has been concluded but does not state a price or make provision for the determination of the price, the buyer shall be bound to pay the price generally charged by the seller at the time of the conclusion of the contract. The price fixed according to weight will be determined, in case of doubt, by the net weight. The buyer is required to pay the price at the seller's place of business or at his habitual residence, and in the case of price to be paid against handing over of the goods or documents, at the place where such handing over takes place[111] on the date agreed by the contract or fixed by usage.[112] Article 57 appears to be an attempt to incorporate the concept of the legally binding content and effect of a declaration. The buyer is obliged under the ULIS to pay the price generally charged by the seller at the time of the conclusion of the contract even if the price is much higher than the normal price for such goods. The price generally charged by the seller would apply even if it was unknown to the buyer and it could not be assumed from the circumstances that it was known to him. Further, the ULIS leaves unresolved cases where the purchase price has not been agreed to expressly or tacitly. The normal commercial practice is that the price means the usual price generally agreed on for similar goods at the same place. In the light of prevailing commercial practice, the rule under the ULIS is open to criticism as thereunder no effective contract of sale would have come into being in such cases.[113] Failure of the buyer to pay the purchase price may amount to a fundamental breach of contract and attract *ipso facto* avoidance of the contract.[114] The buyer further has to take steps to make provisions for or guaranteeing payment of price, such as the acceptance of a bill of exchange, the opening of a documentary credit or the giving of banker's fee.[115] The provisions of Article 69 have not taken into account the many disputes which could arise between buyers and sellers about documentary credits, as for example, disputes over contracts providing for a letter of credit without specifying its precise contents, the time of opening the credit or the amount involved.[116]

111. Article 59 of the ULIS.

112. Article 60 of the ULIS.

113. Austria-UNCITRAL UN Doc. A/CN. 9/11, p. 8.

114. Article 62 of the ULIS.

(xix) Breach of Contract

The ULIS is original in its regulation of the breach of contract. It establishes two categories for such cases within every type of breach of contract according to whether or not their existence makes it possible to avoid the contract and the gravity of the breach.

The ULIS provides that generally where there is a "fundamental breach" of the contract, the contract can be *ipso facto* avoided. What may amount to a fundamental breach under Article 62 is failure to pay the price at the date fixed ; under Articles 26 and 30, the failure to deliver the goods at the date or at the place of performance fixed; under Article 27, the failure to deliver the goods at the date fixed with the option to the buyer that he may require performance by the seller or declare the contract avoided. Silence on the part of the buyer in these circumstances has the effect of the contract being *ipso facto* avoided. Failure to perform their obligations within the additional period also amounts to fundamental breach of contract.

Apart from the drawback that it is left to the subjective judgment of the parties to determine whether there has been a "fundamental breach of contract" and at the same what might constitute fundamental breach in one country but not in another, there are no guide-rules for determining what and when breach of contract is fundamental. The subjective

115. Article 69 of the ULIS.

116. Japan-UNCITRAL, UN Doc. A/CN. 9/L. 16/Add. 5, p. 30.

estimation might in practice give rise to difficulties resulting from a natural tendency to exaggerate the importance of any breach, no matter how trivial.[117]

The solutions for contract avoidance may also unnecessarily lead to increase in the number of avoided contracts.[118] Further, the ULIS is inconsistent in that it does not provide for *ipso facto* avoidance if the goods have been handed over by the carrier at a place other than that fixed.[119] In the case of defective performance, there is no *ipso facto* avoidance. Though this is understandable as far as the inter-connection between the changes in the market prices and delay are concerned, but it may primarily be deterimental to the developing countries and to the weaker parties in general.[120]

One of the most important questions of the breach of contract is the consideration of the circumstances of non-performance. It establishes exemptions relieving the party in default of his liability for damages.

On a breach of a contract due to non-conformity of the goods, the buyer under Article 46 may keep the non-conforming goods and "reduce the price in the same proportion as the value of the goods at the time of the conclusion of the contract has been diminished because of their lack of conformity with the contract."

