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THE DENUNCIATION OF THE WARSAW CONVENTION†

BY LEE S. KREINDLER††

I. UNITED STATES DENUNCIATION AND ITS PROBABLE EFFECT

THE UNITED STATES denounced the Warsaw Convention on 15 November 1965. The Act of Denunciation consisted of a Notice delivered to the Polish government by the United States embassy in Poland.¹ Under the terms of the Convention the denunciation becomes effective six months later, or 15 May 1966.² However, the Notice of Denunciation will be withdrawn, the State Department has said, if the airlines that serve the United States agree, before 15 May 1966, to waive the present limit (8,300 dollars) to 75,000 dollars, with an ultimate waiver to at least 100,000 dollars agreed upon.³

The *New York Times* applauded denunciation in an editorial on 23 October 1965, saying:

In announcing its intention to withdraw from the Warsaw Convention, the United States has moved to end an anachronistic and unfair scheme limiting airline liability to passengers on international flights.

The Warsaw Convention was set up to protect airlines when flying was in its infancy. Its rigid and inadequate liability of \$8,300 for death or injury of a traveler was designed to prevent airlines from being put out of business as a result of liability claims.

In 1955 The Hague Protocol called for doubling the liability limit to \$16,600, which was still grossly inadequate. The United States did not ratify The Hague Protocol; but earlier this year the Johnson Administration requested Congressional approval of it as "the first step in recognition of the need for greater protection of passengers in international aviation."

Now the Administration has wisely decided to take a much bigger step to protect airline passengers. It plans to renounce the Warsaw Convention by May 15 and reject The Hague Protocol unless the airlines agree to raise the liability ceiling to \$100,000 per passenger. It would be preferable to follow

† This account of the events leading up to the denunciation of the Warsaw Convention by the United States and the discussion herein of the viewpoints of the various interested parties was prepared by the Chairman of the Aviation Law Section of the American Trial Lawyers Association. ATLA and its Aviation Law Section waged a major campaign to end the limitation of damages imposed by the Warsaw Convention.

The opinions expressed herein do not necessarily represent the viewpoint of the *Journal's* Editors, Editorial Advisors, or Publisher.

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¹ Dep't State Press Release No. 268, 15 Nov. 1965; see also *N. Y. Times*, 16 Nov. 1965, p. 82, col. 1 (city ed.).

² Convention for the Unification of Certain Rules Relating to International Transportation by Air, art. 39, 49 Stat. 3000 (1935) [hereinafter cited as *Warsaw Convention*].

³ Dep't State Press Release No. 268, 15 Nov. 1965.

domestic practice and do without a ceiling, which has not hurt domestic airlines, but the Administration plan does at least scrap the wholly inadequate limits that the airlines have maintained.

Over half of the international airline traffic is handled by American companies and a large portion of the passengers using international airlines are Americans. As we have previously said on this page, we would prefer outright renunciation of the Warsaw Convention and rejection of the protocol because they are no longer needed by the airlines and have never been in the interests of passengers. But the Administration's proposal is one that can reasonably be met by foreign airlines and will protect passengers instead of penalizing them.⁴

It appears doubtful that the airlines will agree to the 100,000 dollars, or even the 75,000 dollars waiver. At a meeting of the International Air Transport Association Legal Committee in Paris in early October 1965, the IATA representatives, fully apprised of the State Department attitude, rejected the suggestion that limits be waived to 100,000 dollars. They even rejected a suggestion favored by Trans World Airlines that the limit be waived to 66,600 dollars (50,000 dollars plus The Hague Protocol limit of 16,600 dollars). The airline attitude apparently is that a limit of maximum liability tends to become the standard payment, or, to put it another way, the maximum frequently becomes the minimum. Since the Warsaw Convention establishes a presumption of liability up to the limit,⁵ a passenger or his estate would have nothing to lose in insisting on the limit even if his damages did not justify it. Thus the airlines feel that a limit of 100,000 dollars would ultimately cost them far more than no convention, and no limitation. Absent a convention, say the airlines, a passenger would have no presumption of liability, would have to prove negligence, and would have to *prove* his damages in any amount. The airlines also feel that some useful defenses, such as limitations in national law, would be available. Thus the airlines' position seems to be that, absent a convention, they would have better control over claims than with a convention, presumed liability, and a 100,000 dollar limitation.⁶

