Spanish Maritime Navigation Law: Some Territorial Questions[1]

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Structured Abstract

Article Type: Research paper

Purpose—To specify what maritime transport is covered by Spanish regional regulations, in order to specify the scope of Spanish Maritime Navigation Act 14/2014 of July 24. Likewise, the relationship in Spain between the Maritime Navigation Law and international Conventions ratified and in force in Spain, regulating issues related to maritime navigation, is studied to understand their respective scopes of application.

Design, Methodology, Approach—Under the division of powers between central government—"the State"—and the devolved regional governments—"autonomous communities" (provided for in the Spanish Constitution and under the provisions of the Royal Legislative Decree 2/2011 of September 5 approving the Consolidated Text of the Law on State Ports and the Merchant Marine)—those autonomous communities with coastlines have taken over authority in matters of maritime transport carried out exclusively between points or ports of each respective autonomous community. It is therefore necessary to examine the regulations of the Spanish autonomous communities, the State law, and the international Conventions on maritime navigation to know the respective scope of application of these regulations.

Findings—The Spanish autonomous communities cannot regulate legal-private aspects of maritime transport carried out for commercial purposes, but they will be able to regulate maritime transport that is within autonomous competence (between ports or points of the same autonomous community), carried out for non-commercial purposes (recreational, sports…). The option of the Spanish Maritime Navigation Act 14/2014 of regulating some maritime institutions (internal cases) by referrals to the international Conventions (not applicable to internal cases), determines that the regulation of internal cases, is the planned in the Convention.

Practical implications—Useful for professionals in the maritime and port sector, for public administration workers and for undergraduate and postgraduate students in law.

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Journal of Territorial and Maritime Studies / Volume 9, Number 1 / Winter/Spring 2022 / pp. 34–49 /
ISSN 2288-6834 (Print) / DOI: 10.2307/JTMS.9.1.34 / © 2022

Originality, Value—After the first years of application of the Spanish Maritime Navigation Act 14/2014, and given the scarcity of studies on the matter, it is necessary to specify its scope of application.

Keywords: autonomous communities, autonomous powers, international maritime conventions, maritime navigation, maritime transport, ports, State powers, uniformity of maritime law

I. The Distribution of Authority Between the State and the Autonomous Communities: Special Reference to Maritime Transport and Ports

1.1 Maritime Transport

The scope of authority of Spain's autonomous communities in matters of maritime transport is limited by Article 149.1.20 of the Spanish Constitution (referred to here by its Spanish acronym CE), which states that the State holds exclusive authority in "merchant marine" matters, so authority for any maritime transport that can be included under the "merchant marine" concept cannot be devolved to the regions but is reserved solely for the central authorities.

In this regard, an examination of the provisions of Royal Legislative Decree 2/2011 of September 5 Approving the Consolidated Text of the Law on State Ports and the Merchant Marine (LPEMM) is of interest. Art. 6.1 of the said Law sets limits on the meaning of the phrase "merchant marine" by listing a number of areas of authority of the State in regard to maritime navigation, including "a) Maritime transport operations, except those that take place exclusively between ports or points of the same autonomous community, provided that the said community has authority in this matter, with no connections to ports or points of other territories."[2] This means that the authority on matters of maritime transport that the autonomous communities can take on (and indeed have taken on) must refer to maritime transport carried out exclusively in the waters of each respective autonomous community,[3] i.e., between points of ports of that autonomous community with no connections with points or ports of other autonomous communities or other territories (e.g., points or ports in other countries).[4]

Under this distribution of authority, the statutes of autonomy of all the coastal autonomous communities except Galicia include an express take-up of authority on matters of maritime transport. Specifically, the Statute of Autonomy of the Basque Country[5] (Art. 10.32) attributes exclusive authority to that autonomous community on matters of maritime transport with the following wording: "32. Railways, overland, maritime, river and cable transport, ports, heliports, airports and the Meteorological Service of the Basque Country, without prejudice to the provisions of Article 149.1.20 of the Constitution…." Similarly, Law 2/2018 of June 28 on Ports and Maritime Transport in the Basque Country (LPTMPV) envisages the regulation of "ports" and "maritime transport" under the authority of the said community.[6]

Along these lines, the Statute of Autonomy of Andalusia[7] (Art. 64.1.2) envisages the region

as having sole authority over "maritime and river transport of passengers and freight carried out entirely within the waters of Andalusia." Similarly, the Statute of Autonomy of Asturias[8] states that the Principality of Asturias has sole authority over "maritime transport carried out exclusively between ports or points of the autonomous community with no connections with ports or points of other territories" (Art. 10.6). With almost identical wording, Art. 30.6 of the Statute of Autonomy of the Balearic Islands[9] states that the region has sole authority over "maritime transport carried out exclusively between ports or points of the autonomous community with no connections with ports or points of other territories." Sole authority "over maritime transport that takes place entirely within the confines of the archipelago" is also assigned to the Autonomous Community of the Canary Isles under Art. 160.1 of its Statute of Autonomy.[10] The same goes for the Statute of Autonomy of Cantabria,[11] as per Art. 24.7.

The Statute of Autonomy of Catalonia[12] assigns authority to the region in matters of maritime transport under Article 169.6: "Article 169. Transport. 6. The Autonomous Community shall have sole authority on matters of maritime and river transport carried out entirely within Catalonia, with respect for the authority of the State on merchant marine and port matters. This includes: a) the regulation, planning and management of maritime and river transport of passengers; b) administrative actions in the performance of services and the exercising of activities concerned with maritime and river transport; c) the requirements for the exercising of activities." However, the Statute of Autonomy of Galicia[13] does not expressly mention the sole authority of the region on matters of maritime transport carried out entirely within Galicia.[14] The Statute of Autonomy of the Region of Murcia[15] declares the sole authority of the region on matters of "maritime transport between ports or points of the autonomous community with no connections with ports or points of other territories" (Art. 10.4). In the case of the Statute of Autonomy of the Community of Valencia,[16] Art. 49.1.15 establishes that the autonomous community government has sole authority over "Railways, overland, maritime, river and cable transport, ports, airports, heliports, and the Meteorological Service of the Community of Valencia, without prejudice to the provisions of points 20 and 21 of subsection (1) of Article 149 of the Spanish Constitution."

