



(re)DESIGN
OUR MEETINGS & EVENTS!

MPI SPRING EDUCATION DAY
April 12-13, 2023

MPI WISCONSIN
CHAPTER

Madison Concourse Hotel &
Governor's Club, Madison, WI
Pre-Conference Spring Spectacular

**Keynote: ReDESIGNing
Partnerships**

Lisa Sommer Devlin

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Who I am:

- ▶ Lisa Sommer Devlin
 - ▶ Devlin Law Firm, P.C.
- ▶ Have represented hotels since 1990's
- ▶ Goal to make contracts fair for BOTH sides!

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Trends for 2023:

- ▶ Return to longer booking lead times
- ▶ Flexibility still key
- ▶ Sellers' Market
- ▶ No pandemic related language
- ▶ Hotels investing in property and people

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But I was told...

- ▶ Legal stuff is complicated.
- ▶ Hard to absorb
- ▶ Lawyers can differ on approach, but the law is the law



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Negotiation strategies in break out this afternoon

- ▶ This is more “hard and fast” rules.
- ▶ There will be time for questions at the end!

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Addenda/Rider/Amendment Does it matter?

- ▶ Addendum clarifies but does not change existing agreement
- ▶ Amendment changes existing agreement
- ▶ Rider=Made up word
- ▶ None belong at time of contracting!
- ▶ **NEGOTIATION STRATEGY:**
- ▶ **“Before I send you our contract, do you have any clauses that are critical to you?” or:**
- ▶ **“Let me send you our key clauses”**
- ▶ **Try to negotiate one complete agreement**

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Amendments

- ▶ In writing and signed by both sides
 - ▶ Not text
 - ▶ Not email
- ▶ Be sure you address impact on all aspects of contract
 - ▶ Concessions
 - ▶ Space
 - ▶ Performance
 - ▶ Cancellation

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Liquidated Damages

- ▶ Damages are not “PENALTIES”
- ▶ Using wrong word won’t invalidate contract; BUT
- ▶ Use of word makes people perceive it as punishment, when it is not.

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United States v Bethlehem Steel Co. US Supreme Court 1907

- ▶ ...the courts became more tolerant of such provisions, and have now become strongly inclined to allow parties to make their own contracts, and to carry out their intentions, even when it would result in the recovery of an amount stated as liquidated damages, upon proof of the violation of the contract, and without proof of the damages actually sustained

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Elements of liquidated damages:

- ▶ 1. Parties agree that a loss would be suffered.
- ▶ 2. Agree that loss is difficult to determine.
- ▶ 3. Agree on reasonable amount to be paid

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When there is a valid liquidated damage provision:

- ▶ Proof of actual loss is not required
- ▶ Breaching party pays agreed amount, whether too high or too low
- ▶ No obligation to give credit for mitigation or resale.

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If no liquidated damage clause or clause is invalid:

- ▶ Injured party is entitled to ACTUAL damages
- ▶ Lost profits, additional expenses incurred
- ▶ Less mitigation or resale

- ▶ Remember: removal of damage clause does not mean you will not owe, it means you will owe ACTUAL DAMAGES

- ▶ “NO ATTRITION” if stated means don’t owe, but since no commitment by group, contract is likely invalid.

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Damages should be negotiated!

- ▶ Sliding scale in cancellation
 - ▶ Dates are based on estimate of chance to resell
 - ▶ Could be based on when GROUP needs to make decisions
- ▶ Amounts of damages
 - ▶ Always recommend \$\$\$\$ amount, not just %
- ▶ Food and beverage
 - ▶ Contract is based on total revenue commitment
 - ▶ Hotel is entitled to damages for f&b from date of signing
 - ▶ Can still negotiate

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Better strategies that work for both:

- ▶ Resale/Mitigation
 - ▶ NOT REQUIRED
 - ▶ If agreed, must have formula: “less rooms resold” never enough
 - ▶ Resale credit value
 - ▶ Tied to cancellation %
- ▶ Profit
 - ▶ Not legally required if % is fair
 - ▶ If you use, must define %
- ▶ ITS JUST MATH!
 - ▶ Instead of complicated formulas, come up with fair \$\$\$\$ values!
 - ▶ Hotel would much prefer lower amount without resale to complicated formula

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“Mutual Cancellation”

- ▶ Not legally appropriate
- ▶ Damages group suffers has no relationship to damages hotel would suffer

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Force Majeure/Impossibility (it's the same thing) Remember the elements:

- ▶ UNANTICIPATED THING HAPPENS
- ▶ **AND**
- ▶ IT MAKES EVENT ILLEGAL OR IMPOSSIBLE

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What is a Force Majeure and what is not?

- ▶ If you CAN'T perform= Force Majeure.
- ▶ If you DON'T WANT TO perform- **NOT** a Force Majeure.

- ▶ Unfair to expect Hotel to bear financial loss of “don't want to”
- ▶ “Don't want to” should be negotiated separately.

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Force Majeure clause should be objective, not subjective

- ▶ No clause is required
- ▶ No such thing as a “partial” Force Majeure
- ▶ “Threat” of anything is not a Force Majeure
- ▶ Law automatically will excuse
- ▶ The longer the clause, the more likely to have disputes.

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Words Matter

Common requests:

1. Material impact
2. Inadvisable, impractical
3. Legal, economic, policy
4. Covid, epidemic, pandemic
5. CDC, WHO, State Dept warnings, advisories, etc.
6. Waiver of attrition/minimums

Issues/response:

1. Illegal, impossible
2. Commercially impracticable
3. Not a legal standard-don't want to
4. Always present
5. That's their job—use government regulations prohibiting
6. Causes disputes

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Ideally, contract clauses should not be based on sellers' or buyers' market

- ▶ Understand how clause you are requesting impacts the other side.
- ▶ Try to come up with something that works for both sides.
- ▶ Communicate: don't demand
 - ▶ Here is what I am worried about
 - ▶ How can we address to protect both of us?

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What has happened to rebooking?

- ▶ During COVID, events could not happen
- ▶ Groups could have cancelled and owed nothing: true Force Majeure
- ▶ Hotels and groups worked together to rebook
- ▶ Group cancelling now CAN have event, so not excused
- ▶ Rebooking does not make up for hotel's loss

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Lowest Rate/Rate Integrity

- ▶ Vestige of 2008
- ▶ Never should have agreed
- ▶ Hotel is futures agreement
- ▶ Compare to airline
- ▶ Group can/should manage booking behavior
- ▶ If must have, occupy most of hotel

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“No Walk”

- ▶ No hotel can guarantee
- ▶ Clause not legally enforceable
- ▶ Agree on what will happen

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Politics

- ▶ This is a “Don’t want to” not a “Can’t”
- ▶ Group owes if decides to cancel due to political issue
- ▶ Clauses submitted by groups are TERRIBLE and **should be avoided at all costs by groups and hotels**
- ▶ Have not seen one that would work
- ▶ What to do?
 - ▶ Shorter booking windows
 - ▶ Options to reduce block
 - ▶ Communication rather than demands

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**YOUR
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