CHAPTER 10

STANDARD CONTRACTS USED IN THE OFFSHORE INSURANCE SECTOR: CLEAR AND UNAMBIGUOUS?

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I. INTRODUCTION

The insurance sector has played a pivotal role in the growth of the oil industry by providing the capacity to cover the huge capital expenditure associated with offshore drilling. Insurance products designed for the offshore sector have been readily available in the London market since the 1950s. Given the fact that marine insurance is arguably the most historic form of commercial insurance, it is understandable why offshore energy insurance has been based upon standard marine insurance policies, especially in the early days. This practice continues today to a certain extent, and standard hull clauses are often employed to insure offshore drilling units and other offshore equipment and craft, such as Floating Production, Storage and Offshore (FPSO) vessels.

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1 This is not such an uncommon development in insurance markets. The aviation insurance market, and in particular aircraft hull insurance, followed a parallel route. It was marine-reliant at the beginning, but soon adopted its own tailor-made 'all risks' policies. However, the aviation insurance market took independence a step further and (arguably) limited the influence of the principles of marine insurance law by inserting clauses to that effect in the standard policies; see R. Margo, *Aviation Insurance*, 3rd edn (Butterworths, 2000), p. 13.

Offshore energy insurance has, in time, evolved into a distinct brand offering products that are tailor-made for the energy industry. The sector has also developed standard forms that are distinct from the ones used in the marine market for similar risks.[1] The insurers from the energy sector of the market provide a wide range of products for the offshore industry, ranging from business interruption, loss of hire, offshore liability risks and control of well insurance, to construction risks associated with offshore craft and equipment. However, the section of the energy insurance sector that deals with the risk of loss of or damage to offshore production units and craft, also known as offshore operating insurance, remains a significant one, essentially due to the high value of such craft.[2]

Standard clauses that are often used in the market to provide cover for offshore craft will form the focus of this Chapter.[3] The authors intend to provide a critical analysis on clauses used in the market in insuring offshore craft, with a view to determining whether the cover provided is fit for the purpose and, if not, how these clauses can be amended to achieve a greater degree of contractual certainty. To be more precise, the authors will discuss (i) whether hulls clauses, which are still used in the market to insure offshore craft, are capable of offering the desired cover against risks associated with offshore drilling and operations; and (ii) whether standard clauses specifically produced by the energy market for offshore craft offer certainty. Before embarking upon a legal analysis, it is useful to introduce the contractual setting by identifying the standard clauses most commonly used in the energy market in insuring offshore craft.

II. INSURING OFFSHORE DRILLING UNITS AND CRAFT: CONTEMPORARY PRACTICE

The first attempt of the London market to produce a standard policy for offshore drilling barges and rigs was made in 1957. The market produced standard clauses against marine and drilling perils in both an 'all risks' and a 'named risk' format. In 1972, these forms were updated and the Rig Committee[4] produced the London Standard Drilling Barge Form (LSDBF) 1972[5] on an 'all risks' basis. The LSDBF provides cover to oil rigs and drilling barges during towage, installation or decommissioning from the drilling location, and while engaged in the drilling operation itself. Concurrently, the market introduced the London Standard Platform Form (LSPF) 1972, designed for fixed offshore installations in operating mode but excluding

2 For example, the value of the hull and infrastructure of a large FPSO vessel may exceed US$2bn. The asset value frequently rises above US$3bn when the cost of the risers and mooring systems are taken into account, and to more than US$5bn when the sub-sea systems linking the FPSO to the wells are added (*Drilling in Extreme Environments: Challenges and Implications for the Energy Insurance Industry* (Lloyd's of London, 2011), p. 26, available online at: www.lloyds.com/~/media/Lloyds/Reports/Emerging%20Risk%20Reports/Lloyds%20Drilling%20in%20extreme%20environments%20FINAL3.pdf, accessed 31 January 2014.

3 For a comprehensive analysis on other types of standard contracts often used in the offshore sector, see D. Sharp, *Upstream and Offshore Energy Insurance* (Witherbys Insurance, 2009).

4 This is a sub-committee of the Lloyd's Marketing Association which today works closely with the International Underwriting Association to represent the interests of insurers writing offshore energy risks in London.

navigational risks. Despite the widespread use of these forms, the Rig Committee attempted in 1996 to bring the 1972 form up to date. As a result, it produced a new version of the Drilling Barge Form under the title of the London Market Offshore Mobile Unit Form (LMOMUF) 1996. Likewise, a new version of the Platform Form was introduced to the market in 2009 under the title of the London Standard Platform Form (LSPF) 2009. The new versions of these forms have not been taken up with great relish in the London market, and the LSDBF 1972 and LSPF 1972 are still in common use.

These standard clauses are not the only ones that are used as the basis of cover for offshore operating insurance in the London market. Many brokers still utilise standard hull forms when insuring offshore craft and installations. The Institute Time Clauses Hulls (ITCH) Port Risks 1987,[6] for example, is the main form used when insuring FPSO vessels. Also, it is not uncommon to find that drilling barges belonging to US interests are insured under the American Institute Hull Clauses (Time) with minor amendments.[7]

III. USING MARINE HULL FORMS IN THE OFFSHORE SECTOR

A. Insuring FPSO vessels by using Institute Time Clauses Hulls – Port Risks (ITCH – Port Risks)

An FPSO vessel is a ship-shaped structure which is designed to receive hydrocarbons from well-heads, and process and store them until they can be offloaded onto a tanker or transported through a pipeline.[8] An FPSO will typically be permanently moored in place by nine chain anchors attached to pilings, and will be continuously on-site for the duration of a field's productive life. As such, one sees the logic of using Institute Hull Clauses designed to provide cover against port risks as the basis of cover for such craft. However, taking into account the risks associated with offshore operations, it is submitted that various disputes with regard to coverage issues are likely to arise, particularly if the standard hull clauses are used in their original format or with minor changes without carefully considering the coverage issues. Some of the difficulties that can emerge will be the subject of our further deliberations.

The first contentious point is to what extent losses caused by movements in the earth's surface are covered in a case where an FPSO vessel is insured under the ITCH – Port Risks. A blowout occurring on the well to which an FPSO is connected through an internal turret could well result in cratering[9] and even the capsizing of an

5 (9/3/72).
6 (20/7/87).
7 (29/9/09). An earlier version of these clauses (2/6/77) is also in common use.
8 A Floating Storage and Offloading (FSO) vessel is very similar in nature, except it has no facility to process hydrocarbons. An old oil tanker can be modified to function as an FPSO or FSO vessel, but today it is common to see crafts specifically built for this purpose.
9 The term 'cratering' can be defined as the formation of a basin-like depression in the earth's surface surrounding a well as a result of erosion and the eruptive action of oil, gas, fluids or substances flowing without restriction.

FPSO.[10] Standard clauses used in the energy market usually provide cover against all risks with some limited exceptions. Yet, the ITCH – Port Risks 1987 are named-risk policies, so the assured is required to bring himself under the policy in order to have any hope of recovery if cratering causes a loss. Given that the loss in the instance described above is associated with the movement of the seabed, one can be tempted to argue that the cause of the loss is a peril of the seas. There is a considerable body of case law as to which occurrences qualify as 'perils of the seas',[11] but the use of the word 'peril' denotes that something fortuitous or accidental is envisaged.[12] Recently, it has been stressed by the Supreme Court in *Global Process Systems Inc.* v. *Syarikat Takaful Malaysia Bhd (The Cendor Mopu)*[13] that there is no threshold in identifying what will amount to a fortuity. The question in each case is whether sea and weather conditions were such as to have caused a fortuitous accident or casualty.[14] This might lend support to the submission that as long as the loss is not attributable to internal failure or deficiencies,[15] any external fortuitous event, including collapsing of the seabed or vigorous movement on the surface of the seabed, could qualify as a peril of the sea.

Facing a submission of this nature, the insurer could potentially argue that the proximate cause of the movement of the seabed is a blowout occurring in an oil well. This is a peril that is not specifically insured against under the ITCH – Port Risks, and accordingly the assured could not be indemnified.[16] There will be force in this counter-submission, since the judgment of the House of Lords in *Leyland Shipping Co. Ltd* v. *Norwich Union Fire Insurance Society Ltd*[17] directs the courts to look for the dominant or efficient cause when identifying the proximate cause of a loss.[18] Applying the contemporary causation test in this scenario, it is difficult to see how the blowout, which is the force behind the movement on the seabed eventually leading to the loss of an FPSO, can be disregarded as a potential cause of the loss. That said, the assured would possibly have a second bite of the cherry, especially if the blowout results in an explosion, which was what happened in the *Deepwater Horizon* disaster in the Gulf

10 Although the risk of capsizing is considerably less, the same could occur in cases where blowouts occur in remote wells.

11 See, in particular, *Canada Rice Mills Ltd* v. *Union Marine & General Insurance Co. Ltd* [1941] AC 55; *Baxendale* v. *Fane (The Lapwing)* [1940] P 112; *Samuel (P) & Co. Ltd* v. *Dumas* [1924] AC 431 and more recently in *Versloot Dredging* v. *HDI-Gerling Industrie Versicherung AG (The DC Merwestone)* [2013] EWHC 1666 (Comm), [2013] 2 Lloyd's Rep 131.

12 Rule 7 of the Rules for Construction of Policy attached to the MIA 1906 stipulates: 'The term "perils of the seas" refers only to fortuitous accidents or casualties of the seas.'

13 [2011] UKSC 5, [2011] 1 Lloyd's Rep 560.

14 *Ibid.* at [104], *per* Lord Clarke.

15 See, for example, *Dedgeon* v. *Pembroke* (1874) LR 9 QB 581 and *Lamb Head Shipping Co. Ltd* v. *Jennings (The Marel)* [1992] 1 Lloyd's Rep 402.

16 A similar debate can arise for losses caused by tsunamis. Although the damage is caused by a series of waves, a tsunami is usually caused by earthquakes, volcanic eruptions, other underwater explosions, landslides, glacier calvings, meteorite impacts and other disturbances above or below water. It is a debatable point whether a tsunami can be viewed as a peril of the seas or another peril, that is, as an earthquake or other volcanic eruption. It should be open to underwriters to argue that the proximate cause of a tsunami is an earthquake or volcanic eruption.

17 [1918] AC 350.

18 The function of the courts is said to be to identify the cause without which the loss would not have occurred.

of Mexico.[19] In the context of insurance law, 'explosion' has been held to mean 'an event that is violent, noisy, and caused by a very rapid chemical or nuclear reaction, or the bursting out of gas or vapour under pressure'.[20] It is undisputable that this description would be relevant in this context as well, and the assured would possibly be able to bring himself under a policy that incorporates the ITCH – Port Risks, especially if the blowout is followed by an explosion. This hypothetical example is sufficient to demonstrate the coverage problems that can emerge due to the special nature of the risks associated with offshore operations if craft used offshore, such as FPSOs, are to be insured by using hull clauses in their original format. For clarity, it is vital that a clear indication is made in the policy as to whether loss caused by cratering or blowout is covered or not.

Another difficulty could emerge in a case where a loss is caused by the bursting of boilers on board an FPSO or FSO. The ITCH – Port Risks provide cover for loss or damage consequential upon the bursting of a boiler[21] as long as such loss or damage has not resulted from want of due diligence by the assured, owners or managers.[22] Given the nature of the processes taking place on board of an FPSO or FSO, large capacities of steam, hot water or thermal oil are required. It is common that additional boilers are installed on FPSO or FSO vessels, which would normally not exist on ordinary sea-going vessels. An interesting question is whether there would be coverage for consequential losses emerging from the bursting of a boiler which is used merely for oil processing purposes rather than navigational purposes. There appears to be no English decision where this head of cover has been considered. However, the wording of the clause, which makes no specific reference to the function for which the boiler has been employed on board the vessel, seems to be wide enough to provide cover in such cases. On the other hand, it is plausible to suggest that given that the ITCH – Port Risks 1987 are largely intended to be used for sea-going vessels, the intention of the draftsmen must have been to refer to boilers that are essential in the course of navigation. Taking this argument to its natural conclusion, it can be suggested that boilers that are used for performing additional functions that are distinct from the purpose of navigation are naturally excluded. This kind of difficulty can undoubtedly be avoided, if the subject matter of insurance is clearly specified at the outset. Otherwise the current wording employed in the ITCH – Port Risks 1987 can be a fruitful source of litigation.

Lastly, it needs to be pointed out that the ITHC – Port Risks 1987 contain provisions that are impractical, inappropriate or even irrelevant for the offshore

19 The *Deepwater Horizon* oil spill occurred in the Gulf of Mexico in 2010 with devastating consequences. The incident, which followed the explosion and sinking of the *Deepwater Horizon* oil rig as a result of a blowout, is considered to be the largest accidental marine oil spill in the history of the petroleum industry. It claimed eleven lives and it took eighty-seven days to stop the oil spill. The total discharge is estimated at 4.9 million barrels.

20 *Commonwealth Smelting Ltd* v. *Guardian Royal Exchange Assurance Ltd* [1984] 2 Lloyd's Rep 608, at 612, *per* Staughton J.

21 Following the decision of the Court of Appeal in *Promet Engineering (Singapore) Pte Ltd* v. *Sturge (The Nukila)* [1997] 2 Lloyd's Rep 146, it is trite law that hull policies do not provide cover for the cost of replacing or repairing the boiler or breakage of the shafts. On the other hand, the International Hull Clauses (1/10/03) expressly stipulate that the cost of repairing or replacing any boiler might be covered under that policy subject to certain conditions.

22 Cl. 4.2 of the ITCH – Port Risks 1987.

sector. Using these clauses in their unamended formats could create unintended consequences for the owners of FPSOs or FSOs. Let us start with the Protection and Indemnity (P&I) clause. The ITCH – Port Risks 1987 offer liability cover for the owners of insured vessels up to 100% of the insured value of the vessel. This is done on the premise that vessels routinely operating at ports are specialised vessels and are exposed to risks that are more restricted than the risks experienced by conventional trading ships.[23] However, in its amended format this clause specifically excludes liability for 'pollution or contamination of any real or personal property or thing whatsoever.'[24] The language used is very broad and undoubtedly excludes liabilities that the owner of an FPSO or FSO could face in respect of leakage and pollution, including clean-up and containment costs and also economic loss claims.[25] If the FPSO or FSO in question has been entered into a P&I club,[26] this exclusion would not have a significant impact on the owners. However, in all other cases the owners must be aware of the gap in their commercial insurance and seek to fill it by purchasing additional liability insurance from the market.

The other point to note is that the sue and labour clause in the ITCH – Port Risks 1987 allows the assured to claim expenses incurred for the purpose of averting or minimising a loss that would be recoverable under the policy.[27] The limit of sue and labour expenses under this clause is theoretically the insured value of the vessel. This limit is acceptable when insuring smaller vessels used in ports. However, in the context of insuring an FPSO or an FSO, whose insured value could in some cases be in excess of US$1 billion, the exposure of the insurer will be enormous if this provision is left in its original format. Also, bearing in mind that the amount of coverage available for sue and labour expenses is usually reduced to a lower sum (i.e., 25% of the insured value[28]) in other offshore insurance contracts used in the energy market, one would expect that such an amendment in the wording of the sue and labour clause will be the subject of negotiations. However, as it is currently worded, the sue and labour clause that appears in the ITCH – Port Risks 1987 is out of line with the contemporary practice in the offshore insurance market, particularly from the insurers' perspective.