This raises the question of whether in the circumstances a buyer is justified in rejecting the goods and refusing to pay anything. The ULIS makes a major departure from the traditional common law doctrine of strict performance of a contract for the sale of goods. Under Article 43, the buyer has the unqualified right to "declare the contract avoided" and reject the goods only if a "fundamental" breach of the

117. U. A. R.-UNCITRAL, UN Doc. A./CN. 9/11 Add. 3, p. 26.

118. Hungary-UNCITRAL, UN Doc. A./CN. 9/11/Add. 3, p. 17.

119. Article 32 of the ULIS.

120. Hungary-UNCITRAL, UN Doc. A/CN. 9/11/Add. 3, p. 17.

contract is involved. Under Article 10, a breach is "fundamental" when "the party in breach knew or ought to have known at the time of the conclusion of the contract, that a reasonable person in the same situation as the other party would not have entered into the contract if he had foreseen the breach and its effects." What "a party knew or ought to have known" is "what should have been known by a reasonable person in the same situation" under Article 13.

Further, Article 44 which is based on the German concept of *Nachfrist* provides that after a breach that is not "fundamental" the seller retains, even after the delivery date has passed "the right ..to deliver other goods which are in conformity with the contract....., provided that the exercise of this right does not cause the buyer either unreasonable inconvenience or unreasonable expense." The buyer is permitted to "fix an additional period of time of reasonable length for the further delivery or for the remedying of the defect; and if the seller has not performed within this period, the buyer may avoid all obligations under the contract.

Article 62 of the ULIS provides that where the failure of the buyer to pay the (purchase) price at the date fixed amounts to a fundamental breach of the contract, the seller may either require the buyer to pay the price or declare the contract avoided. The seller shall inform the buyer of his decision within a reasonable time, otherwise the contract shall be *ipso facto* avoided. Where such failure to pay is not a fundamental breach, the seller may grant to the buyer an additional period of time and if the buyer fails to pay at the end of such period, the seller may either require payment or provided he does so "promptly", declare the contract avoided. This Article does not make clear what would be the position relating to delivery of goods. If the goods have been delivered, and the contract is *ipso facto* avoided in the circumstances mentioned, it might create difficulties; it might be sufficient that the seller has the right to declare the contract avoided where delivery has not taken place; the

seller to declare the contract avoided ought be maintained as long as the delay in the delivery continues.[121]

(xx) Avoidance of contract

The ULIS provides for avoidance of the contract, it appears, when a contracting party may not be able to perform his obligations under the contract.

(a) Anticipatory fundamental breach

The rule contained in Article 76 provides as a preventive measure that if before the date of performance it is clear that one of the parties will commit a fundamental breach of the contract, the other party may declare the contract avoided. Prof. Turc in his commentary on the ULIS wrote: "It is not right that one party should remain bound by the contract when the other has, for instance, deliberately declared that he will not carry out one of his fundamental obligations or when he conducts himself in such a way that it is clear that he will commit a fundamental breach of contract." This practice has its origin in the common law, but is unusual in the civil law systems.

This Article suffers from the dangers of subjective satisfaction of a party to the contract, since it is vague as to what is the basis for determining the anticipated breach of contract. Supervision of a contract is a much easier practice to apply since it involves nothing irrevocable; avoidance, which destroys the contract, is much more serious, particularly since it can be based merely on suspicion of a failure to perform.[122] The Article places at the disposal of any contracting party who is deceitful or in bad faith a weapon by means of which he may, at any time, avoid a contract which has become a great burden to him—this particularly is dangerous for developing countries, because it could deprive

121. Norway-UNCITRAL, UN Doc. A.CN. 9.11, p. 29.

122. Phillipee Kahn, *Revue Trimestrielle De Droit Commercial*, 1964, p. 727.

them (sometimes for reasons unconnected with the contract) of goods essential for their development or security.[123]

(b) Unforeseen circumstances

A party, under the provisions of Article 74 of the ULIS will not be liable for non-performance of one of his obligations if he can prove that it was due to circumstances which, according to the intentions of the parties at the time of the conclusion of the contract, he was not bound to take into account.

Under English law the problem of the consequences of frustration was dealt with by apportioning the losses between the parties according to the justice of the circumstances.

This Article was not sufficiently clear and appeared to have an excessively subjective character. It should include that the party who wishes to be relieved of his liability for non-performance should have a duty to notify the other party of the impediment so that failure to notify would entail liability to pay damages for the loss sustained by the other through lack of notification.[124] Further, it does not say anything about denial or revocation of export or import licences or about governmental intervention of any other kind, or of any specific type of contingencies that will or will not excuse unless the parties expressly provide otherwise.[125]

(c) Stoppage of goods in transit

Article 73 of the ULIS authorises each party to suspend the performance of his obligations when "after the conclusion of the contract, the economic situation of the other party appears to have become so difficult that there is good reason to fear that he will not perform a material part of his obligations."

