MARINE INSURANCE DAY

General Average: Recent Trends and Challenges, and the Impact of Potential Unseaworthiness

October 5, 2023

I bet
you can't turn around
in the Suez Canal.
Hold my
Beer!
EVERGREEN

What is General Average?

Refers to a partial loss due to a sacrifice of vessel or cargo or an expense incurred for the purpose of saving all the interests involved in a maritime venture.

The word “Average” is a medieval term meaning “loss”, and “General” refers to all the interests in the voyage, whereas “Particular Average” is a loss suffered by only one interest.

Six elements of General Average
- reasonable
- expense or sacrifice
- intentionally or voluntarily incurred
- for the common safety
- to preserve the property from peril
- and must be successful

History and Present Day

- GA dates back to the earliest days of maritime trade. While GA was recognized in leading maritime countries, it wasn't until the International Conference was held in York in 1864 and produced the York Rules, which were revised at Antwerp in 1877 to become the first set of York-Antwerp Rules.

- The YA rules are not an international convention but take effect by being incorporated in the Contract of Carriage.

- The Rules are updated periodically by the Comité Maritime International, which is made up of national Maritime Law Associations.

The York-Antwerp Rules

The York-Antwerp Rules define a general average act as:
"There is a general average act when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure."

The York-Antwerp Rules consist of lettered rules (A-G) and 23 numbered rules. The lettered rules address what constitutes general average; the numbered rules deal with specific instances of sacrifice and expenditure and set out detailed guidelines concerning allowances etc.

The YA Rules recognize two main types of allowance:
• "Common safety" allowances: sacrifice of property (such as flooding a cargo hold to fight a fire) or expenditure (such as salvage or lightening a ship) that is made or incurred while the ship and cargo were actually in the grip of peril.

• "Common benefit" allowances: once a ship is at a port of refuge, expenses necessary to enable the ship to resume the voyage safely (but not the cost of repairing accidental damage to the ship) for example, the cost of discharging, storing and reloading cargo as necessary to carry out repairs, port charges, and wages etc. during detention for repairs and outward port charges.

Examples of General Average

Grounding:

- Damage to ship and machinery through efforts to refloat.
- Loss of or damage to cargo through jettison or lightening of the ship.
- Cost of storing and reloading any cargo so discharged.
- Port of refuge expenses.

Fire:

- Expenses incurred to extinguish the fire.
- Damage to ship or cargo due to efforts to extinguish the fire.
- Port of refuge expenses.

Heavy weather, collision, machinery breakdown, or other accident involving damage to ship and resort to or detention at a port:

- Towage
- Port of refuge expenses.

Parties to the Adventure

More than one interest must be at risk

Typical Interests Include:
- Vessel
- Cargo
- Vessel's bunkers
- Empty Containers/Chassis
- Unpaid Freight

*One party can have several interests and each is treated separately.

** "Ballast" General Average: In the US, the Hull Underwriter is considered a separate interest. Therefore, General Average can exist even when vessel is in ballast.

Contribution to General Average

Each party to the adventure contributes proportionally based on their contributory value at the termination of the voyage

- Vessel's contributory value – value of the vessel less the cost of non-General Average repairs
  (Hull Policy may contain the following: *All vessels deemed insured for their full contributory values in respect of claims hereunder for General Average, Salvage, Salvage Charges and Sue and Labor*.)

- Cargo – Value at time of discharge, where the adventure ends, less any non-General Average damage suffered prior to or at the time of discharge.

Does Not Contribute:

- Mail, passengers' luggage, personal effects and accompanied private vehicles, some military shipments

Who Incurs the Expense

- Vessel owners on behalf of all interests usually incur the expenses in the first instance. Other interests sometimes incur them as well.
- As a result, vessel owners and salvors have a maritime lien against all interested parties (cargo, bunkers, freight, empty containers).
- Upon arrival at destination, the maritime lien allows owners / salvors to detain cargo until appropriate security has been filed.