As a subsidiary point, it is worth mentioning that the ITCH – Port Risks 1987 contains detailed provisions in respect to wages and maintenance of the crew[29] and

23 See cl. 9 of the ITCH – Port Risks 1987. A similar cover is provided by the Institute Fishing Vessels Clauses (20/7/87), cl. 20. Such vessels are not normally entered in P&I clubs.

24 Cl. 9.3.10 of the ITCH – Port Risks.

25 The relevant provision goes on to exclude liability for 'punitive and exemplary damages' often awarded by American courts in pollution cases. For instance, following the *Exxon Valdez* disaster in 1989, Exxon paid in all US$507.5 million punitive damages, including lawsuit costs, plus interest, which were further distributed to thousands of plaintiffs.

26 Assuranceforeningen Gard, a leading P&I club operating in the energy market, offers P&I cover not only for mobile offshore units but also for accommodation vessels, FPSOs and FSOs. Gard Rules 2013, r. 2(3) states that the club offers cover for liability incurred by the member that arises in direct connection with the operation of the vessel, although coverage is extended to include supply base(s) activities, as long as such activities are also directly connected to the operation of the vessel.

27 Cl. 13 of the ITCH – Port Risks 1987.

28 See, for example, cl. 13 of the LSDBF 1972.

29 Cl. 16 of the ITCH – Port Risks 1987 reads: 'No claim shall be allowed, other than in general average, for wages and maintenance of the Master, Officers and Crew, or any member thereof, except when incurred solely for the necessary removal of the Vessel, with the agreement of the Underwriters,

agency commissions.[30] However, one finds it difficult to see how such provisions would be of relevance in the context of FPSOs and FSOs. Also, given that most FPSOs and FSOs are intended to be moored in a specific location, the sistership clause[31] that appears in the ITCH – Port Risks is likely to be of limited use.

B. Insuring offshore drilling units by using American Institute Hull Clauses (AIHC)

It is common to see mobile drilling units being insured under the AIHC. The cover provided by the AIHC is based on the antiquated Lloyd's Ship and Goods (SG) form, which dates from 1779,[32] and it is debateable whether it provides the desired certainty for the offshore sector. A common risk factor associated with all mobile drilling units is that of an uncontrolled release of hydrocarbons, leading to a blowout, and possibly fire and explosion, or the disturbance of the seabed and immediate environment (cratering). For example, the formation of a seabed crater around jack-up rigs causes instability that may result in rig collapse with consequent structural damage, flooding and ultimate sinking. Another potential risk associated with jack-up oil rigs is the prospect of 'punch-through', which could lead to serious structural damage and even the collapse of the platform. This could result if there is a rapid penetration of the legs through a strong layer overlaying a weaker one. Given that the AIHC are 'named risk' policies which make no specific reference to risks that are unique to the offshore sector, it is debateable, to say the least, whether loss or damage suffered by the mobile drilling unit caused by cratering, punch-through or blowouts will be covered.

The perils clause which invariably appears in the AIHC reads:

> Touching the Adventures and Perils which the Underwriters are contented to bear and take upon themselves, they are of the Seas, Men-of-War, Fire, Lightning, Earthquake, Enemies, Pirates, Rovers, Assailing Thieves, Jettisons, Letters of Mart and Counter-Mart, Surprisals, Takings at Sea, Arrests, Restraints and Detainments of all Kings, Princes and Peoples, of what nation, condition or quality so ever, Barratry of the Master and Mariners and of all other like Perils, Losses and Misfortunes that have or shall come to the Hurt, Detriment or Damage of the Vessel, or any part thereof, excepting, however, such of the foregoing perils as may be excluded by provisions elsewhere in the Policy or by endorsement thereon.

It has been deliberated in the earlier part of this Chapter whether losses caused by cratering or blowout could be qualified, respectively, as perils of the seas or explosion.

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from one port to another for the repair of damage covered by the Underwriters, or for trial trips for such repairs, and then only for such wages and maintenance as are incurred whilst the Vessel is under way.'

30 Cl. 17 of the ITHC – Port Risks 1987 stipulates: 'In no case shall any sum be allowed under this insurance either by way of remuneration of the Assured for time and trouble taken to obtain and supply information or documents or in respect of the commission or charges of any manager, agent, managing or agency company or the like, appointed by or on behalf of the Assured to perform such services.'

31 Cl. 8 of the ITCH – Port Risks 1987 stipulates: 'Should the Vessel hereby insured come into collision with or receive salvage services from another vessel belonging wholly or in part to the same Owners or under the same management, the Assured shall have the same rights under this insurance as they would have were the other vessel entirely the property of Owners not interested in the Vessel hereby insured; but in such cases the liability for the collision or the amount payable for the services rendered shall be referred to a sole arbitrator to be agreed upon between the Underwriters and the Assured.'

32 And is no longer in use in the London market.

The perils clause in the AIHC seems to offer a better chance for an assured attempting to bring himself under the policy. The key issue here would be to determine the scope of the term 'all other like perils' that appears in the perils clause. Would it be, for example, possible to say that 'cratering' is a peril similar to 'perils of the seas', specifically listed in the clause, or is 'blowout' a peril similar to 'fire'? There is no American authority evaluating the meaning of 'all other like perils'; but the matter has been rigorously debated by English courts, especially in the nineteenth century, when the SG Policy was in common use. It is apparent that to come under the scope of coverage offered by the clause, the peril which has operated should be similar in kind to the perils specifically mentioned in the earlier part of the clause (*ejusdem generis*).[33] Furthermore, as stressed by Lord Ellenborough in *Cullen* v. *Butler*,[34] it is vital to demonstrate that the loss or peril was of a marine character.

The English courts have been receptive to the idea of expanding the scope of this clause to cover losses which are of an extraordinary nature or arise from some irresistible force which cannot be guarded against by the ordinary exertions of human skill and prudence. For instance, in *Phillips* v. *Barber*[35] the insured vessel, after discharging her cargo in the port of delivery, was put into a graving dock for repair, and there blown over by the wind and damaged. Even though the vessel was not waterborne at the time of the incident, nor was in the ordinary course of her voyage, the court showed no hesitation in holding that the loss was covered under the policy, as it had been occasioned by violence of the wind and weather in port. Accordingly, the loss was the result of a peril *ejusdem generis* with those specified. It can be argued that movements on the surface of the seabed which are of an extraordinary nature and cannot be prevented by ordinary human skill and prudence, like the strong wind affecting the insured ship outside the water in *Phillips* v. *Cullen*, is similar to perils of the seas. If one follows this line of thinking, any loss caused by cratering should be covered under the AIHC.

It is more debatable whether a similar outcome should follow in cases where structural damage arises on jack-up oil rigs due to punch-through. Assuming that it is scientifically impossible to foresee that a soft layer lies below a hard layer, it is plausible to argue that loss caused due to punch-through is irresistible, extraordinary, cannot be avoided by reasonable care and skill and has a marine character, thus making it a peril similar to 'perils of the seas'. On the other hand, if it is technologically possible to determine the nature of the seabed and the operators failed to detect the existence of a soft layer lying beneath a hard one, the key question would be whether the negligence of the operator could be viewed as a peril similar to the perils listed below. In a number of old cases, negligence of the crew was held to be of the same kind as the perils of the seas. In *Davidson* v. *Burnard*,[36] the insured cargo was damaged as a result of entry of seawater through a main discharge pipe from the engine room. Upon discovering that a valve had been inadvertently left open by the negligence of the crew, Willes J held that this was a loss of a similar kind to one caused by perils

33 Rule 12 of the Rules for Construction reads: 'The term "all other perils" includes only perils similar in kind to the perils specifically mentioned in the policy.'

34 (1816) M & S 461, 465.

35 (1821) 5 B & Ald 161.

36 (1868) LR 4 CP 117.

of the sea, regardless of whether the incident arose in port or not, or in smooth or rough waters. Admittedly, the position is slightly different in a case where the negligence of a project manager who is not on board of the insured vessel leads to the loss. However, in both cases, it is the negligence of those involved in the operation of the insured vessel that causes the loss by operation of another peril. As such, there is room to argue that the project manager who negligently fails to detect the soft layer laying beneath a hard layer is in a similar position to the crew who failed negligently to close a valve in *Davidson* v. *Burnard*. On the other hand, it would be a stretch to argue that his negligence is of a similar kind to 'barratry' listed in the clause, given that the latter can only be committed wilfully and requires an element of dishonesty. An interesting question is whether cover would be available under the Additional Perils (Inchmaree) clause of the AIHC[37] in case of a punch-through arising as a result of the project manager's negligence in determining the site for drilling. Losses directly caused by the negligence of masters, officers, crew or pilots are insured against. However, given that decisions with regard to drilling operations are taken by project managers in consultation with experts, it is far from clear whether their negligence in determining the suitability of the seabed prior to commencement of drilling could be viewed as the negligence of the 'officers' for the purposes of the 'Inchmaree clause'.

When it comes to losses emerging from a blowout, it looks more likely that the perils clause could be extended to provide cover. In *West India Telegraph Co.* v. *Home and Colonial Insurance Co.*,[38] damage caused by explosion of the boiler under ordinary pressure of steam in moderate weather was held to be covered under the general clause. Brett LJ based his judgment on the ground that an explosion by steam was *ejusdem generis* with fire. He said:[39]

> An explosion by gas very often ends in fire, and a fire under the deck of a ship very often leads to that which is very like an explosion; whether by rarefying the air or by some other process, the result is that the deck is blown up. There is a sufficient similarity between a fire and an explosion by steam to enable us to give a large construction to the general phrase. I think therefore upon the construction of the policy that a loss by steam explosion is a loss insured against.

Drawing parallels from this judgment, it can be argued that losses emerging from blowout, especially if this gives rise to an explosion, should be covered under the perils clause.

37 The Additional Perils (Inchmaree) clause of the AIHC (06/02/1977) reads: 'Subject to the conditions of this Policy, this insurance also covers loss of or damage to the Vessel directly caused by the following: Accidents in loading, discharging or handling cargo, or in bunkering; Accidents in going on or off, or while on drydocks, graving docks, ways, gridirons or pontoons; Explosions on shipboard or elsewhere; Breakdown of motor generators or other electrical machinery and electrical connections thereto, bursting of boilers, breakage of shafts, or any latent defect in the machinery or hull, (excluding the cost and expense of replacing or repairing the defective part); Breakdown of or accidents to nuclear installations or reactors not on board the insured Vessel; Contact with aircraft, rockets or similar missiles, or with any land conveyance; Negligence of Charterers and/or Repairers, provided such Charterers and/or Repairers are not an Assured hereunder; Negligence of Masters, Officers, Crew or Pilots; provided such loss or damage has not resulted from want of due diligence by the Assured, the Owners or Managers of the Vessel, or any of them. Masters, Officers, Crew or Pilots are not to be considered Owners within the meaning of this clause should they hold shares in the Vessel.'

38 (1880) 6 QBD 51.

39 *Ibid.*, at 61.

Before completing the survey on coverage issues, a few observations with regard to the nature of cover offered by the AIHC for mobile drilling units are in order. First, it is worth noting that the perils clause offers coverage against earthquakes and similar perils (possibly including volcanic eruptions and tsunami), whilst standard policies produced specifically for drilling units invariably exclude such losses from cover.[40] Secondly, neither the perils clause nor the 'Inchmaree clause' provide cover for losses caused by faulty design, faulty or defective workmanship or electrolytic action.[41] However, this does not constitute an anomaly in terms of the scope of cover, as such perils are often excluded from standard policies designed specifically for offshore units.[42]

Another point to take into account in considering the parameters of the cover offered by the AIHC is the nature of operations that are permissible under the policy. For instance, in standard policies used to insure mobile offshore units, loss or damage or expense caused whilst drilling a relief well for the purpose of controlling or attempting to control fire, blowout or cratering associated with another platform are usually excluded from cover.[43] This is due to the fact that such operations pose significant additional risks for the insured vessel or craft.[44] The position might, however, be different in cases where the mobile offshore unit is insured under the AIHC. The 'Adventure Clause' expressly allows the insured craft to assist and tow vessels or craft in distress. In a case, therefore, where the insured vessel suffers a loss whilst offering assistance to another vessel or craft, by drilling a relief well or otherwise, the loss will be recoverable as long as (i) the cause of loss is attributable to an insured peril (e.g., perils of the seas, fire or any other like peril, and negligence of the master, officers, crew or pilots; and (ii) assistance is offered to another vessel[45] or craft and not to a fixed platform or pipeline.

To illustrate other constraints that owners of offshore mobile units could operate under when such craft are insured under the AIHC, it is appropriate to consider the coverage problems that could arise especially during the transportation of these craft to the oil fields on board of other vessels. It is not uncommon, for example, to see jack-up oil rigs transported on board semi-submersible heavylift transportation barges. Significant risks are associated with a transportation of this nature, and normally insurers would insist on a report from a marine warranty surveyor. The surveys, however, do not remove the possibility of loss, and occasionally losses arise mainly as a result of errors on the sea-fastening of the mobile offshore unit on the deck of the heavylift vessel, or the sea-fastening of moveable structures and heavy equipment on the mobile drilling unit. In cases of this nature, it will be very unlikely that the assured is indemnified under the AIHC. However, such indemnity would have been possible had the mobile offshore equipment been insured under an all-risk policy

40 See cl. 8 of the LSDBF 1972.

41 This is an electrochemical action which takes place when dissimilar metals are in contact in the presence of an electrolyte (including sea water), resulting in corrosion.

42 See cl. 8 of the LSDBF 1972.

43 See, for example, cl. 8(c) of the LSDBF 1972.

44 The cover could be extended to such operations if notice is given to the insurers and additional premium is agreed.

45 By virtue of s. 313(1) of the Merchant Shipping Act 1995 the term 'vessel' includes every description of vessel used in navigation.

especially designed for the offshore sector. The indemnity under the AIHC would be unlikely, because neither the perils clause nor the 'Inchmaree clause' offers cover against the risk of errors in sea-fastening of such equipment. Whilst it is the case that the 'Inchmaree clause' offers coverage against negligence of masters, officers and crew, this clause refers to the actions or omissions of the master, officers and crew of the insured vessel. It does not refer to the actions or omissions of the master, crew or officers involved in the sea-fastening of the insured vessel to the carrying heavylift transportation barges. In the light of the Supreme Court judgment in the *Cendor Mopu*,[46] it is worth noting that in cases where structures (i.e., legs) on mobile offshore units such as jack-up oil rigs suffer losses, even though they are tightly sea-fastened and no other peril (i.e., perils of the seas) is responsible for the loss, indemnity for such losses would still not be possible as such a loss would be attributed to inherent vice.[47]

IV. PROBLEMS ASSOCIATED WITH STANDARD CLAUSES USED TO INSURE OFFSHORE CRAFT OR EQUIPMENT: LSBDF 1972, LMOMUF 1996 AND LSPF 1972/2009

It is desirable that the wording used in a particular clause in a commercial insurance policy is consistent, coherent and complete, although it has been recognised by very distinguished commercial judges that to seek perfect consistency in a complex form of contract is to pursue a chimera.[48] In particular, when it comes to standard clauses used in the energy insurance market to insure offshore craft and installations, inconsistencies in the wording become more transparent, especially when such forms are compared with their counterparts often used in the marine insurance market. This is possibly a reflection of the fact that the energy insurance is a relatively new area of activity and has not yet gone through the transformation that standard hull and cargo clauses have over the course of the last few centuries.[49] Nevertheless, in the light of the fact that the insured value of offshore craft could reach billions of dollars, it will not be too alarmist to suggest that the market participants are sitting on a time-bomb that can explode at any point in time, unless they identify the problematic clauses and modify them at the negotiation stage.[50]

In this section of the chapter, the authors analyse commonly used standard forms in the London market to insure offshore craft and installations with a view to ascertaining whether they provide contractual certainty to both the assured and the

46 [2011] UKSC 5, [2011] 1 Lloyd's Rep 560.