123. U.A.R., UNCITRAL, UN Doc. A/CN. 9/11/Add. 3, p. 25.

124. Norway, UNCITRAL, UN Doc. A/CN. 9/11, p. 26.

125. H. Berman : "Uniform Law : A Comparative Critique" in 30 *Law and Contemporary Problems* (1965), p. 354

If the seller has already despatched the goods before such situation of the buyer becomes evident he may prevent the handing over of the goods to the buyer if the latter holds a document which entitles him to obtain them. This principle is a precautionary measure dictated by a concern to give the party threatened by a disturbance in other contracting party's economic situation an opportunity to take the necessary steps to avoid the unfortunate consequences of such a situation. Many national laws permitted stoppage *in transitu*, but this possibility was confined to cases where the competent authority had adjudged a party bankrupt or insolvent.

This provision, in that it regulates the obligations of the carrier also, conflicts with the provisions of municipal and international law concerning the carriage of goods. It also places an unreasonable burden on the carrier.[126] Further, questions may arise when goods are transhipped, whether a carrier or warehouse is the agent of the seller or of the buyer, and whether, therefore, the goods remain in transit or have, from the seller's point of view, come to rest.[127] The rights and duties of the bailee that may arise are also not certain.

It is feared[128] that this provision leaves it to the party concerned to evaluate both the economic situation of the other party and the extent of obligations which will not be performed. This is likely to leave the weaker party at the mercy of the stronger one, particularly in the context of the developing countries. The seller would be entitled to decide unilaterally [or under Article 73 (1) either party] that the other party was in a precarious economic position and would then be entitled to stop the delivery of the goods *in transitu*. The subjective satisfaction of the party would be sufficient.

However, if the seller availed himself of the Article and stopped the goods *in transitu* and the buyer challenged the

126. Austria, UNCITRAL, UN Doc. A/CN. 9/11, p. 9.
127. H. Berman : *op. cit.*
128. UAR, UNCITRAL, UN Doc. A/CN. 9/11/Add. 3.

action of the seller, it would be for the Courts to decide whether the seller's decision had been warranted.[129] But this would amount to putting the cart before the horse since this provision could be misused by a contracting party wishing to extricate himself from his obligations, or actuated by malice, would only have to make such a claim in order to deprive the other party, even if only for a certain period, of the benefit which he hopes to derive from the contract. For a developing country, that benefit might represent a vital need.[130]

(d) Effects of avoidance of contract

If a contract has been avoided, both contracting parties are released from their obligations under the contract, subject to any damages that may be due. If the party has performed the contract partly or wholly, they are entitled to claim restitution.[131] However, if it is not possible for the buyer to return the goods in the condition in which he received them, he cannot declare the contract avoided.[132] In certain circumstances[133] he may declare the contract avoided even if the goods have perished or deteriorated.

In case of avoidance of contract, the party declaring the contract avoided may claim damages[134] according to the provisions of the ULIS relating thereto.[135] Damages are to be calculated on the basis of the difference between the price fixed by the contract and the current price on the date on which the contract is avoided.[136] When there is no such price,

129. U.K., U.S.A., Italy, UNCITRAL, UN Doc. A/CN. 9/L. 16/Add. 3.
130. UAR, UNCITRAL, UN Doc. A/CN. 9/11/Add. 3, p. 24.
131. Article 78 of the ULIS.
132. Article 79 (1) of the ULIS.
133. Article 79 (2) of the ULIS.
134. Article 77 of the ULIS.
135. Article 84 of the ULIS.
136. Article 84 (1) of ULIS.

the current price to be taken into account shall be that "prevailing in the market in which the transaction took place.[137]

It may be pointed out[138] that in the present state of international trade, there is no single current price. It is, however, difficult to ascertain the place where the "transaction" (the significance of which is also not clear) took place : whether it is the place where the preliminary negotiations took place, or the place where the contract was concluded, or where the contract was executed. Difficulties may arise in determining the place of "transaction" since it is rare for an international sale to be concluded or executed in a single place. It has been suggested[139] that it might be simpler to take the current price prevailing in the place where the seller has his place of business (or residence) and to judge the price to decide in cases where it would be inappropriate to apply the price.

