

Translation

REMARKS ON CERTAIN ARTICLES OF THE PRELIMINARY DRAFT
OF AN INTERNATIONAL CONVENTION CONCERNING THE CARRIAGE OF GOODS BY ROAD

Article 1.- Carriage should be rewarded in order that the rules of the Preliminary Draft may apply to it. But the Preliminary Draft has been intended to apply also to carriage by road gratuitously performed by professional carriers.

According to paragraph 2 of this article, the Preliminary Draft shall not apply to carriage performed by motor vehicle undertakings entered in the list of the lines established in compliance with the International Convention concerning the transport of goods by rail (C.I.M.), as well as to carriage performed under the terms of international postal Conventions. Likewise, in case of adoption of a Convention on combined transports, they shall not be subject to this Convention.

Article 2.- Determination of the international character of carriage should be based on the intention of the parties, rather than on a fact, which might be unintentional.

Carriage on the line from Paris to The Hague, whose place of departure and place of destination are situated within the territories of two different States, is therefore to be considered an international carriage in the sense of the Preliminary Draft, even if the vehicle which has left Paris bound for The Hague should end its journey in France for any reason whatever.

Frontier carriage is as a rule subject to the same provisions as international carriage in general. However, as it will be pointed out further on (article 3), the rules concerning the carriage document are optional. For these reasons it was not deemed necessary to lay down special rules concerning frontier carriage.

When the place of departure and the place of destination are situated within the territory of a single State but the route passes

through the territory of another State in transit, the carriage, according to the Preliminary Draft, shall not be considered as an international carriage in the sense of this Convention.

Article 3.- According to the Preliminary Draft, the contract of carriage of goods is merely consensual and its conclusion shall not be subject to any particular formality. A mutual understanding between carrier and consignor is in itself sufficient to give rise to the contract. The absence of the way-bill shall therefore affect neither the existence nor the validity of the contract, which shall be likewise regulated by the provisions of the Preliminary Draft.

The right conferred in the Preliminary Draft on the consignor to require the carrier to accept a way-bill will not be of much use to him, because if the carrier is not willing to accept that document, he will have in most countries the refusal of concluding the carriage contract. But it is obvious that the carrier will not frequently enforce his right to refuse such contract because of competition. Moreover, even if the carrier has a right to refuse to conclude a carriage contract, it is quite likely that, under the common law of his country, in doing so he may be in a way responsible to his consignors in case he is bound by offers previously made to the public.

It would naturally be highly useful that the drawing-up of a written deed should be obligatory. Yet, it is questionable whether all countries would accept such a rule. The presumption is that providing such obligation with an effective sanction would give rise to serious difficulties in certain countries.

Moreover, it is to be pointed out that if the consignor is obliged to make over, and the carrier to accept a way-bill, namely if they are absolutely bound to use it, frontier carriage should be regulated by less restrictive rules. A way-bill concerning this kind of carriage should not be binding. But it is very difficult to give a definition clear enough and applicable to any case of frontier carriage.

For these reasons it is deemed that the proposed system will afford a sufficient guarantee in so far as protection of interests is concerned.

Article 4.— Trade and industry have for a long time wanted a document for rail carriage enabling the consignor to transfer freely to a third party the right to dispose of goods in transit by endorsement of a carriage document. For road carriage, which is often quicker than carriage by rail, the use of such a carriage document may perhaps be more restricted than in the case of rail carriage. Users of a means of carriage as up-to-date as road carriage ought not, however, to be deprived of an up-to-date document capable of satisfying their requirements, especially in regard to very long distances. For these reasons, in addition to the way-bill issued to the consignee, another has been proposed "to order" or "to holder". According to the Preliminary Draft, the consignor has a right to require the carrier to accept such a way-bill. However, the question is whether the consignor should be entitled to do so, or whether the issue of a way-bill to order or to holder should depend on the agreement of the parties.

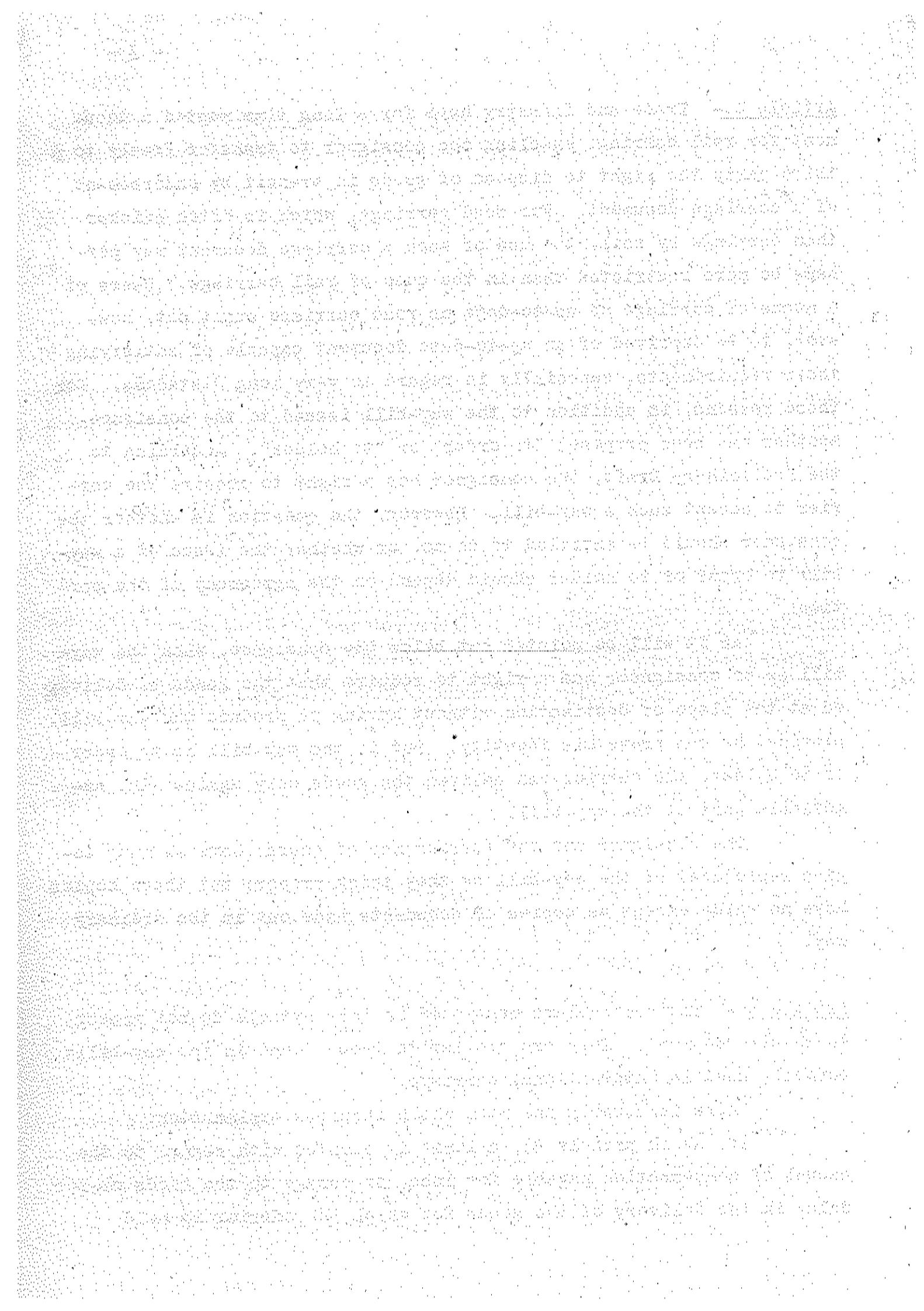
As it will be pointed out below the consignee, when the way-bill is to consignee, has a right to require that the goods be delivered at the place of destination without having to produce the way-bill, provided he can prove his identity. But if the way-bill is to order or to holder, the carrier can deliver the goods only against the negotiable part of the way-bill.

