

# THE COMPASS

Newsletter of DGS Marine Group

Edition 1 Summer 2011

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2011

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### WELCOME

The British European and Overseas P&I / FD&D Facility, through its Managers DGS Marine Management Services Ltd, are proud to present our first Newsletter; 'The Compass'.

The Facility's initiative to introduce this quarterly Newsletter is reflected in the name itself- similar to a Compass onboard, which when expertly steered navigates a ship safely to its destination, efficiently sailing through the perils at sea. Our Newsletter aims to provide guidance and advice to our Assureds in safely operating their vessels.

'The Compass' will include articles on Risk Management/ Loss Prevention issues, comments on new legislations/ case law, lessons learnt from claims and information on initiatives and events the Club sponsors and / or is involved in.

The Club takes pride in its Risk Management / Loss Prevention programme and recognises that this service must fit with our Assureds' needs. The Club's Risk Management / Loss Prevention Service is intended to complement (not compete) with our Assureds' own initiatives by way of providing advice, information and assistance. This, and subsequent quarterly editions of 'The Compass', will attempt to cover a wide range of Risk Management / Loss Prevention topics that effect our Assured and their vessels.

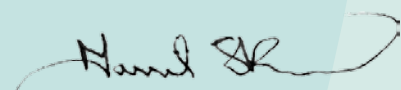
Further, in addition to topical issues which affect the shipping industry, 'The Compass' will also include articles written by experts and our own experienced in house claims executives on new legislations and comments on latest case law to keep the assured abreast with current changes in Maritime Law. Additionally, 'The Compass' will

also include articles on lessons learnt from claims that the Club has dealt with in the past and is currently dealing with.

We consider this quarterly Newsletter as an important vehicle to compliment the above mentioned services in keeping our Assureds' interests at heart, while providing appropriate advice and updates on current topical issues affecting the shipping industry.

The DGS Marine Management team would be happy to answer queries on the articles written in our quarterly Newsletters, in addition to queries on various issues, arising out of new legislation and regulations, as well as provide assistance to our Assureds on various Risk Management / Loss Prevention issues; thus in keeping with our motto of;

***"No matter how small or big the issues,  
we are here for you"***



Mr. David Skinner, Managing Director.

In keeping with their tradition of adapting to the ever-changing challenges posed by modern-day shipping, Lloyd’s and the Lloyd’s Salvage Arbitration Branch (“LSAB”), the body responsible for administering the Lloyd’s Open Form of Salvage Agreement (“LOF”), has recently issued a new version of the Form – LOF 2011.

### Mr. Alex Macinnes

Mr. Alex Macinnes is a Senior Associate in the London office of Wikborg Rein. He has a degree in Naval Architecture and previously trained as a ship surveyor with Lloyd’s Register of Shipping. Alex practices in all areas of shipping and marine insurance law.



LOF 2011

When a vessel finds herself in difficulties on the high seas, aside from the limited assistance available from the Coast Guard and the RNLI (whose primary focus is to save life), there is generally no publicly funded rescue service available – a vessel’s owners and the owners of cargo onboard will have to rely on assistance provided by others in order to save the vessel and, in some cases, avert a full-scale environmental disaster. The law has long recognised this lack of resources and has sought to encourage others to offer assistance by providing that anyone successfully coming to the aid of a vessel in distress is to be rewarded by a significant payment from the owners of the property saved. The rewards can be significant. However, the price of failure can also be costly. Save for two main exceptions, if the salvor fails to save the day, they will receive no payment at all and will have to shoulder the costs of the failed exercise – the principle of “no cure - no pay”. In addition, the amount of any award is generally limited to the value of the property as saved (the “salved value”).

Most of the world’s major maritime nations have recognised the benefit of such an approach to salvage matters, and have therefore attempted to harmonise the rules by agreeing cross-border conventions, most recently by the 1989 Salvage

Convention under the auspices of the Comité Maritime International (“CMI”). However, as is often the case with such conventions, the sheer scale of the task and the involvement of so many different countries and interests, leads to the creation of imperfect laws. In response to the problems created by the lawmakers, the shipping industry has consistently stepped up and devised practical solutions to address the law’s shortcomings, not least through the mechanism of LOF.