At the Paris meeting, IATA's Legal Committee decided that the airlines should waive the present limit, but only to 50,000 dollars. At 50,000 dollars a convention still provides some benefits to the airlines, or so it was felt, in the limitation of damages. According to the airline consensus, however, 50,000 dollars was the figure beyond which the limitation was not worth presumed liability and the procedural ease afforded passengers. IATA then circulated a mail ballot to its member airlines seeking approval of a resolution that would waive the limit of the Warsaw Convention, as amended by The Hague Protocol, to 50,000 dollars. Inasmuch as the State Department has made it clear that it will not be satisfied with 50,000 dollars, the IATA ballot appears to be academic.

⁴ N.Y. Times, 23 Oct. 1965, p. 30, col. 2 (city ed.).

⁵ Warsaw Convention art. 17.

⁶ This conclusion is drawn from the author's personal conversations with several leading airline lawyers.

II. THE CAUSE OF DENUNCIATION

In the United States, we have come to recognize the integrity of the person and we award fair damages for violation of that integrity, whether through personal injury or death. Injuries and accidental deaths have never been so appropriately compensated as today in the United States.

The Warsaw Convention, by contrast, places a limitation of 8,300 dollars on the amount an airline will have to pay an accident victim or his family even if the airline's negligence clearly caused the accident.⁷ The limitation constitutes an artificial restriction on the amount an airline will pay, no matter how gross the injury or how great the loss to the victim's family. To the extent that the award is limited, the cost or burden of the loss is placed entirely upon the victim or his family. Thus, if a man is seriously injured in an airline crash and his medical expenses exceed 100,000 dollars, he will still be limited by the Warsaw Convention to 8,300 dollars. Under the proposed The Hague Protocol, discussed *infra*, the award would be restricted to 16,600 dollars. Even under the compromise suggested by the United States Government, he would be allowed only 100,000 dollars, leaving him nothing to compensate for pain and suffering and his loss of earnings.⁸

Thus, in a sense, it was inevitable that the United States, which so tangibly recognizes the value of human life, should come to reject the Warsaw Convention. The United States, which supplies more than sixty per cent of the passengers in international travel, has finally, if reluctantly, come to assert its pride in the dignity of the individual.

III. HISTORY OF DENUNCIATION

The denunciation of the Warsaw Convention is the culmination of a long, twisting chain of events starting with the enactment of the Convention in 1929 and adherence by the United States in 1934. The Convention's principal provision limits airline liability to 8,300 dollars per

⁷ Warsaw Convention art. 22.

⁸ Lest this be considered a flight of fancy, the author refers to two cases he has handled where the injuries to individuals in airline accidents were so bad that the medical expenses were about \$100,000. One case, about five years ago, involved a young girl who had horrible burns and who lost all her fingers, the outer table of her skull, and her ears. Her settlement was \$375,000, which after medical, hospital, and legal expenses left her about \$200,000 to take care of her and her dependent family for the rest of her life.

Another airline case was recently settled for more than \$650,000. This involved equally horrible injuries to a man who had a wife and several children. By careful budgeting, he has been able to provide for his own means of existence for the rest of his life, and for the support of his wife and children and his children's education.

The size of these awards seems high until one begins to consider the suffering, expenses, and losses endured by the individuals. When these are considered, it is seen that the settlements are little more than bare and even inadequate compensation for what has been endured.

Fortunately, both cases involved domestic transportation. What compounded tragedies these would have been if they had occurred in international travel under the Warsaw Convention or The Hague Protocol!

