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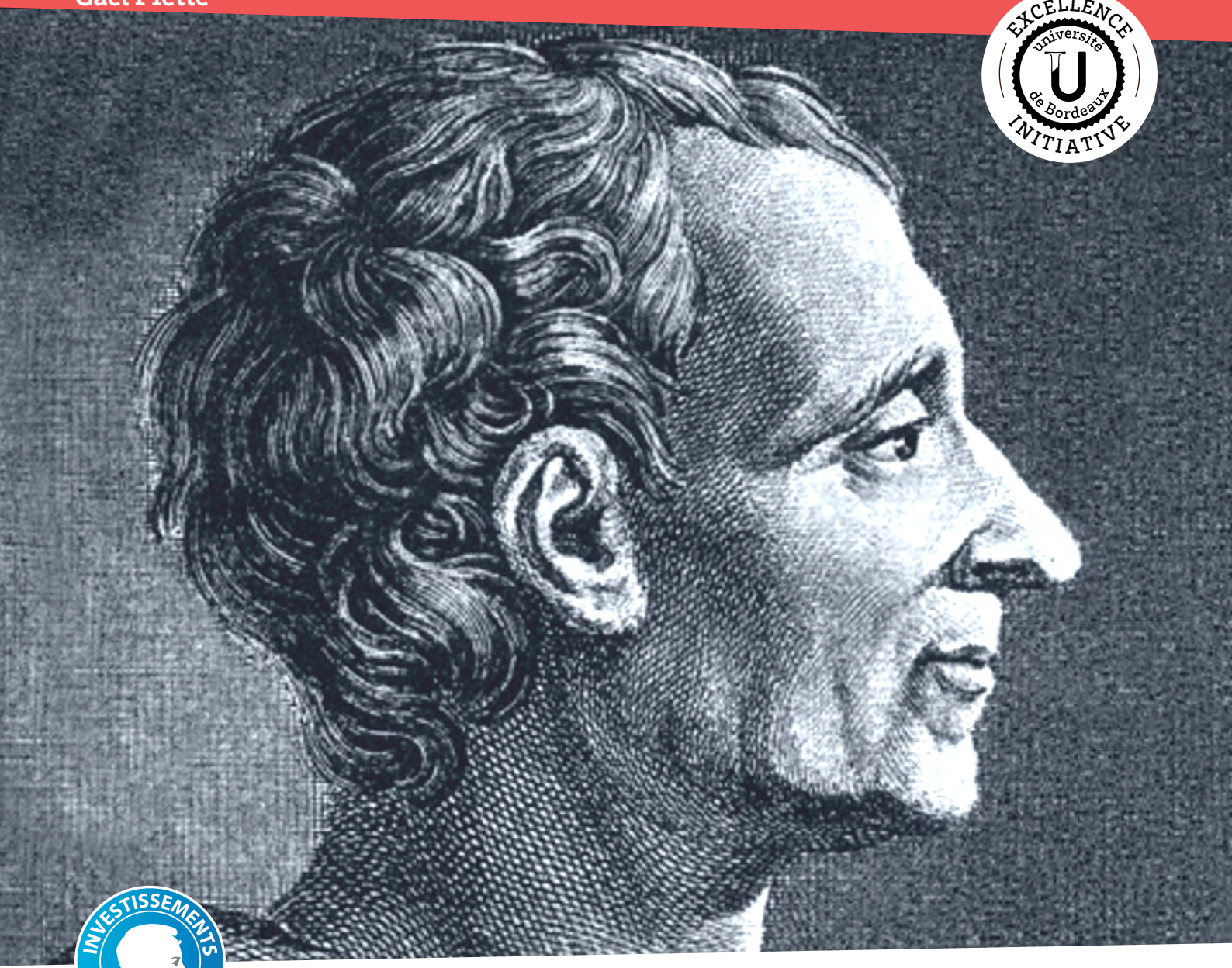

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Maritime Law:

The concept of "ship" under French law

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It might seem incongruous to ponder the concept of "ship". Everyone thinking they know what a ship is: it is the *Titanic*, the *Karaboudjan*, the *Bounty*, or even the *Medusa* (which is perhaps more famous for its raft). In reality, while each person can give examples of a ship, defining the concept is not as straightforward as it may seem at first.