In line with the provisions of Articles 149.1.20 of the CE and Article 6.1 of the Law on State Ports and the Merchant Marine (LPEMM), and in line with the authority assumed by the coastal autonomous communities on matters of maritime transport, there is a need to examine how this devolved authority is coordinated with the regulation of maritime transport envisaged in Spanish Maritime Navigation Act 14/2014 of July 24 (SMNA). The following can be asserted:

1. The legislators who drew up the SMNA took into account the distribution of authority between the State and the autonomous communities, as shown in Final Provision 6 ("Titles of Authority"), which states that "this Law is drawn up pursuant to the provisions of Articles 149.1.6 and 20 of the Spanish Constitution, under which the State holds sole authority on matters of mercantile, procedural and merchant marine legislation."
2. Authority on mercantile and procedural legislation is held solely by the State (Article 149.1.6 CE), with such legislation being understood to mean the regulation under private law of mercantile matters and not the regulation under public law or the structuring of or intervention in certain sectors of the economy.[17] Thus, private-

law aspects of maritime transport carried out for trade purposes (the framework of liability for damages arising from maritime transport of passengers or freight, collisions, privileges, limitations on liability, piloting, towing, etc.) and procedural issues (regulation of preventive attachment of vessels or craft, etc.) are under the sole authority of the State. As a result, the regulation in private law of maritime transport for trade purposes envisaged in the SMNA (contracts on matters of transport, towing, piloting, collisions, salvage,[18] limitations on liability, etc.) applies to both transport between ports or points of the same autonomous community (for which authority lies with each region) and transport between ports or points of different autonomous communities (for which authority lies with the State).

3. Regional regulations on maritime transport do not envisage full regulation of such transport but focus on the areas of devolved authority in maritime transport as an economic activity.[19] They thus cover public-law aspects such as structuring, taking into account that sole authority for mercantile legislation lies with the State. Thus, private-law aspects of maritime transport not regulated under regional legislation are subject to the SMNA and to such other State, autonomous community and international level regulations as may be applicable.

4. Article 149.1.6 CE attributes sole authority to the State on matters of mercantile and procedural legislation, but the statutes of autonomy of the autonomous communities with coastlines declare that they hold authority over maritime transport in generic terms, without excluding mercantile or procedural aspects. Indeed, there is no need to specify such exclusions in mercantile and procedural matters, as they are already attributed exclusively to the State. However, in the particular case of the Basque Country, regional authority extends also to maritime transport for non-mercantile purposes. This can be deduced firstly from Articles 1 and 2 of Law 2/2018 of June 28 on Ports and Maritime Transport in the Basque Country, which does not require the maritime transport in question to be carriage for reward, and secondly from the explanatory statements for the said Law (paragraph 6), which indicate that the regulation is intended to cover "maritime transport needs of a commercial, fishing and recreational nature." Accordingly, the maritime transport for which the Basque Country holds authority extends also to transport for sports, recreational, research and other non-mercantile purposes. In such cases, the reservation for the State of authority on mercantile legislation does not seem to be applicable. However it is considered under Article 149.1.6 CE that private-law aspects of maritime transport for sporting, recreational and research purposes must be regulated by the State.[20] We believe that the Basque Law on Ports and Maritime Transport could have regulated these private-law aspects, but the fact is that it does not do so.

1.2 Ports

Ports are closely linked to maritime transport, given that they are natural locations or artificial infrastructures that facilitate such transport. Accordingly, an awareness of the legislative framework on ports is of interest here. The basic lines are established in Articles 148.1.6 and 149.1.20 CE.

The distribution of authority for ports set out in the Spanish Constitution is based on

Article 148.1.6, which envisages that the autonomous communities may take on authority on matters of "ports of refuge, marinas and recreational airports and, in general, those which do not engage in commercial activities," while Art. 149.1.20 CE specifies that the State holds sole authority over "ports of general interest"[21] (as also stated in Art. 11.1 LPEMM[22]). In line precisely with the provisions of Articles 148.1.6 and 149.1.20 CE, the ten autonomous communities with coastlines (Andalusia, Asturias, the Balearic Islands, the Canary Isles, Cantabria, Catalonia, Galicia, Murcia, the Basque Country and Valencia) have taken over ownership of all their marinas and other ports except those considered of general interest.[23] In any event, it cannot be deduced from the said provisions that the purpose of the wording in the Constitution was to establish an orderly classification of ports, but rather to merely specify which ports fell under the authority of the State and which under that of the autonomous communities.[24]

The delimitation envisaged in the Constitution as to which ports are under the authority of the State and which under that of the regional governments is imprecise. It states that ports of general interest are under State authority and ports of refuge, marinas and ports where there are no commercial operations may be controlled by the autonomous communities, but it does not specify who has authority over commercial ports which are not classed as being of general interest. The Constitution must not be understood as stating that trading ports and ports of general interest are the same thing. It does not give the State exclusive authority over "commercial ports" but over "ports of general interest."[25] The argument that they are one and the same thing would substantially restrict the areas of authority of the autonomous communities. This is why the LPEMM first draws a distinction in Article 2.4 between two categories, i.e., "commercial"[26] and "non-commercial" ports,[27] and then specifies in Article 3.4 that a number of ports are not classed as "commercial." This is an attempt to specify the possibility of the autonomous communities taking over authority for such non-commercial ports under Art. 148.1.6 CE, a provision which enables them to be given authority over ports which "do not conduct commercial activities," insofar as they are not ports "of general interest." The latter are above the authority of the autonomous communities and are defined and delimited in Article 4 LPEMM.

Article 4.5, para. 2 of the LPEMM does, however, acknowledge the possibility that the autonomous communities may hold authority over ports classed as "commercial" under the LPEMM: "Commercial operations at ports under the authority of the autonomous communities may only be carried out if the ministries indicated in the foregoing paragraph give their authorisation […]." Under this provision, and taking into account that the Constitution does not draw any equivalence between commercial ports and ports of general interest, it can be stated that the autonomous communities hold authority over commercial ports which are not ports of general interest.[28]

II. The Maritime Navigation Law and International Conventions[29]

2.1 Internal and International Maritime Regulation: Approach to the Problem

The legal framework covering maritime navigation is characterised by a broad range of uniform or international regulations in a number of sectors, such as carriage of freight,

carriage of passengers, collisions, salvage, privileges, limitation of liability, marine pollution, arrest of ships, etc., that coexist with internal or domestic maritime legislation. This double regulation—internal and international—is a source of contradictions and leads operators to face situations of great legal uncertainty, as it is often no simple matter to determine when it is internal regulations that must be applied and when it is international regulations.[30]

In this regard it must be taken into account that international conventions are directly applicable in Spain and form part of the body of law once they have been ratified and published in the BOE [Spanish Official Gazette], in line with Article 96.1 of the Spanish Constitution and Article 1.5 of the Spanish Civil Code. Nor can international conventions be repealed or modified by internal Spanish legislation. Specifically, the provisions of such conventions can only be repealed, amended or suspended in the manner envisaged in the treaties themselves or under the general rules and regulations of international law.