Similarly, within the last year there have been two awards for deaths suffered in airline crashes, of about \$1,000,000 each. Each involved the death of a man with very high earnings, and in each case the financial loss to the decedent's family far exceeded what was actually recovered from the airline. Again, the awards sound high until the actual loss is considered. Again, tragedy would have been compounded on tragedy if the Warsaw Convention or The Hague Protocol had applied.

passenger for death or personal injury, unless "wilful misconduct" is proved.⁹

A. *The Jane Froman Case*

The move in the United States to withdraw from the Warsaw Convention began to gain momentum in the early 1950s with public shock and resentment at the result in the case of entertainer Jane Froman¹⁰ who had been badly injured in a Pan American Airways crash in Portugal in 1943. Despite her serious injuries and large medical bills, her 1953 award against Pan American was limited to 8,300 dollars, resulting in considerable public indignation throughout the United States.

1. *The "Wilful Misconduct" Exception*

Article 25 of the Warsaw Convention provides that an airline cannot avail itself of the provisions of the Convention if the accident has been caused by its "wilful misconduct." The term is a translation of the word *dol* in the official French text of the Warsaw Convention. As applied in France, *dol* means, essentially, gross negligence, but the term "wilful misconduct" was defined in the *Froman* case to mean something far more difficult to prove: an intentional act done with either intent to cause damage or recklessly and with knowledge that damage would probably result.¹¹ Jane Froman lost her case because the jury, quite naturally, refused to believe that any pilot would intentionally cause a crash in which he himself might be killed or that he would act recklessly, with knowledge that a crash would probably result.

2. *More Flexible Definition*

The *Froman* case is the only American case in which "wilful misconduct" is so rigidly defined. In other cases, the courts have construed "wilful misconduct" as an act done with intent to cause damage or recklessly with disregard of the probable consequences.¹² The difference between the *Froman* requirement and the definition more commonly applied is that the former requires knowledge on the part of the pilot or other employee of the airline that the crash will probably result, whereas the prevalent definition does not.

As a result of this more flexible definition, four cases have succeeded in obtaining reasonable damages within the last few years under the "wilful misconduct" exception.¹³ More importantly, many cases have been settled by plaintiffs for amounts far in excess of the Warsaw Convention limits,

⁹ Warsaw Convention arts. 22, 25.

¹⁰ *Froman v. Pan American Airways*, 284 App. Div. 935, 135 N.Y.S.2d 619 (1954), *leave to appeal denied*, 308 N.Y. 1050, *cert. denied*, 349 U.S. 947 (1955); *Ross v. Pan American Airways*, 299 N.Y. 88, 85 N.E.2d 880 (1949).

¹¹ Record on Appeal, *Froman v. Pan American Airways*, *supra* note 10.

¹² *Tuller v. KLM*, 292 F.2d 775 (D.C. Cir.), *cert. denied*, 368 U.S. 921 (1961); *Pekelis v. Transcontinental & Western Air*, 187 F.2d 122 (2d Cir.), *cert. denied*, 341 U.S. 951 (1951); *American Airlines v. Ulen*, 186 F.2d 529 (D.C. Cir. 1949).

¹³ *LeRoy v. Sabena Belgian World Airlines*, 344 F.2d 266 (2d Cir. 1965); *Tuller v. KLM*, *supra* note 12; *American Airlines v. Ulen*, *supra* note 12; *Malmos v. British Commonwealth Pac. Airlines*, No. 34123, N.D. Cal., 9 March 1959.

where the airline has felt the possibility of a "wilful misconduct" determination. Almost any Warsaw Convention case has a settlement value today in excess of 8,300 dollars simply because of the possibility of the plaintiff proving "wilful misconduct" under the current, more liberal definition.¹⁴

B. *The Hague Protocol*

By 1955, the airlines realized that the public indignation arising primarily from the *Froman* case had come to the point that something was required to quell it; for this reason, The Hague Conference of 1955 was called. Its purpose was twofold: first, to increase the limits to the point where United States opposition would be quieted and, second, to plug up some loopholes that were permitting recoveries in excess of the limits.