Nevertheless, the concept is central to maritime law. The application of special rules depends on it. A set of rules that apply to all ships – but only *to ships* – hinge on the qualification as a "ship". A ship must be registered in line with specific formalities. Its sale can only take effect where a specific formality – the *mutation en douane* (effectively a record of transfer of ownership on customs registers) – has been completed. It may be encumbered with mortgages and maritime privileges which are subject to specific conditions and systems of rules. Collisions between ships are exempt from ordinary legal rules. The owner of a ship may rely on a global limitation of liability with regard to all their creditors. These various examples show that many maritime problems suppose that one question has been answered beforehand: is the ship at issue genuinely a ship?

French jurisprudence has been asking that same question for some time (1) – and the answer is not an easy one: "*nothing is more difficult to define than a "ship*" (2). Admittedly, there are various clues – buoyancy, the place of operation, propulsion – which seem to characterise a ship. However, most are neither necessary nor sufficient, and may also apply to other machines or vehicles, that maritime law has no reason to govern.

Some factors are inoperative. The intention of the parties, as arising from the administrative registration of the ship cannot be taken into account: it is not for a person to select the legal status of a good on the basis of an administrative formality. The geographical zone in which navigation takes place is no more convincing. The geographical criterion does not settle the fate of certain makes, which are just as dangerous as the sea (3). Nor does it serve in (re)solving the difficulties encountered in the meeting points between river and sea, coastal areas where navigation is most concentrated and accidents more numerous. The inconsistencies in the rules governing harbor and estuary support vessels are a clear reflection of this (4). It also provides no solution to the problem posed by ships that venture out to sea only exceptionally, or which journey upriver: the legal rules governing ships cannot vary according to some fantasy of navigation. The limits of the sea in relation to land ought to be defined beforehand. These limits – which move depending on the seasons, the lunar cycle, or technical progress – do not have the permanence required of a concept intended to produce legal effects. Salinity, a criterion put forward by many authors, is difficult to apply, particular in light of the existence of brackish waters: the Arctic Ocean when the ice caps melt, the eastern part of the Baltic Sea (the Gulf of Finland in particular), the Saint-Lawrence River, the River Thames, the Elba, etc.

Lastly, French law dismisses size as a qualifying criterion for ships, contrary to received ideas and certain other legal systems. Belgian law, for instance, defines ships as "*any building of at least 25 gross tonnage*" (Law of 21 August 1878, as amended by Law of 10 February 1908, Article 1, Book II, Belgian Commercial Code). Chinese law reserves the qualification to buildings above the threshold of 20 tonnes (Chinese Maritime Code, Art. 3). There is no such provision under French law. "*And all of them gone to sea!*"

This lack of clarity results in a shifting concept of "ship". French positive law tends to adopt a broad conception (I). However, a return to a strict conception could be desirable (II).

I. The broad conception of "ship" under French positive law

The extensive concept of "ship" under French maritime law is the consequence of deeply disparate legislation (A) and comprehensive solutions in case law (B).

A. Disparate legislation

Maritime legislation applicable under French law can be divided into two sources: domestic and international legislation.

As regards domestic legislation since the promulgation of the Transport Code in 2010, French la now has a definition for "ship". It must be noted that neither the *Ordonnance de Marine* (Marine Ordinance) 1681 nor the Commercial Code 1807, nor the Law of 3 January 1967 defining the status of ships and other seagoing vessels did not provide a definition for "ship" (5). In the same vein, the Law of 7 July 1967 concerning marine incidents states that in the event of a collision, "*all floating craft, with the exception of those secured to a fixed mooring, shall be treated in the same way as seagoing ships*" (Art. 1, para. 2) and, in the event of salvage, *"all floating craft shall be treated in the same way as seagoing ships*" (Art. 9, para. 2). Thus the legislation treated some floating craft in the same way as ships, without specifying the exact meaning of "ship"!