The consignor and the carrier may of course have as many copies reproduced of the way-bill as they think proper; but these copies have no value except as copies of documents made out in the ordinary way.

Article 6.— The particulars mentioned in this article do not appear to require comment. They are similar to those found in the way-bills commonly used in international carriage.

There is however one item which requires explanation.

If, as in article 23, a limit is adopted with regard to the amount of compensation payable for loss, or damage to the goods or for delay in the delivery of the goods for which the carrier is held



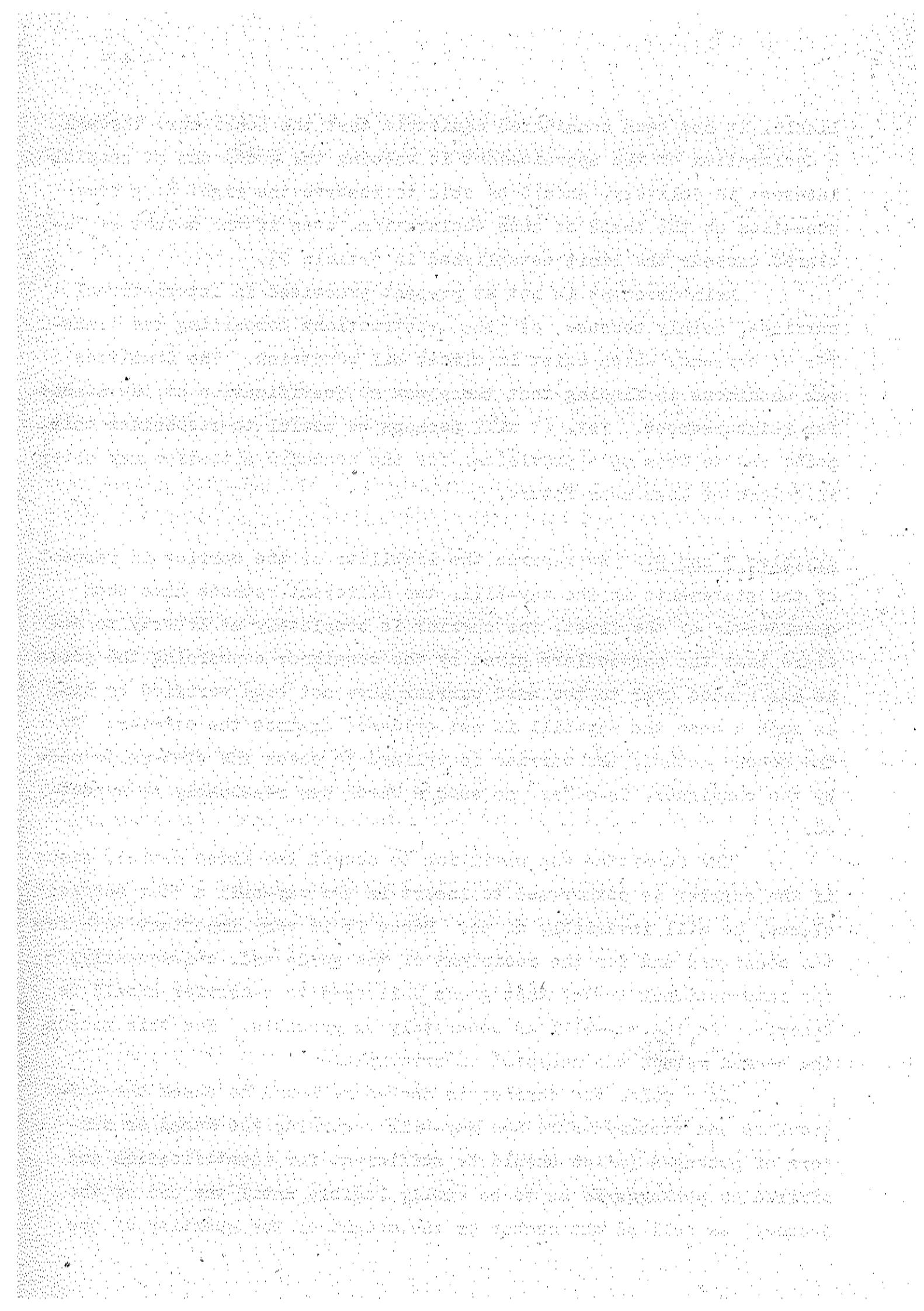
liable, it has been considered equitable that the consignor, through a declaration of the appraisement in valuing the goods and of special interest in delivery, should be able to reserve the right to a compensation on the basis of such declaration, even if the amount so declared exceeds the limit established in article 23.