General Average Security

Cargo interests typically provide the following security in order for the vessel Owner to lift their lien:

- **General Average Bond** signed by the owner or received of the cargo, with the commercial invoice attached

- **General Average Guarantee** signed by cargo insurer, **or** if cargo is uninsured,

  Cash Deposit as security for an amount estimated by the Average Adjuster to cover likely GA contributions

In addition to the required security, details of any loss or damage to the cargo should be sent to the insurer and the average adjuster as soon as possible as this may reduce the amount to be paid towards general average.

Salvage Security

- Depending on the circumstances and jurisdiction, and in cases involving salvage contracts such as Lloyd's Open Form, the salvor will also have a right to place a lien on salved property. Cargo interests would need to provide the following:

- Salvage security to salvors at the place where the salvage services end, and

- General Average security to the shipowner, at destination.

General Average Absorption Clause

Hull Policies often, usually for an additional premium, include cargo's contribution to General Average up to agreed amount, provided contribution from other interests has been waived.

Example of GA Absorption Clause:

It is understood and agreed that, subject to the terms and conditions of this policy, and at the Insured's option, other interests' (including, but not limited to, cargo, containers, freight, bunkers, concessionaires) proportion of General Average (including Salvage, if any) not exceeding $XXX,XXX shall be recoverable hereunder, provided claims for contribution from all other interests have been waived by the Insured. It is also agreed that in these circumstances no collecting and settling commissions will be recoverable hereunder in respect of all interests' proportion of General Average.

GA Guidelines and Security Documents?

- A set of CMI Guidelines for the Adjustment of General Average, and model wording for GA security, were approved by the CMI Assembly in Antwerp in October 2022. The CMI – Comité Maritime International – is an international maritime law organization that serves as the custodian of the York Antwerp Rules for the Adjustment of General Average (YAR).
- The Guidelines were developed by the CMI Standing Committee on General Average beginning in 2016, in preference over a suggestion that the York Antwerp Rules should be expanded to include a set of definitions. The intention of the Guidelines is to assist commercial parties in dealing with general average cases and to provide (1) general background information, (2) guidance as to recognized best practices, and (3) an outline of procedures. There are both an expanded and condensed version of the Guidelines. The model security wording are intended to reduce delays caused by varying wordings. The Guidelines and model security wordings are available here: https://comitemaritime.org/work/cmi-general-average-guidelines-and-security-forms/ Having the approval of the CMI, International Union of Marine Insurance, and International Chamber of Shipping, the security wordings are intended to become the universal standard, with immediate effect.
- The CMI also approved amendment and unification of the interest provisions in YAR 2004 and 2016, in order to streamline interest calculations as part of GA adjustments, at the Assembly in Antwerp in October 2022.

New Jason Clause

- The New Jason Clause permits a vessel owner to recover in General Average even if the owner bears some responsibility for the casualty, as long as the owner is entitled to immunity from liability under the Carriage of Goods by Sea Act or any other applicable statute.

The BIMCO New Jason Clause:

"In the event of accident, danger, damage or disaster before or after the commencement of the voyage, resulting from any cause whatsoever, whether due to negligence or not, for which, or for the consequence of which, the Carrier is not responsible, by statute, contract or otherwise, the goods, Shippers, Consignees or owners of the goods shall contribute with the Carrier in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred and shall pay salvage and special charges incurred in respect of the goods.

If a salving ship is owned or operated by the Carrier, salvage shall be paid for as fully as if the said salving ship or ships belonged to strangers. Such deposit as the Carrier or his agents may deem sufficient to cover the estimated contribution of the goods and any salvage and special charges thereon shall, if required, be made by the goods, Shippers, Consignees or owners of the goods to the Carrier before delivery."