A distinction must be drawn here between universal and non-universal conventions.[31] Universal conventions are those which are applicable to both international and domestic events (e.g., the 1993 Maritime Liens and Mortgages Convention,[32] the 1989 Salvage Convention[33] and the 1976 International Convention on Limitation of Liability for Maritime Claims[34]), while non-universal conventions are applicable to international events but not to domestic ones (e.g., the 1910 Collision Convention,[35] the Hague-Visby Rules,[36] the 1974 Athens Convention 1974[37] and the Arrest of Ships Convention 1999[38]).

One of the goals of the SMNA is precisely to coordinate its contents with international maritime law so as to overcome the current contradictions between the different international conventions in force in Spain and the various domestic provisions governing the relevant matters, as indicated in Point 1 of its Preamble.[39] Accordingly, Article 2 of the SMNA establishes under the heading "Sources and interpretation" that "1. This Act shall be applied as long as it does not oppose the terms set forth in the international treaties in force in Spain and the legal provisions of the European Union that regulate the same matters (…)," and "2. In all cases, for interpretation of the provisions of this Act, the provisions contained in the international treaties in force in Spain and the convenience of promoting uniform regulation of the matters it forms shall apply." This goal of ensuring uniformity seeks to put an end to the much-criticised dual provisions that exist in such matters in many fields in which Spain has ratified various international conventions on the one hand, but has domestic legislation on the other that often fails to comply with those conventions. This is pointed out in Point II of the Preamble to the SMNA.[40]

In any case, these lines will show whether or not the legislative technique used in Spanish law is conducive to the uniformity of maritime law, and whether the internal regulations adopted in Spanish law are necessary or not, taking into account that international conventions ratified by Spain are already part of its internal legal system. On the other hand, the scope of Article 2 of the Spanish Act will be examined. That article establishes the priority application of the conventions over domestic legislation, and the need for the rules of Spanish law to be interpreted in accordance with the provisions of international law to foster uniformity.

2.2 Legislative Technique Used in the Maritime Navigation Law

The legislative technique used in the Spanish Maritime Navigation Act 14/2014 (SMNA) to coordinate the national regulation with the contents of the international

conventions is different from the one adopted in the Proposal of 2004. In the Proposal it was decided to reproduce the full contents of the conventions in the internal law. Indeed, the Proposal regulated completely the different maritime institutions, including institutions that were already regulated in international conventions which were previously part of the Spanish domestic legal system and whose scope of application extended to domestic factual cases.[41] In these cases where maritime institutions are regulated by universal conventions (applicable to internal and international cases), the Spanish legislator's wording in the 2004 Proposal tried to match the one referred in those conventions, but used more suitable terms to our legal system. The writers of the Proposal recognizes this in the Explanatory Memorandum: "When writing the precepts of the Law incorporated into the conventions, it has been sought to use the appropriate concepts and terminology to our own legal system; this technique has the advantage that it offers a compact text without the need for the person applying the rule to refer to texts other than the general included in the Law."[42] On the other hand, the writers adopted also a regulation for the maritime institutions contemplated in non-universal conventions (not applicable to internal cases).

The legislative technique of the Proposal of 2004 consisted, in short, in a duplication of the texts of the International conventions in the Internal Law, although the duplication was not literal; in the Internal Law, some slight modifications were introduced or the contents of the conventions were partially reproduced.[43] This technique was criticized because it presented the inconvenience of generating a double regulation of the same maritime institutions, the international regulation (the conventions) which was already part of the Spanish legal system due to its publication in the Official State Gazette and the internal regulation (Spanish Maritime Navigation Law) which reproduced—with nuances—the text of the conventions.[44] Additionally, the modification of the International conventions would not have an immediate reflection in the Spanish internal Maritime Navigation Law, as it would be necessary to modify the Internal Law (to adjust it to the convention), so the reforms could not present the necessary agility for a better protection of the maritime sector.[45] The criticism of 2004's legislator option and the problems created by the duplicity of regulations led to reject this technique of duplication.

The legislative technique of the 2004 Proposal, rather, the duplication of the conventions, was replaced by the referral to the conventions. The Spanish legislator, taking as a starting point the text of 2004, started to eliminate its duplications of the conventions, with the intention of suppressing the international and national double regulation. Instead of reproducing at all the conventions, the Spanish legislator regulates the maritime institutions conducting a referral to the existing international convention regarding to the specific maritime institution. This technique is already present in General Maritime Navigation Bill of 2006, as well as in the later ones of 2008 and 2013, and in the current law (SMNA 2014).[46] Specifically, the remission made by the SMNA 2014 to international conventions is double, a general one in its Article 2, recognizing the hierarchical superiority of international conventions and the specific referrals foreseen in each institution that already had an international regulatory convention.[47]

The general remission of the Article 2 SMNA establishes: "1. This Act shall be applied as long as it does not oppose the terms set forth in the international treaties in force in Spain and the legal provisions of the European Union that regulate the same matters (…),"

admitting with it, explicitly, that the conventions will be of preferential application with respect to the Internal Law (SMNA 2014).

The SMNA 2014 incorporates several specific referrals to the conventions as well. Indeed, the aforementioned Law frequently uses the technique of referral to the international convention in force in Spain to determine the source applicable to a particular maritime institution (maritime liens and mortgages, limitation of liability, collision, salvage, arrest of ships, etc.). In other words, the national law itself establishes that the regulation of a particular maritime institution is the one contained in the international convention. However, the Spanish legislator does not limit itself to collecting this referral to the international convention but, after this referral, it proceeds to regulate some specific aspects of the different maritime institutions, thus increasing the possibilities of friction between the two (international and national) legal texts.