The relevant date to determine the price is, under the Article, the date on which the contract was avoided. This might encourage the party avoiding the contract by declaration to engage in speculations. There is less chance if the relevant date is made the date of delivery.[140]

(xxi) Passing of risk

Under the Uniform Law passing of risk has been made concomitant with the delivery of goods, which has to be effected in accordance with the provisions of the contract and the Uniform Law.[141] Where the sale is of goods in transit by sea, the risk is transferred to the buyer when the goods are handed over to the carrier.[142] This does not apply where the

137. Article 84 (2) of the ULIS.
138. UAR, UNCITRAL, UN Doc. A/CN. 9/11/Add. 3, p. 27.
139. UAR, *Ibid.*
140. Austria, UNCITRAL, UN Doc. A/CN. 9/11, p. 10.
141. Article 97 of ULIS.
142. Article 99 (1) of the ULIS.

seller knew or ought to have known that the goods had been lost or had deteriorated. Once the risk has passed, the buyer's liability is to pay the price notwithstanding any loss or deterioration of the goods, unless it is due to the act of seller.[143] The concept of 'risk' is not defined and judging from Article 96 of the ULIS, it refers only to the buyer's obligation to pay the price notwithstanding the loss or deterioration of the goods.[144] The basic idea under ULIS is simple; the seller carries the risk so long as he had the duty to preserve the thing and the buyer is not required to free him of that duty. If the buyer is late in taking delivery, the transfer of risks will run from the day his lateness started.[145] However, where the goods are unascertained goods, passing of risk is suspended until goods have been manifestly appropriated to the contract, and the buyer has been notified that that has been done, i.e., when the seller has done[146] "all acts necessary to enable the buyer to take delivery." Taking delivery is defined by Article 65. In other words, the passing of risk is effected by "supply". A provision concerning expenses does not of itself affect the passing of risk.[147]

These provisions of the ULIS, in addition, permit the parties to arrange for the risk to assume in a manner other than that provided in the ULIS.[148]

Under Article 97 of the ULIS, risk of loss generally does not pass until conforming goods are delivered to the buyer or carrier. This is also the general rule of the American Uniform Commercial Code, Sections 2-509, but some European

143. Article 96 of the ULIS.
144. Article 96 of the ULIS.
145. L. A. Ellwood: "The Uniform Law..." in *Some Comparative Aspects of the Law Relating to Sale of Goods.* (ICLQ Supp. 9, 1964), p. 39
146. Article 98 (2) of the ULIS.
147. Article 101 of the ULIS.
148. Mexico, UNCITRAL, UN Doc. A/CN. 9/11. Add. 1, p. 22.

laws[149] provide that, subject to exceptions, risk of loss passes when the contract is entered into. On the problem of passing of risk turn several questions equally important in international trade, who must provide insurance, salvage damaged goods and press a claim against the insurer.

The ULIS does not employ the concept of property—(as is the case with most common law countries)—but uses instead the concept of 'delivery'. Article 97 provides that risk passes to the buyer "where delivery of the goods is effected." Article 19 defines "delivery" as "the handing over of the goods which conform to the contract."

But for a typical commercial sale which involves shipment by an independent carrier, this simple basic rule is most inadequate. Article 19 of the ULIS briefly provides "that where the contract of sale involves carriage of the goods and no other place of delivery has been agreed upon, delivery shall be effected by handing over the goods to the carrier for transmission to the buyer." This rule holds even if the seller reserves control over the goods through a negotiable bill of lading.

Further,[150] where the parties agree to accept well-known delivery clauses (e.g. *Incoterms*) no problems would arise. Where, however, this was not the case, the ULIS did not provide a clear solution to the problem, for instance, in cases where goods were delivered to a carrier or in the case of subsequent transhipment. It would be difficult to solve the problems arising in such cases in the light of "general principles" on which ULIS is based, as provided in Article 17 thereof.