A proposed amendment to the Convention, The Hague Protocol, was enacted by the Conference.¹⁵ This Protocol was signed by the United States at The Hague, but has never been ratified. If ratified, it would have the effect of doubling the limit to 16,600 dollars, but in doing so, as indicated below it would seriously restrict the "wilful misconduct" exception so as to make it virtually impossible to prove.

1. *Redefinition of "Wilful Misconduct"*

The principal loophole sought to be plugged at The Hague was the "wilful misconduct" exception,¹⁶ discussed *supra*. The Hague Protocol would make a fundamental change in the definition of "wilful misconduct," as it provides that the words *dol* or "wilful misconduct" are to be deleted from the Warsaw Convention and the following provision substituted:

The limits of liability specified in Article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents done with intent to cause damage or recklessly and with knowledge that damage would probably result.¹⁷

Thus, The Hague Protocol substitutes the *Froman* definition, which a plaintiff can never prove, for the current definition of "wilful misconduct." It is impossible to prove that the act was done with intent to cause damage and it is virtually impossible to prove that it was done with knowledge that damage would probably result.

The Hague Protocol, therefore, would make avoidance of the damages limit virtually impossible. It would be the plain, simple fact that the settlement value of any Warsaw-Hague case would be 16,600 dollars or less, with no opportunity for a claimant to recover reasonable damages. The cases would actually be worth less in settlement under The Hague Protocol than they are today under the Warsaw Convention with its more

¹⁴ This conclusion is drawn largely from the author's current (1965) experience in handling pending cases.

¹⁵ ICAO Doc. 7686-LC/140 pp. 1-10. See also 1955 U.S. & Can. Av. 523-51.

¹⁶ Warsaw Convention art. 25.

¹⁷ The Hague Protocol, art. XIII, 1955 U.S. & Can. Av. 523-51.

liberal interpretation of "wilful misconduct," despite the doubling of the limit.

2. *The Liability of Servants Loophole*

The second major loophole in the Warsaw Convention, which has permitted passengers or their estates to defeat the 8,300 dollars limitation, is its failure to limit the liability of servants and agents of the airlines. The airlines' liability insurance usually covers their employees, and, in addition, some airlines are believed to have "hold harmless" agreements with their employees, frequently part of contracts with unions representing them.¹⁸ Thus, a judgment obtained by a passenger or his estate against a pilot, or the estate of a pilot, in excess of 8,300 dollars may be collectible from the airline itself, or its insurance carrier, notwithstanding the Warsaw Convention limitation.

The Hague Protocol would close this avenue around the Warsaw Convention, since it would add a new article to the Convention making it applicable to servants and agents with the aggregate recovery fixed at the single limit of 16,600 dollars. Again, this would reduce the opportunity for a passenger to recover in excess of the limited amount.

3. *Airline Notice Practices*

In addition, ratification of The Hague Protocol would legitimize the current doubtful notice practices of the airlines and would remove from the Warsaw Convention the present requirement that the passenger be given notice of its applicability.

The Warsaw Convention requires that the airline give notice to passengers that it is applicable. It provides that the airline must deliver a ticket which shall contain "a statement that the transportation is subject to the rules relating to liability established by the Convention."¹⁹

Since the Warsaw Convention frequently applies to domestic as well as foreign flights, and since its applicability depends on the somewhat complex terms of the treaty itself, it is not always easy to determine whether the Warsaw Convention applies. The airlines universally use a standard form ticket, for Warsaw as well as non-Warsaw travel, with language, printed in unreadably small type, to the effect that the Warsaw Convention applies to this transportation unless it is not "international carriage" as defined in the Warsaw Convention. Of course, to know what is "international carriage" as defined in the Warsaw Convention a passenger would have to look at the Convention itself.

