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DEHUMANISING THE HUMAN ELEMENT OF MARITIME MIGRANT SMUGGLING: A DISCUSSION ON THE APPLICATION OF HUMAN RIGHTS IN THE MARITIME SPHERE

By: Professor Patricia Mallia
(Vella de Fremeaux)* and
Dr Felicity Attard**

The Context

The principal subject of maritime migration and migrant smuggling is the individual. The backdrop against which this threat to maritime security should be perceived is that of human rights and humanitarian principles of protection. However, the dignity of the human person in maritime migrant smuggling has become nothing less than a tragedy characterised by its absence, a consequence of a battle between diametrically opposed interests, the current political climate and a failure of solidarity amongst States. There is a pressing need to balance conflicting rights and duties, where principles of State sovereignty come up against principles of protection; where jurisdictional notions clash with humanitarian considerations; and where the interests of States may not align with the mandates of international law. There is a glaring divide between what States want to do and what States are required to do under international law. These legal obligations play

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MANAGING EDITOR'S INTRODUCTORY NOTE

We begin this edition with a timely article on immigration, a pressing issue confronting Europe. The article is timely insofar as the United States is also, at the time of this writing and probably for years to come, confronting its own immigration issues. Our authors, Professor Patricia Mallia and Dr. Felicity Attard, point out that we often forget (or choose to ignore) the very human elements involved in migration and the often-conflicting rights of the individual migrants and rights of sovereign nations to control their own borders. Perhaps if the sovereigns involved spent as much time, treasure, and effort on addressing the root causes of migration as they do on efforts to stop or control it, human rights and humanitarian principles could become the guiding light to resolving the problems.

We follow with an erudite review and analysis by Mark Buhler of a little-known law and set of new regulations to be adopted under it, dealing with large private yachts and the right to carry passengers for hire. As Mark ruefully points out "although [the law] may appear to be of great initial interest, it will probably be of rather limited actual use." For all those involved in the yacht industry, as well as those the article is well worth review. It also serves as a sad reminder of what can happen to good intentions when passing through "the legislative sausage-making process."

Our next offering is our usual column by Bryant Gardner, "Window on Washington." This time, Bryant guides us through the intricacies of the newly enacted Commercial Vessel Incidental Discharge Act ("CVIDA"), establishing a new (mostly) unified Federal regime for the regulation of vessel discharges in United States waters. As Bryant points out, "like any good legislation, it embodies numerous compromises ensuring that neither side of the debate got what they wanted but everybody got enough of what they needed." If only that same process of compromise were more prevalent in our current government. . . .

Next is a very thorough update by Aaron Greenbaum of recent developments in the ever-developing and often litigated area of maintenance and cure. Aaron has previously provided us with similar great and useful updates in the area, and we hope to make this an annual element of BMB.

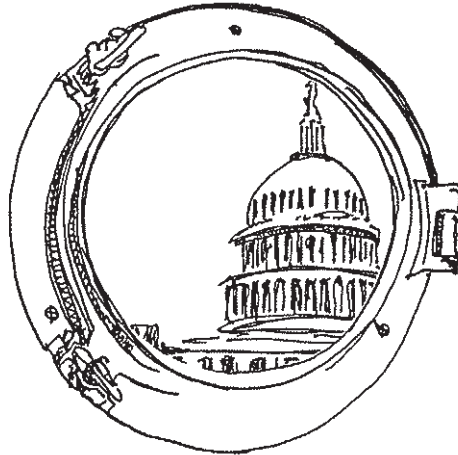
Last but not least, we conclude with the Recent Development case summaries. We are grateful to all those who take the time and effort to bring us these summaries of developments in maritime law. One interesting topic of first impression in the Ninth Circuit is the subject of the decision in *Cruz v. Nat'l Steel & Shipbuilding Co.*, addressing whether the borrowed servant doctrine applies to "employees" under the Longshore and Harbor Workers' Compensation Act ("LHWCA"). Pamela Schultz has indicated that she will provide a more thorough commentary of the approaches taken by other circuits as compared to the Ninth Circuit in an upcoming edition of BMB.

Once again, we encourage our readers to submit photos, artwork, poems, or thought pieces to enhance the enjoyment of reading our publication.

As always, we hope you find this edition interesting and informative, and ask you to consider contributing an article or note for publication to educate, enlighten, and entertain us.

Robert J. Zapf

WINDOW ON WASHINGTON



LIVING CVIDA LOCA

By: Bryant E. Gardner*

On December 4, 2018, the President signed into law the Commercial Vessel Incidental Discharge Act (“CVIDA”)¹ establishing a new (mostly) unified Federal regime for the regulation of vessel discharges in United States waters. The measure marks a grand compromise capping off years of heated debate concerning the regulation of ballast water and other vessel discharges under the U.S. Clean Water Act.² The legislation has been hailed as a victory by both environmental and shipping interests.