The specific referrals that the Spanish Law (SMNA) completes to the international conventions are: *Maritime liens*: Article 122 SMNA, *Carriage of goods*. Liability of the carrier for loss, damage or delay: Article 277 SMNA "Liability regime"; *Passage contract*. Article 298 SMNA "Regime of liability"; *Collisions*. Article 339.1 SMNA "Legal regime and concept of collision"; *Salvage*. Article 357 SMNA "Legal regime"; *Limitation of liability*. Article 392 SMNA "Right to limit liability"; *Arrest of ships*. Article 470.1 SMNA "Nature and regulation of the measure."

III. Consequences of the Legislative Technique Used

3.1 Generic Referral to the International Conventions

1st. The general referral of the Article 2.1 SMNA (under the title "Sources and interpretation"), "1. This Act shall be applied as long as it does not oppose the terms set forth in the international treaties in force in Spain (…)," in which the hierarchical superiority of the International conventions is recognized, is unnecessary as it reiterates what is already provided in Article 96.1 of the Spanish Constitution and in Article 1.5 of the Spanish Civil Code.[48] This forecast contained in Article 2.1 SMNA does not add anything with respect to what has already been foreseen in our system, so its absence would not alter the source regime.

2nd. As regards to the reference contained in Article 2.2 SMNA, "2. In all cases, for interpretation of the provisions of this Act, the provisions contained in the international treaties in force in Spain and the convenience of promoting uniform regulation of the matters it forms shall apply," has as purpose the uniform application of the provisions of international conventions. However, as has been already indicated,[49] it is a rule that has not possibilities of effective practical implementation, given that there is not a unique judiciary that applies the convention and sets uniform criteria for interpreting and applying the conventions, it is that each Member State shall apply the conventions through their respective national court, and the decision of the Supreme Court of a Member State is not binding for other Member States. It should be added that SMNA 2014 is an internal law and, in its provisions, together with the referral to the conventions, there are Articles regulating maritime

institutions either complementing or putting aside the convention. In this case, in which the internal law does not follow the convention, it cannot be used as an interpretive criterion "the convenience of promoting uniform regulation," because the rule does not have an international origin but internal and the purpose of the internal regulation is precisely to depart from the uniformity.[50]

3.2 Specific Referral to the Conventions Applicable to Internal and International Cases

The specific referrals made by the SMNA to universal conventions, that is, applicable to internal and international cases, are in Articles 122 SMNA (referral to the Convention on Maritime Liens and Mortgages, done at Geneva, on May 6, 1993), 357 SMNA (referral to the International Convention on Salvage, done at London on April 28, 1989) and 392 SMNA (referral to the Protocol of 1996 that amends the Convention on Limitation of Liability for Maritime Claims, done at London on November 19, 1976). These referrals would come to reiterate what the Articles 96.1 Spanish Constitution and 1.5 Spanish Civil Code already stipulate, that is, that regulations governing the aforementioned maritime institutions are those contained in the international conventions. The conventions belong to our internal legal system once they are published in the BOE [Spanish Official Gazette], and they constitute the applicable norm to the maritime institutions contemplated in aforesaid conventions. The specific referrals of the SMNA do not add nothing to what our system plans in general terms for matters regulated in international conventions. In this sense, the referrals are redundant, but at the same time clarifying as they specify the legal regime applicable to maritime liens, salvage and limitation of liability.

However, doubts about the legislative technique used arise because the Spanish legislator (SMNA) is not limited to making a specific referral to the conventions, but then specifies that the regulatory source is not only the convention to which it refers, but also the (internal) provisions that are added in the SMNA itself.[51] Thus, together with the referral to the convention we have an additional regulation in the internal law (SMNA).

In this sense, the provisions adopted by the SMNA, additionally to the convention (to which the SMNA is forwarded), could complement the convention when regulating those aspects which it leaves to the Member States to regulate with their internal laws. These SMNA internal rules are perfectly valid: by observing the system of sources in particular, they do not contradict the convention, since they are adopted within the margins of the convention and under the provisions of the convention. To this type of internal provisions refers the Preamble of the SMNA, Section II, when supports: "This also explains the legislative technique used, based on referral to the conventions in force in each matter, reserving to the Act the role of providing content to the room that such international treaties leave to the States."[52] These spaces (the room) would be completed with the Articles of the SMNA which follow to the referral to the international convention. Among these articles could be found, for example, the Articles 399.2 and 403 SMNA about liability limitation.[53]

Nevertheless, not all provisions of the SMNA, in addition to the referral to the conventions, are limited to filling in the spaces that the conventions leave to the Internal Law.[54] In the SMNA we can find Articles reiterating aspects already regulated in the international conventions, that is, applicable to internal and international cases. These provisions of

the SMNA generate a situation of double regulation, internal (SMNA) and international (the convention referred by the SMNA itself), about the same maritime institution. This happens, for example, with the Articles 396 SMNA (claims subject to limitation) and 397 SMNA (claims excluded from limitation). And this double regulation is what Spanish legislator expects to avoid with the SMNA, as is pointed out in the Preamble, Section II: "This objective of uniformity implies the aim to put an end to the much-criticized dual provisions that exist in such matters in many fields in which, on one hand, Spain has ratified different international conventions and, on the other, we have domestic legislation that, in many cases, does not comply with these." These provisions of the SMNA which regulate issues already regulated in the convention do not have legal effectiveness, as the convention is hierarchically superior and given that the SMNA regulates issues that it doesn't have to regulate, because they are already provided for in the convention and the convention is already part of our domestic legal system.[55] This double regulation, like we have advised, should not generate legal problems if the Articles of the SMNA and the conventions (LLMC…) present the same wording, but problems may arise if the drafts of the two regulations do not coincide.[56] In any case, the referred internal provisions, which reiterate the contents of the universal conventions, should not have been incorporated to the SMNA, since the conventions are already part of our system and the referrals that the SMNA makes to the conventions would be sufficient to confirm their application to internal or domestic cases.