There are cases now in the courts challenging the type of notice being given by the airlines.²⁰ The penalty on an airline for not delivering a ticket with the requisite notice is severe, since it would result in presumptive liability with no limitation. If the courts require the airlines to give unequivocal notice, the airlines will have a serious problem meeting the re-

¹⁸ 1 Kreindler, *Aviation Accident Law* 378 (1963).

¹⁹ Warsaw Convention art. 3(1)(e).

²⁰ *Mertens v. Flying Tiger Line*, 341 F.2d 851 (1965); *Kelley v. Sabena Belgian World Airways*, Civil No. 61C993 E.D.N.Y.

quirement since it will be difficult to teach ticket agents when the Convention is applicable, so that they may deliver a ticket with proper notice. Obviously, unless they receive proper notice, passengers have no way of knowing about the limitation so that they can protect themselves with adequate insurance.

The Hague Protocol solves the problem for the airlines. It eliminates the notice requirement of the Warsaw Convention and substitutes a requirement that the ticket contain notice that the Convention *may* apply. In other words, it legitimatizes the doubtful practice of the airlines being challenged in the courts today.

C. *Recent Developments*

Responsible plaintiffs' lawyers who have had first-hand experience with hardships caused by the Warsaw Convention have always opposed it. When The Hague Protocol was drafted it, too, was opposed, not only because it would have plugged up loopholes in the Convention which were permitting passengers to recover in excess of the limits, but because it would have hardened the abhorrent limitation principle into our law and made it more difficult to destroy the Convention entirely.

1. *The IGIA Program*

In 1958, President Eisenhower sent The Hague Protocol to the Senate, for advice and consent to ratification. No action was taken on it by the Senate, however, during the Eisenhower administration. The Kennedy administration, finding that the proposed treaty was still on the Senate calendar, recalled it from active consideration and referred it for study to the Interagency Group on International Aviation (IGIA), an interdepartmental body with representatives from the Federal Aviation Agency, the Civil Aeronautics Board, and the Departments of State, Defense, Commerce, and Labor.

IGIA, by a somewhat divided vote in 1963, came out for the combined recommendation (1) that The Hague Protocol be ratified and (2) that a system of automatic compulsory trip insurance providing 50,000 dollars per passenger for death or personal injury, be imposed.²¹ This was IGIA's position despite the fact that no one outside the Government was in favor of the automatic insurance proposal. It had become apparent by this time that the airlines themselves were strongly opposed to the idea principally because of the cost involved. There was also the possibility that the automatic insurance plan would inspire sabotage of airplanes, since it would no longer be necessary for the prospective saboteur-for-insurance to purchase his insurance and thereby subject himself to discovery. Nevertheless, this was the program of IGIA, and the Kennedy administration rather fell heir to it.

It took about a year for IGIA to draft the automatic insurance legislation. It was introduced into Congress in 1964 along with a request from Secretary of State Rusk to the Senate Committee on Foreign Relations that

²¹ IGIA 23/1.19, 17 Aug. 1964.

the Senate give favorable consideration to ratification of The Hague Protocol.²² No action was taken in 1964 and, indeed, for the first few months of 1965.

Then, in May 1965, the insurance legislation was introduced into Congress and referred to the Committees on Interstate and Foreign Commerce of both houses, and The Hague Protocol was noticed for hearings before the Senate Committee on Foreign Relations.

This event marked the beginning of a few months of feverish activity by the Aviation Law Section of the American Trial Lawyers Association (ATLA), which ultimately registered significant and effective opposition to ratification of The Hague Protocol with the Senate.²³

Opposing this was considerable pressure in favor of ratification. The IGIA program had the imprimatur of Administration policy. Both the State Department and the Federal Aviation Agency appeared in support of The Hague Protocol, also indicating approval of the IGIA recommendation in favor of automatic insurance. The airlines, speaking through the Air Transport Association, also urged the adoption of The Hague Protocol, although they indicated their opposition to the insurance proposal.

