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Fox Rothschild LLP
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2022 Aviation Private Roundtable

Indemnification Provisions in Commercial Contracts

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Presented By



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Hold-Harmless Provisions and Additional Insureds



Key Components of Indemnification Provisions

- Indemnitor
 - Identify who is the party providing indemnification
- Indemnitee
 - Identify who is protected by the provision
 - Protection may extend to the indemnitor's employees, agents, partners or others
 - Protection may include the indemnitor's successors and assigns
- Scope of damages covered
 - May cover injury to third parties and/or injury to the indemnitee
 - Indemnitor's obligation to indemnify the indemnitee is typically linked to a specified triggering occurrence, such as:
 - Breach of the parties' agreement
 - Negligence on the part of the indemnitor

Key Components of Indemnification Provisions

- Sets forth type(s) of behavior covered by the provision, as well as the applicable standard of care:
 - Total/Unlimited indemnification
 - Indemnitor's duty to indemnify may be negated by the indemnitee's negligence
 - Provisions indemnifying the indemnitee for its own gross negligence or willful misconduct may be invalidated, depending on the state
- Indemnification provisions may be targeted to specific known risks, such as transportation of hazardous materials or other areas connected to the transaction

Key Components of Indemnification Provisions

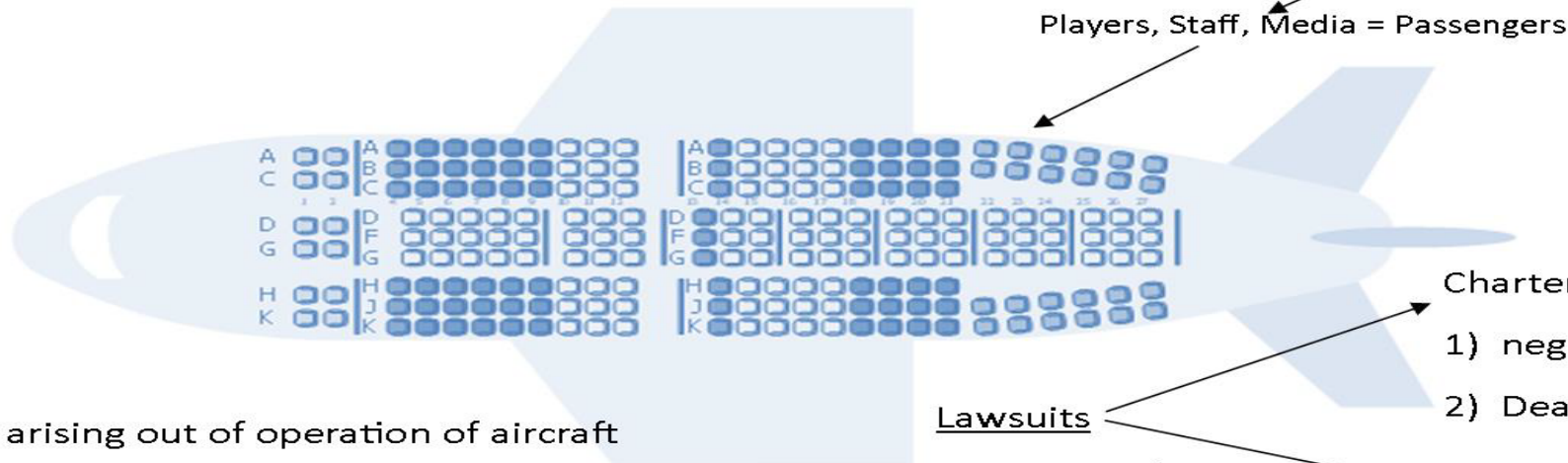
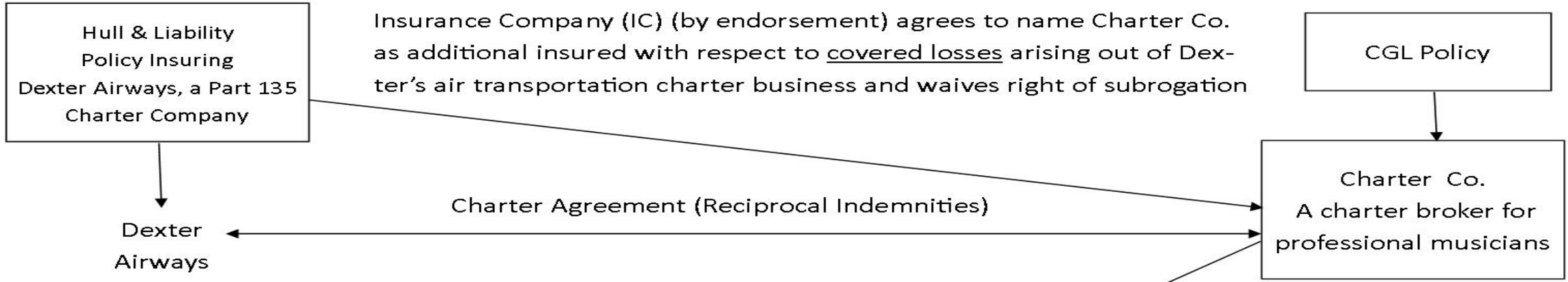
- Scope of the indemnitor's insurance procurement obligations:
 - Does the contract require sufficient coverage?
 - Is the cost of insurance coverage economically reasonable under the circumstances?
 - Does the contract include a waiver of subrogation to prevent the insurer from suing the indemnified party?
- Contractual liability limitations
 - Does the contract include a cap on damages to limit the indemnitor's liability?
 - Does the contract specify a threshold minimum amount of damages as a pre-condition for triggering the indemnity obligation?
- Duration of the provision
 - How long does the indemnity obligation survive? Typically extends for some period of time beyond the term of the contract