Ambraco, Inc. v. M/V PROJECT EUROPA, her engines, tackle, furniture, apparel, appurtenances, etc., 2003 WL 22462171, at *1 (E.D. La. Oct. 28, 2003), *aff'd sub nom.* 119 Fed. Appx. 676 (5th Cir. 2005)

- Vessel carrying cargo of twine from Cabedelo, Brazil to New Orleans, Louisiana.
- After a fire caused serious damage to cargo and the main cargo hatch of the MV EUROPA, the crew extinguished it and the vessel then proceeded to her arrived destination of New Orleans.
- The ship owner had incurred 600,000 Euros of general average expenses due to the fire.
- The cargo interests sought $3 million in damages due to their losses.
- Both parties enlisted experts to determine the cause of the fire, but the experts could only speculate as to the fire‘s cause and could not definitively determine it.

Ambraco, Inc. v. M/V PROJECT EUROPA, her engines, tackle, furniture, apparel, appurtenances, etc., 2003 WL 22462171, at *1 (E.D. La. Oct. 28, 2003), *aff'd sub nom.* 119 Fed. Appx. 676 (5th Cir. 2005)

- The issue before the court was whether the cargo interests satisfied their burden of proving that the vessel owner‘s actual fault or privity “either caused the fire or prevented its being extinguished.“
- Because the cargo interests could not establish the cause of the fire by a preponderance of the evidence, the court held that the vessel owner was protected under the Fire Statute and COGSA‘s fire defense and that the cargo interests failed on their claim.
- With respect to the general average expenses, the court held that under the New Jason Clause, even if the vessel owner is negligent “unless the carrier is found liable under COGSA“ (which the court held it was not), the vessel owner was entitled to its claim for contribution from the cargo interests for general average.

Deutsche Shell Tanker Gesellschaft mbH v. Placid Refining Co., 993 F.2d 466, 468 (5th Cir. 1993)

- Deutsche Shell's tanker DIALA was on a voyage on the Mississippi River with cargo of crude oil, when it lost picture on its 10-cm radar. Later during the same voyage, it lost picture on its 3-cm radar, and while it was trying to anchor to avoid traveling further without radar, the swift "current caught hold of the ship and swept her two miles downstream where she ran aground."
- Deutsche Shell brought suit against the cargo interests for general average expenses, to recover for the costs of the salvage effort to refloat the vessel.
- The cargo interests denied the claim and argued that Deutsche Shell's failure to maintain its 3-cm radar was the proximate cause of the grounding, and therefore, the cargo interests should not be liable for any alleged general average expenses.

Deutsche Shell Tanker Gesellschaft mbH v. Placid Refining Co., 993 F.2d 466, 468 (5th Cir. 1993)

- The issue before the court was who would be liable for the expenses of the salvage efforts after the grounding. That issue hinged on whether Deutsche Shell exercised due diligence to maintain the vessel's radar in a seaworthy condition during the voyage.
- In a general average claim before the court, there is a 3-step analysis:
  - Did the vessel owner establish that a general average act occurred and that there was a separate cargo owner at the time of the act?
  - If the vessel owner meets this burden, the cargo owner can avoid liability by establishing that the vessel was unseaworthy at the start of the voyage and the unseaworthiness was the proximate cause of the general average act.
  - Finally, if the cargo owner can establish the above, the vessel owner still has the opportunity to prove that it exercised due diligence to make the vessel seaworthy at the start of the voyage, in order to defeat the cargo owner's defense.
- In this case, the court affirmed the district court's holding that even if a general average act occurred due to a peril, the act was caused by Deutsche Shell's failure to exercise due diligence to maintain the vessel's radar in a seaworthy condition. Because Deutsche Shell did not maintain its 3-cm radar, and the radar ultimately failed during a voyage, Deutsche Shell did not exercise due diligence and the efforts undertaken after the grounding occurred did not constitute a general average act. Therefore, the cargo interests were not responsible for contributing to the expenses.