Reimbursement is not at present practised in international carriage, mainly because of the restrictions concerning the transfer of currency which exist in almost all countries. The Committee was unanimous in finding that there was no justification at the moment for reimbursement. Yet, it will perhaps be useful to reconsider this point and to draw up a provision, for the economic situation may alter in a more or less near future.

Articles 7 and 9.— As regards the liability of the carrier in respect of the statements in the way-bill, two different methods have been considered: by the first, the carrier is completely at liberty to declare that the particulars given by the consignor concerning the goods he has handed over to the said carrier have not been verified by him; in such a case the way-bill is not evidence against the carrier. By the second method, the carrier is obliged to check the statements made by the consignor, in-sofar as such a check can reasonably be expected.

The Committee was unwilling to accept the first method, since if the carrier is authorised to insert in the way-bill a "not checked" clause, he will invariably do so. Hence it is very important both for the consignor and for the recipient of the goods and, consequently, for international trade, that goods delivered to a carrier should be described in the way-bill as accurately as possible. For this reason the second method was accepted in principle.

As a rule, the carrier is therefore bound to check the particulars and statements in the way-bill regarding the marks or numbers of packages (which should be sufficient for identification and affixed on packages so as to be easily legible until the end of the journey) as well as the number or the weight or the quantity of the



goods. According to the Preliminary Draft, the carrier is also bound to check the apparent order and condition of the goods.

The obligation under which the carrier is put should however be tempered, as it is necessarily based on the assumption that the carrier was able to properly check. Therefore, the Preliminary Draft does not consider this operation as obligatory in two cases: when the carrier has not the normal means of checking the accuracy of the particulars given, and when he has reasonable grounds for suspecting the correctness of the statements. In these cases he shall state the fact in the way-bill. In the absence of a reservation in the way-bill, it should be presumed that the goods have been delivered to the carrier in accordance with the statements inserted in the way-bill and in apparently good order and condition. The way-bill is evidence of this unless proof is adduced to the contrary.

Article 8.- It has been considered equitable that the consignor, on whom it is incumbent to establish the way-bill, shall be responsible for the correctness of this document.

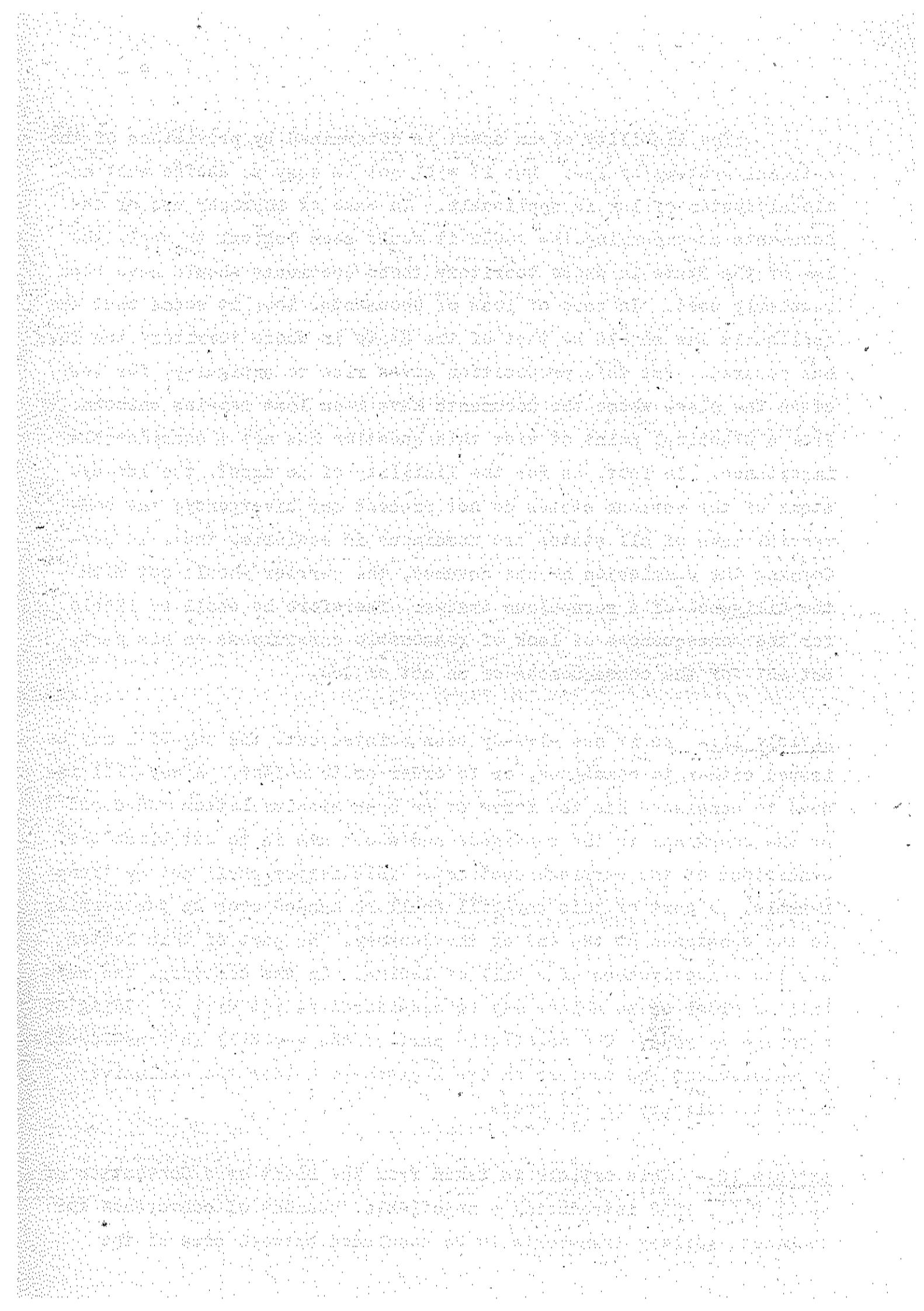
Article 10.- The Preliminary Draft of Convention, submitted to the Committee on the occasion of its meeting held at The Hague, laid down the rule that the carrier is not bound to enquire into the accuracy and completeness of the informations and documents supplied. Following an exchange of views in which Mr. Ingwersen and Mr. Dozol took part, the latter proposed a new wording according to which the carrier should inquire, within the bounds of possibility, whether informations and documents were correct and sufficient. The Preliminary Draft was changed according to this proposal.

