidential (not on all fields as we will see) and quicker Moreover these solutions has produced by real expert of this field instead of judges who does not really have, sometimes, a deep knowledge of the case they work on. Furthermore a really interesting point is that the parties can choose the applicable law for the settlement of their contract, there is an infinity of choices possible, it could be a substantive law, a procedural law or a choice of conflicts of laws. The most common solutions of out of court dispute settlement are: Mediation, arbitration, negotiation, rent a judge program or summary jury trial.

Our aim in this paper will be to answer the following question:

What are the advantages and the drawbacks of the extra judicial settlement methods and a description of these different uses from the wine industry point of view. And, the most important which one of these alternatives is the most interesting?

METHODOLOGY

Identification of feasible alternative solutions to the problem

As we saw in the introduction the traditional judicial courts are no longer a relevant solution when a contractual dispute arises in the wine industry. Then, a question becomes essential: What alternatives are possible to settle this kind of discord? We will present in the following paragraphs the most used alternatives: arbitration, negotiation and mediation. As well as two very recent but interesting and relevant other methods: the rent a judge program and the summary jury trial.

Development of both the feasible alternatives and the possible outcome

- Arbitration

To avoid the heavy and long usual judicial mechanism, it is possible, firstly, to use the service of an arbitrator, in other terms to initiate a procedure of arbitration. An arbitral award is given by

an arbitral composed of one, three or rarely five arbitrators, they are chosen by the contract parties. The arbitral procedure has to be previously chosen at the moment of the contract signature by the insertion of an arbitral clause inside the contract. The applicable law at the arbitration can be several ones: the local laws of the contractors, the local law of the country where the object of the contract is (centre of gravity test), the law governing the arbitration clause or a choice of conflict of laws (it's possible to use different laws for different parts of the contract). During the arbitration, the arbitrators will have to follow the rules made by the New York convention; consequently the award will be binding for the parties. Moreover, the award can be binding by the effect of a treaty or convention between the two countries of the parties or by the effect of local laws. One of the biggest disadvantages of this method is that any appeal procedure is possible, a party can try to annul the award but it is quite complicated.

- Mediation

The major difference between the result of a mediation and an arbitral award is that the first one is nonbinding. A mediation path is composed by three different steps: first, a mediator will try to make sure each party understand the other's point of view. Second, he will meet each party individually to listen and understand their interests. And third, he will help them to reach a settlement and find some common interests.

Mediation is normally confidential but if all the parties agree it is possible to publish the result. Furthermore, mediation is quite simple to put in practice since it can be set up at any point of the dispute and does not need to be plan before the dispute with a specific clause in the contract as it is the case with the arbitration.

- Negotiation

Negotiation procedure is highly close to mediation one. One of the only differences and the main one is that in the negotiation there is no third parties involved, the parties talk between themselves to try to reach a solution in order to save their common interests. Often, when a negotiation has reached an impasse, a mediators is called to try to solve the conflict before going to the judicial court. It is possible to say that mediation and negotiation are interest-based procedure while arbitration is referred to as a rights-based procedure. This means that the aim of negotiation and mediation is to solve the conflict AND save the interest of both parties while the objective of an arbitration will be to settle the conflict in accordance with the applicable law.

- Rent a judge program

This system is quite new (born in California during the late 90') and mostly popular for the commercial case. It is knowing a growing success in the USA nowadays. In terms of formality and control of the parties, specialists affirm that Rent a judge system stands between litigation and arbitration. This system is a kind of privatisation of a real tribunal; the aim is to keep the advantage of an official judicial court while avoiding its weaknesses. The development of the

“trial” is the same as the one of a real one. Moreover, the composition and organisation of the court is the same as well. Nevertheless, official judges are not allowed to sit in this kind of tribunal, thus it is often retired or former public judges who sit in those ones. The solution proposed by the court in this system is not binding and an appeal is possible in any other court. This solution is more and more used on the contract field because it is much quicker than a traditional court. The biggest disadvantages if this system is its price, indeed it costs a big amount of money.

- Summary jury trial

This other alternative solution comes also from the USA. In this system a mock court is held. It consists of the last try of settlement before going in front of a real court. After hearing the solution of this fake court the parties shall try to apply it in order to reach a settlement, and only if it does not work they go to the judicial court. This solution, if it works allows avoidance of lot of time and money expenses. Nevertheless the solution proposed has absolutely any juridical value and this procedure can be quite long. Moreover, this solution always give a win/lose solution, there will always create a winner party and a loser one, it is possible to reach a common interest.

Selection of the criteria to accept or not the alternative solutions

In order to rank these different alternatives and to find out which one is the most relevant, accurate and the more adapted to the industry we are studying we should establish some criteria adapted to the wine business. We know that in this business reputation of the different actors of it matters of it. It is why a big wine seller from Burgundy, for example, does not want the public to know that he lost his trial against his Chinese client for disrespect of a contractual quality clause for example; that is why the **discretion** of the procedure is highly important. Furthermore, this kind of alternative dispute resolution can be useful only if the decision produced can be enforced afterward; thus the **enforcement of the decision** will be our second criteria for ranking. Moreover, in my mind to insure a better access to the system, the procedure has to be too complicated, too heavy to put in practice. Consequently, we will analyse our five different solutions regarding the **ease of implementation of the procedure**.