Folger Coffee Co. v. Olivebank, 201 F.3d 632, 636 (5th Cir. 2000)

- During a storm, seawater came over the aft deck and entered the alternator room causing a complete loss of power to the vessel. The vessel could not be steered without power. Due to this outage, the vessel sustained significant damage because it was tossed at extreme angles since the vessel had lost steering. After salvors were called to assist the vessel, the shipowners declared general average.

- The cargo interests sought a declaratory judgment that the vessel owner was not entitled to contribution in general average; and they sought recovery for damage to cargo because the vessel was unseaworthy at the beginning of its voyage.

- The trial court held that the vessel was seaworthy when it left port and thus was entitled to contribution from the cargo interests. The cargo interests appealed.

Folger Coffee Co. v. Olivebank, 201 F.3d 632, 636 (5th Cir. 2000)

- In this case, the court affirmed the lower court's decision and held that although seawater had entered the alternator room because the vessel's skylight and vent covers were open, ultimately, those covers were capable of closing. Since they were not closed due to a management decision and not a lack of functionality of the vessel, the vessel was seaworthy, and the cargo interests were not absolved from contributing to the general average expenses.

- A good quote describing the court's analysis:
  "The parties do not dispute that the bill of lading covering the cargo aboard the M.V. OLIVEBANK required general average contribution. Under COGSA, once the vessel establishes that a general average act occurred,[3] the cargo owner may only avoid liability by establishing that the vessel was unseaworthy at the start of the voyage and that the unseaworthiness was the proximate cause of the general average event. If the cargo owner proves unseaworthiness, the vessel may still prevail by proving that it exercised due diligence to make the vessel seaworthy prior to the voyage."

Folger Coffee Co. v. Olivebank, 201 F.3d 632, 636 (5th Cir. 2000) (citing *Deutsche Shell*, 993 F.2d at 468).

Duferco S.A. v. Ocean Wide Ship. Corp., 210 F. Supp. 2d 256, 272 (S.D.N.Y. 2000)

- Due to the improper loading of the cargo of steel slabs, the vessel in this case sustained severe damage to its cargo holds when the steel slabs collapsed in the holds.
- Following an arbitration to determine who would be responsible for the declared general average costs, the owner and time charterer sought to challenge the arbitration award assessing the damages caused by the improper stowage of cargo.
- When the cargo collapsed and damaged the hull of the vessel, the vessel owner declared general average, and Duferco, the charterer, argued that the restowage costs should have been included in the general average calculations.
- The arbitration panel held that the charterer Duferco “failed to follow its own stowage plan and was, therefore liable to Owner in damages for the consequences of the improper stowage and then directed Duferco to pay both the time charterer and the vessel owner (including attorneys’ fees) approximately $1.6 million.

Duferco S.A. v. Ocean Wide Ship. Corp., 210 F. Supp. 2d 256, 272 (S.D.N.Y. 2000)

- The court affirmed the arbitration award, holding that in order to vacate an award, the party seeking to vacate an arbitration award must show that the arbitration panel committed a manifest disregard of the law.
- Ultimately, due to this high burden of proof, because the charterer could not show that the Panel's decision about who should be charged to pay the restowage costs was a manifest disregard of the law, the charterer remained responsible for those costs, and the arbitration award was upheld.

Usinas Siderugicas de Minas Geras, Sa-Usiminias v. Scindia Steam Nav. Co., Ltd., 118 F.3d 328, 329 (5th Cir. 1997)

- In an attempt to navigate away from a dock using tugs, the vessel ran off course and ran aground and collided with a barge, causing further damage.
- The vessel owner declared general average due to the grounding and demanded contribution from the cargo owners.
- The cargo owners refused to contribute in general average claiming that the vessel was unseaworthy, and the vessel owner filed suit to recover for those general average expenses.
- After the district court held that a general average event had in fact occurred, ruling in favor of the vessel owner, the cargo owners appealed.