47 Lord Mance put it succinctly at [81], saying that '. . . inherent vice would cover inherent characteristics of or defect in a hull or cargo leading it to cause damage to itself . . . without any fortuitous external accident or casualty.'

48 *The Starsin* [2003] UKHL 12, [2004] 1 AC 715 at [12], *per* Lord Bingham of Cornhill.

49 The Institute Time Clauses (Hulls), drafted by the Institute of London Underwriters, came into use for the first time in 1888 and since then have been revised on numerous occasions.

50 The authors are not aware of any work undertaken by the Joint Rig Committee to revise the standard clauses used.

insurer of such offshore craft and equipment. When appropriate, the authors also intend to provide suggestions as to how the drafting of ambiguous clauses can be improved.

Both the LSDBF and the LPSF contain clauses that have been borrowed from marine hull and cargo standard insurance policies. Whether this was a deliberate choice made on the basis of their usefulness in an offshore-energy setting or the result of insurers employing availability heuristics is open to debate. The analysis that will be carried out is complicated further by the fact that the amount of legal authorities on the construction of these clauses is very limited.

A. Inconsistent causative wording

In this part, the authors will bring three aspects of the standard clauses under the spotlight. First, attention will be directed at the use of the causative language in the exclusions section of the LSDBF 1972,[51] as well as the LSPF 1972 and 2009.[52] The authors consider the scope of these clauses as well as the implications of using different wordings to exclude risks. Secondly, the authors will deliberate the scope and legal character of the 'due diligence' provisions that can be found in clause 5 of the LSDBF 1972 and clauses 5 and 4(E) of the LSPF 1972 and 2009, respectively. The relevant clauses have been the subject of litigation in the context of hull clauses, yet there are no reported cases on their interpretation under the LSDBF and/or the LSPF. The authors will draw parallels from the marine cases. Yet, absent specific case law, any such application in an offshore energy setting is subject to speculation. The reluctance of insurers to provide a clearer wording in the 1972 forms further complicates matters.[53] At the same time, the redrafting of the 'due diligence' clause in the LSPF 2009 raises questions about its legal status that have not received any judicial or academic pronouncements so far. Finally, the authors will discuss provisions concerning various obligations of the assured that appear in various standard clauses. As will be observed, the drafting techniques employed in this context are far from being precise and could potentially fuel litigation.

a. A statutory provision of limited assistance

The starting point of any analysis on causation is section 55(1) of the Marine Insurance Act (MIA) 1906.[54] Yet, this section is not particularly helpful, since it gives no indication as to how the proximate cause could be identified, leaving its interpretation to the vagaries of the courts. Following an initial period of experimentation with the 'closest in time' doctrine, English courts settled for the doctrine that requires

51 Cll. 8 and 19.

52 Cl. 6 and 18 of the 1972 LSPF; cl. 5 of the 2009 LPSF and cl. 3 of the Schedule of the 2009 LSPF.

53 D. Sharp, *Upstream and Offshore Energy Insurance*, p. 356.

54 Section 55(1) of the MIA 1906 provides: 'Subject to the provisions of this Act, and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against.'

the identification of the 'most efficient' cause.[55] This change of focus instigated a welcoming search for the real cause of a loss. At the same time, it increased uncertainty, since it is not enough anymore to identify the chain of events that led to the loss and concentrate on the last one. Instead, all relevant events are thrown into a pool with the aim of identifying the one (or ones) that have the greatest impact on the loss. How to choose the dominant one or how to treat concurrent causes is left to the discretion of the courts, given that section 55(1) MIA 1906 does not provide any guidance and is essentially a tautology.[56]

Since *Leyland Shipping Co. Ltd* v. *Norwich Union Fire Insurance Society Ltd*,[57] identifying the 'efficient or dominant' cause of a loss is essentially a matter of common sense.[58] Establishing principles of interpretation with respect to abstract notions is a litigation-prone field, as any tort lawyer would testify with respect to the man on the Clapham omnibus. As such, it is not surprising that the question of what common sense is in a causative context is a recurring theme in insurance litigation before English courts.

Section 55(1) of the MIA 1906 is unhelpful regarding the interpretation of the 'proximate cause' rule, but is quick to state that the statutory rule is applicable only in the absence of contrary indication in the policy. This statutory discretion brings flexibility in the causative inquiry as the parties are free to formulate the causative tests used in their policies. Still, this flexibility creates problems of its own, since policy-drafters are not always clear about their intentions. Both the LSDBF 1972 and the LSPF 1972/2009 provide ample ground for testing this statutory freedom. Being 'all risks' policies, the causative language is mostly relevant with respect to exclusions, and this is where our focus will turn in this part of the Chapter.

55 Lord Mance in *The Cendor Mopu* [2011] UKSC 5, [2011] 1 Lloyd's Rep 560 at [49] recently provided a succinct description of the causative inquiry in the pre-MIA 1906 era and its transition to the modern test: '[i]n the Victorian era, the "proximate" cause in marine insurance was readily associated with the last cause in point of time: see eg *Thompson* v. *Hopper* (1856) 6 E & B 172, 937; *Dudgeon v Pembroke* (1877) 2 App Cas 284; in the parallel bill of lading context, *Thomas Wilson, Sons & Co.* v. *Owners of the cargo per the Xantho (The Xantho)* (1887) 12 App Cas 503, at 514, *per* Lord Bramwell; *J J Lloyd Instruments Ltd* v. *Northern Star Insurance Co. Ltd (The Miss Jay Jay)* [1987] 1 Lloyd's Rep 264, at 271, *per* Mustill J as well as "Fault and Marine Losses" [1988] LMCLQ 310 (Sir Michael Mustill). The modern focus on the "real efficient cause" was finally established at the highest level after the enactment of the Marine Insurance Act 1906, in *Leyland Shipping Co. Ltd* v. *Norwich Union Fire Insurance Society Ltd* [1918] AC 350.'

56 With respect to concurrent causes Lords Saville and Mance in *The Cendor Mopu* confirmed the principles of insurance law as understood before this judgment. Lord Saville at [22] stated that: 'if there are two proximate causes, one of which is covered and the other which is (as here) specifically excepted, it appears settled that the loss is not recoverable under the insurance: *Wayne Tank and Pump Co. Ltd* v. *Employers Liability Assurance Corpn Ltd* [1974] QB 57; *J J Lloyd Instruments Ltd* v. *Northern Star Insurance Co. Ltd (The Miss Jay Jay)* [1987] 1 Lloyd's Rep 32.' Lord Mance also by reference to the judgment of the Court of Appeal in *The Miss Jay Jay* stated at [77] that 'where there are two proximate causes of a loss, one insured under and the other not expressly excluded from the policy, the assured will be able to recover'. 57 [1918] AC 350.

58 Lord Collins in *The Cendor Mopu* [2011] UKSC 5; [2011] 1 Lloyd's Rep 560 at [95] recently endorsed the judgment of Bingham LJ in *TM Noten BV* v. *Harding* [1990] 2 Lloyd's Rep 283, noting that '[t]oday what was "the real or dominant cause" or proximate cause is a question to be answered applying the common sense of a business or seafaring man'.

b. A great variety of causative wordings

The authors have reproduced below the causative wordings used in the exclusions sections of three standard forms used in the context of offshore operating insurance:

LSDBF 1972

1. *caused by or attributable to* earthquake or volcanic eruption, or fire and/or explosion and/or tidal wave *consequent upon* earthquake or volcanic eruption: clause 8(a)
2. *arises solely from* the intentional sinking of the barge for operational reasons: clause 8(b)
3. *caused whilst or resulting from* drilling a relief well: clause 8(c)
4. *caused by or resulting from* delay, detention or loss of use: clause 8(e)
5. *due to* change in temperature, corrosion, rusting . . . replacing any part which may be lost, damaged or condemned *by reason of* any latent defect therein: clause 8(f)
6. *caused by* electrical injury or disturbance; this clause shall not exclude claims for physical loss or damage *resulting from* fire: clause 8(g)
7. *in connection with* the removal of property, materials, debris or obstruction: clause 8(i)
8. loss or damage to drill stem located underground or underwater unless *directly resulting from* fire, blowout, cratering or total loss of the Drilling Barge *caused by* a peril insured hereunder: clause 8(j)
9. *caused by, resulting from, or incurred as a consequence of* war, terrorist or nuclear perils: clause 19

LSPF 1972

- *caused while or resulting from* drilling a relief well: clause 6(a)
- *caused by or resulting from* delay, detention or loss of use: clause 6(c)
- *due to* change in temperature, corrosion, rusting . . . replacing any part which may be lost, damaged or condemned *by reason of* any latent defect therein: clause 6(d)
- *caused by* electrical injury or disturbance; this clause shall not exclude claims for physical loss or damage *resulting from* fire and explosion: clause 6(e)
- *in connection with* the removal of property, materials, debris or obstruction: clause 6(g)
- *caused by, resulting from, or incurred as a consequence of* war, terrorist or nuclear perils: clause 18

LSPF 2009

- *caused by or arising from* any named Windstorm in the US Gulf or the Gulf of Mexico; *caused by or arising from* earthquake or volcanic eruption, or fire and/or explosion and/or tidal wave and/or tsunami and/or seaquake *consequent upon* earthquake or volcanic eruption; *caused by or arising from* drilling a relief well; *caused by or arising from* delay, detention, loss of market, loss of use or any other consequential loss: clauses 5 (A)(ii)–(iv), (vi)
- *due to* change in temperature, rusting, oxidation . . . if fire or explosion results then any direct physical loss or damage *arising directly from* that fire or explosion shall not be excluded by this Exclusion: clause 5(A)(vii)(a)

- loss of or damage to dynamos, exciters . . . unless physical loss or physical damage is *caused by* any peril not otherwise excluded from this Section originating outside the electrical equipment specifies in this exclusion: clause 5(A)(ix)
- *caused by or resulting from or arising out of* interference by strikers or locked-out workers; or political or labour disturbances, riots or civil commotions . . . clause 5(A)(x)
- blockage [which] *comprises, causes or leads to* physical loss or physical damage to any property . . . this Section will indemnify the Insured for the expense of repairing or replacing pipelines, flowlines . . . damaged or blocked *as a result of* an actual total loss or a constructive total loss of Property Insured . . . and which *results from* any cause which is not excluded from this Section: clause 5(A)(xvi)
- *directly or indirectly caused by or arising from* war, terrorist or nuclear perils: clause 3(A) of the Schedule

One is immediately struck by the anarchic structure of all these formulations. First, a variety of causative wordings is used in the exclusions sections: twelve different formulations are used in the LSDBF 1972; seven different wordings are used in the LSPF 1972; and ten different wordings are used in the LSPF 2009. Secondly, a number of individual clauses contain alternative causative wordings, complicating the search for the appropriate causative test. The drafting techniques adopted in the said forms are in stark contrast to the drafting philosophy of the 1982 and the 2009 Institute Cargo Clauses (ICC)(A), which have a far more coherent structure in their provisions dealing with exclusions (clauses 4–7). They limit the number of causative wordings to five in each form, with two of them – 'attributable to wilful misconduct' and 'proximately caused by delay'[59] – copied from section 55(2) of the MIA 1906.[60] Most importantly, the ICC(A) 1982/2009 avoids using alternative wordings within individual clauses, with one notable exception in clause 4.7 of the 2009 version.[61]

The structural differences make it difficult to argue that the causative wordings of the exclusions sections of LSDBF/LSPF are the result of meticulous drafting. In the remaining part of this section of the Chapter the authors will attempt to identify some of the controversies and discuss how the wording of such causes can be improved to achieve a greater degree of certainty.

c. LSDBF and LSPF 1972: from 'caused by' to 'caused whilst'

The wording 'caused by' is sporadically used on its own in the LSDBF and LSPF 1972, although it is the one that courts and academics consistently link to the

59 The wording 'proximately caused by delay' is found in the 1982 ICC(A). In the 2009 (ICC)(A) it has been replaced by 'caused by delay'.

60 Namely, in the 1982 ICC(A) the following causative wordings are used: 'attributable to' in cl. 4.1; 'caused by' in cll. 4.3, 4.4, 4.5, 6, 7.1, 7.3; 'proximately caused by' in cl. 4.5; 'arising from' in cll. 4.6, 4.7, 5.1; 'resulting from' in cl. 7.2. In the 2009 ICC(A) the following causative wordings are used: 'attributable to' in cl. 4.1; 'caused by' in cll. 4.3, 4.4, 4.5, 4.6, 6, 7.1, 7.3, 7.4; 'directly or indirectly caused by or arising from' in cl. 4.7; 'arising from' in cl. 5.1; 'resulting from' in cl. 7.2.

61 Cl. 4.7 2009 ICC(A) provides that 'loss damage or expense directly or indirectly caused by or arising from the use of any weapon or device employing atomic or nuclear fission and/or fusion or other like reaction or radioactive force or matter' is excluded from cover.

proximate cause test as applied since 1916.[62] In both the LSDBF and LSPF 1972, the wording is used in a limited manner to exclude loss of or damage to a number of electrical devices and appliances caused by electrical injury or disturbance.[63] Both clauses clarify that if the loss or damage is caused by a peril which originates outside the electrical devices in question and is not excluded by the policy in its own right, it will be covered. There is no direct authority in England, yet the structure of the clause in question seems to support the conclusion that damage to a dynamo caused by a general blackout in the barge or platform will be covered by the policy. For the exclusion to apply, the electrical disturbance that is the dominant cause of the device's damage must be related to an internal defect of the device, such as a short-circuit, and not to its failure to operate due to the blackout. Any other interpretation would make the phrase 'originating outside the electrical equipment' largely otiose. In that respect, only damage caused by internal-related electrical disturbances is excluded from cover.

The application of the proximate causation rule is also supported by expressions such as 'due to', 'by reason of', 'consequent upon' and 'incurred as a consequence of', which are also found in the 1972 forms. However, they are to be avoided, because they add nothing to the proximate causation rule and their use has diminished in (marine and non-marine) insurance policies. It is suggested that the term 'caused by' is to be preferred.

The wording 'caused whilst', which is found in clauses 8(c) and 6(a) of the LSDBF and LSPF 1972, respectively, is not to be confused with the wording 'caused by'.[64] Whereas the latter is related to proximate causation, the former is directed to remote causes. Excluding cover for loss 'caused whilst . . . drilling a relief well . . .' does not require the insurer to prove that the drilling of the well was a cause of the loss or damage, or that the drilling exacerbated the loss or damage. There is antiquated English authority, as well as US authority, to suggest that the mere happening of the loss or damage while the excluded activity takes place is sufficient for the exclusion to apply.[65] In both cases, the exclusions in question were drafted in wider terms than the relevant exclusions in the 1972 LSDBF and LSPF. They excluded liability for

62 *Coxe* v. *Employers' Liability Assurance Corporation Ltd* [1916] 2 KB 629, J. Dunt, *Marine Cargo Insurance* (Informa, 2009), p. 124, J. Birds *et al.*, *MacGillivray on Insurance Law*, 12th edn (Sweet & Maxwell, 2012), p. 587.