Article L. 5000-2 of the Transport Code defines ships as "*any floating craft, built and equipped for commercial, fishing or recreational maritime navigation and allocated to said purpose*".

The above definition is not, however, beyond reproach. Firstly, it relies on the concept of maritime navigation, which suffers a degree of uncertainty. Article L. 5000-1 specifies that maritime navigation is "*surface or submarine navigation practised at sea, together with that practised in estuaries and watercourses downstream of the initial obstacle to the navigation of ships*", it being stipulated that the list of those obstacles is set down by regulation. Next, the definition under Article L. 5000-2 makes use of neither the available case law [construction] nor the jurisprudential reflexions conducted over the course of more than a century. Lastly, Article L. 5000-2 itself specifies that its definition shall only apply in the absence of any provisions to the contrary. In other words, this definition can in no way harmonise the concept of "ship". It would also appear to be insufficient in establishing what a ship is with any precision.

As regards international legislation, it is no exaggeration to state that each convention adopts its own definition of "ship". Some are particularly sweeping, such as the MARPOL Convention 1973, the International Convention on Salvage 1989 (Art. 1-b), the Nairobi International Convention on the Removal of Wrecks 2007 (Art. 1-2) or even the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships (Art. 2-7). Amongst the broadest convention

definitions, it would not be amiss to cite that contained in the International Convention on Civil Liability for Bunker Oil Pollution Damage (BUNKER) 2001, which views ships as "*any seagoing vessel and seaborne craft, of any type whatsoever*" (Art. 1-1). In the same vein, COLREG (Convention on the International Regulations for Preventing Collisions at Sea 1972) stipulates that "[*t*]*he word "vessel" includes every description of water craft, including non-displacement craft, WIG craft and seaplanes* (6)*, used or capable of being used as a means of transportation on water*" (Rule 3 (a)).

Conversely, some conventions take a narrower approach. One interesting example is the Convention on Limitation of Liability for Maritime Claims (LLMC) 1976. The Convention does not define "ship". On the one hand, it provides that a State Party can extend the limitation of liability scheme to boats intended for navigation on inland waterways (Art. 15 (2)), which demonstrates that the Convention makes the distinction between ships and boats. On the other hand, the Convention expressly excludes from its own scope any air-cushion vehicles and floating platforms constructed for the purpose of exploring or exploiting the natural resources of the sea-bed or the subsoil thereof (Art. 15(5)).

These few examples reflect the whole variety of legislative definitions. It should nevertheless be noted that the great majority adopt a particularly broad concept of "ship" without defining it with any degree of precision.

B. Comprehensive case law

The Court of Cassation attempted to define the concept of "ship" in 1844: "*Seagoing ships, whatever their dimensions or description, must be understood as being all those which, having their own hull and crew, perform a special service and are adequate for a particular industry"* (7). This definition falls short nonetheless. It is difficult to imagine a craft that does not perform "a special service" and is not adequate for "a particular industry". Furthermore, this definition does not serve in differentiating between seagoing ships and riverboats, which was the only genuinely important question at the time.

Thereafter, in 1898 and 1919, two key decisions were handed down, on the subject of tugboats intended to operate along rivers and canals. The Court refused to recognise such ships as ships, holding that their owner "*intended that they should pull ships up or downriver*" and that "*they have never served any other purpose*" (8). Thus such a ship "*was exposed to none of the particular risks of sea voyages*"(9).