Notable past examples of the industry’s response to such matters through LOF include the “enhanced award” and “safety net” provisions introduced by LOF 1980, devised to address the particular problems posed to the environment by distressed oil tankers carrying hundreds of thousands of tonnes of crude oil cargo. The potential liabilities for salvors if their actions resulted in environmental damage had previously acted as a disincentive to them offering assistance. The “enhanced award” and “safety net” provisions of LOF 1980 helped to redress the balance. Also the later introduction by the industry of the SCOPIC clause (the Special Compensation P&I Club Clause) to LOF 2000 convincingly dealt with the unforeseen difficulties introduced by the “Special Compensation” provisions of Article 14 of the 1989 Salvage Convention

(which itself was the lawmaker’s attempt to capture and build upon the positive effects of the LOF 1980 “safety net” provisions). The Convention required proof of a risk of “damage to the environment” and the assessment of a “fair rate” for the services provided – both of which were practically difficult and therefore, again, discouraged would-be salvors from offering assistance. SCOPIC addressed both of these problems by applying an agreed tariff rate and removing the requirement for a threat of damage to the environment.

The latest additions to the LOF system through LOF 2011 introduce a number of further useful changes. Some are relatively minor changes, including the right of the arbitrator to obtain security for their costs from the parties, and the obligation on the parties to report the signing of the LOF form to Lloyd’s – designed to allow Lloyd’s to better monitor the actual use of LOF in the industry (such is the success of the Form that many LOFs are agreed, signed, and a salvage award quickly agreed and settled without Lloyd’s ever becoming involved or arbitration being commenced). The two most significant changes introduced by LOF 2011 relate to the publishing of awards and the procedures to be followed in respect of salvage services provided to container vessels.



The changes introduced by LOF 2011 are, once again, timely and practical. They provide another example of how the salvage industry, and LOF in particular, constantly adapts to the ever-changing world of shipping – often acting much more quickly and much more effectively than the sometimes ineffectual governments and lawmakers involved.

The publishing of awards is part of the efforts of Lloyd's to make London salvage arbitration more transparent and, therefore, more acceptable to both salvors and property underwriters alike. Previously, awards were kept confidential. Now the awards, along with their underlying reasons, will routinely be made available via the Lloyd's website 21 days after publication of the award, albeit on a subscription basis. The parties can apply to the arbitrator to prevent the publication of an award where there is *"good reason"* for withholding it. It is likely that such applications will relate to commercially sensitive information which a party wishes to keep confidential. There are also provisions for the publishing of an award to be postponed if it is in the process of being appealed.

The second major area of change introduced by LOF 2011 relates to container ships and the costs involved in dealing with the 'unrepresented' cargo in such cases. The problems of salvage on large container vessels have been highlighted by the recent very large and very expensive cases of the *"Hyundai Fortune"*, the *"APL Panama"*, the *"Hanjin Pennsylvania"* and the *"MSC Napoli"*. Modern container vessels are even larger than these examples, capable of carrying

massive numbers of containers – in some cases over 15,000 containers. This can result in there being thousands of different owners of the various packages of property. Each of those property owners is entitled to be involved in the arbitration process, and the salvor has separate duties to all of them. Many of the cargo owners will take an active part in the salvage proceedings, appointing a representative in the UK (as provided for by the rules). However many other cargo owners will not take an active part and will not appoint a representative, although nevertheless (through their insurers) they will often provide security to the salvors in order to obtain the early release of their cargo.

Previous to LOF 2011, in order for an award to be valid against the unrepresented cargo owners, it was necessary for the salvor to have given each of them proper notice of the arbitration proceedings. In the case of a container vessel, the process of notifying the unrepresented cargo interests could be extremely costly (in practice, salvors often employ an Average Adjuster to carry out the notifications). However, under the new Clause 13 of the Lloyd's Standard Salvage and Arbitration clauses (the "LSSA" clauses), the salvors may now give

valid notice of the arbitration proceedings to those unrepresented parties through the entity providing the security (usually the cargo insurers). This will have the effect of greatly simplifying the notification procedure and reducing the costs involved.

