circumstances which according to the purpose of the contract clearly fall within the sphere of risk of one of the parties do not as a rule entitle that party to rely on the collapse of the basis of the transaction [references]. This is not, however, the case here . . .

(c) In the present case it is decisive that player W, having been involved in an act of bribery at the time when he changed clubs, could no longer be considered a licensed or contractual player for personal reasons in accordance with the rules established by the German Football League and recognised as binding by the parties. In consequence of his entanglement in the scandal in the Federal League he was afflicted with a personal defect which excluded him altogether as a player, for *any* club, as the legal outcome of the matter in the German Football League shows. It is irrelevant that the parties were ignorant of this when they concluded the contract. What matters is the objective situation, not the subjective knowledge of the parties. W lost his personal qualification as a football player within the area of the German Football League when he acted contrary to the rules of sport and not only when this became known to the public. Consequently already at the time when he changed clubs he lacked the legal pre-requisites for being used by a club belonging to the German Football League. Such a player also loses his objective 'value' for his original club as a result of an act contrary to the rules of sport. If the defect adhering to the player is only discovered after the contract for a transfer has been concluded, this only discloses that the player had already lost the qualities which rendered him valuable for a club in the German Football League. Such a defect is to be attributed, as a rule, to his *old* club, for it originated in the latter's sphere.

(d) The Court of Appeal regarded as decisive for the distribution of the risk to what extent the misconduct with which the player must be charged touches in essence his internal relations with the club which employs him. It held that the nature of the obligation of a licensed player towards his club consisted in playing for and not against his club; accordingly it has placed the burden of the risk of any violation of this obligation on the club that employed him, even if the player migrates to another club later on. The Court of appeal has rightly placed the risk on the defendant as being the club which is 'more closely involved', having regard to the circumstances of the case, than the plaintiff. The fact that the player W was bribed in connection with the league match of the defendant in Bielefeld on 29 May 1971, which constitutes the cause of the disruption of the basis of the transaction represented by the contract of transfer, belongs to the 'sphere of risk' of the defendant not only from the point of view of time. The misconduct of the player is also directly connected with his activity for the plaintiff in sport and as an employee. In the light of such a situation it cannot be assumed according to good faith that the plaintiff assumed the risk.

5. The Court of Appeal held that as a result of the absence of the basis of the transaction the plaintiff is entitled to withdraw from the contract and has allowed the claim for the full repayment of the transfer fee. This too cannot be faulted on legal grounds.

(a) The absence or the failure of the basis of a transaction does not, of course, result in the complete elimination of the contractual relationship The release of one or of both parties to a contract from their contractual obligations must only be allowed in so far as good faith so requires. The first question is, therefore, whether the contract cannot be modified so as to accord with reality in a manner which takes into account the legitimate interests of both parties [references]. The Court of Appeal has observed these principles. It has held that a modification of the contract is excluded because the counter-performance of the defendant in releasing the player W prematurely was worthless in practice and, in particular, because an apportionment of the financial damage among both parties was ruled out in view of the obvious distribution of the risk. This conclusion, too, cannot be faulted . . .

Case 106
BUNDESGERICHTSHOF (EIGHTH CIVIL SENATE) 8 FEBRUARY 1984
NJW 1984, 1746

Facts

In 1977 the plaintiff, an Iranian importer, ordered from the defendant, a German brewery, 12,000 cases of export beer, 24 cans per case, at a price of DM15.36 per case. The price of DM184,320 was paid by draft on a bank in Teheran in July 1977. The goods were to be delivered c.i.f. Teheran, and were shipped in August 1977 from Bremen to a port in Iran, whence they were largely distributed inland. Investigations disclosed that about 40 per cent of the goods were damaged and unusable, and on 7 November 1978 the parties reached the following compromise: 'Until 31 May 1980 the plaintiff may buy cases of beer at a reduced price of DM9.30 . . . Payment of DM20,000 will shortly be made to the plaintiff's account in Teheran. The balance of the sum demanded as damages, a further DM20,000, will be paid on receipt of a draft in respect of 20,000 cases of beer . . .' The first DM20,000 was paid to the plaintiff by the defendant, but no more deliveries of beer were made nor was the further DM20,000 paid to the plaintiff. In January 1979 the Shah fled and Ayatollah Khomeini seized power in Iran. Since then, according to the plaintiff, the Islamic Republic has a total prohibition, on pain of death, of trade in alcoholic products and the importation of alcohol into Iran. The plaintiff wished to negotiate a further extra-judicial settlement, but the defendant would not consent, so the plaintiff in the present litigation claimed damages in respect of the useless beer in the amount of DM53,728 (ie, 40 per cent of DM184,320 = DM73,728 less DM20,000 already received).

The Landgericht gave judgment for the full amount, the Oberlandesgericht only in the sum of DM37,000. The [defendant's] appeal was dismissed.

Reasons

II.

1. . . .

(c) According to the court below, this was not a case of impossibility of performance, since the prohibition of importing alcohol into Iran did not affect the defendant's duty to make compensation for the harm it had caused. The parties do not challenge this, and the court was correct so to hold, at any rate in the result, since the plaintiff's obligations under the compromise were performed by the very act of making it (partial release, granting of delay, modification of the debt) and the defendant's obligations thereunder, namely to pay the further DM20,000 and to deliver discounted beer f.o.b. German ports as agreed in 1977, were perfectly capable of being

performed. The plaintiff was not bound to order any beer or to set up a credit line; these were options of the plaintiff and preconditions of the defendant's obligations.