However the new wording is not too clear and it will not be easy to know what is the real obligation of the carrier. It would be advisable to reconsider this question and to examine whether it is preferable to go back to the previous wording. It is better for the consignor to have a clear rule, even if not too favourable to him.

The liability of an agent is determined by provisions of the national systems of law. But it will not be easy to decide what national system of law is applicable. In case of improper use of the documents accompanying the goods it would seem logical to apply the law of the State in whose territory these documents should have been regularly used. In case of loss of documents, too, it seems that the applicable law should be that of the State in whose territory the loss has occurred. But this proposition gives rise to ambiguity, for very often the place where the documents have been lost remains unknown. From a practical point of view this question has not a considerable importance. In fact, as for the liability of an agent, the law-systems of the various states do not present any divergency; the commercial laws of all states are unanimous in declaring that, in performing the commission he has assumed, the carrier should act with the diligence of a scrupulous trader. Therefore he shall be liable for the consequences of lack of reasonable carefulness on his part, but not for the consequences of an act of God.

Article 11.— As it has already been pointed out, the way-bill may be issued either to consignee, or to order or to holder. A way-bill issued to consignee has the forme of an open missive letter addressed by the consignor to the consignee and whose aim is to establish the conditions of the carriage contract. This letter shall not be transferable. A part of this way-bill shall be handed over by the carrier to the consignee at the end of the journey. No part of this letter has the effectiveness of a bill of lading. On the contrary, the way-bill to order or to holder may be considered as the bill of lading of carriage by road. The negotiable part of the way-bill is transferable by endorsement and confers on its legitimate holder the exclusive right to delivery of the goods.

Article 12.— This article is taken from the Draft of a Convention of April 21st, 1938 introducing a negotiable document of conveyance for combined railway transports to be concluded between some of the



states who are parties to the Convention of Berne. It seems easy in using these rules to control whether the person presenting a negotiable way-bill is the legitimate holder of that document. Even those who are quite unfamiliar to juridical reasoning may be able to decide on such a question without any difficulty.

The carrier is bound to check the legitimacy of the series of endorsements, but he is not due to check the legitimacy of the signature of the endorsers.

Article 13.— When the way-bill is to consignee, the consignor only, to the conclusion of the consignee, can dispose of the goods in the course of the carriage. But if the way-bill is to order or to holder, the right to dispose of the goods passes from consignor to consignee when the consignor has delivered to the consignee the negotiable part of the way-bill.

Article 15.— This article settles the question, which had been put forward, specially by the carriers, viz. the difficulty of taking care of the goods when delivery is prevented. The carrier is then given free hands. He can unload the goods and sell them in the shortest possible time to get paid for the freight and of the costs due. However according to article 15 the carrier has to take care of the unloaded goods. But the way in which he has to fulfil this duty is not determined by the carriage contract and therefore is not subject to the rules of the Preliminary Draft of Convention in so far as the carriers' liability is concerned. His duty in this respect is regulated by the national law applicable which determines the liability of those who have to take care of goods delivered into their custody.

The consignor is responsible to the carrier for the freight and other costs due. It is therefore to his interest to fix the receipt of the goods as soon as possible. It may happen that the buyer has come to know that the goods have deteriorated in the period of the carriage and consequently that he does not want to pay the freight.

the first time, and I have been told that it is a very good place to go to. I have also heard that the people there are very kind and helpful. I am looking forward to my trip to Japan and hope to learn a lot about the country and its culture.

If the way-bill is to order or to holder, it may also happen that the buyer has not received the negotiable part of the way-bill and is therefore unable to hand it over to the carrier. In these circumstances the consignor, having been informed by the carrier, shall settle the matter. If the consignor fails to do so, too, the carrier, as already said, has a right to retain the goods or to place them in the care of some one who shall retain them for account of the carrier. After that the carrier shall be entitled to sell the goods in the shortest possible time to get paid for the freight and the costs due.