63 Cl. 8(g) of the LSBDF 1972 excludes cover for 'loss of or damage to dynamos, exciters, lamps, motors, switches and other electrical appliances and devices, caused by electrical injury or disturbance, unless the loss or damage be caused by a peril not excluded hereunder originating outside the electrical equipment specified in this clause. Nevertheless this clause shall not exclude claims for physical loss or damage resulting from fire'. Cl. 6(e) of the LSPF 1972 excludes liability in respect of 'loss or damage to dynamos, exciters, lamps, motors, switches and other electrical appliances and devices, caused by electrical injury or disturbance, unless the loss or damage be caused by a peril not excluded hereunder originating outside the electrical equipment specified in this clause. Nevertheless this clause shall not exclude claims for physical loss or damage resulting from fire and explosion.'

64 Cl. 8(c) of the LSDBF 1972 excludes cover for 'loss damage or expense caused whilst or resulting from drilling a relief well for the purpose of controlling or attempting to control fire blowout or cratering associated with other drilling barge, platform or unit unless immediate notice to be given to Underwriters of said use and additional premium paid if required.' Similarly, cl. 6(a) of the LSPF 1972 follows the same wording with minor, inconsequential differences.

65 *Mair* v. *Railway Passengers Assurance Co. Ltd* (1877) 37 LT 356. See also the US case of *Rauch* v. *Underwriters of Lloyd's at London* 320 F.2d 525 (1963) where the US Court of Appeals for the Ninth

death or injury happening while the excluded activity takes place, omitting any reference to the word 'caused'. It is arguable that the exclusions in the 1972 forms do not go all the way to open up the causative inquiry as the said two cases suggest, in that they still require a causative link between the event that takes place during the drilling of the relief well and the loss. Still, the use of the word 'whilst' strongly suggests that there is no requirement for the loss to have been causatively linked to the drilling of the well.

Considering that relief wells are drilled in emergency situations to control blow-outs, such a wide test favours unfairly the insurers. What if the platform is destroyed by a hurricane, which is not an excluded risk under the 1972 forms, while drilling the relief well? The current wording provides ample ammunition to insurers to argue that the loss is not covered by the policy, although the drilling of the well was not even a contributing factor to the loss. Did the insurers intend to create such an extensive exclusion? The wording of the exclusion clause seems to support such a conclusion. The insurers are prepared to provide cover for losses occurring while drilling a relief well upon notification and payment of an additional premium. Otherwise, it is reasonable to argue that their intent is for the exclusion to operate as a complete bar to recovery for any losses that occur while the platform is used for drilling a relief well.

The wording 'resulting from drilling a relief well' is much more restrictive in scope than the wording 'caused whilst'. As the analysis in the following section demonstrates, it provides for a proximate cause test and it is redundant next to the wording 'caused whilst'. Having said that, its insertion is explained by the precautionary approach of insurers vis-à-vis the drilling of relief wells. It is arguable that it will exclude losses that are the direct result of the drilling, yet they only manifest upon its completion. To avoid any arguments that the said losses were not caused whilst drilling the relief well, the wording 'resulting from' was added. It is submitted that a similar result can be achieved with the wording 'caused whilst'.

d. LSDBF and LSPF 1972: the insufficiency of 'resulting from'

The wording 'resulting from' is linked by both courts and academic writers to the rule of proximate causation.[66] As such, the use of the alternative 'caused by or resulting

Circuit held that the exclusion 'this certificate does not cover death . . . (e) . . . while the Assured is operating . . . or serving as a member of a crew of an aircraft' applies to the death of the pilot whose aircraft went down in a lake and who drowned after getting out of it, although the policy provided cover for accidental drowning.

66 Lloyds TSB General Insurance Holdings Ltd v. Lloyds Bank Group Insurance Co. Ltd [2001] EWCA Civ 1643; [2002] Lloyd's Rep IR 113. When the case reached the House of Lords the judgment of the Court of Appeal was overturned on different grounds. However, Lord Hoffmann endorsed the approach of the Court of Appeal with respect to the scope of the wording 'result from' in Lloyds TSB General Insurance Holdings Co. Ltd v. Lloyds Bank Group Insurance Company Limited [2003] UKHL 48; [2003] Lloyd's Rep IR 623 at [23], per Lord Hoffmann. See also J. Gilman et al., Arnould Law of Marine Insurance and Average, 18th edn (Sweet & Maxwell, 2013), p. 1037. Most recently, Popplewell J in Versloot Dredging v. HDI-Gerling Industrie Versicherung AG (The DC Merwestone) [2013] EWHC 1666 (Comm); [2013] 2 Lloyd's Rep 131 confirmed that the wording 'resulting from' directs us to look for the proximate cause of the loss.

from' in clause 8(e) LSDBF 1972 and 6(c) LSPF 1972 creates a tautology.[67] This wording can be explained by the insurers' (mistaken) perception that the wording 'resulting from' initiates a search for less proximate causes.[68] As such, the current wording leaves the usefulness of the delay exclusion in doubt, since for it to apply the delay shall be the dominant cause of the loss or damage or at least a cause of equal efficiency.[69] Delay that is caused by an insured risk would not be sufficient to trigger the application of the exclusion, unless the insurers prove that the delay was at least a concurrent cause of the loss.

A broader (and clearer) result could have been achieved by following the wording of the delay-related exclusions of the 1995 Institute Freight Clauses:[70] cover is excluded for 'loss, damage or expense *consequent on delay*, detention or loss of use *whether arising from a risk insured against or otherwise*' (emphasis added). By doing so, the application of the exclusion would be 'dependent upon the presence in the chain of an intermediate event (viz. 'loss of time') between the loss for which the loss is made . . . and the event which in insurance law is the "proximate cause" of that loss'.[71] Such wording would elevate the importance of delay in the causative inquiry and would put an end to queries about its role that are still relevant in both 1982 and 2009 versions of the ICC(A).[72]

Furthermore, the word 'directly' in front of 'resulting from' in clause 8(j) LSDBF 1972 is superfluous, since both terms encourage a search for the dominant cause of the loss.[73] This addition is arguably an attempt by insurers to limit the perceived scope of the wording 'resulting from'. Damages to a drill stem will only be covered when their effective cause is fire, explosion, blowout or total loss of the barge, which in turn is proximately caused by an insured peril (e.g., explosion). Damage to the drill stem caused by operational reasons, such as the exercise of excessive pull-down pressure, will fall outside the cover. In terms of drafting consistency, the same result could have been achieved by replacing the wording 'directly resulting from' with 'caused by'.

There is an argument to be made that the wording 'resulting from' as used in the second sentence of clause 8(g) LSBDF 1972 and clause 6(e) LSPF 1972 directs us to look for remote causes.[74] It is arguable that the use of different wordings ('caused by' and 'resulting from') in the same clause is intended to limit the ambit of the

67 Cl. 8(e) of the LSDBF 1972 excludes liability for 'loss, damage or expense caused by or resulting from delay, detention or loss of use'. Cl. 6(c) of the LSPF 1972 has the exact same wording.

68 J. Dunt, *Marine Cargo Insurance* (Informa, 2009), p. 125.

69 H. Bennett, *The Law of Marine Insurance*, 2nd edn (OUP, 2006), pp. 466–467.

70 Cll. 14 and 12 of the Institute Time Clauses Freight and the Institute Voyage Clauses Freight, respectively.

71 Naviera de Canarias SA v. Nacional Hispanica Aseguradora SA (The Playa de las Nieves) [1978] AC 853, at 882, per Lord Diplock.

72 See the discussion on proximate cause and delay in the context of the ICC in J. Dunt, *Marine Cargo Insurance*, pp. 119–122, 156–157.

73 Cl. 8(j) LSPDF 1972 excludes liability for 'loss or damage to drill stem located underground or underwater unless directly resulting from fire, blowout, cratering, or total loss of the Drilling Barge caused by a peril insured hereunder . . .'

74 Cl. 8(g) LSPDF 1972 excludes liability for 'loss of or damage to dynamos, exciters, lamps, motors, switches and other electrical appliances and devices, caused by electrical injury or disturbance, unless the loss or damage be caused by a peril not excluded hereunder originating outside the electrical equipment specified in this clause. *Nevertheless this clause shall not exclude claims for physical loss or damage resulting from*

exclusion. The argument goes that the loss or damage to the electrical appliances will be covered by the policy, although the effective cause is an electrical disturbance, provided that fire is a concurrent cause. It is submitted that the wording 'resulting from' is not sufficient to achieve such a result. The exclusion of loss or damage caused by electrical disturbance will prevail over the loss or damage resulting from fire, which is a covered risk.[75] For such a result to be achieved, either the fire should be the dominant cause of the loss, or a wider wording, such as 'indirectly caused by fire', should be used. It has been argued that the second sentence was added to cater for situations where the electrical disturbance causes fire which then damages the appliance.[76] It is respectfully submitted that this conclusion might suffer from the same drawback as *per* our discussion above. Unless the fire qualifies as the sole, dominant cause of the damage, the express exclusion will prevail. The significance of the second sentence will be highlighted, if the wording 'indirectly caused by fire' is used. In such an event, the risk of fire in the causative inquiry is upgraded, making it more difficult to rely on the exclusion.

Likewise, the ambitious wording 'caused by, resulting from, or incurred as a consequence of', which is found in clauses 18 and 19 of LSDBF 1972 and LSFP 1972, respectively, does not serve the function of expanding the proximate causation rule.

e. LSDBF and LSPF 1972: the contradiction of 'arising solely from'

The wording 'arises solely from' in clause 8(b) LSDBF 1972 is a contradiction.[77] There is an ongoing debate in English law as to whether the wording 'arises from' opens the door to remote causes. Yet, the use of the word 'solely' restricts the scope of the exclusion to a finding that the only cause of the loss or damage is the intentional sinking of the barge for operational purposes. The existence of any other concurrent causes will bring the loss or damage under the policy.[78]

What this exclusion purports to do is to limit the exposure of insurers vis-à-vis claims consequential upon and directly linked to the intentional sinking of the barge, such as recovery expenses,[79] environmental pollution or damaging the vessel of a third party; with the second sentence of clause 8(b) ensuring that the clause on collision liability will not come into effect. Deleting the word 'solely' will increase the scope of the exclusion, even if the wording 'arising from' is interpreted strictly to adhere to

fire.' (emphasis added). Cl. 6(e) 1972 LSPF follows the same wording with minor, inconsequential differences.

75 Under the principle formulated in *The Miss Jay Jay* [1987] 1 Lloyd's Rep 32 and most recently endorsed by the Supreme Court in *The Cendor Mopu* [2011] UKSC 5; [2011] 1 Lloyd's Rep 560, when there are two proximate causes of the loss, one covered by the policy and one specifically excluded, the exclusion prevails.

76 D. Sharp, *Upstream and Offshore Energy Insurance*, p. 364.

77 Cl. 8 (b) LSDBF 1972 provides that liability is excluded for 'loss, damage or expense which arises solely from the intentional sinking of the barge for operational purposes; such sinking shall not constitute a collision, stranding, sinking or grounding within the meaning of this insurance'.

78 Clarke argues that '[n]o clause operates in isolation and there will always be the temptation to argue that it was not therefore exclusive' in M. Clarke, *The Law of Insurance Contracts*, 6th edn (Informa, 2009), p. 843.

79 Recovery expenses are also excluded under cl. 8(i) LSDBF 1972.

the proximate causation rule. Yet, such a deletion is to be discouraged, because it will allow speculation about the role of the operational reasons that led to the sinking. It will inevitably raise the question of whether losses to the sunken barge (as opposed to losses caused by the sunken barge) shall be excluded as well. In terms of drafting consistency it is suggested that the wording 'arises solely from' is replaced by 'caused solely by'.

f. LSDBF and LSPF 1972: the broad scope of 'in connection with'

The wording 'in connection with', which is found in clause 8(i) and clause 6(g) of the LSDBF and LSPF 1972, respectively, is one under threat of extinction in insurance policies.[80] It is commonly used in contractual indemnities; yet English cases on its meaning are few and far between. Rix LJ examined such an indemnity in *Shaun Campbell* v. *Conoco (UK) Ltd, Britannia Operator Ltd, Amec Process and Energy Ltd, Salamis SGB Ltd*.[81] His Lordship stated in no uncertain terms that 'the words "in connection with" . . . are widely regarded as being as wide a connecting link as one can commonly come across. In themselves they do not express the need for a causal connection, although of course they do express a need for a connection of some kind.'[82] Claims which are even remotely related to the decommissioning or abandoning of barges or platforms in the sea, or to operations of clean-up and debris removal are not covered by this policy. Such a strict approach is not surprising, since both the LSDBF and LSPF 1972 limit cover to '. . . all risks of *direct physical loss of or damage* to the property insured' (emphasis added).[83] If one combines clause 8(b) with clause 8(i) LSDBF 1972, which was analysed in the previous section, the result is to exclude in no uncertain terms consequential losses stemming from the post-operational life of the barge.

g. LSDBF and LSPF 1972: the uncertain future of 'attributable to'

The wording 'attributable to' is commonly linked to wilful misconduct as a result of section 55(2)(a) MIA 1906, where it has been traditionally interpreted to favour a search for less proximate causes.[84] It has also been argued that this expansive interpretation is applicable to the wording 'attributable to' or 'reasonably attributable to' even outside the confines of wilful misconduct.[85] Still, this wording does not

80 Cl. 8(i) of the LSDBF 1972 excludes 'claims in connection with the removal of property, materials, debris or obstruction, whether such removal be required by law, ordinance, statute, regulation or otherwise.' Cl. 6(g) of the LSPF 1972 has the same wording.

81 [2002] EWCA Civ 704; [2003] 1 All ER (Comm) 35. The indemnity in question read as follows: '. . . (ii) The Contractor hereby agrees to indemnify and hold harmless the Operator against all liability for, and all claims arising in respect of any injury, death, sickness or ill health caused to or suffered by the Contractor and any Personnel as a result of or arising out of or in connection with the performance or non-performance of the Contract regardless of the cause or reason therefor and regardless of the negligence or breach of statutory duty of the Operator and against all costs, charges, expenses, damages and proceedings incurred in connection with such claims or liabilities howsoever arising.'

82 *Shaun Campbell* v. *Conoco (UK) Ltd, Britannia Operator Ltd, Process and Energy Ltd, Salamis SGB Ltd* [2002] EWCA Civ 704; [2003] 1 All ER (Comm) 35 at [19], *per* Rix LJ.