The zebra mussel, native to the Caspian and Black seas, arrived in Lake St. Clair in the ballast of a cargo vessel in the late 1980s, and within ten years had spread throughout the Great Lakes. Congress enacted the National Invasive Species Act of 1996 (“NISA”) in an attempt to control aquatic invasive species, and delegated administration and enforcement of the Act to the

U.S. Coast Guard.³ The U.S. Environmental Protection Agency (“EPA”), which administers the Clean Water Act, faced calls to regulate ballast water and other dischargers under the National Pollution Discharge Elimination System (“NPDES”). The EPA mostly rejected those petitions, favoring its longstanding exception for discharges incidental to the “normal operation” of the vessel, primarily on the grounds that it would be excessively burdensome, if not impossible, to establish a permit for every possible discharge, including things such as anchor chair effluent, deck run-off, and other routine emissions. After denial of their petition, environmental groups filed a lawsuit to compel the EPA to regulate ballast water under the Clean Water Act, ultimately prevailing in the United States Court of Appeals for the Ninth Circuit.⁴ The EPA therefore issued a “Vessel General Permit” regulating vessel discharges, most recently updated in 2013.⁵ Over time, ballast water regulation became increasingly diffuse, with Federal

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¹ The Frank LoBiondo Coast Guard Authorization Act of 2018, Pub. L. No. 115-292, Title IX, 132 Stat. 4376

² 33 U.S.C. §§ 1251-1388.

³ 16 U.S.C. §§ 4701-4751

⁴ *Northwest Env. Advocates v. U.S. Env. Prot. Agency*, 537 F.3d 1006 (9th Cir. 2008).

⁵ Final National Pollutant Discharge Elimination System (NPDES) General Permit for Discharges Incidental to the Normal Operation of a Vessel, 78 Fed. Reg. 21,938, (EPA April 12, 2013).

requirements regulating 27 different types of vessel discharge and Federally enforceable state and waterbody specific conditions added to the permit by States under the NPDES certification process administered by the EPA, and Coast Guard continuing to administer NISA. Shipping and maritime interests therefore sought legislative relief on Capitol Hill.

The fight to enact CVIDA on the Hill continued for years across several congresses, without success. In early 2018, passage appeared imminent when CVIDA was added to the Coast Guard Authorization Act—one of the few reliable legislative vehicles still remaining—but controversy surrounding the Act caused the Coast Guard bill to founder upon the strong objections of the Great Lakes delegation, whose states have been the hardest hit by aquatic invasive species. The proposal failed in the Senate, which voted 56-42 depriving the bill of the 60 votes needed to pass. Democrats voting with Republicans to advance the bill included Joe Manchin (W. Va.), Bob Casey (Pa.), Joe Donnelly (Ind.), Clair McCaskill (Mo.), Doug Jones (Ala.) and Bill Nelson (Fla.)—and every one of them other than Jones was up for reelection in a state won by President Trump. Ultimately, in the lame duck session, the parties were able to reach a compromise. Shipping and maritime interests such as the International Chamber of Shipping and the American Waterways Operators had advocated a single, unified Federal standard under the authority of the Coast Guard—environmental groups and Great Lakes interests fought for more State control, regional variation, and EPA dominance. The legislation ultimately passed strikes a delicate balance between these positions, with the Democrats extracting some additional concessions in light of the November 2018 mid-term elections restoring their control of the House.

CVIDA leaves the details up to the implementing agencies, setting the stage for further battles among the stakeholders. Under CVIDA, EPA has two years from enactment of the legislation to promulgate a science-based emission standard, which can distinguish among classes, types and sizes of vessels, and between new and existing vessels. The Coast Guard is to review the EPA standard, and provide its concurrence or objection within 60 days of issuance. If the Coast Guard disagrees, this will not stop the EPA standard from going forward, but EPA is required to publish its response to any Coast Guard objection submitted within the 60-day review period. EPA is required to review the standard every five years in consultation with the Coast Guard,

and amend it if appropriate. However, such revisions cannot make the requirement any less stringent, unless new information not previously available during the promulgation of the initial standard establishes valid grounds for doing so. EPA also has the ability to issue an order requiring the use of an emergency “best management practice” for any region or category of vessels when EPA determines such an order is necessary to reduce the reasonably foreseeable risk of introduction or establishment of aquatic nuisance species, subject to the same Coast Guard concurrence or objection process.