Another problem for the salvor of a container vessel with unrepresented cargo interests involves the situation where a settlement agreement is reached between the salvor and the represented interests. The problem is that, without the agreement of the unrepresented interests, the salvor has little choice other than to proceed with the costly arbitration procedure and to obtain an award against the unrepresented interests. However, subject to the approval of the Arbitrator, Clause 14 of the new LSSA Clauses now allows an agreement reached with 75% (by value) of the represented cargo to bind the remaining unrepresented cargo interests. This then avoids the cost of proceeding through the full arbitration procedure. Finally, subject to the approval of the Arbitrator, Clause 15 of the LSSA Clauses allows low value salvaged cargo to be excused from liability for salvage where the costs of including it is likely to be disproportionate to the contribution involved.



Discovering a stowaway on board is a Ship-Owners' worst nightmare, given the numerous ramifications that result from it. The Ship-Owner is immediately faced with various extra costs, loss in time and, at times, voyage interruptions which result from vessels having to be diverted to a port of refuge to disembark the stowaway.

### Capt. Nigel Moniz and Capt. Pushkar Gadam

Capt. Nigel Moniz is the Divisional Director of the London Office and Capt. Pushkar Gadam is the Risk Management/Loss Prevention Executive.



Various reasons are associated with people fleeing their own country, which range from personal reasons to political persecution. The problem of finding stowaways on board vessels is not new; various conventions and circulars have been issued in the past and will continue to be issued in the future. In this article we will endeavour to briefly focus on the conventions in place and subsequently provide some practical solutions gathered from the Club's experience in dealing with stowaways.

### International Regulations:

The first international convention relating to stowaways was adopted in Brussels in 1957; however, it has not yet come into force and is unlikely to do so in the future, due to a perceived lack of commitment in reaching a consensus on formally implementing the convention. In 1965, the International Maritime Organisation ('IMO') adopted the Facilitation of International Maritime Traffic ('FAL') Convention in order to prevent unnecessary delays in maritime traffic, to aid co-operation between Governments, and to secure the highest practicable degree of uniformity in formalities and other procedures. As it has been seen, stowaway cases contradict the purpose of this convention which leads to future amendments being made. In 2002,

amendments to the ('FAL') convention incorporated recommended practices on dealing with stowaways.

The standards and recommended practices for stowaways are reflected in the Guidelines on the Allocation of Responsibilities to Seek the Successful Resolution of Stowaway Cases (Resolution A.871 (20)), which were adopted in 1997 and established basic principles to be applied when dealing with stowaways.

### Statistics

The IMO publishes quarterly and annual reports on stowaway cases affecting the shipping industry. The latest available annual report is for 2009, where it clearly shows a total of 1070 cases were reported, out of which 826 cases originated from unknown countries. A graphical presentation of the balance 244 cases is shown (in Illustration 1) and could be considered as hot spots for stowaway embarkation.

Apart from complying with regulations and checklists, it is prudent that the Ship Owners, Master and his Crew are aware of areas of concern or hot spots and the importance of planning ahead and taking suitable precautions whilst trading in those areas.

### Practical Solutions

The most practical solution is to prevent the embarkation of stowaways in the first place. The Ship-Owners / Operators must provide Masters with up to date circulars of the latest geographical areas of concern to allow him to plan accordingly and draw up a plan which should include a thorough check of the ship before she departs such areas. Time used in the search is valuable and saves the Ship-Owners a lot of time, aggravation and ultimately money. On numerous occasions commercial pressures force the Master to sail out of port before the search is completed. In such cases, the Master should be given an opportunity to resume and complete the search after going to a nearby roadstead. That said, even after all the possible precautions are taken to prevent stowaways from boarding the vessel, there is always a chance that a stowaway is discovered after the vessel has been at sea for a couple of days. If a stowaway is found prior to the Vessel sailing or on the nearby roadstead, disembarking the stowaway is much easier, given that the vessel is still in territorial waters of the country of embarkation. However, in any event the Master should inform the Club of the incident.