83 Cl. 5 of the LSDBF 1972 and the LSPF 1972.

84 J. Dunt, *Marine Cargo Insurance*, p. 118.

85 *Ibid.*, pp. 128–130.

provide for an interpretation as expansive as the wordings 'caused whilst' or 'in connection with'. The relevant risk is not required to be the effective cause of the loss, but at least it shall be *a* cause of it.[86]

Having said that, the current editors of *Arnould* suggest that this wording does not change the proximate cause rule as understood from *Leyland Shipping* onwards.[87] Recently, Clarke J in *Beazley Underwriting Ltd, Liberty Mutual Insurance Europe Ltd* v. *The Travelers Companies Inc.* supported the restrictive interpretation of the wording.[88] He distinguished the opinion of Lord Hoffmann in *Lloyds TSB General Insurance Holdings* v. *Lloyds Bank Group Insurance Co. Limited*,[89] who supported the expansive interpretation by reference to *Municipal Mutual* v. *Sea Insurance*.[90] Clarke J was of the view that Lord Hoffmann did not make a generic statement with respect to the ambit of the wording 'attributable to'. Instead, he argued that his Lordship was guided by the broad ambit of the clause in question in *Municipal Mutual*, which reads as follows: 'all occurrences of a series consequent on or attributable to one source or original cause . . .' For Clarke J this clause 'involves a considerably looser causal connection than proximate cause' as result of the use of the wording 'one source or original cause'.[91] In that respect, Clarke J argued that it was the specific wording of the clause that triggered Lord Hoffman's decision. Instead, the wording 'attributable to' is neither here nor there and depending on the context it can advance a proximate cause test. In *Beazley Underwriting*, the clause in question provided for an indemnity to be given for 'loss, liability or cost . . . arising out of any event or matter . . . whether attributable to or arising from or out of' a series of negligent acts. Clarke J, referring to *Royal Exchange Assurance* v. *Kingsley*,[92] held that '. . . there is no reason why attributable to cannot import a test of proximate cause' in this context.[93]

For the purposes of identifying the scope of the exclusion stipulated in clause 8(a) LSDBF 1972, which excludes loss, damage or expense 'caused by or attributable to' earthquake or volcanic eruption, or fire and/or explosion and/or tidal wave *consequent upon* earthquake or volcanic eruption, it is essential to determine whether a restrictive or a more wide-ranging interpretation is adopted. Under the restrictive interpretation, advocated by Clarke J, both words point towards the proximate causation test. Under the extensive interpretation, the wording 'caused by or attributable to' is contradictory because each of its components is pointing towards different causative tests. If one overlooks this contradiction, the wording directs us to engage in an exercise of searching for less proximate causes. The exclusion will operate when the earthquake or volcanic eruption facilitates the loss or damage, and not only when it is its dominant cause. Thus, in a situation where the barge is damaged by fire which is caused by the negligence of crew while an earthquake takes place, it is arguable that the damage caused by the fire will be recoverable under the restrictive interpretation, since its dominant cause is a covered peril. However, the expansive interpretation will arguably

86 *Ibid.*, p. 130.
87 J. Gilman *et al.*, *Arnould Law of Marine Insurance and Average*, pp. 1000–1001.
88 [2011] EWHC 1520 (Comm); [2012] 1 All ER (Comm) 1241 at [127].
89 [2003] UKHL 48; [2003] 4 All ER 43.
90 [1998] Lloyd's Rep IR 421.
91 [2011] EWHC 1520 (Comm); [2012] 1 All ER (Comm) 1241 at [127].
92 [1923] AC 235, at 244.
93 [2011] EWHC 1520 (Comm); [2012] 1 All ER (Comm) 1241, at [127].

increase the likelihood of applying the exclusion, since the insurers will be required to demonstrate that the occurrence of the earthquake facilitated the fire. This is a much lower threshold than proving that the earthquake was a cause of equal efficiency with the fire. Following the latest judicial and academic change of heart, it is submitted that the existing wording might not have the desired effect for insurers.

h. LSDBF and LSPF 1972: a general assessment

The causal wordings of both the LSDBF and the LSPF 1972 would benefit from simplification and streamlining. This is so because their drafters have arguably fallen into two drafting traps. First, they accumulated causal wordings in exclusion clauses with the aim of ousting the proximate causation rule. However, the chosen wordings often contradict each other, with the end result being that they strengthen the proximate cause rule. Secondly, they introduced a variety of causative wordings in the exclusions section with the aim of creating different causative tests. However, their choice of words often does not make clear what their intentions are with respect to the appropriate test, with the end result being a strengthening of the proximate cause rule, even though this was possibly not the intended outcome.

The bottom line is that the standard forms do not make clear what the intentions of their drafters are. It is to be expected that some of them will be interpreted against the wishes of their drafters as a result of the ambiguity in drafting. It is suggested that the drafters look into the ICC(A) 2009 for two valuable lessons: (i) there is no accumulation of causal phrases within the same exclusion in order to avoid the inherent ambiguity of such practice; and (ii) a limited number of causative phrases are used, which carry a long and (relatively) unambiguous interpretative history.

i. Is the 2009 LSPF any better?

I. THE BAD TIMING OF CHANGING THE FOCUS FROM 'RESULTING FROM' TO 'ARISING FROM/OUT OF'

The LSPF 2009, which aims to replace the LSPF 1972, is an improvement, but it does not go all the way to solve the causative inconsistencies of its predecessor. One is immediately struck by three issues in the LSPF 2009. First, the drafters have changed their focus from the wording 'resulting from' to the wording 'arising from/out of'. Secondly, the practice of accumulating causative phrases in individual exclusion clauses is still going strong. Thirdly, there is an increase in the number of causative wordings which can be explained by the increased length and sophistication of its exclusions section. One notable absence from LSPF 2009 is the wording 'in connection with'. Its omission does not seem to be the result of the criticism about its extended scope. Instead, the relevant clause of the LSPF 1972 is a covered peril under the LSPF 2009 and as such it is phrased differently.[94]

The change of focus from 'resulting from' to 'arising from/out of' is arguably explained by the belief of the market that the latter wording 'broaden[s] the concept

94 Cl. 2(B)(iii) 2009 LSPF.

of causation'.[95] Having accepted that the wording 'resulting from' advances a proximate causation test, insurers used the wording 'arising from' to direct the inquiry into remote causes. Whether their belief is reflected in the case law is highly debated. Two recent decisions of the High Court, in *British Waterways* v. *Royal & Sun Alliance Insurance plc*[96] and in *Beazley Underwriting*, cast doubt on their belief. A common feature of both judgments is that they explicitly declined to endorse the judgment of the Court of Appeal in *Dunthorne* v. *Bentley and Others*,[97] which is the judgment of choice for those supporting an expansive interpretation of the wording.

Clarke J in *Beazley Underwriting* took a middle ground and held that the wording 'does not dictate a proximate cause test, [but] a somewhat weaker causal connection is allowed.'[98] Answering the question of what this weaker test shall include, Clarke J replied: '. . . a relatively strong degree of causal connection [is still required].'[99] Furthermore, he distinguished *Dunthorne* on the basis that it was a case of statutory interpretation, doubting that the wording 'arising from' shall be interpreted by reference to 'caused by' if the case concerned the interpretation of an insurance policy:

> In *Dunthorne* v. *Bentley* . . . the question was whether an accident was '*caused by or arising out*' of the use of a car within the meaning of section 145 (3) (a) of the Road Traffic Act 1938 . . . That was, of course, a case of statutory construction, not the construction of a contract of indemnity, and the presence of '*caused by*' indicated that '*arising out of*' had some wider meaning.[100]

Burton J in *British Waterways* took a drastic view. He went through the relevant case law and he held that the weight of the conflicting case law supports the restrictive interpretation of the wording which points towards proximate causation: 'It does seem as though there is, at any rate if the Scottish cases are to be taken into account, a more stringent approach to the need for establishment of causation where exclusions are being considered than (as in Beazley) where the question is as to whether there is indemnity under the policy.'[101] He cast doubt on the correctness of *Dunthorne* on the basis that the Court of Appeal made 'no reference . . . to *Coxe* or *Evaggelos*, and to the persuasive words of two very experienced commercial judges.'[102] Not surprisingly, in both cases Scrutton J and Donaldson J linked the wording 'arising from' with proximate cause. It is important to note that Burton J reserved this restrictive interpretation to exclusions and left the door open for an expansive interpretation in the insuring agreements. In that respect, he distinguished the decision of Clarke J in *Beazley Underwriting* as an expansive one, yet he found space to accommodate it: the wording 'resulting from' in an exclusion clause directs us to look into proximate causation, with a broader test permitted when interpreting the wording in the insuring agreement. Whether courts will jump on the opportunity to give a

95 J. Dunt, *Marine Cargo Insurance*, p. 127.
96 [2012] EWHC 460 (Comm); [2012] Lloyd's Rep IR 562.
97 [1996] RTR 428.
98 [2011] EWHC 1520 (Comm); [2012] 1 All ER (Comm) 1241, at [128].
99 *Ibid.* at [130].
100 *Ibid.* at [122].
101 British Waterways v. Royal & Sun Alliance Insurance plc [2012] EWHC 460 (Comm); [2012] Lloyd's Rep IR 562 at [44].
102 *Ibid.*, at [45].

final blow to *Dunthrope* by following either the judgment of Clarke J or the judgment of Burton J remains to be seen. However, with respect to exclusions it is fair to say that there is a strong current against the expansive interpretation of the wording.

Does this mean that the commonly used wording 'caused by or arising from' is a tautology? If we take the opinion of Clarke J at face value, using the wording 'caused by or arising from' endorses the perception of the market in that it directs us to look for less proximate causes. Still, this search for remote causes is not without restraints: Clarke J favours a cause that is strongly linked to the loss or damage. Being *a* cause of the loss or damage, or facilitating the loss or damage, would not suffice to satisfy his test. Instead, a stronger link is required which is not necessarily the dominant one. Having the platform damaged while a hurricane ravages the Gulf of Mexico will not be enough for insurers to avoid liability on the basis of clause 5(A)(ii). The hurricane is required to have somehow contributed to the damage; how much depends on whether you follow the *Dunthorne* test or the *Beazley* test. For the same reasons, the relief well exclusion in clause 5(A)(iv) PSPF 2009, which uses the 'caused by or arising from' wording, is less extensive than its equivalent in clause 8(c) LSDBF 1972, which uses the wording 'caused whilst or resulting from'. The term 'caused whilst' is wide enough to cover any damage that occurs during the drilling of the relief well.

Yet there is a good chance that English courts will follow the restrictive interpretation of Burton J, dismissing the opinion of Clarke J on the basis that it is difficult to apply in practice, although its doctrinal foundations are perhaps more sound. This will have the effect of treating the wording 'caused by or arising from' as a tautology when interpreting an insurance exclusion clause. Such a finding would deliver a heavy blow to the coherence of the LSPF 2009, which bases its exclusions section on this wording, since the proximate causation test would be the test of choice.

II. IS 'INDIRECTLY CAUSED BY' A GOOD ALTERNATIVE?

The over-reliance on the wording 'arising from/out of' in the LSPF 2009 can be demonstrated by clause 5(A)(x), which provides that insurers shall have no liability in respect of 'loss, damage, cost or expense *caused by or resulting from or arising out* of: (a) interference by strikers or locked out workers . . .' (emphasis added).[103] The use of this triplet of causative words demonstrates the eagerness of insurers to look past the proximate causation rule. Yet, it is difficult to see how the current wording adds anything to the proximate causation rule, especially if the judgment of Burton J in *British Waterways* is to be followed. Such a desire would have been better satisfied if the wording 'indirectly caused by' was used instead. A similar wording already exists in clause 3(A) of the Schedule, where it is stated that '. . . there shall be no coverage under this Contract for loss, damage, liability, cost or expense directly or indirectly caused by or arising from (i) war . . .'. The word 'directly' does not add anything to its scope, yet it is extensively used in marine policies together with 'indirectly' as a measure of extreme cautiousness.

103 Cl. 5(A)(x) of the LSPF 2009 provides that insurers shall bear no liability for 'loss, damage, cost or expense caused by or resulting from or arising out of: (a) interference by strikers or locked-out workers; or (b) political or labour disturbances, riots or civil commotions; or (c) confiscation or expropriation or nationalization or deprivation or requisition, or (d) any delay caused by any of the conditions stated in (a), (b) or (c) above'.

The use of the wording 'indirectly caused by' in clause 5(A)(x) would have expanded the causation test to its remotest, arguably with the exception of the wording 'caused whilst'. Having a labour disturbance, a strike or a civil commotion looming in the background would not be sufficient to justify the application of the exclusion under the 'indirectly caused' test (but arguably would have satisfied the 'caused whilst' test), unless they 'permitted and even encouraged' the damage to the platform '(even in a rather remote way)'.[104] It has been argued (and rightly so) that such an exception will apply 'if it is the normal or usual incident of the immediate or direct cause of loss' with 'looting and theft [being the] normal incidents of civil commotion'.[105] On that basis, it can be argued that the destruction of property is a normal incident of labour disturbance, and the loss of revenue is a normal incident of interference by strikers or locked-out workers. It is not surprising then that insurers historically use this wording with respect to war and nuclear risks. However, it is submitted that the insertion of 'arising from' following the wording 'directly or indirectly caused by' does not add anything to the causative inquiry and is superfluous.

Interestingly enough, the wording 'indirectly caused by' does not enjoy the universal support of insurers. The wording is 'used sparingly in the Institute Cargo Clauses as there is force in the criticism that it is extremely difficult to determine how remote the cause must be.'[106] In the alternative, clause 5(A)(x) could be restructured to resemble the structure of clause 7 ICC(A) or clause 1 ICC(B) or (C). The excluded perils could be linked to two different causative wordings, for example, 'loss, damage, cost or expense: i) caused by interference by strikers or locked-out workers; ii) (choose one of the following:) arising from/resulting from/attributable to political or labour disturbances, riots or civil commotions' and so on. There is a strong argument to be made that the juxtaposition of these two wordings indicate that two different causative tests should be applied with 'caused by' supporting the traditional test of effective cause and the alternative wording looking for less proximate causes. It is also suggested that only two causative wordings are used so that a clear intention can be discerned from their contrast. Furthermore, the use of more than two causative wordings will trigger difficult questions as to what is the dividing line among them, which most probably will be resolved in the assured's favour.

III. A GENERAL ASSESSMENT

The analysis of the causative wordings in the exclusions sections of the three standard forms does not leave much to celebrate. The 1972 forms demonstrate a remarkable inconsistency of causative wordings, which often creates contradictions or tautologies. Contractual certainty does not seem to have been in the aims of their drafters. The 2009 form does constitute an improvement with its quasi-consistent use of the wording 'caused by or arising from/out of', but this is where the improvements end. There is still a great variety of causative wordings used in different parts of the exclusions section, as well as an accumulation of wordings within individual exclusions. Both drafting techniques bring ambiguity into the interpretation of the policy and the inevitable hostility of the courts. The fact that there are no reported cases should

104 M. Clarke, *The Law of Insurance Contracts*, pp. 838–839.
105 *Ibid.*
106 J. Dunt, *Marine Cargo Insurance*, p. 132.

not be a cause for celebration for insurers, since it is highly debatable that it shall be attributed to the clarity of the causative wordings.

In this section of the chapter, we have highlighted some of the inconsistencies and offered suggestions for amendment with the aim of starting a debate which focuses on these three forms rather than the broader marine one.

D. The uncertainty of the 'due diligence' proviso in LSDBF and LSPF

a. The perceptions of insurers in the spotlight again

The coverage sections (clause 5) of both the LSDBF 1972 and the LSPF 1972 are in almost identical form. They provide cover against 'all risks of direct physical loss of or damage to the property insured'.[107] However, they qualify this cover by inserting the following 'due diligence' proviso: '. . . provided such loss or damage has not resulted from want of due diligence by the Assured, the Owners or Managers of the property insured, or any of them.' This 'due diligence' proviso is familiar to the marine community, but it does not advance the statement of independence of the 1972 forms from the marine market. It has been borrowed from the so-called 'Inchmaree clause,' which is a common feature of the Institute clauses since the decision of the House of Lords in *Thames & Mersey Marine Insurance Co. Ltd* v. *Hamilton, Fraser & Co, (The Inchmaree)*.[108] In broad terms, the 'due diligence' proviso has the aim of deterring foul play from senior management, with the negligence of line employees, such as the master, the crew or repairers, being a covered risk under the 'Inchmaree clause'.