Usinas Siderugicas de Minas Geras, Sa-Usiminias v. Scindia Steam Nav. Co., Ltd., 118 F.3d 328, 329 (5th Cir. 1997)

- This case presents the question of whether an error in navigation which occurs when a vessel is shifting from a dock to a temporary anchorage is an excepted cause under COGSA.
- The appellate court affirmed the district court's holding that a navigation error did not make the vessel unseaworthy and did not absolve the cargo owners from contributing to the general average expenses.

Australian Spirit LLC v. Phillips 66, Soc. Of Maritime Arb. Dec. No. 4365 (March 29, 2019) (Fox, Thomas; Sheinbaum, Louis; and Martowski, David)

- The AUSTRALIAN SPIRIT, while carrying crude oil from Newfoundland to New York Harbor, lost steering due to a fractured rudder stock which became detached and sunk into the sea.
- General average was declared, and the Vessel was towed to Portugal to be repaired.
- The Vessel owner sought contributions from the Charterer in the amount of approximately $1.27 million, which the Charterer rejected.
- Arbitration proceedings followed.

Australian Spirit LLC v. Phillips 66, Soc. Of Maritime Arb. Dec. No. 4365 (March 29, 2019) (Fox, Thomas; Sheinbaum, Louis; and Martowski, David)

- The issue before the Arbitration Panel was whether the Vessel owner had established by a preponderance of evidence that it exercised due diligence with respect to the inspection, maintenance and repair of the lower pintle bearing prior to the casualty.
- The Panel held that the Vessel owner did not timely undertake inspection, replacement or renewal work. Furthermore, the Panel denied the Vessel owner's contribution claim and concluded that the Vessel owner had "failed to establish by a preponderance of evidence that it acted under the circumstances as a prudent shipowner and exercised due diligence with respect to the inspection, maintenance and repair of the Vessel's lower pintle bearing [in connection with the rudder] prior to the casualty."
- The Panel then awarded the Charterer attorneys' and arbitrators' fees and costs for a total award of $449,000.

Australian Spirit LLC v. Phillips 66, Soc. Of Maritime Arb. Dec. No. 4365 (March 29, 2019) (Fox, Thomas; Sheinbaum, Louis; and Martowski, David)

- The Panel's analysis to arrive at its conclusion follows:
  - "It is undisputed that in order to succeed on a general average claim, the [Vessel owner] must prove by a preponderance of credible evidence that the Vessel was 'fit for service and in a seaworthy condition' and that it exercised due diligence to 'maintain or restore the vessel'.
  - This non-delegable duty extends to the ownership, operation and maintenance of the vessel and due diligence 'is measured by what a reasonably prudent ship owner would do in the circumstances' and 'requires a carefulness of inspection and repair proportionate to the danger'.
  - Maintenance of a vessel 'in class' is insufficient to demonstrate that owners have exercised due diligence to the standard required under U.S. law and jurisprudence. However, the fact that a vessel is regularly inspected and surveyed in conformity with class requirements and standards, is a factor tending to prove due diligence.
  - Due diligence has also been defined as 'the same thing as exercising reasonable or ordinary care' and the determination of whether an owner has exercised due diligence and due care will, of necessity, be heavily fact sensitive and unique to the circumstances of each case."