3.3 Specific Referrals to the Conventions Applicable Only to International Cases

The SMNA contains referrals to international conventions whose scope of application is limited to cases with an international element in order to specify the regulatory rules of a maritime institution. This happens, for example, with the Article 339 SMNA regarding to collision (which refers to 1910 Convention for the unification of certain rules of law relating to Collision between vessels) or the Article 470 SMNA about the arrest of ships (which refers to the 1999 International Convention on the Arrest of Ships). As a consequence of these referrals, the internal or domestic governing regulation of the maritime institution (collision, arrest…) will be the international convention, since the Spanish legislator decided so. Being that the internal cases that were out of the scope of the conventions, the SMNA had the faculty of freely regulating those institutions and has chosen to regulate them by referrals to international conventions.[57]

The abovementioned option of the SMNA of regulating some maritime institutions' internal cases by referrals to the international conventions (not applicable to internal cases), determines that the regulation of internal cases is the planned in the convention. But, the regulatory status of the conventions is the same as an internal law: that is, it does not have a hierarchically higher status to that of the internal law (the SMNA), because it is the internal legislator who, through the SMNA, adopts as regulation what is provided in the convention, for cases that were not planned in the aforementioned convention.[58] Then, the Spanish legislator can complement, modify, expand or reduce the contents of these conventions through the SMNA, because the regulation of the convention takes the internal law status and therefore the SMNA can be fully adjusted to the provisions of the convention, but may also deviate from it according to what the Spanish legislator considers appropriate because the SMNA

is free to decide how it regulates those internal cases (cases that were outside the scope of the Convention).[59]

And indeed, the Spanish legislator is not limited to refer to the conventions to set the regulation of the collision or the arrest, but after the referral to the convention adopts an additional regulation in the SMNA that comes to nuance, complement or directly to deviate from the convention. This is the case with the Article 342 SMNA that establishes the regime of joint and several liability of both ship operators for personal and material damages caused to third parties, arising from the shared blame approach, while the 1910 collision convention (Article 4) provides joint and several liability only for personal injuries and not for materials.

Therefore, the final writing of the SMNA has made a great effort to eliminate the double regulation of maritime institutions internal and international, but, as we have already indicated throughout the present work, it has not been possible to eliminate that double regulation, so interpretive problems can arise and the judges must make an effort to try to solve them.[60]

IV. Conclusions

Article 149.1.6 CE attributes sole authority to the State on matters of mercantile and procedural legislation, but the statutes of autonomy of the autonomous communities with coastlines declare that they hold authority over maritime transport that takes place exclusively between ports or points of the same autonomous community with no connections to ports or points of other territories. The autonomous communities cannot regulate legal-private aspects of maritime transport carried out for commercial purposes, but they can regulate maritime transport that is within autonomous competence (between ports or points of the same autonomous community), carried out for non-commercial purposes (recreational, sports…).

SMNA 2014 is an internal law and, in its provisions with the referral to the conventions, there are articles regulating maritime institutions either complementing or putting aside the convention. In this case, in which the internal law does not follow the convention, it cannot be used as an interpretive criterion for "the convenience of promoting uniform regulation" (Article 2.2 SMNA), because the internal regulation does not have an international origin and the purpose of the internal regulation is precisely to depart from the uniformity.

The specific referrals made by the SMNA to universal conventions, that is, applicable to internal and international cases, would come to reiterate what the Articles 96.1 Spanish Constitution and 1.5 Spanish Civil Code already stipulate—that regulations governing the aforementioned maritime institutions are those contained in the international conventions.

The option of the SMNA of regulating some maritime institutions' internal cases by referrals to the international conventions (not applicable to internal cases), determines that the regulation of internal cases is planned in the convention. But, the regulatory status of the conventions is the same as an internal law; that is, it does not have a hierarchically higher status to that of the internal law (the SMNA), because it is the internal legislator who, through the SMNA, adopts as regulation what is provided in the convention for cases

that were not planned in the aforementioned convention. Then, the Spanish legislator can complement, modify, expand, reduce … the contents of these conventions through the SMNA.

Notes

1. This paper has been produced under the research project "*El transporte ante el desarrollo tecnológico y la globalización: nuevos desafíos jurídicos del sector marítimo y portuario*" ["Transport in the Face of Technological Development & Globalization: New Legal Challenges for the Maritime and Ports Sector"] funded by the Spanish Ministry of Science & Innovation and by the European Regional Development Fund (MICINN/ERDF/EU) (Ref. PID2019-107204GB-C32). Principal researcher: José Manuel Martín Osante.

2. Specifically, the matters included under the "merchant marine" concept in Article 6.1 of the LPEMM for the purposes of that Law are the following: "a) Maritime transport operations, except those that take place exclusively between ports or points of the same Autonomous Community, provided that the said Community has authority in this matter, with no connections to ports or points of other territories; b) The structuring and control of Spain's civil fleet; c) Safety of navigation and human life at sea; d) Maritime safety, including the power to provide piloting services, to determine what towage services are required in ports and the availability of both in emergencies; e) Maritime salvage on the terms envisaged in Article 264; f) The prevention of pollution from vessels, fixed platforms and other facilities located in waters in which Spain holds sovereignty, sovereign rights or jurisdiction and the protection of the marine environment; g) The technical and operational inspection of vessels, crews and freight; h) The structuring of maritime traffic and communications; i) The monitoring of the location, flags and registration of civil shipping and its despatching, without prejudice to the relevant prior authorisations from other authorities; j) Assurance of fulfilment of obligations on matters of national defence and civil protection at sea; k) Any other service attributed by law to the Administration as regulated under Title II of Book Two of this Law."

2. "Merchant marine" is not deemed to include the structuring of the fishing fleet in the field of fishing *per se*, the structuring of the fishing sector or inspection in either of these fields."

3. As stated in Ignacio Arroyo, *Curso de Derecho Marítimo* 3rd ed. (Cizur Menor, 2015), p. 199, in reference to "maritime transport when it takes place in the inshore maritime waters of the shoreline of an Autonomous Community"; and in Juan Luis Pulido Begines, *Curso de Derecho de la Navegación Marítima* (Madrid: Tecnos, 2015), p. 65, on indicating that the authority for maritime transport recognised in certain statutes of regional autonomy is limited to "maritime transport carried out exclusively in the waters of each Community."

4. If maritime transport operations involve stopovers in ports or points outside the autonomous community, that transport does not fall under the authority of the autonomous community, as indicated in José Luis Gabaldón García and José María Ruiz Soroa, *Manual de Derecho de la Navegación Marítima* 3rd. ed. (Madrid-Barcelona: Marcial-Ponts, 2006), p. 130, in reference to general regional autonomous community authority in matters of "maritime transport."