2. *The Fight Against The Hague Protocol*

The main problem in fighting the Protocol was presented by the fact that ratification of the Protocol had come up before the Senate Foreign Relations Committee, whereas the insurance program had been referred to the Commerce Committee. ATLA, opposing The Hague Protocol, felt that the insurance bill would be unpopular with many Senators and knew that both the airline industry and the insurance industry would oppose it. The airline strategy, however, was to push ratification of The Hague Protocol, knowing, or hoping that the automatic insurance proposal would later die in committee.

The opposition effort was two-fold: first, ATLA urged the Senators to oppose The Hague Protocol on its merits, and to denounce the Warsaw Convention; second, the Association urged that at least the Senate not consider The Hague Protocol until it had first passed upon the more doubtful insurance legislation.

Both the State Department and the Federal Aviation Agency gave some support to the proposition that the two parts of the IGIA program should be kept together, or, at least that ratification of The Hague Protocol should be conditioned upon approval of the insurance plan.²⁴ Mr. Leonard C. Meeker, Legal Adviser of the Department of State, testifying before committee on 26 May said:

The Interagency Committee and I would think it is fair to say Americans as a whole—are agreed that \$16,600 as a maximum is not adequate.

²² *Ibid.*

²³ *Hearings on The Hague Protocol to the Warsaw Convention Before the Senate Committee on Foreign Relations*, 89th Cong., 1st Sess., 27-28 May 1965.

²⁴ *Id.* at 1-38.

. . . .
If the Senate should withhold its advice and consent to The Hague Protocol, we would have to give serious consideration to denunciation of the Warsaw Convention. Or, if the Senate gives its advice and consent to ratification of The Hague Protocol but the Congress does not pass the complementary insurance legislation, we would then also have to consider whether to withdraw from the Warsaw Convention. We hope that the Congress will give prompt approval to the insurance legislation.²⁵

The Senate Committee on Foreign Relations had an executive session on The Hague Protocol proposal on 14 June 1965. State Department representatives were invited to this meeting and Mr. Meeker gave an additional statement in which he re-emphasized the commitment of the administration to push the insurance proposal, and, if that failed, to denounce the Warsaw Convention. Mr. Meeker said:

Doubt has been expressed that the State Department would ever recommend denunciation of any convention. This is not the case. We recognize that the question of limitation of liability in international air accidents is a difficult one, on which reasonable men may differ. But we do not think a sound argument can be made for remaining in the Warsaw Convention if the Senate does not advise and consent to The Hague Protocol. . . . We believe The Hague Protocol and the insurance legislation are part of a two-step process in providing protection for international air travelers. If within a reasonable time the insurance legislation is not enacted, we would feel an obligation to the American people to reexamine the question of adherence to The Hague Protocol.²⁶

On the strength of the State Department's representation, the Senate Foreign Relations Committee voted 16 to 1 to recommend ratification of The Hague Protocol to the full Senate. In doing so, however, the Report of the Committee recommended:

That if insurance legislation similar to that which has been proposed by the administration is not enacted within a reasonable time (*i.e.*, prior to the adjournment of the 89th Congress), the Department of State should take immediate steps to denounce the Warsaw Convention and The Hague Protocol.²⁷

The overwhelming vote of the Senate Foreign Relations Committee to recommend ratification of The Hague Protocol appeared to be a blow to the efforts to extricate the United States from the Warsaw Convention. But in retrospect it provided the basis for the ultimate denunciation, for, in advocating ratification of the Protocol, the Committee strongly tied it to the very doubtful insurance proposal.

The ATLA Aviation Law Section then redoubled its efforts to get its message against The Hague Protocol and the Warsaw Convention through to the entire Senate.