The 'due diligence' proviso of the 'Inchmaree clause' has been mostly the subject of US case law. It is surprising that English courts have sparsely dealt with it considering its long history. In one view this is the case because '[u]nderwriters have interpreted the proviso in a limited manner . . .'[109] It is not surprising, then, that most English marine insurance law textbooks devote no more than a few pages to the analysis of the proviso.

Most recently, the English cases of *Sealion Shipping Ltd Toisa Horizon Inc.* v. *Valiant Insurance Co. (The Toisa Pisces)*[110] and *Versloot Dredging* v. *HDI-Gerling Industrie Versicherung AG (The DC Merwestone)*[111] shed some much-wanted light on its scope in the context of hull and loss-of-hire clauses. Still, the reported English cases remain few and far between. As expected, there are no reported cases interpreting the 'due diligence' proviso in the context of the LSDBF 1972 and the LSPF 1972. As such,

107 Cl. 5 of the 1972 LSDBF provides that '[s]ubject to its terms, conditions and exclusions this policy insures against all risks of direct physical loss of or damage to the property insured, provided such loss or damage has not resulted from want of due diligence by the Assured, the Owners or Managers of the property or any of them'. Cl. 5 of the 1972 LSPF has the same wording with minor, inconsequential differences.

108 (1887) 12 App Cas 484.

109 J. Hill, *O' May on Marine Insurance: Law and Policy* (Sweet & Maxwell, 1993), p. 136.

110 [2012] EWHC 50 (Comm); [2002] 1 Lloyd's Rep 252. The judgment of Blair J was confirmed by the Court of Appeal in *Valiant Insurance Company* v. *Sealion Shipping Ltd & Toisa Horizon Inc.* [2012] EWCA Civ 1625; [2013] 1 Lloyd's Rep 108. Our focus will be on the first instance judgment of Blair J, who dealt with the 'due diligence' proviso.

111 [2013] EWHC 1666 (Comm); [2013] 2 Lloyd's Rep 131.

identifying its scope becomes a largely educated guesswork. Parallels can be drawn from the case law on hull policies; yet, they are to be approached cautiously, because (i) the said proviso in the hull policies does not qualify the entire cover; and (ii) energy companies have drastically different corporate structures than shipping companies.

This scarcity of case law has also the potential to fuel market perceptions. It was argued, before *The Toisa Pisces* and *The DC Merwestone*, that the aim of the 'due diligence' proviso is to exclude '. . . losses resulting from *intentional acts* committed at a higher level in the ownership or management structure of the shipowning company, which are either reckless or show scant regard for proper standards of maritime safety . . .'[112] If correct, this provides an explanation as to why insurers have been rather reluctant to make use of the proviso. Their perception could have been that the proviso only excludes the recklessness of the senior management of the shipping company. As such, the negligence of the senior management, being an intermediate state of affairs between the negligence of the crew or the master and the recklessness of the senior management, was neither excluded from cover nor specifically included. It should be noted that at the time when the relevant work was written, it was debatable what the proper standard was. Still, this perception was flying in the face of contemporary academic writings and (admittedly scarce) case law in North America.[113]

b. The Toisa Pisces: a first clarification

The debate about the standard of care in the 'due diligence' proviso came to rest in 2012 with the judgment of Blair J in *The Toisa Pisces*,[114] which received the approval of the Court of Appeal later the same year.[115] The vessel in question suffered a propulsion motor breakdown and was placed off-hire by her charterers for thirty days. The loss-of-hire insurers attempted to avoid the policy on the basis of a breach of the duty of good faith, or alternatively attempted to avoid paying the claim on the basis that the breakdown occurred as a result of the lack of due diligence of the assured's technical manager. The Loss of Charter Hire policy in question contained two compatible 'due diligence' provisos: the standard one in clause 6.2 of the ITC–Hulls (1/1/83), which was incorporated by reference, and one found in clause 1 of the said policy, which read as follows: 'breakdown of machinery, including electrical machinery or boilers, provided that such breakdown has not resulted from wear and tear or want of due diligence by the Assured.'

Insurers argued that the reliance of the technical manager on the allegedly negligent inspection of the motor by the repairers (who were competent professionals) prior to the breakdown amounted to negligence. Had a careful inspection taken place, the cause of the breakdown would have been revealed, it would have been repaired in time and the breakdown would have never happened. As such, the insurers, relying

112 D. Sharp, *Upstream and Offshore Energy Insurance*, p. 355.

113 In *The Toisa Pisces* [2012] EWHC 50 (Comm); [2012] 1 Lloyd's Rep 252, at [100]–[101], Blair J makes reference to the relevant academic writing on the subject.

1 114 [2012] EWHC 50 (Comm); [2012] 1 Lloyd's Rep 252.

115 [2012] EWCA Civ 1625; [2013] 1 Lloyd's Rep 108. The issue on the 'due diligence' proviso was not discussed before the Court of Appeal.

mostly on academic writings, favoured negligence as the appropriate standard of care regarding the proviso.[116]

The assureds argued for the higher threshold of recklessness. They based their preference on the clauses requiring the assured to take reasonable precautions to prevent accidents that are commonly found in property, goods in transit and employers' liability insurance. They argued that these are the closest ones in terms of scope to the 'due diligence' proviso, and as such their interpretation shall be applied by analogy. These clauses have been consistently interpreted by English courts to favour a recklessness test over a negligence one.[117] Otherwise, the argument goes, the insurance policy is deprived of its commercial purpose, 'which is to indemnify the insured for the consequences of his negligence'.[118]

Blair J favoured the interpretation of the insurers, and held that the 'due diligence' proviso requires one to look for instances of negligence of the company's management. The reasoning for his decision was twofold: (i) contemporary academic writings and a Canadian case of the Court of Appeal of Nova Scotia support the negligence threshold; and (ii) the commercial purpose of the policy is not undermined because '[n]egligence constitutes a covered peril in its own right, but it is limited to the negligence of specified persons (the master, officers, crew, pilots, repairers and charterers are identified in clause 6.2 of the Institute Time Clauses) . . . It is . . . rather a case of defining the extent of the indemnity.'.[119]

The decision of Blair J provides a structural elegance to the ITC–Hull clauses. Losses caused by the negligence of offshore personnel are covered by the policy, whereas losses caused by the negligence of senior onshore personnel are excluded. There is no middle ground left in limbo. At the same time, his construction interprets the 'due diligence' proviso for what it really is, namely an exclusion from cover, where the parties agreed to exclude the negligence of the assured vis-à-vis the named perils in the 'Inchmaree clause'. Whereas the assureds interpreted it as a condition of cover and then applied this interpretation to an exclusion.

Interestingly enough, Blair J found for the assureds on the facts. The technical manager of the assured was not negligent in relying on the advice of the repairers as to the recommended course of action. Even if a careful inspection would have revealed the problem that led to the motor breakdown, it was reasonable of him to rely on their findings.[120] The factual finding softened the blow for the assureds, because Blair J did not judge the situation with the benefit of hindsight. Reliance on the advice of the inspectors on the spot is crucial for the efficient operation of shipping companies. Otherwise the technical manager would have to second-guess any advice he receives from line employees or contractors, and/or participate in the inspection himself. It is doubtful that a technical manager would satisfy the threshold by just demonstrating that he instructed competent professionals to carry on the inspections. Still, a degree of control over their behaviour and questioning of their advice would be required.

116 [2012] EWHC 50 (Comm); [2012] 1 Lloyd's Rep 252 at [100].

117 J. Birds *et al.*, *MacGillivray on Insurance Law*, pp. 1007–1008, with references to *Fraser* v. *Furman (Productions) Ltd* [1967] 1 WLR 898 and subsequent case law.

118 *Ibid.*, p. 1007.

119 [2012] EWHC 50 (Comm); [2012] 1 Lloyd's Rep 252 at [100]–[101].

120 *Ibid.* at [118].

With the required level of control and questioning being a matter of evidence, it is expected that insurers will advocate for a more hands-on role from the management of the company and will attempt to lay the responsibility for the negligence of line employees/contractors on the management.

Having said that, the formulation of Blair J strikes a good balance between (i) the need to put pressure on the management of the assured to promulgate and observe safe operating practices; and (ii) the commercial and operational realities of shipping companies. At the same time, it opens the door to a liberal interpretation of the 'due diligence' proviso that essentially gives insurers an extra defence. Thus, it is not surprising that only a few months after the judgment of Blair J in *The Toisa Pisces* the interpretation of the 'due diligence' provisos of clause 6.2 ITHC–Hulls (1.10/83) and clause 2 IAPC was one of the issues raised in the *DC Merwestone*.[121]

c. The DC Merwestone: endorsing The Tosia Pisces

The *DC Merwestone* suffered ingress of seawater into the bowthruster room with the result that her main engine was damaged beyond repair. The assured argued that the loss was covered by the policy, among other things, because the proximate cause of the loss was the negligence of the crew prior to the commencement of the voyage in failing to drain 'the seawater from the emergency fire pump or close the sea inlet valve to the pump located in the bowthruster room', [122] or the negligence of the contractors 'in failing to seal the cable duct at each end of the duct keel tunnel'.[123] Yet, the assured argued that their failures did not amount to want of due diligence on behalf of the owners or the managers of the vessel, and as such they were covered.

The insurers argued, among other issues, that the loss was not covered by the negligence perils of the 'Inchmaree clause', because the loss resulted from want of due diligence by the owners or managers in:

> (1) failing to promulgate appropriate cold weather procedures; and/or (2) failing to have a proper and effective system for the testing and maintenance of the bilge alarms; and/or (3) failing to inspect and maintain the forward and aft bulkheads in the duct keel . . . and/or (4) failing to have a proper and effective system for the maintenance of the bilge and ballast pumping system.[124]

Popplewell J took the decision of Blair J in *The Tosia Pisces* for granted, and held that negligence is the appropriate threshold for judging the 'due diligence' proviso. He also held that it is for the insurers to prove the negligent failure of the assured.[125] This was an issue that was never addressed in English law, although as of late, academic writings are leaning towards this very solution despite conflicting Canadian case law.[126] It is submitted that this is the right choice. Once one follows the decision

121 [2013] EWHC 1666 (Comm); [2013] 2 Lloyd's Rep 131. The 'due diligence' proviso of the IAPC provided that '[t]he cover provided in Cl. 1 is . . . subject to the proviso that the loss or damage has not resulted from want of due diligence by the Assured, Owners or Managers . . .'

122 *Ibid.* at [8].

123 *Ibid.* at [24].

124 *Ibid.* at [25].

125 *Ibid.* at [70].

of Blair J and constructs the 'due diligence' proviso as an exclusion, the evident choice is to place the burden of proof on the insurers' shoulders. This exclusion, though, does not qualify the entire cover of the ITC–Hulls, as the insurers suggested, but is only limited to the named perils in clause 6.2.[127] Any other conclusion would defy both the clear structure of clause 6, as well as the commercial purpose of the policy.[128]

Popplewell J was critical of the attempts of the insurers to blame the negligence of the crew and the contractors on the company's management, namely its general manager, the head of its technical department and its safety management director. Adopting the line of thinking of Blair J, he gave priority to the expertise (or its failure thereof) of the line employees and contractors over the supervisory powers of the assured's managers. With respect to the cold weather procedures, he held that 'the managers could reasonably have assumed that their crew knew about this basic aspect of good seamanship: their vessels had been trading to Northern European ports in winter for years and must have encountered freezing conditions not infrequently; but there has not apparently been any previous incidents of a similar kind.'[129] With respect to the failure to seal the cable duct at each end of the duct keel tunnel, he held that 'absent some reason to make a specific inspection of the cable glands, the owners could not reasonably have been expected to discover the deficiencies prior to the casualty.'[130] Furthermore, the failures of the alarms and the pumping system were dismissed as causative-irrelevant events with respect to the 'due diligence' proviso.[131]

d. A brief assessment of the two judgments

Taken together, these two judgments open the door to the liberal interpretation of the 'due diligence' proviso on the one hand, but impose controls as to its scope on the other. Both Blair J and Popplewell J did not go for the proactive risk management approach that the insurers were advancing, namely that the failure of the crew or contractors creates a *prima face* case of failure of their technical supervisors and the safety processes and/or inspections they implemented and/or authorised. Instead, they created two spheres of responsibility which do intersect, yet have to be treated separately. The insurers will be able to avoid liability under the policy if they prove that the technical and safety managers were negligent in their sphere of responsibility, namely 'to prepare or equip the vessel for the voyage or service she is about to perform'.[132]

At the same time, both Blair J and Popplewell J rejected a strict, precautionary assessment of the said managers' duties. Their behaviour will be assessed on the basis of the information that they receive from the line employees and/or their contractors, and the question to be answered would be whether their decisions were reasonable

126 See, for example, J. Gilman *et al.*, *Arnould Law of Marine Insurance and Average* p. 161.
127 The DC Merwestone [2013] EWHC 1666 (Comm); [2013] 2 Lloyd's Rep 131 at [102].
128 *Ibid.* at [104].
129 *Ibid.* at [85].
130 *Ibid.* at [93].
131 *Ibid.* at [105]–[108] and [136].
132 Allen N. Spooner & Son Inc. v. Connecticut Fire Ins. Co. 314 F2d 753, 758 (1963) advocated by J. Gilman et al., Arnould Law of Marine Insurance and Average, p. 1162 as the correct approach to be adopted under English Law.

in light of these circumstances. It might be the case that the information they received was inadequate, and as such they should have requested clarification before taking any decisions, with any failure to do so to be constructed as want of 'due diligence'. Yet, both judges made clear that due diligence is not to be equated with the failure to take all necessary measures to prevent a loss.[133] A retrospective analysis of what could have been done to avoid the loss should not be the deciding factor, unless it was reasonable to take such a course of action on the basis of the information provided (or the information that it was reasonable to provide) at the time the decision was made. In that respect, it is not surprising that Popplewell J rejected the argument of the insurers that the failure to include cold weather procedures in the Safety Management System (SMS) amounted to want of 'due diligence'. It was not universal practice to include such procedures, and most importantly the director for safety management of the assured emailed the crew a month before the accident with instructions to drain all waterlines. For Popplewell J, notifying the crew by email was more effective notice than burying such instruction in a lengthy protocol which contains numerous different procedures.[134]

What, though, might be problematic is the test formulated by Popplewell J when deciding whether the failure to inspect and maintain the bulkheads in the duct keel amounts to want of 'due diligence': '. . . absent some reason to make a specific inspection of the cable glands, the owners could not reasonably have been expected to discover the deficiencies prior to the casualty.'[135] One might argue that the inquiry of Popplewell J comes close to the interpretation of the 'reasonable precaution' clauses that both himself and Blair J rejected when interpreting the 'due diligence' proviso. The risk with the approach of Popplewell J is that if taken to the extreme, it reintroduces a recklessness threshold with regards to the 'due diligence' proviso. Taking reasonable measures only when the assured has a reason to believe that there is a deficiency resembles the test advanced by Diplock LJ in *Fraser* v. *Furman (Productions) Ltd*.[136] When analysing the reasonable precaution clauses, Diplock LJ held that the insurers can take advantage of such a clause if they prove that the assured omitted taking precautions 'with actual recognition by the insured himself that a danger exists, and not caring whether or not it is averted.'[137]

One might argue that the test of Popplewell J with respect to 'due diligence' is the result of availability 'heuristics', in that he was influenced by his analysis of section 39(5) of the MIA 1906. This took place when considering the alternative allegation of the insurers, namely that the loss was caused by the deficient condition of the vessel's pumping system that made her unseaworthy, to which her owners were privy. It has been long established (and was accepted by Popplewell J) that the 'blind-eye' knowledge inquiry of section 39(5) of the MIA 1906 requires the insurer to prove that the assured had a firmly grounded suspicion of the deficiency that made the vessel unseaworthy and took a deliberate decision to avoid confirming its existence.[138]

133 The DC Merwestone [2013] EWHC 1666 (Comm); [2013] 2 Lloyd's Rep 131 at [70]; also The Toisa Pisces [2012] EWHC 50 (Comm); [2012] 1 Lloyd's Rep 252 at [100].
134 The DC Merwestone [2013] EWHC 1666 (Comm); [2013] 2 Lloyd's Rep 131 at [86].
135 *Ibid.* at [93].
136 [1967] 1 WLR 898.
137 *Ibid.* at 906, *per* Diplock LJ.