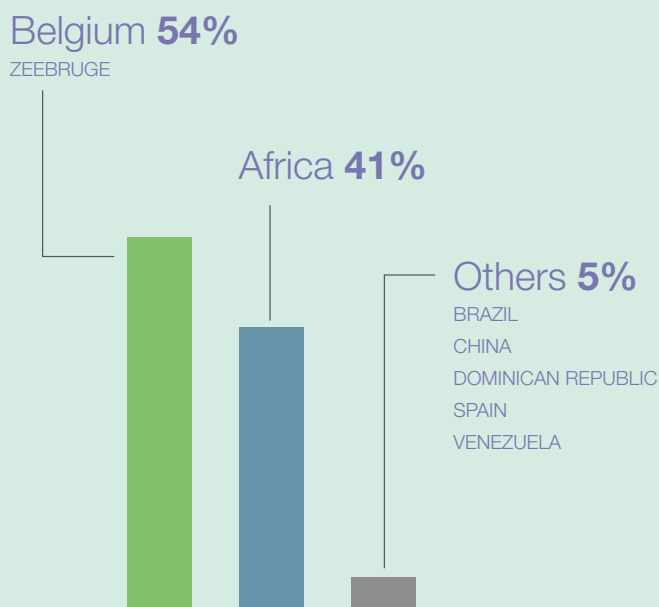


ILLUSTRATION 1

As seen in this Illustration, it is evident that two main areas of concern are the African continent and Belgium, specifically, the Port of Zeebrugge. The Club is a strong believer that prevention is better than cure which can be very appropriately used in the context of stowaway cases.

The disembarkation of a stowaway found after the vessel has sailed out of port involves close cooperation of the Master, the Ship Owner, the P&I Club, and the Vessel's agents to successfully repatriate the stowaway. From our experience in dealing with stowaway cases, the following are initial actions that should be taken by the Master in close co-operation with all parties:

*When a stowaway is found at sea, the Master should contact the Ship Owner/ Manager, P&I Club and Vessel's agent immediately. Further, he should also conduct an assessment on whether the Vessel can turn back to the port of Origin and on disembarkation successfully resume the original voyage.*

*The Master should ensure that there is continuous and transparent flow of information between the Ship Owners / Managers and the Club.*

*If, for various reasons, the vessel is unable to return back to the port of origin, the Master should liaise with the Ship Owner and the Club in deciding if the current voyage needs to be interrupted. From the Club's past experience, it is not uncommon for a vessel to be diverted to a convenient port en-route and to utilise the*

*industry known as 'repatriation corridors', which are countries where the stowaway can be repatriated with minimum procedures.*

*The aforementioned IMO Guidelines should be strictly adhered to, the stowaway should be kept at a secure location and should be provided with adequate food and clothing. The Crew should not be allowed to fraternise with the stowaway.*

*It is also vitally important for the Master to ascertain the identity of the stowaway and gather as much information as possible from him / her. As a usual practice, a Club questionnaire will be sent to the Master to assist him in obtaining the above mentioned information from the Stowaway. It is important that this questionnaire is filled out by the Stowaway and not by the Master or any Ship's Officers. The reason for this is that the Club, through its appointed experts, has access to stowaway databases which will be used to confirm the identity of stowaways. It also allows the Club appointed experts to use the handwriting / spelling mistakes to identify the Stowaway and / or his original nationality and to ascertain if he is a repeat offender and is trying to hide his identity.*

*If there is more than one stowaway or for that matter a group of stowaways then they must be separated whilst filling in the questionnaire as they will tend to purposefully falsify information making verification of nationality very difficult.*

*Upon receipt of the above mentioned information the Club will liaise with the Master, Ship Owner and their appointed experts in deciding the most convenient and cost effective way of repatriating the stowaways. The appointed experts have years of experience and various contacts that would be called upon to assist in obtaining the necessary papers and getting the stowaways off the ship as quickly and efficiently as possible.*

A stowaway, once found onboard, considerably increases the work load of the Master and his Crew. However, if guidelines are followed, relevant people are contacted immediately following discovery and a smooth flow of information is affected, these cases can be swiftly resolved. The Club endeavours to assist their Assureds and Vessel Master's to swiftly resolve stowaway cases. If there are any further queries on the above matter please do not hesitate to contact the Club and in any event when a stowaway is found on board.

### Capt. Nigel Moniz and Capt. Pushkar Gadam

Capt. Nigel Moniz is the Divisional Director of the London Office and Capt. Pushkar Gadam is the Risk Management/Loss Prevention Executive.