These decisions could have given the impression that French case law would adopt a narrow conception of ships. However, it went in the opposite direction, particularly under the influence of developments in water sports and activities. The Court of Cassation considered that a rubber dinghy, a yacht accessory, was subject to the rules on collisions because it could "*only be used at sea*" (10). French case law went even further, in treating a sailboard in the same way as a ship! This judgment, already well-established in the eyes of the Court of Appeal at Rennes (11), was recently confirmed by the Court of Cassation (12). This so-called "theory of assimilation", which consists in not qualifying a craft but rather treating it in the same way as a ship, muddies the waters considerably.

Judging by existing legislation and case law, it would seem that the concept of “ships” can encompass crafts ranging from 350 metre-long ocean liners costing 1 billion euros to sailboards, jet-skis or pedalos, even oil rigs. Such a conception of “ships” is not judicious: by dint of considering that any floating craft is a ship, maritime law will ultimately lose its specificity. Indeed, the concept, which lies at the very heart of maritime law, must retain a degree of unity, "*without which a saucepan bobbing along will one day be subject to the regulations on collisions at sea*" (13).

Thought must therefore necessarily be given to a return to a strict conception of ships.

II. A desirable return to a strict conception of ships

In order to return to a strict conception of ships, it is necessary to establish the precise criteria for identifying a ship (A). A strict conception does not, however, preclude the ad hoc application of maritime law to other floating craft (B).

A. Criteria for identifying ships

In order to qualify as a ship, a craft will have to meet three criteria.

The first of these is buoyancy. A craft may only qualify as a ship if it is able to float, on the surface of the sea or at depth (e.g. in the case of submarines) (14). Moreover, this criterion is the first put forward by the definition contained under Article L. 5000-2 of the French transport Code (“Any floating craft…”). The buoyancy criterion serves in particular to preclude from the concept of "ships” those vessels that travel along the sea floor without floating.

The second criterion is self-propulsion. A ship is a means of transport. Without distorting the concept of means of transport, it is consequently necessary for it to have a means of propulsion. This may be one or several engines, one or several sails, oars, etc. Craft which cannot move independently, i.e. which must be towed in order to be moved, are therefore not ships (15). This is how the Court of Cassation was able to consider that a diving barge, a floating platform, could not qualify as a ship, as it was "*devoid of any means of propulsion*" (16). An oil platform therefore cannot be considered a ship.

The third criterion is the ability to face the dangers of the sea. This is the most important criterion found in maritime jurisprudence (17). A craft that is able to face (victoriously, in theory) the perils of the sea is a ship (18). This criterion is a reference to the particularism of maritime law itself: its rules are explained and justified by the risks that maritime navigation presents. This ability to face the dangers of the sea may be present or future: a ship under construction is a ship (19). The Court of Cassation regularly employs the criterion, holding for instance, with regard to a rowboat, that “*the low weight of the craft, its frail appearance and the lack of height in its hull in relation to the waterline limited it use to that of a toy boat; these factors showed that it was not intended for navigation at sea*” (20).

A ship is therefore a floating craft, equipped with a means of propulsion, able to face the dangers of the sea.

As a consequence, barges, port support craft (21) or even sailboards cannot be qualified as ships. The same applies to hovercraft, which float on the water propelled by an air propeller but cannot

be described as a ship, as its lightness, low level of autonomy and its low draught are such that it is not suited to face the perils of the sea.

These three criteria and the resulting definition serve better to identify the concept of ships, which must be understood in the strict sense as the qualification determines the application of maritime law. Such a strict conception does not preclude certain ships from being treated on an *ad hoc* basis as ships.

B. The *ad hoc* extension of maritime law to other floating craft

The starting point for this idea is really quite simple: ships are not alone at sea. They share that space with other craft: harbour support vessels, toy boats, oil platforms (22), seaplanes, hovercraft (23), ground effect vehicles, oil terminals, floating hotels, etc. On the one hand, these various craft must comply with the imperatives and rules of maritime navigation. On the other hand, in the event of a "mixed" incident, i.e. involving one or more ships and one or more of such vessels, it would be particularly difficult to operate a distributive application of the existing legislation, by applying maritime law to the ship only and ordinary law to the craft that is not a ship (24).