5. Framework Law [*Ley Orgánica*] 3/1979 of December 18 on the Statute of Autonomy of the Basque Country (Spanish Official Gazette nº 306, 22.12.1979; Basque Official Gazette nº 32, 12.1.1980).

6. As indicated by Iñaki Zurutuza Arigita, "Los Servicios Portuarios y su Regulación en la Ley de Puertos y Transporte Marítimo del País Vasco," in José Manuel Martín Osante (dir.), *Navegación de Recreo y Puertos Deportivos: Nuevos Desafíos de su Régimen Jurídico* (Madrid: Marcial Ponts, 2019), pp. 58–60, https://doi.org/10.2307/j.ctv1grb9g2.6, the area of application of the LPTMPV extends to ports and maritime transport. The author indicates he specific scope of the Law in relation to both matters.

7. Framework Law 2/2007 of March 19 on the Reform of the Statute of Autonomy of Andalusia, Spanish Official Gazette nº 68, March 20, 2007.

8. Framework Law 7/1981 of December 30 on the Statute of Autonomy of Asturias, Spanish Official Gazette nº 9, 11.1.1982.

9. Framework Law 1/2007 of February 28 on the Reform of the Statute of Autonomy of the Balearic Islands, Spanish Official Gazette nº 52, January 3, 2007.

10. Framework Law 1/2018 of November 5 on the Reform of the Statute of Autonomy of the Canary Isles, Spanish Official Gazette nº 268, June 11, 2018.

11. Framework Law 8/1981 of December 30 on the Statute of Autonomy of Cantabria, Spanish Official Gazette nº 9, November 1, 1982.

12. Framework Law 6/2006 of July 19 on the Reform of the Statute of Autonomy of Catalonia, Spanish Official Gazette nº 172, July 20, 2006.

13. Framework Law 1/1981 of April 6 on the Statute of Autonomy of Galicia, Spanish Official Gazette nº 101, 28.4.1981.

14. This contrasts with the provisions on ports, where sole authority is expressly assumed by Galicia. Indeed, Article 27.9 of the Statute of Autonomy of Galicia (Framework Law 1/1981 of 6 April on the Statute of Autonomy of Galicia, Spanish Official Gazette nº 101, 28.4.1981) includes among the areas of authority held exclusively by Galicia that of "ports, airports and heliports not certified as being of general interest by the central government, ports of refuge, marinas and recreational airports"; Article 28.6 attributes to the region the authority to develop legislation and enforce central government legislation on matters of fishing ports." For details, see Francisco Torres Pérez, "Aspectos jurídicos de la gestión del sistema portuario de Galicia," in José Manuel Martín Osante (dir.), *Navegación de Recreo y Puertos Deportivos: Nuevos Desafíos de su Régimen Jurídico* (Madrid: Marcial Ponts, 2019), pp. 128 *et seq*., https://doi.org/10.2307/j.ctv1grb9g2.9.

15. Framework Law 4/1982 of June 9 on the Statute of Autonomy of the Region of Murcia, Spanish Official Gazette nº 146, 19.6.1982.

16. Framework Law 1/2006 of April 10 on the Reform of the Statute of Autonomy of the Community of Valencia, Spanish Official Gazette nº 86, 11.4.2006.

17. See Manuel Broseta, "Ponencia Sobre el Estado Actual y Perspectivas del Derecho Mercantil," in *Centenario del Código de Comercio* Vol. I (Madrid: Ministry of Justice, 1986), p. 434; and Alberto Díaz Moreno, "El Derecho mercantil en el marco del sistema constitucional de distribución de competencias entre el Estado y las Comunidades Autónomas," in Juan Luis Iglesias Prada (coord.) and Aurelio Menendez, *Estudios Jurídicos en Homenaje al Profesor Aurelio Menéndez* (Madrid: Civitas,1996), pp. 234–241, especially p. 241.

18. Cf. Alberto Díaz Moreno, op. cit., p. 232 (nº 9) who, prior to the entry into force of the SMNA, stated that "the authority to dictate regulations which, strictly from a private-law viewpoint, regulate issues of assistance, salvage, towing, finds and removals lies solely with the State, by virtue of Art. 149.1.6 CE."

19. As indicated in José Luis Gabaldón García and José María Ruiz Soroa, op. cit., pp. 129–130.

20. On this issue, some interesting remarks have been made by Andrés Recalde, "El Objeto y el Ámbito Material de la Ley de Navegación Marítima" in Alberto Emparanza and José Manuel Martín Osante, *Comentarios Sobre la Ley de Navegación Marítima* (Madrid: Marcial Ponts, 2015), p. 45, who examines the SMNA and states that it is "questionable" whether Art. 149.1.6 CE on the sole authority of the State on matters of mercantile and procedural legislation "justifies the State holding authority to regulate recreational navigation or navigation for research purposes"; and by Alberto Díaz Moreno 1996, pp. 255 & 262, who states that "the law on maritime and air navigation must also be placed under the heading of mercantile legislation" (remarks made while Book III of the Code of Commerce ("On Maritime Trade") was in force, and thus prior to the entry into force of the SMNA).

21. As stated by Román Eguinoa De San Román, *Derecho Comunitario y Puertos de Interés General. Un Análisis del Modelo Portuario Estatal a la Luz fel Reglamento (UE) 2017/352 del Parlamento Europeo y del Consejo de 15 de Febrero de 2017 por el que se Crea un Marco Para la Prestación de Servicios Portuarios y se Adoptan Normas Comunes Sobre la Transparencia Financiera de los Puertos* (Barcelona: Atelier, 2017), p. 91. Specifically, Annex I of the LPEMM contains a list of ports of general interest in the following terms: "The following are ports of general interest and therefore, under Article 149.1.20.a of the Spanish Constitution, under the sole authority of the State administration: 1. Pasaia and Bilbao in the Basque Country. 2. Santander in Cantabria. 3. Gijón-Musel and Avilés in Asturias. 4. San Cibrao, Ferrol and its estuary, A Coruña, Vilagarcía de Arousa and its estuary, Marín and the Pontevedra estuary and Vigo and its estuary in Galicia. 5. Huelva, Seville and its estuary, Cadiz and its bay (including Puerto de Santa María, the Cadiz customs-free zone, Puerto Real, Bajo de la Cabezuela and Puerto Sherry), Tarifa, Bahía de Algeciras, Malaga, Motril, Almería and Carboneras in Andalusia. 6. Ceuta and Melilla. 7. Cartagena (including the Escombreras basin) in Murcia. 8. Alicante, Gandía, Valencia, Sagunto and Castellón in the Community of Valencia. 9. Tarragona and Barcelona in Catalonia. 10. Palma, Alcúdia, Maó, Eivissa and La Savina in the Balearic Islands. 11. Arrecife, Puerto Rosario, La Hondura, Las Palmas (including Salinetas and Arinaga), Santa Cruz de Tenerife (including Granadilla), Los Cristianos, San Sebastián de la Gomera, Santa Cruz de la Palma and La Estaca in the Canary Isles."