The British European & Overseas P&I Club ('BE&O P&I') has recently been involved in a tragic case of a seaman's death during mooring operations. The Club believes that unless safe mooring practices are adopted as a policy onboard and the Crew are well trained, human injury due to mooring operations will continue to haunt seamen.

The Club believes that, along with the appropriate safety precautions, the use of correct mooring procedures is vitally important. Thus, this circular endeavours to provide recommendations on safe and correct mooring operations.

### Case Study

The tragic case in question happened during a berthing operation of our member vessel. An ordinary seaman, whilst in the process of tying a rope stopper, lost his life when a wrongly laid head line slipped from the bit and struck him; resulting in the seaman being thrown from his position to a distance of more than two meters, where his head came in contact with the anchor stopper. He sustained very serious head injuries which, in spite of receiving first aid and being air lifted to the hospital, he succumbed to a day later. Each accident which takes place onboard can be perceived as a lesson to be learnt. Below are some safety precautions which need to be taken during mooring operations. The list is comprehensive but not exhaustive given the nature and design of ships.

### Preparing the Mooring Stations

Mooring stations must be clean and clear of any obstructions. There is a possibility that hydraulic pipes may be running across the mooring deck, which must be appropriately covered or well marked so as to be seen in dark hours as well as

day light. In the event a hydraulic oil leak occurs on deck, it must be rectified as soon as possible and the area cleaned up. The Crew also must make it a point to clean the mooring areas before and after each mooring operation.

The Master / Chief Officer must conduct a tool box meeting prior to mooring operations. It is understandable for ships on short runs that this is not always possible. However, in any event, the Crew must be informed of the number of lines and the order of the lines to be passed; even if this information is passed just prior to the actual operations.

All Crew involved in the mooring operations must wear proper protective equipment. This includes high visibility overalls and / or vests, hard hats, safety shoes, gloves and, in cold weather, suitable high visibility warm clothing. There should be no leeway given to any Crew member. The use of gloves for mooring operations is an often debated topic, the best advice being that gloves should ideally not be loose fitting so that they do not get trapped within the ropes on drum ends. Even the smallest piece of missing PPE can cause a serious accident. For example, in the aforementioned case study, the seaman was wearing a hard hat but his chin strap was missing. This caused his helmet to come off after being struck by the mooring rope, resulting in his head coming in direct contact with the anchor stopper.

It is also prudent to draw a mooring arrangement plan of each Port the ship calls at for future use and ease of operations. These plans can be kept on record and, if the ship is calling at the same Port again, the plans can be retrieved and reviewed; allowing Officers to immediately acquaint themselves with any special previous requirements for that Port with respect to moorings.

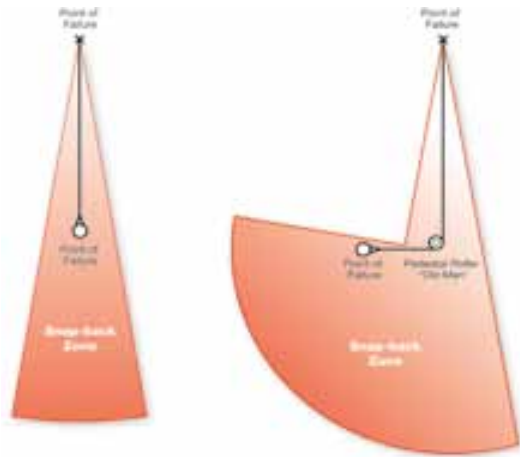
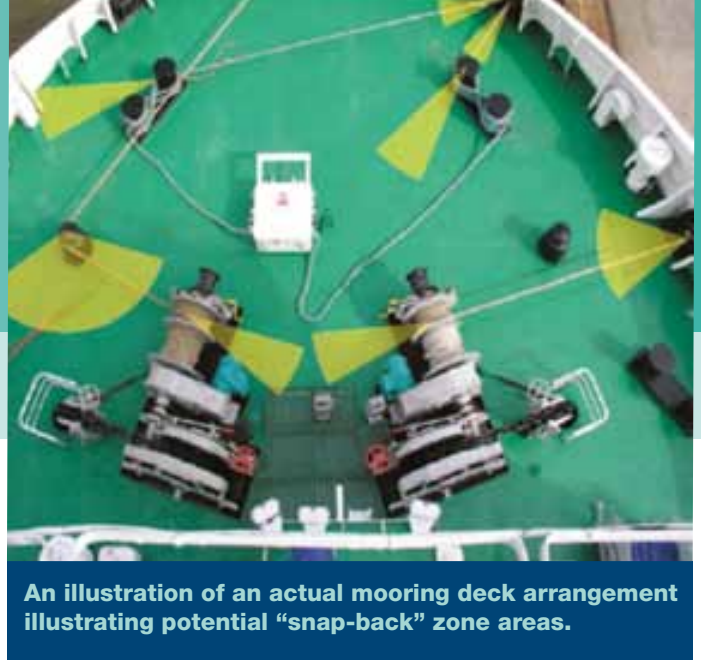
### At the call "Stations fore and aft"