Another highly important point, specifically for this kind of industry) is the **knowledge of the judges**, indeed they should know about what they are talking about. Even more in the wine area, which is a really specific field with specific rules, specific practices and specific customs. We know that it is impossible to predict the quality of a future grape for example. Thus, this fact should be taken into account while establishing and judging a contractual quality clause.

The **length of the procedure** has to be considered as well, in fact all the parties has interest is settle their issues as fast as possible. Finally, the aim in the wine business, as in all the industries, is to make money and the easiest way to make profits is to cut the costs. So, the **cost** of these different procedures should be taken into account.

TABLE 1 : Multiple Attribute Decision Making tool

	Arbitration	Mediation	Negotiation	Rent a judge	Summary jury trial
Discretion	High (not published unless both parties agree on it)	Medium (there is no disposition concerning discretion)	High (this process is only between the parties at the contract)	Low	Low
Enforcement of the decision	High (rules by ny convention rules)	Low	Low	Medium	Medium
Ease of implementation of the procedure	Hard (necessity of add an arbitration clause before the dispute arise)	Easy	Easy	Medium	Medium
Knowledge of the judges	High	High	High	High	Medium
Cost (for a dispute concerning 100 000\$) *	40 000\$	1 200\$ - 4000\$	0\$	2 500\$	500\$ - 1000\$
Length of the procedure	Medium	Fast	Fast	Medium	Medium

*: all the costs given are estimations calculated regarding the USA uses

FINDINGS

Analysis and comparison of the alternative

TABLE 2: RELATIVE WEIGHTING

Discretion	
Highly discret	2,00
Medium	1,00
Public	0,00

Ease of the procedure	
Easy	2,00
Medium	1,00
Complicated	

	Arbitration	Mediation	Negotiation	Rent a judge	Summary jury trial
Discretion	2,00	1,00	2,00	0,00	0,00
Enforcement of the decision	2,00	0,00	0,00	1,00	1,00
Ease of implementation of the procedure	0,00	2,00	2,00	1,00	1,00
Knowledge of the judges	2,00	2,00	2,00	2,00	1,00
Cost	0,20	1,98	2,00	1,95	1,99
Length of the procedure	1,00	2,00	2,00	1,00	1,00
TOTALS	7,20	8,98	10,00	6,95	5,99

TABLE 3: ADDITIVE WEIGHING TECHNIQUE

Attribute	Step 1	Step 2	Arbitration		Mediation		Negotiation		Rent a judge		Summary jury trial	
	Relative rank	Normalized weight (A)	(B)	(A)*(B)	(C)	(A)*(C)	(D)	(A)*(D)	(E)	(A)*(E)	(F)	(A)*(F)
Discretion	1	0,05	2,00	0,10	1,00	0,05	2,00	0,10	0,00	0,00	0,00	0,00
Enforcement of the decision	3	0,14	2,00	0,28	0,00	0,00	0,00	0,00	1,00	0,14	1,00	0,14
Ease of implementation of the procedure	5	0,24	0,00	0,00	2,00	0,48	2,00	0,48	1,00	0,24	1,00	0,24
Knowledge of the judges	4	0,19	2,00	0,38	2,00	0,38	2,00	0,38	2,00	0,38	1,00	0,19
Cost	6	0,28	0,20	0,06	1,98	0,39	2,00	0,56	1,95	0,55	1,99	0,56
Length of the procedure	2	0,09	1,00	0,09	2,00	0,18	2,00	0,18	1,00	0,09	1,00	0,09
SUM	21	1,00	0,91		1,48		1,7		1,4		1,22	

Selection of the preferred alternative

Regarding the tables above, we can say the two most efficient way of conflict settlement in the wine industry are mediation and negotiation. Nevertheless, we have to be realistic, and we know that in fact these two methods give efficient and relevant solutions only in few cases. It is

often a first step to try to reach an agreement before going to court or using one of the others methods described before. Thus, we cannot add them in our ranking.

So the best alternative will be the rent a judge program, followed by the summary jury trial and in third place the traditional arbitration.

Performance monitoring and post-evaluation of results

As a wine selling company, in all the case of contract dispute with our clients, we should in a first time, try to negotiate with them or to make a mediation. In a second time, if it does not work we will have to use the rent a judge method. Maybe, for a better efficiency it will be interesting to add a clause in the contract which one explains that in case of dispute, this special method (rent a judge one) will be used. Moreover, in this clause it is possible to precise that the result of the judgement will be totally binding. This way, it avoids the main disadvantage of this method (the fact that its judgement is nonbinding).

CONCLUSION

To put it into a nutshell, it is possible to affirm that, after a close and deep study of the different alternatives to settle a dispute on the contract field, for an actor of the wine industry the most efficient way is to start by a negotiation or a mediation and then, if it did not work, to start a rent-a-judge procedure.

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About the Author



Augustin Weiss-Maurin

Lille, France



Augustin Weiss-Maurin is currently an Msc student in Project and Program Development and Business Development in Skema business school, Lille, France. He starts his academic career by a bachelor in law in the University of Burgundy, Dijon, France and the university Charles, Prague, Czech Republic. After an academic semester in management in Fundação dom Cabral, Belo Horizonte, Brasil, he is now working on a master in sciences in Skema business school in the aim of working as a project manager in the wine business.