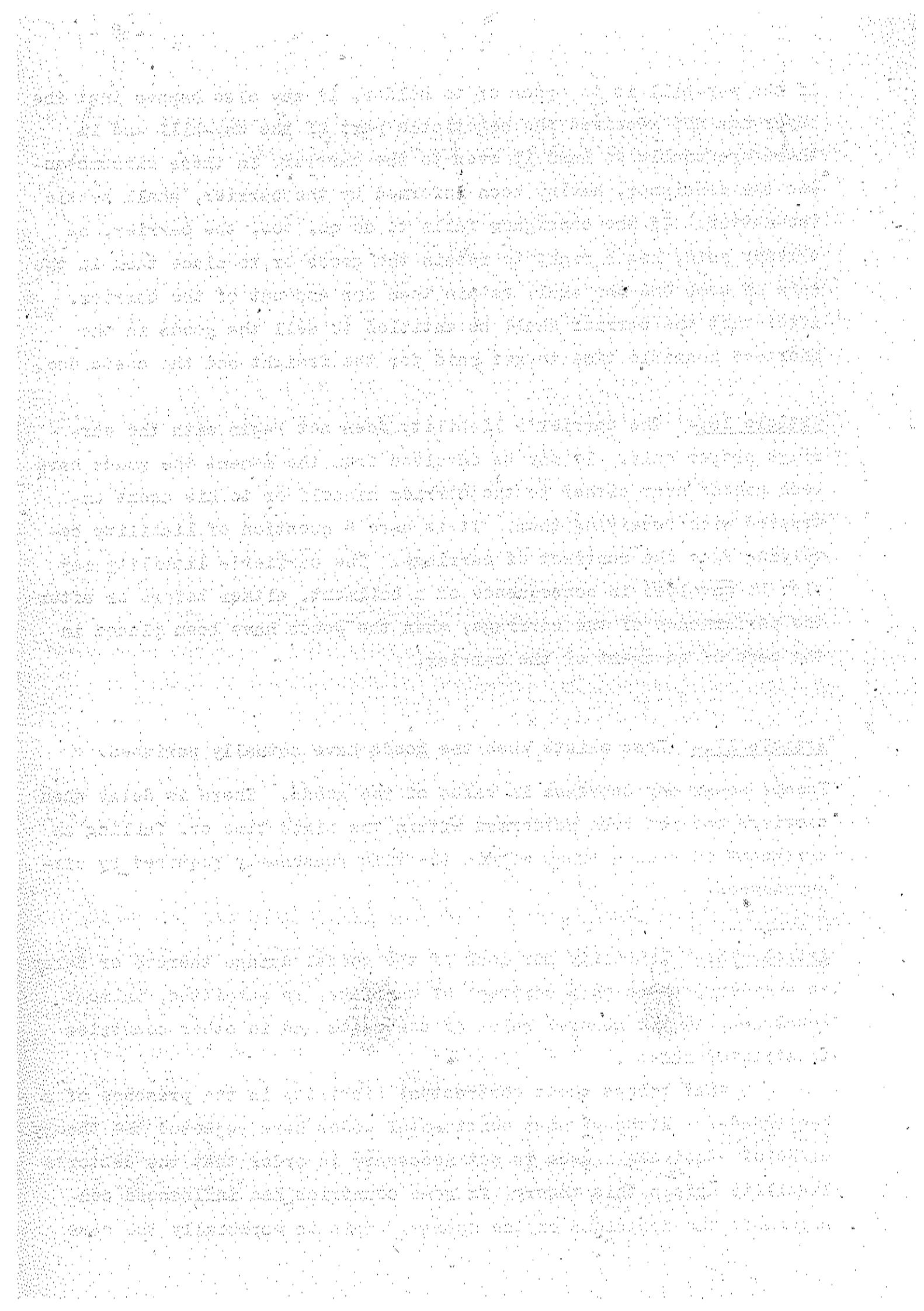
Article 16.- The carrier's liability does not begin with the carriage proper only. It may be involved from the moment the goods have been handed over either to the carrier himself or to his agent entrusted with receiving them. It is here a question of liability devolving from the contract of carriage. The carrier's liability may also be involved in consequence of a bailment, either before or after the performance of the carriage, when the goods have been placed in the care of an agent of the carrier.

Article 17.- Loss exists when the goods have actually perished.

Damage means any decrease in value of the goods. There is delay when carriage has not been performed within the fixed time or, failing an agreement on such a time, within the time reasonably required by circumstances.

Article 18.- Liability for loss of the goods, damage thereto or delay in delivery, based on a contract of carriage, is submitted, in most countries, to the general rules of contracts and in other countries to stricter rules.

What brings about contractual liability is the presence of a negligence. Although most continental codes have rejected the theory risk which holds that negligence is not necessary in order that the debtor's liability arises, this theory, in some countries, has influenced considerably the decisions of the Courts. This is especially the case



in France, where the Courts recognize exemption from liability only in case of accidents due to external events, such as cannot be foreseen (force majeure). Whether evidence that no negligence exists is sufficient to release the debtor, or whether evidence of force majeure is required, it is to be presumed that the practical result, on the while, will be the same, because, all considered, in the second case the proof of force majeure may always be obtained through all legal means, hence also by presumption.

Among internaional conventions, The Hague Rules and the Warsaw Convention uphold the theory of negligence while the Bern Convention applies, in principle, the theory of risk.

According to the Preliminary Draft, the factor that constitutes the liability of the carrier for loss, damage or delay is that such prejudice should be caused by a negligence of the carrier or of his servants. But, as in all laws and conventions establishing the theory of negligence, the burden of proof lies with the carrier. The consequence is that the carrier is liable not only when the negligence has been established, but also when the cause of loss, damage or delay cannot be discovered or proved.

Moreover, in as much as article 18 establishes that the carrier is not liable if he proves that the negligence of his servants has not contributed to the loss, damage or delay, it is to be inferred that carriers are liable for the negligence of their servants.

Article 19.— It has been found that the adoption of the rule established by article 18, concerning the burden of proof with regard to the absence of negligence without exception, would involve a much too binding liability for carriers. Occasionally the proof of the absence of negligence is, owing to the force of circumstances, impossible, even when everything leads to deem that the carrier has nothing to do with the cause of non-performance. In those cases it may be unfair to demand that proof from the carrier. For these reasons it has been proposed in article 19 to modify the rule established in article 18

