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# Ships-Duty to Repair-Commercial Impracticability (Asphalt International, Inc. v. Enterprise Shipping Corp.)

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the FSIA superseded the act of state doctrine:

While purely commercial activity may not rise to the level of an act of state, certain seemingly commercial activity will trigger act of state considerations. . . . When the state *qua state* acts in the public interest, its sovereignty is asserted. The courts must proceed cautiously to avoid an affront to that sovereignty. . . . [T]he act of state doctrine remains available when such caution is appropriate, regardless of any commercial component of the activity involved.<sup>4</sup>

The court then applied a balancing test and concluded that issues concerning the availability of oil significantly affects international relations and to grant injunctive relief would cause insult to the OPEC states and interfere with the efforts of the political branches to seek favorable relief.

The court further noted the absence of an internationally accepted legal principle that would render OPEC's activity in restraint of trade, thus, judicial interference in the area would be inappropriate.

SHIPS — DUTY TO REPAIR — COMMERCIAL IMPRACTICABILITY — *Asphalt International, Inc. v. Enterprise Shipping Corp.*, 667 F.2d 261 (2d Cir. 1981).

Asphalt International, Inc. instituted this action against Enterprise Shipping Corporation, S.A. in the Southern District of New York alleging breach of contract for failure to repair a vessel chartered by Asphalt. Asphalt had entered into an agreement with Enterprise to charter the Oswego Tarmac. This agreement obligated Enterprise to repair and insure the vessel. It also relieved Enterprise of liability for losses resulting from collisions, unless otherwise provided for by agreement. While in Curaco, the vessel sustained extensive damage. Enterprise, believing the vessel was a total loss, sold it and collected the insurance proceeds. Thereupon, Asphalt instituted this action alleging that Enterprise had breached its duty of repair under the agreement and sought damages for lost business and expected profits. The district court dismissed Asphalt's cause of action on two grounds. The charter agreement provided for release of maintenance if the cost exceeded the pre-collision fair market value and the doctrine of commercial imprac-

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4. *Id.* at 1360.

ticability relieved Enterprise of its obligation to repair.

On appeal, the Second Circuit affirmed. In a unanimous opinion, Judge Kaufman concluded that the Enterprise's obligation to repair was discharged when the ship was found to be a constructive loss. The doctrine, which has its roots in marine insurance law, applies when the cost of repairing a damaged ship exceeds the pre-collision fair market value of the ship. When these facts are present, the owner may abandon the ship to the insurer as if it were a total loss. This doctrine was found to be unaltered by the charter agreement or custom in the shipping industry.

Turning to the doctrine of commercial impracticability, the court reasoned that a party's duty to perform a contract is excused if unreasonably excessive costs or a collision altered the terms of the agreement. Agreeing with the trial court's findings that the cost of repair exceeded the pre-collision fair market value, the court concluded that to impose a duty of repair would alter the contract.

The court also refused to estop Enterprise from asserting the doctrine as a defense merely because it had received insurance proceeds. It observed that the doctrine focuses on the reasonableness of the expenditure not upon the ability of a party to pay the commercially unreasonable expense.