Given the nature of the shipping industry ships sometimes call / leave ports at odd hours. Prior to arrival / departure, Crew should be given adequate rest.

Communication with the bridge must be tested by both the Officers attending the stations fore and aft. Additionally, mooring winches must also be tested for operation and reported to the bridge.

### The actual mooring operation

Most often the first ropes to be passed are the ropes to the tug. It is important at this point, prior to connecting to the tug, that the Master is comfortable with the Pilot on bridge; he must understand the instructions (language) given by the Pilot, given that tugs are not in direct contact with the ship's Master but are through the Pilot, where the possibility of miscommunication is high. The Master should understand this and take appropriate decisions; panicky instructions



If the line can travel back in a straight line then it will do, striking anything or anybody in its path.

If the taut line is lead around a lead then it has the potential to whip round in a bigger arc, as illustrated in the diagram on the left.

Source: MCA-Safe Working Practice for Merchant Seamen.

by the Master during the actual operations are the last thing that his Crew want to listen to over their hand held radios.

If ships' lines are to be utilised to make fast to the tug, it must be in good condition with sound mechanically spliced eyes without short splices within their length. Further, it should have a minimum breaking load (MBL) that is at least twice the bollard pull of the tug, to allow for any possible dynamic snatch loadings that the ropes in use may be subject to during the towage operation.

The Crew should stand well clear of the tugs' lines. It is imperative that the Crew do not try to lay out mooring ropes on deck as the same side of the tug when it is pulling or pushing. The Pilot does understand the ship's Crew predicament on this and will not call for any unnecessary speeding up of operations.

The first lines which are passed ashore, both forward and aft, are intended to get the ship alongside and lined up to berth and shore manifold in case of tankers. The first lines sent should be strong, well maintained and, if possible, the best lines of the available lot. Due to the potential tension on the lines, the Officer in charge must remember an important general principle which is highlighted in the UK Maritime and Coast Guard Agency's Code of Safe Working Practice for Merchant Seamen, which states that;

**“...immediate action should be taken to reduce the load should any part of the system appear to be under excessive strain...”**

At the same time, the Officer in charge should instruct the Crew to remain clear of the line being heaved on board. All lines should be led, so far as possible, without sharp changes in direction and be led to the bollard on shore; such as to keep the angle between the rope and the horizontal to a minimum.

Where synthetic fibre ropes and wires are available, the same type and size of lines should be used for the same service. For example, all springs may be made of wire and all headlines made of synthetic fibre. The mixing of synthetic and wire ropes in the same service is dangerous and not recommended. Secondly, they should not (as far as possible) cross or be led through the same lead.

Care should be taken when laying up the line into the mooring bitts. Correct stoppers should be used, ideally of the same material as the rope, for example, synthetic stopper for synthetic lines, natural fibre rope for natural fibre lines, etc. Wire ropes should be stopped with a chain stopper by using a widely spaced cow hitch and the tail of the chain wrapped around the wire against the lay. A clove hitch must not be used as a stopper knot as this may damage the rope / wire and

not be able to be released / opened in an emergency. Tensioned ropes should never be left on drum ends; they must always be laid up on bitts.

Officers and Crew attending the mooring stations should at all times be aware of the snap back zones shown in the above diagram (adopted from MCA Safe Working Practice for Merchant Seamen).

### During Unmooring Operations

Unmooring operations can arguably be said to be safer than the mooring operations, however, care needs to be taken while communicating with the bridge for the correct rope to be slackened and hence removed from shore.