Key Components of Indemnification Provisions

- Damages exclusions
 - Does the contract exclude consequential damages and/or exemplary damages?
- Representation
 - Who exercises control over choice of counsel, litigation management, and settlement?
- Other factors
 - Scope of indemnity provision may be impacted by the parties' respective business objectives and relative bargaining power

Additional Insured Hypothetical

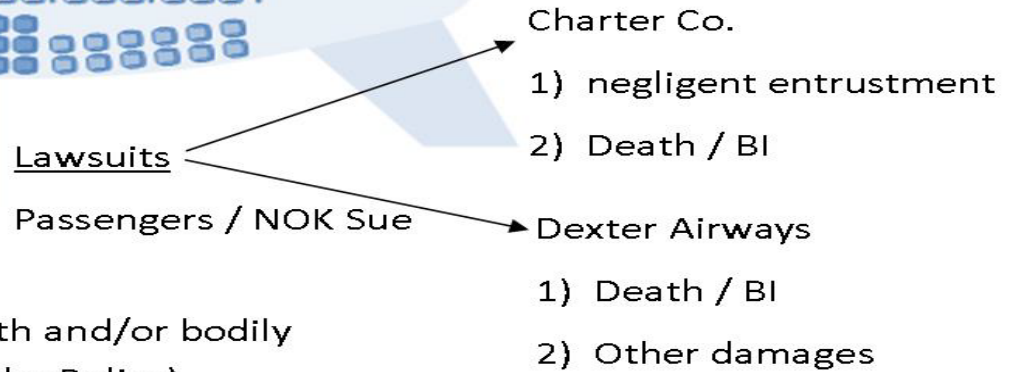
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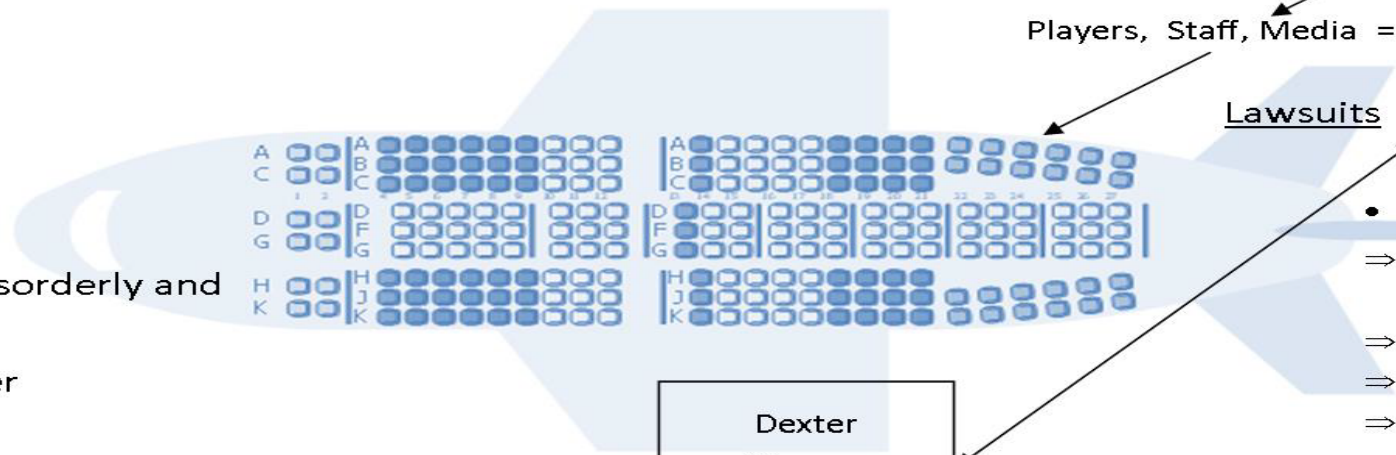
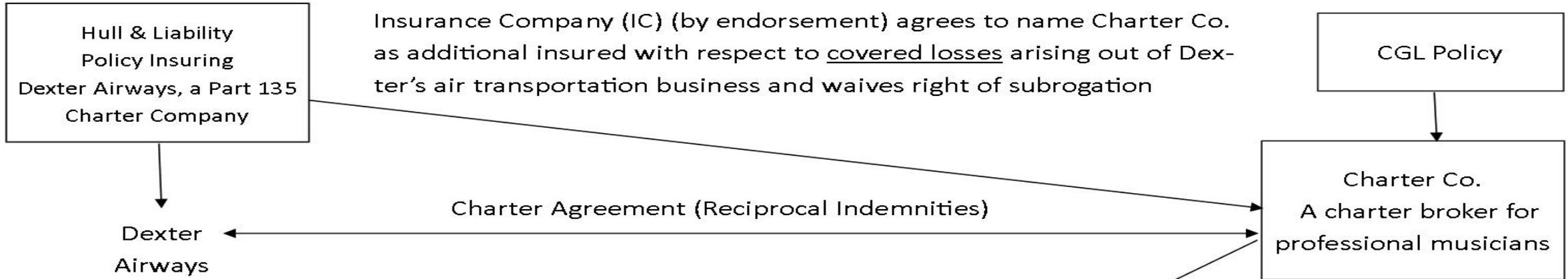


Scenario 1:

- Bodily injury/Death arising out of operation of aircraft
e.g. crash, hard landing, turbulence

- IC would indemnify and defend Charter Co. (as an Additional Insured) and Dexter (as Named Insured and Insured) for the death and/or bodily injury claims (subject to exclusions and terms and conditions in the Policy)
- IC would (probably) not indemnify and defend Charter Co. for claims or losses that are not a "covered loss" e.g. negligent entrustment