Its record in the Committee on Foreign Relations was persuasive and it began to get around to the various Senators. In addition, considerable

²⁵ *Id.* at 5-7.

²⁶ S. Exec. Rep. No. 3, 89th Cong., 1st Sess., app., at 9-10.

²⁷ *Id.* at 7.

support was gained when the *New York Times* published an editorial in favor of withdrawal from the Convention. When the Foreign Relations Committee Report went to the entire Senate and was placed on the Executive Calendar, opposition to the Protocol began to pick up considerable support on the Senate floor. Senators Albert Gore and Ralph Yarborough, particularly, lent their considerable talents to the fight, both making persuasive speeches on the floor of the Senate.

3. *Rejection of the Insurance Legislation*

Meanwhile, the insurance legislation, assigned to the Senate Committee on Interstate and Foreign Commerce, had been delegated to its Aviation Subcommittee. It soon became obvious to Senator Mike Monroney, Subcommittee Chairman, that the automatic insurance proposal lacked substantial support in the Subcommittee. Since the Senate had been asked to ratify The Hague Protocol upon the assumption that the automatic insurance proposal would later be passed, and realizing that the automatic insurance proposal had little or no chance of being enacted, Senator Monroney advised the State Department that unless it could come up with a better alternative to the automatic insurance proposal, The Hague Protocol would not be ratified.

As ratification of the Protocol became doubtful, and opposition to the Warsaw Convention itself grew, the State Department became concerned that the Protocol might come up for a vote and be defeated, which would constitute an embarrassment for the administration. On the other hand, the opposition began to feel that it would be good for The Hague Protocol to be called up and voted upon, since a defeat was expected. This would leave the State Department on record in favor of complete denunciation of the basic Convention, having said that either without The Hague Protocol or without automatic trip insurance it would favor denunciation.

4. *Waiver of Warsaw Convention Limitations Proposed*

Apparently fearing that The Hague Protocol would be called up for a vote in the Senate, and learning that the automatic insurance plan was dead in the Commerce Committee, the State Department decided that it had to go to the Senate with an attractive alternative to automatic trip insurance. It convened an emergency session of IGIA, alternatives were discussed, and on the State Department's recommendation a meeting was scheduled with the nation's leading international airlines. At the meeting the airlines were informed that unless they voluntarily waived the limits of the Warsaw Convention up to 100,000 dollars, the State Department would take steps to denounce the Convention. If the airlines waived the limits to 100,000 dollars, the State Department promised to make a further effort to have the Senate ratify The Hague Protocol on that basis, with the further assurance that it would subsequently convene an international conference to amend the Warsaw-Hague Convention to officially raise its limit of liability to 100,000 dollars.

The reasoning of the State Department was rather interesting. It took the position, and so informed the airlines, that the administration was committed to assuring American passengers damages on the order of 66,600 dollars by the IGIA package proposal. This would have consisted of a recovery of 16,600 dollars under The Hague Protocol plus the 50,000 dollars accident insurance. With the accident insurance a dead issue, the liability limit had to be a figure that would net the passengers approximately the same as the IGIA 66,600 dollars. The State Department figured that out of liability awards there would necessarily be deducted attorneys' fees and litigation expenses amounting to approximately one-third of the awards. Therefore, to net the passenger about 66,600 dollars a liability limit of 100,000 dollars was necessary.

The airlines themselves could not reach agreement. Some of the airlines very quickly agreed to waive the limits up to 50,000 dollars, but declined to go above that. When the Air Transport Association reported back to the State Department, it was unable to report agreement among the airlines to waive the liability limits up to 100,000 dollars.²⁸

5. Congressional Opposition to Warsaw-Hague

While this was going on, pressure continued to accumulate in Congress in opposition to the Warsaw Convention—Hague Protocol. Congressman Lester Wolff introduced a resolution in the House of Representatives calling upon the Senate to refuse to ratify The Hague Protocol and asking Congress to go on record in favor of denunciation of the Warsaw Convention. Senator Robert Kennedy gave a speech on the Senate floor in which he supported much of what Congressman Wolff had said. It began to appear that even with a waiver by the airlines of liability up to 100,000 dollars, the Senate might not ratify The Hague Protocol and, moreover, might call for complete denunciation of the Warsaw Convention.