These ships are, like ships, isolated and exposed to the dangers of the sea. Thus some maritime rules are intended to govern them, particularly those that the dangers of the sea demand: safety regulations, rules applicable to collisions, salvage, questions of oil pollution etc. Conversely, other rules under maritime law do not concern them: these are rules justified by the role played by ships, which is to transport persons and goods. It can therefore be considered that some rules of maritime law may apply to "non-ships", for the sake of justice and simplicity, without those vessels qualifying as ships. As Antoine Vialard argues: "*it is not because a cyclist has to follow the prescriptions of the Highway Code that his vehicle* ipso facto *becomes an automobile*" (25).

Thus, in the event of a collision between a ship and a toy boat, the only reasonable course is to apply the same rules – collision rules – to both ships. However, the fact that a legal provision treats both as ships does not make them both ships. And with the exception of those cases where the law provides otherwise, they ought to fall within the scope of ordinary law, on the same basis of all activities that take place along the coast (jet-skis, pedalos, etc.).

Additionally, there must be limits, as some ships are not ships and ought not to be treated as such. COLREG, for instance, defines seaplanes as ships. Such a definition is debatable. Seaplanes are not designed for maritime navigation. Its natural operational environment is the air, not the waves. While it can and does move on water, this is only ancillary. The same can be said for ground effect vehicles which are aircraft designed to operate at low altitude (two or three metres) above a level surface with no obstacles (the sea, expanses of sand or snow. It is difficult to define such a craft as a ship: it operates in the sky, even though it does so at very low altitude. Like any other flat surface, the sea serves only to create the ship's lift.

Lastly, there is the peculiar case of hovercrafts, which are often treated as ships in existing legislation on the failure to report accidents in the event of incidents caused by shipping (26); customs matters (27), work organisation (28), port charges (29), or the punishment of polluting emissions (30). There are various difficulties in existing case law. A judicial court has considered that hovercrafts are not subject to the requirement of resorting to port pilotage, which would appear to be a refusal to recognise hovercraft as ships. However, the *Conseil d'Etat* has extended

the port taxes levied on passenger ships to hovercraft (31). The latter decision was handed down in a taxation case, the specificity of which is such as to prevent judgments from being extended to other fields.

Ultimately, we will keep in mind the words of René Rodière: *"It is not permissible to qualify as a floating ship any structure described as (...) rising above water; otherwise, a helicopter, which rises through the effects of pressure on land, would be called a lorry or a locomotive"*.

In conclusion, a ship is a floating craft, equipped with a means of propulsion, capable of facing the dangers of the sea. Other floating craft or seagoing ships are not ships and ought not to be treated as such. Nonetheless, some provisions under maritime law may sometimes apply to such ships, in the interests of justice and equity.

Notes:

