

RIGHT OF FREE PASSAGE

Noting the Commissions' Terms of Reference 8.7.3 (d), an update on the topic: "Conditions for the free exercise of sailing have been changed."

The subject has been in the news this year due to the COVID 19 situation.

A paper by the International Regulations Commission Chairman.

Law of the Sea and the Coastal State

An introduction to the United Nations Convention on the Law of the Sea (UNCLOS) which provides a framework for the use of the oceans.

The United Nations Convention on the Law of the Sea (UNCLOS) provides a framework for the use of the oceans. The convention defines the territorial limits a country can claim and whether a vessel is under the laws of its Flag State or also those of the state whose waters it is lying in.

Vessels are free to navigate the High Seas within the laws of their Flag State and only a warship of their own nation has the right to intercept them (other than to confirm the nationality of the vessel) unless they are committing or suspected of committing an international crime such as piracy.

Under UNCLOS vessels have a right of passage through the territorial waters of another country; all vessels exercising this right of passage must undertake a continuous and expeditious passage through Territorial Waters and may not engage in any activity which does not have direct bearing on the passage. They must also abide by international conventions - such as Safety of Life at Sea (SOLAS), the International Regulations for Preventing Collisions at Sea (COLREGS) - and the Coastal State has the jurisdiction to ensure that they do so. Such passage is referred to in UNCLOS as "innocent passage".

The right of a foreign ship to stop and anchor in circumstances of *force majeure* or distress is explicitly referred to in UNCLOS 1982 in the case of innocent passage through the territorial sea (Article 18(2)), straits used for international navigation (Article 39.1(c)) and in archipelagic waters (Article 54). The right of innocent passage and the associated right to stop and anchor do not, however, amount to a right to enter the internal waters of a coastal state. As set out in Article 11, the outermost permanent harbour works which form an integral part of the harbour system are regarded as forming part of the coast so the waters thereby enclosed are internal waters and do not form part of the territorial sea.

Similarly, it would appear from the IMO website that there is no international convention of general application dealing with safety of life at sea (including search and rescue) that, of itself, gives rise to a right of entry to the internal waters of a coastal state (including a port) in circumstances of *force majeure* or distress. It is thus a matter for each coastal state to determine whether and, if so, on what terms a vessel may enter a port within its jurisdiction.

It should also be noted that, even in relation to a foreign vessel that does not enter one of its ports, a coastal state may adopt laws and regulations relating to innocent passage through its territorial sea in respect of safe navigation, regulation of maritime traffic, protection of navigational aids, preservation of the environment and the living resources of the sea (including fisheries laws) and the prevention of infringement of the customs, fiscal, immigration or sanitary laws and regulations of the coastal state (Article 21). There does not appear to be any detailed judicial analysis of the meaning of "sanitary

laws” but, during the coronavirus pandemic, it would probably be relatively straightforward for a coastal state to justify the inclusion of measures to tackle Coronavirus within this description

The majority of recreational yachts will not be regarded as being on a continuous and expeditious passage as they may be exploring the coastline, perhaps anchoring for lunch and they may also visit several ports within the Coastal State. These activities bring recreational boaters under the jurisdiction of the Coastal State (as does launching from a foreign shore) and they could then be required to adhere to all of the Coastal State’s legislation, rules and regulations that apply to foreign flagged boats in addition to any applicable Flag State legislation although this is unlikely.

UNCLOS also defines a country’s Internal Waters (waters which are landward of the Base Line) which includes many ports, harbours, estuaries and bays and of course the inland waters such as rivers and canals.

If a vessel makes a continuous and expeditious passage through territorial waters to a destination within Internal Waters such as a port, the right of passage ends on entering Internal Waters. By voluntarily entering a port or the Internal Waters of another country a vessel submits to the jurisdiction of that country i.e. the Coastal or Port State, as Internal Waters are considered to be an integral part of a country. The authority of a state over foreign vessels in its Internal Waters is the same as those for a foreigner on its soil, which of course includes boat crews going out for dinner, sight-seeing, shopping and generally making use of facilities ashore in their destination port. A foreign flagged vessel does not have a right to enter the internal waters and ports of another country. The Coastal State is therefore free to determine whether and, if so, on what terms a vessel may do so.

Cruising within the territorial waters of another country will in most cases bring pleasure boaters under the jurisdiction of that Coastal State. Generally the Coastal State will refrain from interfering with the internal affairs of foreign flagged vessels as a matter of “comity” – courteous recognition accorded by one nation to the laws and institutions of another. Unless you attract the attention of the authorities for example because your boat is deemed not to be seaworthy, or it is unregistered, you will generally be allowed to go about your business as a visitor without hindrance. However, it is important to be aware that the Coastal State has the right to require foreign flagged vessels cruising within its waters to comply with its regulations.

There are some elements of Coastal State Law that a visiting boat may be expected to comply with. The most common is for the skipper of the vessel to be required to prove that he or she is competent to be in command of the vessel.

In many countries the national legislation will require various items (including liferafts, flares and lifejackets) to be “in date” and where applicable that the relevant service paperwork is available for inspection. A country may also specify items of equipment and/or publications that must be carried. Vessels navigating the European inland waters are generally required to carry a copy of the local rules (which may be written in the native language of the country concerned). It is important to ensure you are aware of all such requirements.