The Coast Guard will administer and enforce CVIDA out on the waterways and deck plates. The Act gives the Coast Guard two years from issuance of the EPA standard to promulgate its own set of regulations. CVIDA requires that the Coast Guard establish rules regarding marine pollution control devices, including design, construction, testing, and approval necessary to ensure compliance with its requirements. Within 180 days of enactment of the law, the Coast Guard is to coordinate with EPA and publish a draft proposal setting forth testing methods and protocols for ballast water management systems rendering marine organisms in ballast water “nonviable,” measuring their concentration, certifying ballast water management systems performance, and providing for certification of laboratories to evaluate applicable treatment technologies. That proposal will then be subject to a 60-day comment period, with the final policy to be published within one year from the date of enactment of the law. Like the EPA standard, the Coast Guard standard cannot be revised to become less stringent unless the agency can demonstrate that new information justifies such a relaxation. Manufacturers of ballast water management systems have welcomed the Act’s establishment of additional clarity regarding the standards for rendering aquatic nuisance species nonviable, which will now include rendering such species permanently unable to reproduce in line with the International Maritime Organization (“IMO”). Ultraviolet systems operate by rendering organisms unable to reproduce, but previously, the Coast Guard’s regulations differed from the IMO standard insofar as they required the elimination of any living organisms.

The legislation includes concessions necessary to gain the support of interests concerned with ensuring States’ ability to impose additional requirements to address local aquatic nuisance outbreaks. In developing the discharge standard, EPA is required to consult with the State governors, who are able to submit objections

to the EPA. Such objections must be detailed and based upon science and relevant technical factors. The raising of objections does not prevent the EPA standard from going into effect, but EPA must substantively respond to them prior to finalizing the standard. Similarly, the Coast Guard is required to consult with the States when developing its regulations. States can petition the agencies for an emergency order or to review any standard or policy issued under the Act, and the agencies must respond within 180 days for emergency orders or within one year for general challenges. When the States' request is granted, the agencies must issue the order or notice of proposed rulemaking within 30 days of that determination. If they States' request is denied, the agencies must publish a detailed justification for the denial within 30 days of that determination, which shall be final agency action reviewable before the Federal courts.

States also have the option to establish "no discharge zones," subject to limitations. States cannot establish the zones until certain determinations have been made by EPA, finding that establishment of the zone would protect and enhance the State's waters. Additionally, EPA must conclude that the discharge can be safely stored and collected until the vessel reaches a discharge facility, that adequate discharge facilities are reasonably available, and that discharge to a facility will not unreasonably interfere with safe loading of vessel cargo and fuel bunkers. While these last items might seem to be determinations more appropriately delegated to the Coast Guard because of its greater familiarity with practical vessel operations, they have been placed in EPA's hands subject to the direction that EPA seek the Coast Guard's concurrence. EPA must approve or disapprove an applying State's proposed no discharge zone within 90 days.

The Act features several regional variations. The Great Lakes delegation scored a carve-out for the Lakes which provides a process for achieving an enhanced regional standard. Any Great Lakes governor can submit a petition for enhanced protections to the Great Lakes Commission and a new Great Lakes National Program Office, as well as each other Great Lakes governor. The National Program Office then publishes the petition in the Federal Register subject to a minimum 30-day comment period. The proposed standard must be

developed in consultation with Canadian Federal and impacted provincial governments. If the proposal does not require new vessel equipment requirements, it must have the support of at least five other Great Lakes governors and will not operate outside the waters of those states which have endorsed the proposal—if the proposal does require new vessel equipment, it must have the support of all of the other Great Lakes governors. CVIDA further provides some exemptions from ballast water exchange requirements for vessels transiting between or among Pacific ports in the United States, Canada, and Mexico north of the 20th parallel. There is also a carve-out for grey water discharged in the waters of Alaska, which will be subject to Alaska regulations.

CVIDA also makes permanent the exemptions for discharges from recreational vessels, non-ballast water discharges from commercial vessels under 79 feet, and non-ballast water discharges from fishing vessels regardless of length. U.S. fishing vessels had been operating under a series of exceptions since 2009, and the fishing industry welcomed the introduction of certainty going forward. Unlike larger cargo vessels, most fishing vessels and smaller recreational vessels are not well-equipped to comply with the new ballast water requirements. The Act further excludes discharges from U.S. Armed Forces vessels, vessels permanently moored to piers including floating casinos, hotels, and bars, National Defense Reserve Fleet vessels scheduled for disposal, and vessels that continuously take on and discharge ballast water using a "flow through" system if the EPA determines the vessel cannot materially contribute to the spread of aquatic nuisance species.

The new CVIDA is an important step toward a more reasonable regulatory regime for vessel discharges. But like any good legislation, it embodies numerous compromises ensuring that neither side of the debate got what they wanted but everybody got enough of what they needed. However, the devil, as they say, is in the details. As the Coast Guard and EPA seek to establish the governing regulatory regimes, and the States move to carve-out their own exceptions, renewed conflict is sure to bubble to the surface, sparking regulatory, legislative, and litigation disputes. Stakeholders and their counsel would be well-advised to keep a close eye on the process going forward.