Again, this test is close to the one he advanced about the 'due diligence' proviso, which can be read to mean that the insurers are required to prove that the assured deliberately refrained from correcting the deficiency when he realised or strongly suspected that there was one.

Availability 'heuristics' or not, it is important that a disguised attempt to apply standards of recklessness is avoided when dealing with the 'due diligence' proviso in both the Institute policies and the 1972 forms. It is correct that two separate spheres of responsibility shall be created. Yet in the managerial sphere of influence, being aware of the deficiency and turning a blind eye to it shall not be the threshold of application of the proviso, because it leaves instances of damage which were reasonably foreseeable by the decision-makers of the company outside the scope of the clause. Such an exclusion would be against the judgment of Blair J in *The Toisa Pisces*, who advocated a negligence test. At the same time, it would leave room for distorting the aim behind the 'due diligence' proviso, namely to deter the management of shipping companies from ignoring safety problems on the basis that any losses will be picked up by their insurers. In that respect, it is submitted that the test of Popplewell J shall not be read to dismiss inquiries about the foreeseability of the harm or the information that the owners should have when making up their minds with respect to safety issues.

e. An assessment of the 'due diligence' proviso in the 1972 LSDBF and the 1972 LSPF

The analysis so far is relevant for the 'due diligence' proviso in the 1972 forms in two respects. First, negligence is the preferred standard of care, since both the *Toisa Pisces* and the *DC Merwestone* do not leave much room to argue otherwise. There is a (weak) argument to be made in favour of recklessness in the context of the 1972 forms on the basis that the commercial purpose of an 'all risks' policy is impaired to a greater extent by the negligent standard than the purpose of a 'named perils' policy. Still, the resemblance of the proviso in the 1972 forms with the corresponding one in the hull policies, as well as the reasoning of Blair J, makes any such argument difficult to sustain. It is submitted that the wording and the position of the 'due diligence' proviso in the coverage section of the 1972 forms provides the 'clear words' that Popplewell J requested for the proviso to qualify the whole cover of the forms.[139]

Secondly, the proviso is to be interpreted as an exclusion, and as such the burden of proof is placed upon the insurers. However, in the 1972 forms it qualifies the entire cover and it is not limited to the specific risks of the 'Inchmaree clause', as is the case under the ITC–Hulls. As such, it has a broader ambit than its hulls equivalent. Still,

138 In the words of Lord Scott: '[B]lind-eye knowledge requires . . . a suspicion that the relevant facts do exist and a deliberate decision to avoid confirming that they exist . . . In my opinion, in order for there to be blind-eye knowledge, the suspicion must be firmly grounded and targeted on specific facts. The deliberate decision must be a decision to avoid obtaining confirmation of facts in whose existence the individual has good reason to believe.' See *Manifest Shipping Co. Ltd* v. *Uni-Polaris Insurance Co. Ltd (The Star Sea)* [2001] UKHL 1; [2003] 1 AC 469 at [116].

139 The DC Merwestone [2013] EWHC 1666 (Comm); [2013] 2 Lloyd's Rep 131 at [102].

insurers are required to prove that the loss or damage to the barge or platform is proximately caused by the negligence of the persons indicated in the clause. The use of the wording 'resulted from', as *per* our discussion in the previous part of this Chapter, provides strong support to the application of the proximate cause rule. Not surprisingly, Popplewell J made a strong statement to that effect in the *DC Merwestone*: 'The words "resulted from" are synonymous with "*been caused by*" . . . [I]t would be surprising if standard clauses dealing with insured perils were intended to introduce some other theory of causation, such as "but for" causation'.[140]

The combined effect of these two points is that the 'due diligence' proviso of the 1972 forms is not giving a *carte blanche* to insurers to treat the negligence of the said persons as the cure for all diseases. Their negligence is required to be the dominant cause of the loss, or at least a cause of equal efficiency with a covered peril. As such, it is becoming even more important to respect the division of responsibilities between line personnel and senior management personnel that both Blair J and Popplewell J suggested in their respective judgments. For the exclusion to apply, the insurers shall be required to prove that (i) the managers were negligent in setting the policy in terms of safety and operation; and/or (ii) their response to the information they were getting from the offshore personnel or contractors was subpar in light of their knowledge at the moment. The negligence of the offshore crew shall not create a *prima facie* case that the assured and its managers failed in their supervisory duties. Such an interpretation would require the reversal of the burden of proof, which is against the phrasing of the 'due diligence' provisos and the said judgments. Instead, it is for the insurers to make a case that the operational or safety standards as implemented by the assured or its managers were substandard.

What the two judgments did not shed light on was who can qualify as an assured, owner or manager of the barge or platform. It has been rightly argued that the wording of the 'due diligence' proviso in the 1972 forms leaves ample room for interpretation in favour of the insurers: '. . . no distinction is made [in the 1972 forms] between personnel operating the platform and senior hierarchy . . . This lack of clarity is not assisted by the additional words *or any of them*, as if to suggest that the phrase "Assureds, Owners, or Managers" is not comprehensive and can be inclusive of other entities who are representing the *Assured*.'[141] This lack of clarity is aggravated by the scarcity of reported cases in England on this particular matter, with most of the analysis advanced so far originating in US courts. Yet, US courts favour an expansive interpretation of the 'due diligence' proviso in hull clauses to 'embrace failure of due diligence at a lower level by shoreside management staff'.[142]

It is submitted that this interpretation does not reflect either English law or the nature of the 1972 forms. With respect to English law, the more restrictive interpretation of the 'privity' cases of section 39(5) of the MIA 1906 is to be preferred, with the aim being to identify the effective decision-makers (the *alter ego*) in the organisation. This would include, among others, the decision-makers in charge of operational and safety matters, be they directors of the owning or management

140 *Ibid.* at [101].
141 D. Sharp, *Upstream and Offshore Energy Insurance*, p. 356.
142 J. Hill, *O' May on Marine Insurance: Law and Policy* (Sweet & Maxwell, 1993), pp. 136–137.

company, with technical superintendents and port captains being rejected from the relevant scope.

With respect to the 1972 forms, the acceptance of the interpretation of the US courts would limit disproportionately their cover, which will inevitably raise questions about their commercial purpose as contracts of indemnity. As the 'due diligence' proviso in the 1972 forms qualifies the entire cover, it already places a heavy burden on the assured. An interpretation that will exclude from cover the negligence of low-level onshore employees will come perilously close to what the claimants in *The Tosia Pisces* described as 'granting an indemnity with one hand and taking it away with the other.'[143]

Furthermore, by excluding the negligence of these employees from cover, no contribution is made to the main aim of the provisos, namely to deter the assured from playing fast and loose with operational and safety issues because he has adequate insurance cover. In most occasions these employees do enjoy a certain level of autonomy and have been delegated duties with respect to the running of platform. Yet they do not exercise control over the company's decisions regarding the safety of the platform.

It is our belief that the 'due diligence' proviso in the 1972 forms shall be interpreted restrictively. As such, the negligence of the 'topside deck' level and the superintendents is to be included in the cover. If insurers were aiming for a broader interpretation, they could have followed the wording of the ITC–Hulls (1/11/95), which extended the list of persons in clause 6.2 to cover '[s]uperintendents or any of their onshore management'. The additional wording 'or any of them', which is found in clause 5 of the 1972 forms, does not have a material impact on our conclusion. It is highly likely that it was inserted to make clear that the want of due diligence by any of the aforementioned individuals will suffice to exclude cover.

It has been suggested that replacing the existing wording of clause 5 of the 1972 forms with the expression '. . . provided such loss or damage has not resulted from want of due diligence by the *Directors or Officers of the Assured*' (emphasis added) will clarify the scope of the proviso, yet insurers are unwilling to make such an amendment to tailor-made policies.[144] It will constitute an improvement over the existing one, but we are not convinced that this wording will bring the needed clarity to the proviso. There will still be discussions over which directors or officers are included in its scope. It is submitted that the best solution from the perspective of contractual certainty is to remove the 'due diligence' proviso from the coverage sections and arguably follow the example of the 2009 LSPF analysed in the next section.

f. The rationality of the 2009 LSPF

The drafters of the 2009 LSPF came up with a new clause, clause 4E, which is entitled 'Due Diligence', and it is part of the 'Conditions' section of the form. The new 'due diligence' clause does not resemble its predecessor, but instead reads more as the 'reasonable care' clauses commonly found in property and liability insurance

143 [2012] EWHC 50 (Comm); [2012] 1 Lloyd's Rep 252 at [101].
144 D. Sharp, *Upstream and Offshore Energy Insurance*, pp. 356–357.

policies.[145] The authors do not purport to provide a full analysis of the new clause, but instead they will focus on the level of care now required.

The new format calls for a new interpretation. It is likely that the judgments of Blair J and Popplewell J, which are fitting for the 1972 forms, will not be sustained under the new format. Instead, it is arguable that the arguments of the claimants in *The Toisa Pisces* will prevail: the obligation to exercise due care and diligence in the conduct of all operations involving the platform is breached by the recklessness of the assured himself. What was the standard approach in liability policies has now become the default position in property policies as well. In the words of Jackson J in *Tate Gallery (Board of Trustees of)* v. *Duffy Construction Ltd & Anor (No. 2)*: 'In a policy of liability or property insurance a reasonable precautions clause in the conventional form is not breached by mere negligence. Recklessness is what constitutes a breach of such a clause.'[146]

This finding can be overturned if the clause in question is clear enough; yet it is doubtful that this is the case with the new clause. The fact that it is drafted as a condition precedent to liability is neither here nor there; its classification is related to the consequences of not attaining the required level of care rather than deciding what that level is.[147] Furthermore, it is expected that our earlier analysis on who the assured is will not be affected. Jackson J directed the matter to be decided at full trial, yet he confirmed the *alter ego* theory and gave a strong hint against the US interpretation: '[R]ecklessness must be committed by people of such seniority within [the defendant] that their recklessness will be attributed to the company itself . . . I am bound to say that on the present material I regard it as unlikely that any recklessness on the part of any individuals on site will be attributed to the company.'[148]

In that respect, the change in the 2009 LSPF is welcoming. The drafters broke free of the influence of hull policies and rationalised the wording and the location of the 'due diligence' provision. At the same time, it is expected that this change will rationalise its interpretation by following the established one with respect to property and liability policies. It is suggested that a similar course of action shall be taken with respect to any amendments of the 1972 LSBD.

145 Cl. 4E of the 2009 LSPF provides as follows: '*It is a condition precedent to insurers' liability under this Section that the Insured shall exercise due care and diligence in the conduct of all operations involving the Property Insured, utilising all safety practices in accordance with state and/or provincial and/or federal governmental rules and regulations and all equipment generally considered prudent for such operations* and, in the event any hazardous condition develops with respect to the Property Insured, the Insured shall at its sole expense, make all reasonable efforts to prevent the occurrence of physical loss or physical damage insured under this Section' (emphasis added).

146 [2007] EWHC 912 (TCC); [2008] Lloyd's Rep IR 159 at [26].

147 The discussion whether the clause is a genuine condition precedent to the liability of the insurers is outside the scope of this part of the chapter. For comments on how it compares with the 'due diligence' provision in the 1996 LMOMUF please see the subsequent part of this chapter.

148 Tate Gallery (Trustees) v. Duffy Construction Ltd (No. 2) [2007] EWHC 912 (TCC); [2008] Lloyd's Rep IR 159 at [32].

V. PROBLEMS ASSOCIATED WITH STANDARD CLAUSES THAT SET OUT THE OBLIGATIONS OF THE ASSURED

In this section, the authors intend to illustrate certain provisions appearing in standard clauses that can be the source of uncertainty either with regard to their scope or legal effect.

Let us first consider the 'due diligence' provision in the LMOMUF 1996, which stipulates:

> The Insured shall exercise due care and diligence in the conduct of all operations which are subject to this Policy and shall utilise all safety practices and maintenance procedures that are generally considered prudent for such operations.

There is an ambiguity in the scope of this requirement; in particular, it is not clear whether the assured is expected to utilise all safety practices in accordance with the rules or regulations of a state, or if the duty extends to safety practices and procedures commonly adopted in the industry, even though such practices and measures are not required formally by state regulation. If the former, the next question is which state's practices and procedures (i.e., the state issuing the licence for exploration and exploitation, or the one which the mobile drilling unit is registered at) will be the benchmark in determining whether due diligence has been exercised by the assured. If the latter, identifying common practices and procedures adopted in the industry is not going to be a straightforward task, especially given that operators adopt varying practices depending on the jurisdiction in which they operate.

Assuming that it is established that the assured has failed to observe the required degree of care and diligence, another difficulty will be to determine what legal consequence would follow such breach. The insurer's likely contention would be that the parties' intention was to create a condition precedent enabling him to decline any claim for loss, damage, liability or expense which resulted from such non-compliance.[149] One can foresee several difficulties with this kind of contention. By laying emphasis on the absence of the words 'condition precedent', the courts have often reached the conclusion that the provision was never intended as such.[150] Of course, the absence of the words 'condition precedent' does not necessarily prevent a clause from being classified as one, as long as clear wording exists which provides that the assured will not be able to recover under the policy in case of failure to comply with the relevant clause in question. For instance, in *Aspen Insurance UK Ltd* v. *Pectel Ltd*[151] the use of the words '[t]he liability of the Underwriters shall be conditional upon . . .' was deemed to be adequate to establish a condition precedent.

149 This is the prescribed remedy in the LMOMUF 1996 in the event of non-compliance by the assured with a provision expressly classified as a condition precedent in the policy. See General Conditions VI, cl. 7 of the LMOMUF 1996.

150 Morison J said in *AIG Europe (Ireland) Ltd* v. *Faraday Capital Ltd* [2006] EWHC 2707 (Comm); [2007] Lloyd's Rep IR 267 at [66]: 'If that had been the intention behind this draconian clause, it should have been spelt out.' See also *Muncipal Mutual Insurance Ltd* v. *Sea Insurance Co. Ltd* [1996] 2 Lloyd's Rep 265, at 274–275.

151 [2008] EWHC 2804 (Comm); [2009] Lloyd's Rep IR 440.