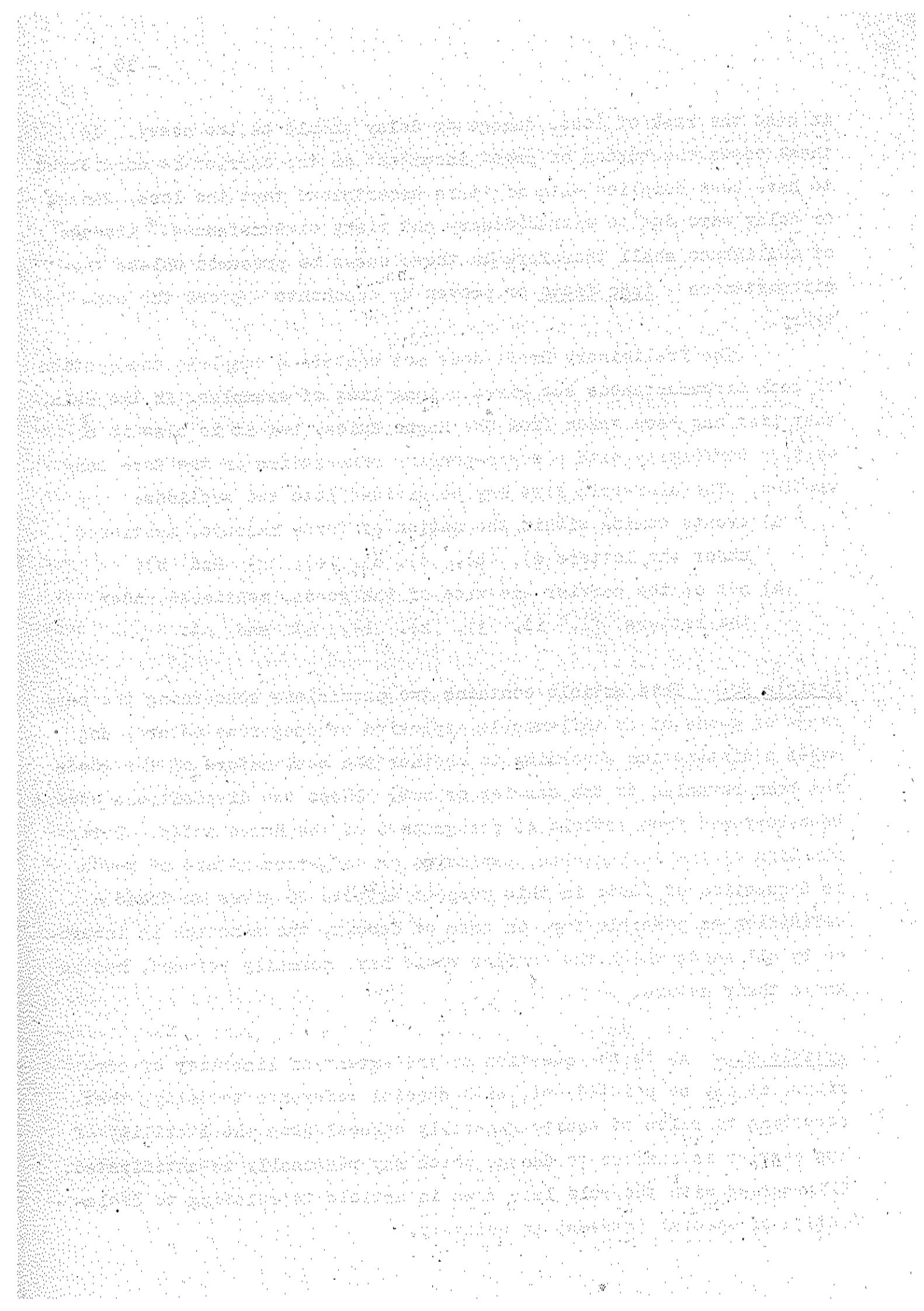
in case the risk of loss, damage or delay should be too heavy. In these cases the burden of proof incumbent on the carrier is considered to have been complied with if it is ascertained that the loss, damage or delay were due to extraordinary and risky circumstances. Absence of negligence shall therefore in these cases be presumed unless the circumstances - ipso facto or proven by opponents - prove the contrary.

The Preliminary Draft does not contain a complete enumeration of such circumstances but gives a long list of examples. In the main, that list has been taken from The Hague Rules, but it is also in a certain conformity with a corresponding enumeration in the Bern Convention. The aforesaid list may be divided into two sections:

- a) events coming within the notion of force majeure, mentioned under the letters a), b), c), d), e), g) and h);
- b) act of the carrier and vice of the goods, mentioned under the letters f), i), j), k), l), m) and n).

Article 20.- This article contains two provisions concerning the carriage of goods of an inflammable, explosive or dangerous nature, and makes a distinction according to whether the real nature of the goods has been revealed to the carrier or not. Those two dispositions have been borrowed from article 4, paragraph 6 of The Hague Rules. Determination of the inflammable, explosive or dangerous nature of goods is a question of fact: in this respect article 20 gives as broad a definition as possible for, in case of deceit, the sanction is incurred by all goods which the carrier would have normally refused, had he known their nature.

Article 21.- As to the question of the extent of liability of carriers, it may be pointed out, with special reference to delay, that according to rules of equity generally acknowledged the liability of the carrier is limited to damage which may reasonably be anticipated. This agrees with the rule laid down in article 24 relating to declaration of special interest in delivery.