The State Department felt that before it could move toward denunciation of the Warsaw Convention it had to retrace some of its steps with the Senate, particularly with the Senate Foreign Relations Committee. The State Department had asked the Foreign Relations Committee to recommend ratification of The Hague Protocol, and it would be improper for the State Department now to take steps to denounce the Warsaw Convention without first asking the Committee if it had any objection.

Under Secretary of State for Economic Affairs Thomas C. Mann and members of the Staff of the State Department's Legal Adviser met with the Senate Foreign Relations Committee and Under Secretary Mann asked whether the Committee would have any objection to the State Department's moving toward denunciation of the Warsaw Convention. After some discussion Senator Fulbright, Chairman of the Committee, indicated that the Committee would have no objection and that the State Department was free to move toward denunciation.

The State Department then informed foreign governments who were

²⁸ *Flight International*, 23 Sept. 1965, p. 538.

parties to the Warsaw Convention of the distinct possibility of the United States withdrawal. This was apparently a matter of protocol, since it is customary to advise foreign governments of prospective withdrawal from a treaty before it is actually done. The foreign governments were invited to comment, the expectation being that some of them might be irate at the prospect of the United States withdrawal. The reaction of the foreign governments was unexpectedly mild and understanding, however, and this turned out not to be a serious obstacle to United States denunciation.

IGIA met again and recommended to the White House that the United States denounce the Convention unless the airlines waive the limits to 75,000 dollars as an interim measure and 100,000 dollars permanently. The White House approved the recommendation and on 15 November 1965 the Notice of Denunciation was delivered to the Polish government by the American Embassy in Warsaw. The full text of the Notice of Denunciation is set forth in the Appendix following this article.

IV. CONCLUSION

The Warsaw Convention was enacted in 1929 and adhered to by the United States in 1934 at a time when it was not unreasonable to believe that the infant airline industry needed special protection. However, its basic concept of limited liability was, and is, alien to American principles of damages scaled to the particular loss suffered. It is not surprising, therefore, that with the maturity of the airline business, pressures accumulated in the United States for withdrawal, resulting in the recent denunciation.

APPENDIX

*The full text of the Notice of Denunciation delivered to Poland by the United States Embassy in Warsaw is as follows:*²⁹

Excellency:

I have the honor, under instructions from my Government, to give formal notification to the Government of the Polish People's Republic of the denunciation by the Government of the United States of America, for itself, its territories, and all other areas under its sovereignty or authority, of the Convention for the Unification of Certain Rules relating to International Transportation by Air and the Additional Protocol relating thereto signed at Warsaw on October 12, 1929. This notification is given in accordance with the provisions of Article 39 of the Convention.

The United States of America wishes to state that it gives this notification solely because of the low limits of liability for death or personal injury provided in the Warsaw Convention, even as those limits would be increased by the Protocol to amend the Convention done at The Hague on September 28, 1955.

My Government would appreciate it if the Government of the Polish People's Republic would inform the Government of each of the High Contracting Parties to the Convention of this notification and the reason therefor. My Government would also appreciate it if the Government of the Polish People's Republic would inform the Governments of the High Contracting Parties that the United States of America wishes to make clear its continued desire to maintain its tradition of international cooperation in matters relating to civil aviation. To this end, the United States of America stands ready to participate in the negotiation of a revision of the Warsaw Convention which would provide substantially higher limits, or of a convention covering the other matters contained in the Warsaw Convention and Hague Protocol but without limits of liability for personal injury or death.

²⁹ Dep't State Press Release No. 268, 15 Nov. 1965.