22. Article 11.1 LPEMM states that "Under the provisions of Article 149.1.20 of the Constitution the central State administration holds exclusive authority over ports of general interest, classified as such pursuant to this law." The background to these regulations can be seen in Pablo Acero Iglesias, *Organización y Régimen Jurídico de los Puertos Estatales* (Cizur Menor: Aranzadi Thomson Reuters, 2002), pp. 43 *et seq*.

23. As stated by Ignacio Arroyo 2015, p. 886; and Ignacio Arroyo and José Alejo Rueda, "Del Contrato de Arrendamiento Náutico," in Ignacio Arroyo Martinez and José Alejo Rueda Martinez (dirs), *Comentarios a la Ley 14/2014, de 24 de julio, de Navegación Marítima* (Cizur Menor: Aranzadi Thomson Reuters, 2016), p. 983. For example, Art. 10.32 of the Statute of Autonomy of the Basque Country (Framework Law 3/1979 of December 18 on the Statute of Autonomy of the Basque Country, Spanish Official Gazette nº 306, 22.12.1979) establishes that the said autonomous community holds exclusive authority on matters of "ports" provided that they are not classed as ports of general interest. Specifically, the said article 10.32 declares the sole authority in the following areas: "32. Railways, overland, maritime, river and cable transport, ports, heliports, airports and the Meteorological Service of the Basque Country, without prejudice to the provisions of Article 149.1.20 of the Constitution; contracting centres and cargo terminals for matters of transport." The Statute of Autonomy of Andalusia (Framework Law 2/2007 of March 19 on the reform of the Statute of Autonomy of Andalusia, Spanish Official Gazette nº 68, 20.3.2007) envisages the sole authority of the autonomous community over "ports of refuge, marinas and recreational airports and, in general, ports, airports, heliports and other transport infrastructures in the territory of Andalusia not classed in law as being of general interest to the State" (Art. 64.1.5). Similarly, sole authority for ports is assigned to the Autonomous Community of the Canary Isles under Art. 161.1 of its statute of autonomy (Framework Law 1/2018 of November 5 on the reform of the Statute of Autonomy of the Canary Isles, Spanish Official Gazette nº 268, 6.11.2018): "Article 161. Transport infrastructure. 1. The Autonomous Community of the Canary Isles shall hold sole authority for ports, airports, heliports and other transport infrastructures not classed as being of general interest to the State, and enforcement authority over ports and airports classed as being of general interest when the State does not reserve the right to manage same directly." The Statute of Autonomy of Catalonia (Framework Law 6/2006 of July 19 on the reform of the Statute of Autonomy of Catalonia, Spanish Official Gazette nº 172, 20.7.2006) grants the autonomous community authority on matters of ports in Art. 140.1: "Article 140. Transport infrastructures and communications. 1. The Regional Government shall have sole authority over ports, airports, heliports and other transport infrastructures in the territory of Catalonia which are not classed in law as being of general interest." Along the same lines, Art. 27.9 of the Statute of Autonomy of Galicia (Framework Law 1/1981 of April 6 on the Statute of Autonomy of Galicia, Spanish Official Gazette nº 101, 28.4.1981) includes among the areas where Galicia has sole authority "ports, airports and heliports not classed as being of general interest to the State, plus ports of refuge, marinas and recreational airports." Art. 28.6 grants the community authority in the development of legislation and the enforcement of State legislation on matters of "fishing ports." Cf. Francisco Torres Pérez 2019, pp. 128, *et seq*. In the case of the Statute of Autonomy of the Community of Valencia (Framework Law 1/2006 of April 10 on the reform of the Statute of Autonomy of the Community of Valencia, Spanish Official Gazette nº 86, 11.4.2006), Art. 49.1.15 establishes that the regional government has sole authority over ports: "[…] ports, airports, heliports and the Meteorological Service of the Community of Valencia, without prejudice to the provisions of points 20 and 21 of subsection (1) of Article 149 of the Spanish Constitution."

24. For all cases, see María Zambonino Pulito, *Puertos y Costas: Régimen de los Puertos Deportivos* (Valencia: Editorial Tirant lo Blanch, 1997), pp. 68–69.

25. See Pedro Escribano Collado, "Las Competencias de las Comunidades Autónomas en Materia de Puertos," *Revista de Administración Pública* 3(102) (1983), pp. 2315 *et seq*.; and Jesús Pardo López, "Planeamiento y Ordenación Urbanística en los Puertos de Interés General," *Ciudad y Territorio* (80) (1989), p. 43.

26. The definition of "commercial port" can be found in Art. 3 LPEMM: "1. Commercial ports are those which, by reason of the nature of the traffic through them, meet the technical, safety and administrative control requirements for them to engage in commercial port activities, i.e., loading, off-loading, stowage, unloading, transfer and storage of goods of all types, with volumes or forms that call for the use of mechanical equipment or specialist facilities. 2. Passenger traffic (other than local or river traffic) and the supplying and repair of vessels are also classed as "commercial activities." Accordingly, for a port to be classed as "commercial" it must host "commercial port activities." The following are not classed as such (Art. 3.3 LPEMM): "a) the unloading and handling of fresh fish other than within the scope of the port service of goods handling; b) the mooring, anchoring, stopover, supplying, repair and maintenance of fishing, recreational, military and other vessels belonging to the State and public administrations when those activities are carried out within the scope of their authority and must necessarily be conducted in port service areas; c) loading and unloading operations conducted manually because it is not financially viable to use mechanical equipment; d) the use of facilities and the operations and services required to conduct the activities indicated in this subsection."