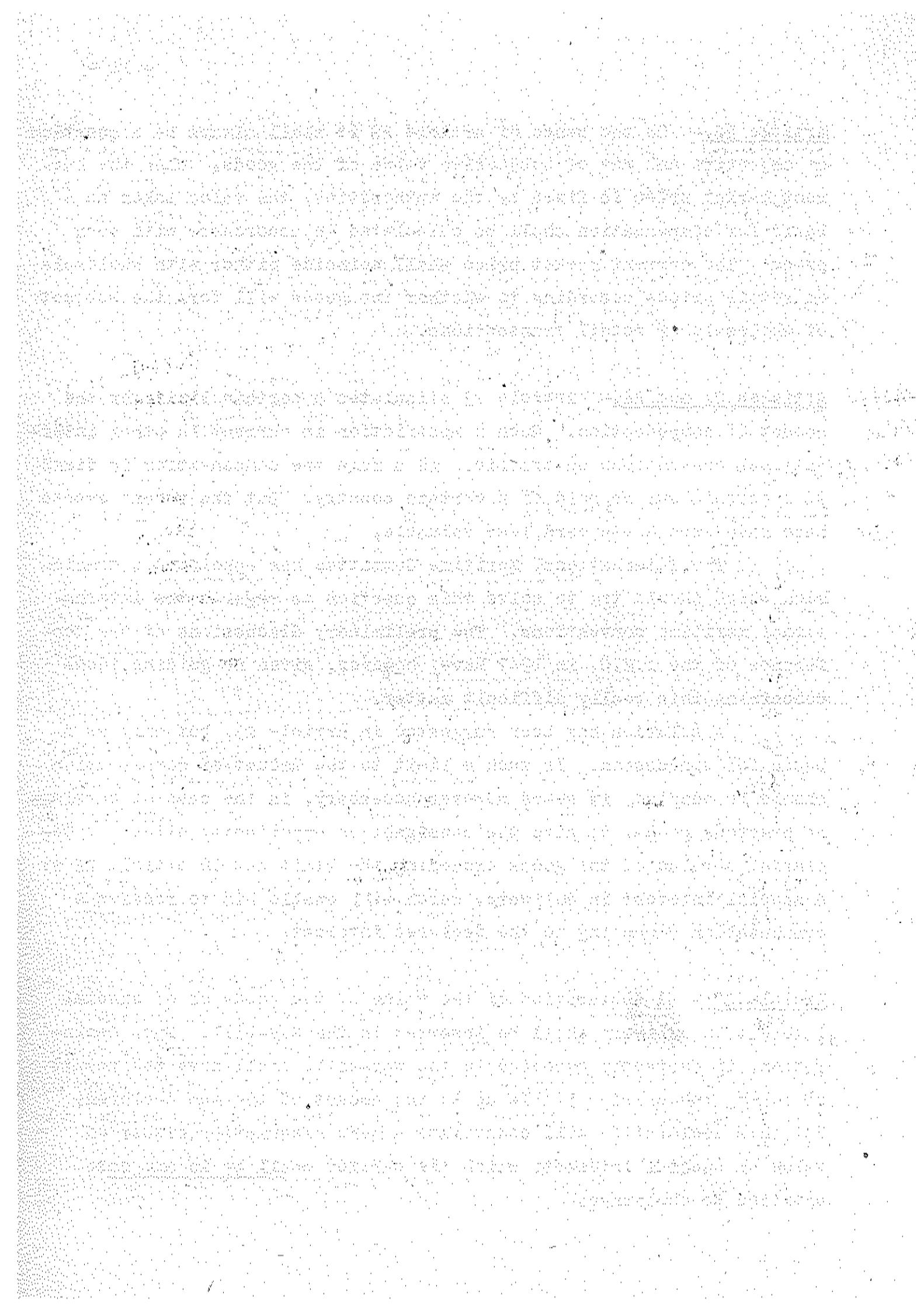
Article 22.- On the sense of article 22 it shall always be a question of objective and not of subjective value of the goods. When the current market price is fixed by the authorities, the value taken as a basis for compensation shall be calculated in accordance with such price. The current market price shall coincide either with wholesale or retail prices according to whether the goods will form the subject of wholesale or retail transactions.

Articles 23 and 24.- Article 23 stipulates a certain limit for the amount of compensation. Such a restriction is current in other international conventions on traffic. As a rule the compensation is fixed to a certain sum in gold of a certain country. But the recent events have made such a standard less valuable.

The International Maritime Committee has appointed a commission which should try to solve this question as regards the international maritime conventions. The preliminary discussions at the conference of the I.M.C. in 1947 have, however, given no guiding ideas concerning this really difficult matter.

A solution has been suggested in article 23, but only as a basis for discussion. If such a limit to the amount of compensation should be adopted, it seems however necessary, in the case of carriage of precious goods, to give the consignor an opportunity either of declaring a value of the goods exceeding the limit set in article 22 or a special interest in delivery, which will enable him to receive a compensation amounting to the declared interest.

Article 25.- A declaration of the value of the goods or of special interest in delivery shall be inserted in the way-bill. Such declaration, if correctly embodied in the way-bill, shall have the result of making the carrier liable up to the amount of the sum declared. But this declaration will constitute a mere presumption either of value or special interest, which the carrier shall be in any case entitled to challenge.



Article 26.— A distinction is made in the Preliminary Draft between wilful wrongdoing of the carrier himself on the one hand and of any of his servants on the other. The limitation is consequently ineffectual in case of wilful misconduct or gross negligence on the part of the carrier, but not in that of wilful misconduct or gross negligence on the part of his servants. As the Preliminary Draft allows the carriage of valuable goods without any exception, it was not deemed possible to make provisions for the unlimited liability of the carrier which might amount to a very large sum if, for example, one of his servants made a gross negligence.

Article 27.— The financial resources of carriers by road are often rather limited. The point in question is whether it would be possible to prescribe to carriers either a credit insurance so that their solvency be guaranteed, or to effect a civil liability insurance against the consequences of loss, damage or delay in delivery of the goods entrusted to them.

It seems, however, impossible to realise in practice the idea of a credit insurance. Even if such insurance might be obtained the claims of the insurers and especially the premiums would presumably be so high that one could not possibly consider to introduce compulsory rules in this respect.

It seems also difficult to arrange a compulsory liability insurance. It is necessary that the interest of the carriers and above all of their servants in taking proper care of the goods in their charge should not be diminished; and that the freight should not be higher than if the risk lies with the consignor, because the premiums to be paid for insurance covering all the carriage performed by the same carrier are rather high. In this case the premiums will be probably calculated on the average basis of a high value of the goods.

A solution has been suggested in this article only as a basis of discussion.

the first time, and I am sure it will be the last. I have been to the
country twice before, and I have never seen such a scene of desolation
and misery. The people are starving, and there is no food to be had.
The roads are muddy and difficult to travel on, and the weather
is hot and humid. I have been trying to find a way to help the
people, but I have not been able to do much. I have been
thinking about what I can do, and I have come up with a few ideas.
I think we could start by providing food and water to the
people who are most in need. We could also try to find a way
to get them to grow their own food, so they can have a more
stable source of nutrition. I also think we could try to
find a way to get them to build better houses, so they can
keep themselves dry and cool. I am not sure if any of these
ideas will work, but I am willing to try anything to help
these people. I hope that one day we can make a real
difference in their lives.