(1) See in particular, Rodière (René), « Navire et navigation maritime », DMF 1975. 323; « Faut-il réviser la définition classique du navire? », JCP 1977. I. 2880.
(2) Bonassies (Pierre), « Le droit positif en 1992 », DMF 1993, n°523.
(3) Navigation on the American Great Lakes is, moreover, considered as maritime navigation.
(4) Vialard (Antoine), « La qualification juridique des engins de servitude portuaire », in *Aspects du droit privé en fin du XXe siècle*, Mélanges en l'honneur de M. De Juglart, LGDJ Montchrestien, 1986, p. 339.
(5) Many foreign legislatures adopted a definition for ships before France: Delebecque (Philippe), Rép. com. Dalloz, *V°* Navire, n°10.
(6) The WIG ("wing-in-ground") craft is "a multimodal craft which, in its main operational mode, flies in close proximity to the surface by utilizing surface-effect action" (COLREG, Rule 3 (m)).
(7) Cass. civ., 20 Feb. 1844, S. 1844, 1. 197.
(8) Cass. req., 4 Jan. 1898, S. 1898, 1. 216.
(9) Cass. req., 13 Jan. 1919, S. 1920, 1, 340; Autran, XXXI, 330.
(10) Cass. com., 27 Nov. 1972, n°70-12596, Navire *Gipsy II*, cited above, DMF 1973. 160, note P. Lureau.
(11) CA Rennes, 4 May 1982, DMF 1983. 40, notes Y.-M. Le Jean and Y. Tassel; CA Rennes, 7 May 1991, DMF 1992. 243, obs. R. Le Brun.
(12) Cass. crim., 2 Feb. 2016, n°15-80927, DMF 2016. 352, obs. S. Miribel.
(13) Rémond-Gouilloud (Martine), « Navire et engin de plage », DMF 1984. 387.
(14) Bonassies (Pierre) & Scapel (Christian), *Traité de droit maritime*, LGDJ, 2e éd. 2010, n°148; Vialard (Antoine), *Droit maritime*, PUF 1997, n°275.
(15) Bonassies (Pierre) & Scapel (Christian), *Traité de droit maritime*, *Ibid.*, n°152; Delebecque (Philippe), Rép. com. Dalloz, *V°* Navire, n°67 et seq; Vialard (Antoine), *Droit maritime*, *Ibid.*, n°275.
(16) Cass. civ., 22 Dec. 1958, DMF 1959. 217. Adde, Cass. com., 11 Dec. 1962, Bull. civ. III, n°510.
(17) Bonassies (Pierre) & Scapel (Christian), *Traité de droit maritime, op. cit.,* n°151; Chauveau (P.), *Traité de droit maritime*, Librairies techniques, 1958, n°151; Delebecque (Philippe), Rép. com. Dalloz, *V°* Navire, n°61 et s.; S. Miribel (Stéphane), « Qu'est-ce qu'un navire? », *in* Mélanges en l'honneur de Ch. Scapel, PUAM 2013, p. 279; Ripert (Georges), *Traité de droit maritime*, *op. cit.*, n°172; Rodière (René), *Traité général de droit maritime, Le navire*, Dalloz, 1980, n°5; Vialard (Antoine), *Droit maritime, op. cit.,* n°275.
(18) Cass. req., 13 Jan. 1919, préc., S. 1920, 1, 340; Cass. com., 6 Dec. 1976, *Canot Poupin Sport*,

DMF 1977. 513; CA Rouen, 30 Nov. 2000, DMF 2001. 470, note C. Navarre-Laroche.

(19) Delebecque (Philippe), Rép. com. Dalloz, *V°* Navire, cited above, n°62.

(20) Cass. com., 6 Dec. 1976, *Canot Poupin Sport*, DMF 1977. 513, note R. Rodière. *Adde*, CA Caen, 12 Sept. 1991, DMF 1993. 20, obs. P. Bonassies and p. 50, note A. Tinayre.

(21) Vialard (Antoine), « La qualification juridique des engins de servitude portuaire », cited above.

(22) Rémond-Gouilloud (Martine), « Quelques remarques sur le statut des installations pétrolières en mer », DMF 1977, pp. 675 and 738.

(23) Rodière (René), « Le statut des aéroglisseurs », D. 1969. chron. 83.

(24) The Court of Cassation even decided to apply the rules on collisions, specifically maritime collisions, to an incident between two jet-skis, i.e. without a ship even being involved: Cass. com., 3 July 2012, n°11-22429.

(25) Vialard (Antoine), *Droit maritime*, *op. cit.*, n°281.

(26) Law n°66-962 of 26 December 1966, D. 1967. 24.

(27) Decree n° 67-276 of 23 March 1967, JCP 67, II, 32950.

(28) Decree n° 77-1529 of 28 December 1977, D. 1978. 76.

(29) *Code des ports maritimes* (Maritime Ports Code), Art. R. 212-1.

(30) *Code de l'environnement* (Environmental Code), Art. L. 218-10.

(31) CE, 19 Dec. 1979, D. 1980, 318, note R. Rodière; DMF 1980. 231, note R. Rezenthel.