However, there is nothing in the language used in the 'due diligence' provision in question to suggest that the necessary conditional link between the obligation to observe due diligence and the requirement of the assured to comply with this obligation has been established. Another difficulty for the insurers is that the courts might be inclined to use the interpretation cannon *expression unius exclusion alterius* against them in this instance. In *Friends Provident Life & Pensions Ltd* v. *Sirius International Insurance Corp.*,[152] Moore-Bick J has spelt out how this canon of construction would operate in this context:

'. . . where the same clause expressly characterises some obligations as conditions precedent and others not, it is generally fair to assume that the parties did not intend to attribute the same significance to those other obligations.'

A quick glance at the LMOMUF 1996 reveals that some provisions have been expressly characterised as condition precedents,[153] whilst no indication of that nature has been made with regard to the 'due diligence' provision. This could well be viewed as a reflection of the intention of the draftsmen to attribute a different legal status to the 'due diligence' provision. This kind of argument can be backed up by the fact that in the new version of the LSPF 2009, an obligation of similar nature, which requires due diligence on the part of the assured in the conduct of all operations involving the insured property, has expressly been singled out as a condition precedent. Needless to say, the LSPF 2009 is a slightly different form used in insuring fixed offshore platforms and installations; but the fact that the draftsmen has gone through the trouble of expressly stating that the due diligence provision is a condition precedent in that standard contract, whilst no similar attempt has been made under the LMOMUF 1996, will make it very difficult for the insurer to argue that the 'due diligence' provision in the LMOMUF 1996 should be treated as a condition precedent.[154]

By the same token, it would be rather difficult for the insurers to argue that the 'due diligence' provision should be classified as an insurance warranty. Although the absence of the word 'warranty' is not conclusive,[155] the courts would be rather reluctant to afford a warranty status in a case where the insurer fails to make his

152 [2004] EWHC 1799 (Comm); [2005] Lloyd's Rep IR 135 at [42].

153 For example, General Conditions VI cl. 2 stipulates: 'It is a condition precedent to the recovery of indemnity under this Policy that: (a) where the Property Insured is performing drilling, deepening, completion, workover, servicing or reconditioning, an operable Blowout preventer(s) or other operable pressure control equipment of standard make will, when required in accordance with all applicable regulations, requirements and prudent and accepted practices in the industry, be set, installed, tested and maintained in accordance with such regulations, requirements and prudent and accepted practices; and (b) the Insured will use every reasonable endeavour to comply with all regulations and requirements in respect of fitting of equipment to minimise damage and that all such equipment will be manned by property certified personnel where required by regulatory authorities.'

154 As Buxton LJ said in *Tektrol Ltd* v. *International Insurance Co. of Hanover Ltd* [2005] EWCA Civ 845; [2005] 2 Lloyd's Rep 701 at [8]: 'In the present case, as will be seen, there are some genuine difficulties in determining the factual situations to which the clauses absolving the insurers from risk, read in context, can properly be applied. It is at least a relevant factor in such an enquiry to recall that the insurers indeed could have made things much clearer in their own favour if that was indeed their intention when they drew the policy.'

155 Dawsons Ltd v. Bonnin [1922] 2 AC 413.

intention clear, given the fact that breach of warranty will have draconian results for the assured.[156]

It remains a possibility that the insurer could argue that the 'due diligence' provision is one that could potentially go to the root of the whole contract, and if breached in a serious fashion, this might enable the insurer to elect to terminate the contract prospectively. The decision of the Court of Appeal in *Friends Provident Life & Pensions Ltd* v. *Sirius International Insurance*,[157] dismisses the prospect of an ancillary provision, such as a notification clause, from being treated as a severable innominate term enabling the insurer to reject a particular claim that the notification clause is related to, rather than terminating the whole policy.[158] However, the reasoning of Mance LJ (as he then was) cannot be extended to support the view that innominate terms do not exist in insurance law. A term that can be broken in numerous ways, some trivial, some serious,[159] and that relates to a primary obligation of an insurer, could well be treated as an innominate term. On that basis, the 'due diligence' provision in the LMOMUF 1996 is a leading contender to be construed in this fashion. That said, it needs to be stressed that as of today, only in a handful cases has a term in a commercial insurance contract been held to be an innominate term.[160]

A contrary argument that can be brought by the assured is that the 'due diligence' provision should be treated as a mere condition that gives the insurer the right to sue or counter-claim for damages insofar as the breach causes him a loss. In the context of insurance contracts, collateral promises given by the assured to fulfil an obligation have occasionally been treated as mere conditions resulting in damages. This is particularly true in cases where the legal consequences of breaching such an obligation have not been expressly stated in the policy.[161] It is, therefore, a plausible argument

156 Thomas LJ put it strongly in *Toomey* v. *Banco Vitalicio de Espana SA de Seguros y Reaseguros* [2004] EWCA Civ 622; [2005] Lloyd's Rep IR 423 at [42]: 'Furthermore regard must also be had to the draconian effects of a breach of warranty, in that a breach discharges the insurer, even if it is not causative of the loss. In many policies of insurance and reinsurance, the parties make clear in the contract whether the term is a warranty or not; if the term is important to the insurer or reinsurer, he can seek to make the term an express warranty. In such circumstances, the insured or reinsured knows where he stands and that a breach can discharge the insurer. A court should, where there is no express agreement, approach the issue of construction with these considerations in mind.'

157 [2005] EWCA Civ 601;[2005] 2 Lloyd's Rep 517.

158 Mance LJ said, *Ibid.* at [30]: 'No authority was cited to us, apart from BAI and its successor cases, in which any court has suggested that a party to a contract may be relieved from a particular obligation under a composite contract such as the present, by reason of a serious breach with serious consequences relating to an ancillary obligation, absent some express or implied condition precedent or other provision to that effect. Either some conditional link can, as a matter of construction, be found between performance of the two obligations or it cannot. Where such a link cannot be found as a matter of contractual construction, I see no basis for a new doctrine of partial repudiatory breach to, in effect, introduce one.'

159 See *Hong Kong Fir Shipping Co. Ltd* v. *Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26, where the seaworthiness obligation has been classified as an innominate term, as it is capable of being broken in various manners.

160 In *The Beursgracht* [2001] EWCA Civ 2051; [2002] Lloyd's Rep IR 335, the assured under an open cover was required to inform the underwriters by the declarations in the form of monthly bordereaux of the acceptances of new risks. The assured accepted a risk but failed to inform the insurers at the time, and indeed not for several years, by which time a claim had been made against the assured in respect of the undeclared risk. The Court of Appeal held that the relevant term was an innominate term, the consequences of the breach of which depended upon seriousness and effect. See also *Limit No. 2 Ltd* v. *Axa Versicherung AG* [2007] EWHC 2321 (Comm); [2008] Lloyd's Rep IR 330.

161 See, for example, *Cowell* v. *Yorkshire Provident Life Assurance Co.* (1901) 17 TLR 452.

that the 'due diligence' provision should be treated as a clause enabling the insurer to counter claim damages, to the extent he can prove loss, in case of its breach.

Further speculation on the legal status of the 'due diligence' provision can be made, but the authors believe that the debate carried out so far is sufficient to illustrate the point that the 'due diligence' provision in the manner in which it appears in the LMOMUF 1996 has a potential for creating disputes between the parties due to uncertainties that are inherent in its wording.[162] Before moving on to another standard form, we can briefly consider another clause that appears in the LMOMUF 1996 and is equally puzzling. The notice of loss provision under General Conditions VI stipulates:

> The Insured undertakes to provide notice to the party named in item 6 of the Declarations of any loss of or damage to the Property Insured or liability or expense which could become the subject of a claim under this policy as soon as practicable after it has become known to the Insured.

Similar notice provisions that appear in standard hull forms are more precise, both as to the time limit within which the assured is allowed to give notice, and also as to what consequences will follow if the notice as stipulated by the provision is not given. For instance, clause 43.1 of the International Hull Clauses 2003 requires the assured, owners or managers to give notice to the leading underwriter in the event of an accident or occurrence whereby loss, damage, liability or expense may result in a claim under the policy; and clause 43.2 then stipulates that:

> If the notice is not given to the Leading Underwriter(s) within 180 days of the Assured, Owners or Managers becoming aware of such loss, damage, liability or expense, no claim shall be recoverable under this insurance in respect of such loss, damage, liability or expense, unless the Leading Underwriter(s) agree to the contrary in writing.

Whether notice has been given as soon as practicable will be a question of fact and might fuel litigation if cover is provided under the LMOMUF 1996. More significantly, it is going to be a moot point whether the insurer could deny a claim, when it is established that notice has not been given as soon as practicable. The only factor that goes in favour of the insurer minded of contending that the notice obligation is a condition precedent to liability is the fact that the obligation is qualified by the use of the word 'shall'. On the other hand, as discussed earlier when considering the 'due

162 For offshore craft insured under the Nordic Marine Insurance Plan of 2013, the legal position for not complying with safety regulations has been spelt out in a clear fashion in cl. 3-25, which reads: 'If a safety regulation has been breached, the insurer shall only be liable to the extent that the loss is not a consequence of the breach, or that the assured has not breached the safety regulation through negligence . . . The insurer has the burden of proving that a safety regulation has been breached, unless the vessel springs a leak whilst afloat. The assured has the burden of proving that he did not breach the safety regulation through negligence, and that there is no causal connection between the breach of safety regulation and the casualty.' Cl. 3-22 defines safety regulations in the following manner: 'A safety regulation is a rule concerning measures for the prevention of loss, issued by public authorities, stipulated in the insurance contract, prescribed by the insurer pursuant to the insurance contract, or issued by the classification society. Periodic surveys required by public authorities or the classification society constitute a safety regulation under sub-clause 1. Such surveys shall be carried out before expiry of the prescribed time-limit. The rules prescribed by the classification society regarding ice class constitute a safety regulation under sub-clause 1.'

diligence' provision, there is nothing in the clause suggesting that the assured would be deprived of the claim if the notice requirement is not fulfilled. One should not be surprised if the judge decides to construe the clause narrowly and not as a condition precedent to liability. This kind of provision that relates to the claims stage and sets out a procedure that needs to be followed by the assured in case of an event arising that could give rise to a claim, without specifying the consequences in case of its breach, could have been treated as a severable innominate term following the reasoning of Waller LJ in *Alfred McAlpine plc* v. *BAI (Run-Off) Ltd*.[163] However, it is doubtful whether the analysis of Waller LJ survives the judgment of the Court of Appeal in *Friends Provident Life & Pensions Ltd* v. *Sirius International Insurance*.[164] If it does not, this provision is likely to be treated as a mere condition that results in damages only,[165] but it will not be an over-exaggeration to say that this is far from certain.[166]

Unfortunately, blemish drafting is not limited to the LMOMUF 1996. Other standard clauses used in insuring offshore installations and equipment suffer from a similar fate. One example would be adequate to illustrate this point. Clause 15 of the LSPF 1972 reads:

> During the currency of this insurance or any time thereafter within the period of the time provided for in Clause 16 for bringing suit against these Underwriters, these Underwriters shall have the right of inspecting the Assured's records pertaining to all matters of costs, repairs, income and expenditure of whatsoever nature relating to the properties insured hereunder, such records to be open to a representative of these Underwriters at all reasonable times.

Naturally the objective of such a clause is to enable the insurers to investigate the records of the assured with the objective of gathering information on his business practices, and it is likely to come in handy when investigating a claim that has been put forward.[167] The main problem with this clause is that it again fails to identify what the consequence of non-compliance will be. An attempt to argue that this should be classified as a condition will be hampered by the fact that no clear and unequivocal

163 [2000] 1 Lloyd's Rep 437. See also K/S *Merc-Scandia XXXXII* v. *Certain Lloyd's Underwriters (The Mercandian Continent)* [2001] EWCA Civ 1275; [2001] 2 Lloyd's Rep 563.

164 [2005] EWCA Civ 601; [2005] 2 Lloyd's Rep 517.

165 It was held in *Stoneham* v. *Ocean Railway & General Accident Co.* (1887) 19 QBD 237 that a term which required the company to give notice in case of a fatal accident within seven days was a contractual term, the breach of which imposed an obligation upon the assured's representatives to reimburse the company for extra expenses that they might incur from having to investigate the circumstances of an accident at a long interval after its occurrence.

166 The equivalent provision of the Nordic Marine Insurance Plan of 2013, which is often used to insure offshore crafts and installations, is drafted in a more precise fashion. Cl. 5-23, which applies to insurance on mobile offshore units, stipulates: 'The assured loses his right to claim compensation if notice of the casualty is not given to the insurer within six months of the assured, the master or the chief engineer of the ship becoming aware of it. In any event the assured loses his right to claim compensation other than for hull damage below the light waterline if notice of the casualty is not given to the insurer within 24 months of the date of the casualty.'

167 A similar but a more comprehensive provision appears in the LMOMUG 1996. General Conditions VI, cl. 12 states: 'The insurer shall be permitted but not obliged to inspect, and review at any reasonable time during normal business hours the Insured's records pertaining to all matters of operational procedures, costs, repairs, incomes, and expenditures of whatsoever nature relating to the Property Insured during the Policy period and extensions thereof and within 36 months after the final termination of this Policy. Upon request of the insurers, the Insured will provide the requested information and allow the insurers or their representatives reasonable access during normal working hours to the Insured's facilities . . .'

wording to that effect appears in the policy, and the obligation on the part of the assured seems to be ancillary in nature. In this respect, a parallel can be drawn with claims cooperation clauses that form a permanent fixture of liability policies.[168] Such clauses are often treated as mere conditions that result in damages in case of breach.[169] Conversely, under the Nordic Marine Insurance Plan of 2013, the legal consequence of the assured not providing the desired assistance to the insurer at the claims stage has been expressly stated.[170]

VI. CONCLUSIONS

Two main conclusions can be drawn from the survey carried out in this Chapter:

(i) Using standard marine forms in insuring offshore craft and equipment is a risky affair for both parties to an insurance contract; and this practice does not enhance contractual certainty, which is the most desired feature of commercial insurance law;
(ii) standard clauses developed by the energy insurance market for insuring offshore craft and equipment cannot be singled out as evidence of exemplary drafting. The authors have demonstrated that several key provisions in such standard clauses, concerning obligations of the assured and exemptions to cover, lack the desired certainty and are in need of urgent reconsideration.

Throughout this chapter, the authors have made various suggestions as to how the drafting of problematic clauses can be improved, and at times comparisons have been drawn with standard clauses that have been developed by other international energy markets such as Norway. Given the significant role that standard clauses could play in competing for market share, there is reason for the London market to be apprehensive, as it is evident that the scope of the cover and obligations of the assured have been expressed in a clearer fashion under the Nordic Marine Insurance Plan 2013, which forms the foundation of cover when insuring offshore craft and installations with one of the main rivals to the London market in this field.

168 Typically, such clauses are framed in general terms that require the assured, for example, to provide information or evidence to the insurer to defend a claim against the assured and to render the insurer all reasonable assistance.

169 See *Porter* v. *Zurich Insurance Co.* [2009] EWHC 376 (QB); [2010] Lloyd's Rep IR 373.

170 Cl. 5-1, which applies to insurance on mobile offshore units by virtue of cl. 18-1, stipulates: 'The assured shall provide the insurer with such information and documents as are available to him and are required by the insurer for the purpose of settling the claim. If the assured, intentionally or through gross negligence, fails to fulfil his duties according to sub-clause 1, the insurer is only liable to the extent he would have been liable if the assured had fulfilled his duty. If the assured has acted fraudulently, the insurer is free from liability. In such case, the insurer may also cancel any insurance contract he has with the assured by giving fourteen days' notice. Notice of cancellation must be given without undue delay after the insurer has become aware of the fraudulent act.'