(d) The court below was right—as the parties accept—to deny that the compromise was invalidated by para 779 BGB. Under this provision a compromise is invalid only when the actual underlying facts differed from those supposed by the parties. If, by contrast, expectations as to future events which the parties entertained at the time of the compromise are falsified by subsequent occurrences—such as here the political developments in Iran and their effect on the contract—para 779 BGB cannot invalidate the compromise [references].

(e) The court below was correct to start from the position that the basis of the transaction [*Geschäftsgrundlage*] of 7 November 1978 subsequently collapsed.

(aa) Even the appellant admits that, quite apart from para 779 BGB, para 242 BGB is applicable to a compromise. [reference].

(bb) The basis of a transaction consists of the common assumptions entertained by the parties at the time of the contract, or of an assumption of one of the parties, ascertainable by the other and not objected to by him, regarding the existence or future occurrence of circumstances, to the extent that the parties' intention to make the transaction is based on such assumptions [reference]. The court below held that the possibility of further deals between the parties was the basis of the transaction. The appellant's objection to this is misconceived. This was not simply a wish of the parties, even though it was frequently expressed, for only further dealings could achieve the economic purpose of the compromise, to make good the losses suffered by the plaintiff. The discount on the price of the beer could make sense only if the plaintiff could dispose of any beer it ordered. The finding that this assumption by the parties formed the basis of the compromise is not in conflict with the principle that a party may not, by invoking matters which fall within his own area of risk, claim that the basis of the transaction has collapsed [reference]. It is true that in commercial matters the risk of being unable to dispose of the goods normally falls within the purchaser's area of risk [reference], but the court below was right to point out that this was not a contract of sale but a transaction by which the defendant was to compensate the plaintiff for its losses. There is nothing to suggest that if the compensation envisaged by the compromise failed to materialise, the parties intended the loss to be borne by the plaintiff alone.

(cc) The basis of the compromise has collapsed. The court below found that trade in alcoholic drinks in Iran is forbidden. The appellant's objections are without merit . . .

(dd) This court has always held that the collapse of the basis of a transaction can only be invoked when otherwise there would be manifestly intolerable consequences inconsistent with law and justice and such as cannot be imputed to the party affected [references]. Nevertheless, the basis of a transaction may be held to have collapsed if the balance of the reciprocal obligations has been gravely disturbed by some intervening event [reference]. In this compromise the plaintiff, in return for waiving its right to sue in respect of the delivery of defective beer in August 1977, was to receive a given benefit in exchange, and is entitled to more than a fraction of that benefit.

The appellant objects in vain that the plaintiff should have foreseen the political developments in Iran. The parties' expectations—here of their future cooperation—may constitute the basis of a transaction even if they are aware that their expectations

may not be answered. According to the findings of the court below, to which the appellant makes no procedural objections, the possibility that these expectations might be frustrated was not so manifest as to prevent the plaintiff from invoking the collapse of the basis of the transaction.

(ee) Notwithstanding the collapse of the basis of the transaction, the court below upheld the compromise, but altered its terms. It was right to do so [references]. Only exceptionally do the rules of collapse of the basis of the transaction make the contract disappear *in toto*; the general rule is that the contract should be maintained so far as possible and simply adjusted to the changed situation so as to do justice to the justified interests of both parties [references]. The evidence does not suggest that if they had known how matters would develop, the parties would have refused to enter any compromise at all. After all, when the plaintiff notified him that the goods were defective, the defendant originally proposed a deal which made no reference whatever to further deliveries of beer. If the compromise is to be upheld, the prior legal situation is irrelevant, so it is immaterial how seriously the defendant questioned the size of the plaintiff's claim or whether the compromise was a very generous one on his part.

The way the court below set about adapting the contractual duties of the parties to the altered circumstances represents an exercise of an *ex officio* discretion of the judge of fact [reference]. The court divided the loss resulting from the collapse of the basis of the transaction equally between the parties. Such a division is quite in order when there is no reason to adopt a different division, and when the loss due to the disturbance cannot be loaded on to one of the parties only [references]. Nothing in the procedure suggests that either party has been burdened with more than half of the risk that the compromise might not be executed. Given the inadequacy of the evidence, the court below had to make a lump-sum estimate of some matters, such as the profit to be made from further sales of beer, but this lies within the area of the fact-finders and certainly does not suggest that adaptation of the contract is impermissible.

(ff) The precise way the court adapted the contract is also legally acceptable.

(gg) In order to work out the profit the plaintiff would probably have made had the compromise been executed, the court assumed that during the period when a discounted price was on offer it would have ordered 60,000 cases and made a profit of DM0.90 per case. Neither finding is irrational, as the appellant asserts. para 287 I ZPO, possibly by analogy, provides a basis for the court's estimate of the amount that might well have been ordered. In estimating the gain the plaintiff would have made had the compromise been carried out, the court arrived at an estimate of the amount of the plaintiff's loss. Since in fact the compromise was not carried out and no exact proof of the amount is available, para 287 I ZPO permits an estimate to be made [reference]. There is no reason not to allow a similar estimate when a contract is being adjusted after its basis has collapsed. The courts have constantly held that estimates made by judges of fact under para 287 I ZPO may be reviewed on appeal only to the extent that the evaluation has been made on obviously false or fundamentally irrelevant grounds or if facts with a critical bearing on the decision have been ignored. The estimate made by the court below survives such a review: . . .