The aft lines, once clear of the water, should be reported to the bridge to give clearance to use the propelling machinery. The anchors must be kept ready for emergency purposes and secured for sea only when the bridge gives the orders.

**The above is a non exhaustive yet comprehensive list of safety precautions that need to be taken into account prior to and during mooring operations. The Club strongly believes in a ‘Safety First’ approach being adopted by the assured. It also strongly believes that proper protection, safety practices and a well trained Crew saves lives.**

The Indian government enacted the Arbitration and Conciliation Act in 1996 (the “Arbitration Act”) in an effort to modernise the outdated 1940 Act. The Arbitration Act is a comprehensive piece of legislation modelled on the lines of the UNICITRAL Model Law. However, a number of controversial decisions in Indian courts have raised concerns about the Indian approach to arbitration and international practice as a whole.

### Mr. Peter Reeves and Ms. Aneta Buras

Mr. Peter Reeves, Senior Executive Consultant and Ms. Aneta Buras, Claims Executive.

In the well known “*Venture Global Engineering vs. Satyam Computer Services Ltd.*” case, the Supreme Court held that a foreign award could, in fact, be set aside under Section 34 of the Arbitration Act and remanded the application under Section 34 to be decided by the Civil Court. However, the Supreme Court has also ruled that application of PART 1 of the Arbitration Act may be excluded by an express or implied agreement of the parties.

The dispute arose in 2000 out of a joint venture between Venture Global Engineering (“VGE”) and Satyam Computer Services Ltd on account of which the parties were referred to the arbitration. The London Court of International Arbitration ruled in favour of Satyam and directed VGE to transfer its shares in Satyam Venture Engineering Services LLC (SVES), and thus, the transfer of shares in the company would be effected in India by SVES which was entitled to buy out Venture’s share in the joint venture company holding at the contractually stipulated price. VGE unsuccessfully challenged the award before the US Courts. Further, VGE filed a suit before the Indian Court challenging the foreign international award.

The decision of the Supreme Court caused a great deal of controversy and consternation in the international community. It gives the Indian courts the authority to review the merits under Indian law of any foreign arbitration awards obtained. The outcome is that it makes the enforceability of international arbitration awards in India more uncertain.

The decision of the Supreme Court could have a significant impact on international commercial arbitration, including disputes arising under charter parties, insurance policies etc by permitting an aggrieved party to challenge a foreign award under Section 34 of the Arbitration Act where the foreign award required performance in India and was seen to have been in breach of Indian laws/regulations, contrary to the “public policy” in India. This might lead to many suits being filed in India challenging foreign awards.

The scope of the Arbitration Act includes all parties who reside, carry on business and/or have an agent in India as well as parties who pay taxes or have assets or debts in India. Consequently we recommend that our Assured, when negotiating C/Ps ensure that they endeavour to incorporate within the Arbitration Clause in the charter party a statement expressly excluding the application of the provisions of Part I of the Arbitration Act. To do so should prevent aggrieved parties from being able to refer a foreign arbitration award to the Indian Court.

The Indian Ministry of Law and Justice has recently published a consultation paper which proposes amendments to the existing Arbitration Act in response to disquiet in the international arbitrational community. The Ministry has proposed a number of amendments including restricting the application of the Arbitration Act to cases where the parties have agreed to Indian arbitration and a narrower meaning to “public policy” as a ground for setting aside foreign arbitral awards.

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**DGS MARINE MANAGEMENT SERVICES LTD**

As Agents to the Managers of the British European & Overseas P&I/FD&D



UK Address:  
St. Michael's Rectory,  
St. Michael's Alley,  
Cornhill, London  
EC3V 9DS

Tel: +44 (0) 207 283 4230  
Fax: +44 (0) 207 626 0396

EMERGENCY 24 HOUR HOT-LINE  
+44 (0) 7944020973

[www.british-european-overseas-fdd.co.uk](http://www.british-european-overseas-fdd.co.uk)  
[www.british-european-overseas-pandi.co.uk](http://www.british-european-overseas-pandi.co.uk)  
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If you have any comments for the editor of 'The Compass' please send them to:  
[editor@dgsmarine.co.uk](mailto:editor@dgsmarine.co.uk)