27. As stated in Art. 3.4 LPEMM, "The following are not classed as commercial ports under this law: a) fishing ports devoted exclusively or fundamentally to the unloading of fresh fish from vessels used to

catch same, or which serve as home ports for such vessels and provide them with some or all of the necessary mooring, anchorage, stopover, supply, repair and maintenance services; b) ports used to provide vessels with sufficient shelter in case of storms, provided that they do not engage in commercial port operations with the exception of sporadic or low-level operations; c) ports intended to be used solely or fundamentally by sports or recreational vessels; d) ports for which a combination of the aforesaid uses is envisaged." Regarding this distinction between commercial and non-commercial ports, see María Zambonino Pulito 1997, pp. 74–77.

28. For all cases, see María Zambonino Pulito 1997, p. 75.

29. A highly interesting source of information on this issue is José María Ruiz Soroa, "El Derecho uniforme en la Ley de Navegación Marítima," in Alberto Emparanza and José Manual Martín Osante (dirs.), *Comentarios Sobre la Ley de Navegación Marítima* (Madrid: Marcial Pons, 2015), p. 49, *et seq*.

30. See Juan Luis Pulido Begines, *Curso de Derecho de la Navegación Marítima* (Madrid: Tecnos, 2015), p. 37.

31. As pointed out by José María Ruiz Soroa, 2015, p. 52.

32. The International Convention on Maritime Liens and Mortgages (Geneva, 1993).

33. The International Convention on Salvage (London, 1989).

34. The Convention on Limitation of Liability for Maritime Claims (London, 1976).

35. Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels (Brussels, 1910).

36. The Hague Rules as Amended by the Brussels Protocol 1968.

37. Athens Convention relating to the Carriage of Passengers and their Luggage by Sea (Athens, 1974).

38. International Convention on the Arrest of Ships (Geneva, 1999).

39. Similarly, Ana Belén Campuzano and Enrique Sanjuán, "El Derecho Marítimo en España: La Ley de Navegación Marítima," in Ana Belén Campuzano and Enrique Sanjuán (dirs.), *Comentarios a la Ley de Navegación Marítima* (Valencia: Tirant lo Blanch, 2016), p. 22.

40. Along these lines, José María Alcántara, "Los Tratados Internacionales en la Nueva Ley de Navegación Marítima," in Asociación Española de Derecho Marítimo, *Comentarios a la Ley de Navegación Marítima* (Madrid: Dykinson, 2015), p. 45.

41. Like observes, José María Ruiz Soroa 2015, p. 50.

42. See *Memorandum* (paragraph "planteamientos generales") in the *Propuesta de Anteproyecto de Ley General de la Navegación Marítima* (Madrid: Ministerio de Justicia, 2004), p. 14.

43. In this sense, José María Alcántara Gonzalez, "Propuesta de Anteproyecto de Ley General de la Navegación Marítima: Algunas Reflexiones Desde la Plaza y una Valoración," *Derecho de los Negocios* 16(178–179) (2005), p. 11, p. 14.

44. See Julio Carlos Fuentes Gómez, "El Largo Proceso de Elaboración de la Ley de Navegación Marítima," in Asociación Española de Derecho Marítimo, *Comentarios a la Ley de Navegación Marítima* (Madrid: Dykinson, 2015), p. 31.

45. In this line, José María Alcántara 2015, p. 49.

46. This change of legislative technique, from the full duplication to the simple referral, deserves a positive valuation to the General Council of the Judiciary, like explains in its *Informe al Anteproyecto de Ley de Navegación Marítima*, Madrid, December 20, 2012, pp. 28–30: "In the dilemma between a tedious regulation, which makes a transposition to our internal law of the regulation contained in the mentioned international instruments, or the use of the technique of referrals to the content of the international texts applicable to the different aspects of maritime navigation, the text of the Preliminary Bill chooses this second possibility. This, which is also what the 2006 and 2008 Preliminary Bills did, contrasts with the technique followed in the 2004 Proposal, where the content of each convention was included in the articles, adapting it to the concepts and terminology appropriate to our legal system (...) the option accepted in the Preliminary Bill deserves a favourable opinion, although it might be advisable to introduce some greater precision in the referral provisions to the text of the Treaties."

47. Just as specifies, José María Ruiz Soroa 2015, pp. 50–51.

48. In this sense, also consider unnecessary the referral about the priority of the international conventions of the Article, José María Alcántara 2015, p. 48; and Ignacio Arroyo Martinez, "Título Preliminar. Disposiciones Generales," in Ignacio Arroyo and José Alejo Rueda Matinez, *Comentarios a la Ley 14/2014, de 24 de Julio, de Navegación Marítima* (Cizur Menor: Aranzadi Thomson Reuters, 2016), p. 84.

49. Ignacio Arroyo 2016, p. 86.

50. José María Ruiz Soroa 2015, p. 51.

51. Lays out and solves these doubts in the right way, José María Ruiz Soroa 2015, pp. 52–54.

52. In the same way, Ana Belén Campuzano and Enrique Sanjuán, 2016, p. 23.

53. The Preamble of the SMNA in its section IX refers to this issue, highlighting how the SMNA completes the regime of limitation of liability provided in the International Convention LLMC 1976/96: "Title VII, which concerns limitation of liability, simplifies the previous—domestic and international—regimes, which are fairly confusing. It does so based on the Convention on Limitation of Liability for Maritime Claims, done at London on 19th November 1976 (LLMC), amended by the Protocol of 1996, the regime of which *is completed in this Title*."

54. In this sense, José María Alcántara 2015, p. 57.

55. See José María Ruiz Soroa 2015, pp. 53–54, who lays out how these rules of the SMNA which overwhelm the universal convention space do not have legal effectiveness.

56. José María Ruiz Soroa 2015, p. 54; and, in the same way, José María Alcántara 2015, p. 57, 60.

57. Cfr. Ana Belén Campuzano and Enrique Sanjuán 2016, p. 23.

58. Like specifies José María Ruiz Soroa 2015, p. 55.

59. In this sense José María Ruiz Soroa 2015, pp. 55–56.

60. Some conclusions in this line, criticism of the legislative technique used by SMNA in relation to its relationship with international conventions, can be consult in José María Ruiz Soroa 2015, p. 60; and, in the same way, José María Alcántara 2015, p. 60.

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