Article 98 (1) (which provides for passing of risk when the handing over could have been made in accordance with the contract in a case where delay in delivery is owing to the

149. Such as Article 185 of the *Swiss Code des Obligations*.

150. ICC, UNCITRAL, UN Doc. A/CN. 9/L. 16/Add. 5. p. 33.

breach of an obligation of the buyer) could produce unfair consequences. For instance, if the handing over of the goods is delayed owing to the non-performance of accessory obligations of the buyer which he was unable to perform owing to circumstances pertaining to him but through no fault of his, then according to Article 74 he has not committed a breach of those accessory obligations because he was relieved of them, and the risk will then continue to be borne by the seller, even though the non-performance was solely for reasons pertaining to the buyer.[151]

(xxii) Transfer of property

As stated earlier, the drafters of the Uniform Law have segregated the doctrine of risk of loss from that of property and have avoided defining the questions concerning the transfer of property of the things sold, especially excluding the effect which the contract may have on the property in the goods sold from the purview of the law.[152] They were of the opinion[153] that the problem of passing of property was dependent on entirely distinguishable legislative policies and was more a lawyers' problem, being alien to the minds of merchants.

However, irrespective of transfer of property in the goods, the buyer's remedy in certain cases is to claim damages where the goods are subject to a right or claim of a third person. The buyer if he suffers loss may claim damages, unless it is a fundamental breach of contract, when he may declare the contract avoided[154] provided that the buyer has notified the seller of such right or claim within a reasonable time from the moment he became or ought to have become aware of the same.

151. Austria, UNCITRAL, UN Doc. A/CN. 9/11, 4.

152. Article 8 of the ULIS.

153. Prof. E. Rabel: Report in UNIDROIT-General Survey, p. 57, 59.

154. Article 52 of the ULIS.

The ULIS does not also make the obligation to pay the price depend upon the transfer of property in the goods, thus reflecting the modern statutory law or judicial practice of most countries and separating passage of risk from passage of title.

The concept of 'property' is most elusive and has different significance for different parties, different interpretations in different countries. The transfer of property in trade is made not by a single act but successively. The ULIS links passing of the risk not to the transfer of property, nor does it provide for the date of transfer of property; it only makes an obligation of the seller to transfer the right to property. Articles 52 and 53 in Section III entitled "transfer of property" under Chapter II of the ULIS deal only with transfer of property in the case of litigation.

The general conception prevails that should a place of delivery not be agreed upon the buyer assumes the responsibility only when the goods quit the possession of the seller, and the buyer acquires the right of possession only when the goods may be disposed of by him.

In the common law countries a sale is defined as a contract by which the property in goods is transferred from the seller to the buyer. If the passing of property is postponed to future date or until the fulfilment of a condition, then the contract is not a sale but only an agreement to sell and will become a sale only when the property is transferred. As soon as the contract of sale is concluded, property together with the risk in the goods is transferred to the buyer. The whole object of the sale is to transfer the property to the buyer.

In pure Roman law and Roman Dutch law, although the sale is said to be complete (or *perfecta*) when there is unconditional agreement upon the thing to be sold and the

price, ownership of the property does not pass at once. There must first be a delivery of physical possession, as well as payment of the price by the buyer or giving of credit by the seller. In theory, the object of the sale is not to pass ownership but only possession, but in practice this is not so.

The sale as the modus for transmission of property in goods is not uniformally recognised in every legal system. Sometimes laws make a great difference between the agreement as an origin of obligations and delivery as the acquisition of the absolute right of property. Moreover, it is not even universally admitted that the seller is bound to transfer property as in the case of an auction sale a thing belonging to another and the right of the owner of stolen or lost goods against a bonafide purchaser in good faith, in the ordinary course of business.

According to the French,[154a] Italian[155] and British laws, simple consent of the parties effects the transfer of property to the buyer. As opposed to this are the German,[156] Austrian, Hungarian, Swiss[157] and Dutch[158] laws.

According to English jurisprudence, in the case of contract for sale of indeterminate goods, the property is transferred only through the selection.

In Malaya, the law which is based on the English law, requires that the goods shall be in a deliverable state before peroperty can pass. Property cannot pass until the goods have been unconditionally appropriated to the contract with the assent of both parties. In a case where the goods are unconditionally appropriated and delivery of them has been tendered, the property in the goods cannot pass if the buyer

154a. Articles 711, 938, 1138, 1538, French Civil Code.
155. Arts. 1125, 1448, Italian Civil Code.
156. Section 929, German Civil Code.
157. Art. 199, Swiss Law of Obligations.
158. Arts. 639, 671, Dutch Civil Law.