Article 28.— Most national Codes recognize the principle that once the goods have been delivered to the party entitled to them and unreservedly accepted by him, the carrier is considered legally to have fulfilled his obligations under the contract; so that no action arising out of the contract of carriage may be brought against him. Some codes have mitigated this estoppel by making generally a distinction between latent and apparent damages, with the object of allowing a certain period within which to sue the carrier for liability by reason of damages of the first kind. This period varies from one country to another.

This estoppel was done away with in the Preliminary Draft, in harmony with The Hague rules: the receipt of goods without any protest does not entail any loss of rights, but only a presumption of the proper state of the goods at the time of their delivery. It is quite possible that the fault may be noticeable to the chief, to the craftsman but not so to his employee who fetches the goods. The adoption of a rule tending to consider the acceptance of goods not as a presumption but as a definitive acknowledgment of their good state at the time of their receipt would involve acceptance of the good by the most qualified person only.

Article 29.— This article determines the country in which an action for compensation may be brought. The determination of the competent court shall be made taking into account the law of the country to whose court the matter may be referred.

Article 30.— Laws on carriage in most countries as well as international law on carriage have adopted the principle that legal relations between contracting parties, arising out of a contract of carriage, must be finally settled in the shortest possible time. Moreover, the carriage law provides that actions not barred by acceptance of the goods by the consignee are subject to periods of limitation shorter than those provided by private law of the various

States. In fact, actions arising out of the contract of transport are generally barred after one year. Then seems to be no reason for contemplating, in international carriage by road, a period of limitation longer than the one provided for national carriage and for international carriage by sea and rail.

Article 31.— In the field of successive carriage two cases must be distinguished:

- a) The goods are conveyed to their place of destination by successive carriers. The consignor enters into a contract with each successive carrier.
- b) The consignor has to deal only with the first carrier who undertakes to have the carriage performed by successive carriers from starting point to destination. In this case, it is only question of a single contract.

Articles 31 to 37 refer to carriage by road performed by several successive carriers under the terms of a single contract.

Article 32.— This article lays down a rule founded on the principle (established in article 33) that the successive carriers are liable for the goods to the interested party, as well as on the principle (established in article 34) that the successive carriers are entitled to claim against each other.

The part of the way-bill which accompanies the goods shall have on the relations between successive carriers the same value of evidence as a way-bill on the relations between carriers on the one hand, and either consignor, or consignee, or legitimate holder of the negotiable part of a way-bill to order or to holder, on the other. As a rule, the part of the way-bill which accompanies the goods shall be of importance when it is a question of establishing where took place the fact which, during the carriage, has caused the loss, damage or delay for which the person entitled claims compensation.

the first time I have seen a specimen of the genus. It is a small tree, 10-12 m. high, with a trunk 15 cm. in diameter. The leaves are opposite, elliptic-lanceolate, 15-20 cm. long, 5-7 cm. wide, acute at the apex, obtuse at the base, with a prominent midrib and prominent veins. The flowers are numerous, white, bell-shaped, 1.5 cm. long, arranged in terminal cymes. The fruit is a small, round, yellowish-orange drupe, 1 cm. in diameter. The bark is smooth and grey.

Article 33.— In case of loss, damage or delay, the person entitled to the goods, will have a right of action against the first or the last carrier, even when the cause of the loss, damage or delay is obviously imputable to the other carriers. The first carrier, by undertaking to forward the goods to their destination, has engaged for the whole carriage and is consequently bound to perform it.

It would be unfair to refuse the person entitled (as a rule the consignee) the right to bring an action against the last carrier, because the consignee would be in a difficult condition if he should bring an action against the first carrier or bring evidence of the negligence of one of the intermediate carriers. According to the Preliminary Draft, a liability action may be brought against the last carrier even if he has not received the goods.

The person entitled may also bring an action against the intermediate carrier who performed the carriage during which loss, damage or delay took place.

The first and the last carrier, as well as the carrier who performed the carriage during which the loss, damage or delay took place, shall be jointly and severally liable to the person entitled. For example, if the action brought by the consignee against the last carrier has failed, the consignee shall be allowed to sue either the first carrier or the carrier who was entrusted with the care of the goods when the damage took place.

Articles 34 and 36.— These articles establish the right of the carrier who, under the provisions of this Convention, has paid compensation for loss, damage or delay without being the only carrier liable for them, to claim against all the other carriers associated in the carriage. On the whole, the Preliminary Draft has agreed to apply to this matter the same regulations contained in the Berne Convention.

Article 37.— The stipulations regulating the relations between carriers are not compulsory. They are applicable only when the carriers have not settled this matter otherwise between themselves. The question how the liability should be divided between the carriers concerns the carriers themselves only; they are at liberty to discuss it, if they desire. This point is distinctly mentioned in this article.

Article 38.— This article settles the difficult question of the liability of those who, without being carriers, have goods in their charge which are on their way under a contract of carriage subject to the Preliminary Draft. The carriers are liable for the performance of the carriage from the place of departure to the place of destination either towards the consignor, the consignee or the holder of the negotiable part of the way-bill. During the carriage, the carriers may have to apply to independent intermediary agents who are not carriers by road: for instance to unload and reload the goods, to store them etc.. Moreover, if the way-bill covers the carriage from warehouse to warehouse, the carrier may be obliged to pass the goods to the customs for examination before the whole of the carriage is executed and then deliver them to the consignee. He may then be liable for what might happen to the goods while they are in the care of the Customs. The carriers ought in this case to be reimbursed for what they have had to pay as a compensation for loss, damage or delay, if these have taken place during the period when the intermediary enterprises mentioned above or the customs, in the case of carriage "from warehouse to warehouse", have had the goods in their care.

Article 39.— Clauses to be considered interdicted are: first of all "negligence clauses"; then all "quantity, quality and weight unknown" clauses, exclusion of risks other than those established by the Draft, determination of an amount of compensation inferior to that provided for in the Preliminary Draft and finally the clause inverting the burden of proof. The nullity of such clause does not involve the nullity of the contract, which remains subject to the terms of the Preliminary Draft.