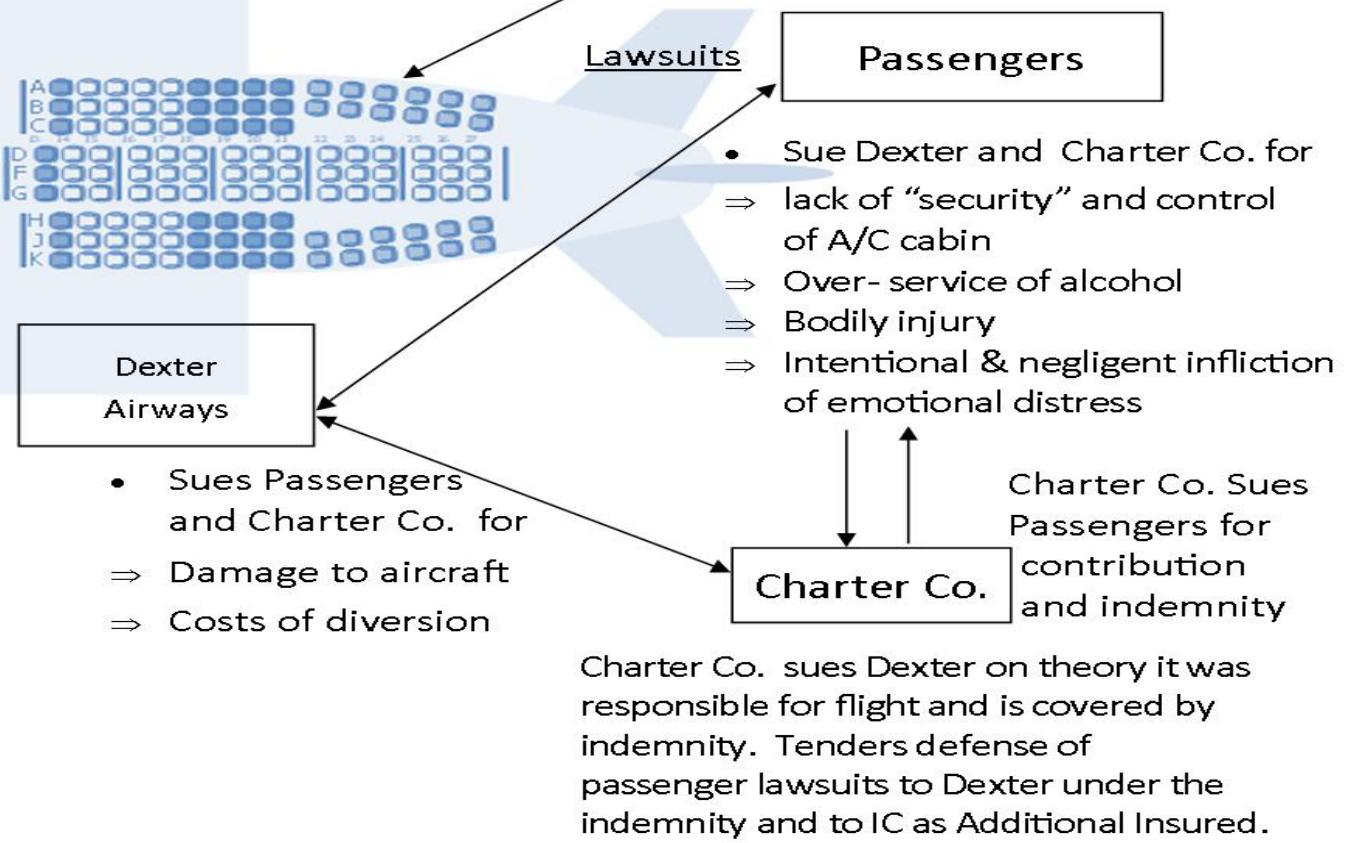




Scenario 2:

- Players are drunk and disorderly and
- Damage aircraft
 - Beat up on each other
 - Threaten F/A
 - Dexter diverts + lands for safety of flight

- Various Claims arise due to indemnities and Dexter's duty of care
- Charter Co. tenders defense of Dexter's lawsuit against it to IC as it is an "Insured" under IC's policy and the claims arose out of Dexter's air transportation charter business (and potentially an overbroad indemnity)



Take Aways Re: Hypothetical Scenario

- Status of additional insured/insured means IC cannot subrogate against Charter Co. due to
 - (1) laws in the U.S. that bar an insurer from subrogating against its own insured and
 - (2) the policy's own terms and conditions
- Over-broad contractual indemnification can “pick up” claims unrelated to Dexter Airways’ operations and may not be insured
- BP Deepwater Horizon, Transocean and Haliburton – A Cautionary Tale

Thank You

If you have any questions, please contact:



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