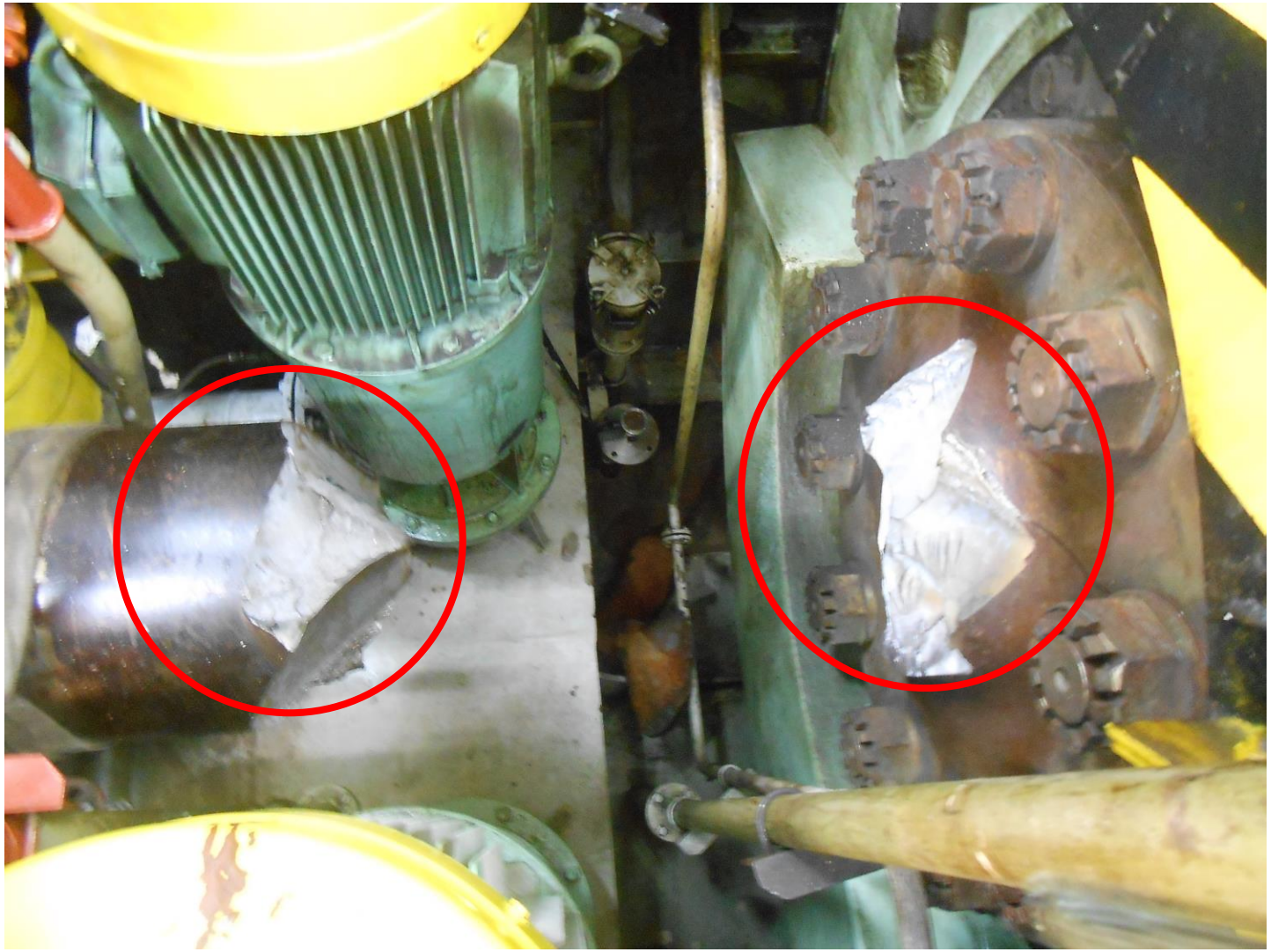
Seaworthiness

Seaworthiness is rarely a black & white issue but can be defined in its very simplest terms as:-

- “A vessel that must be reasonably fit for its intended purpose” OR
- “A vessel that is constructed, outfitted, manned and in all respects fit for a voyage at sea”
- Clearly open to interpretation, give the complexity of ships and the number of components
- Not open to interpretation, however, is the incumbency upon the ship Owner to exercise due diligence to maintain a ship in a seaworthy condition. This cannot be delegated to any other party.
- Crucial for the Shipowner in General Average is that seaworthiness must be demonstrable to have existed at the commencement of the voyage.
- Although not part of the joint venture, it is the crux of the matter for a P&I Club when a ship is determined to be unseaworthy.

Seaworthy?

Broken Intermediate Propulsion Shaft



Seaworthy?

Engine Room Fire

Seaworthy?

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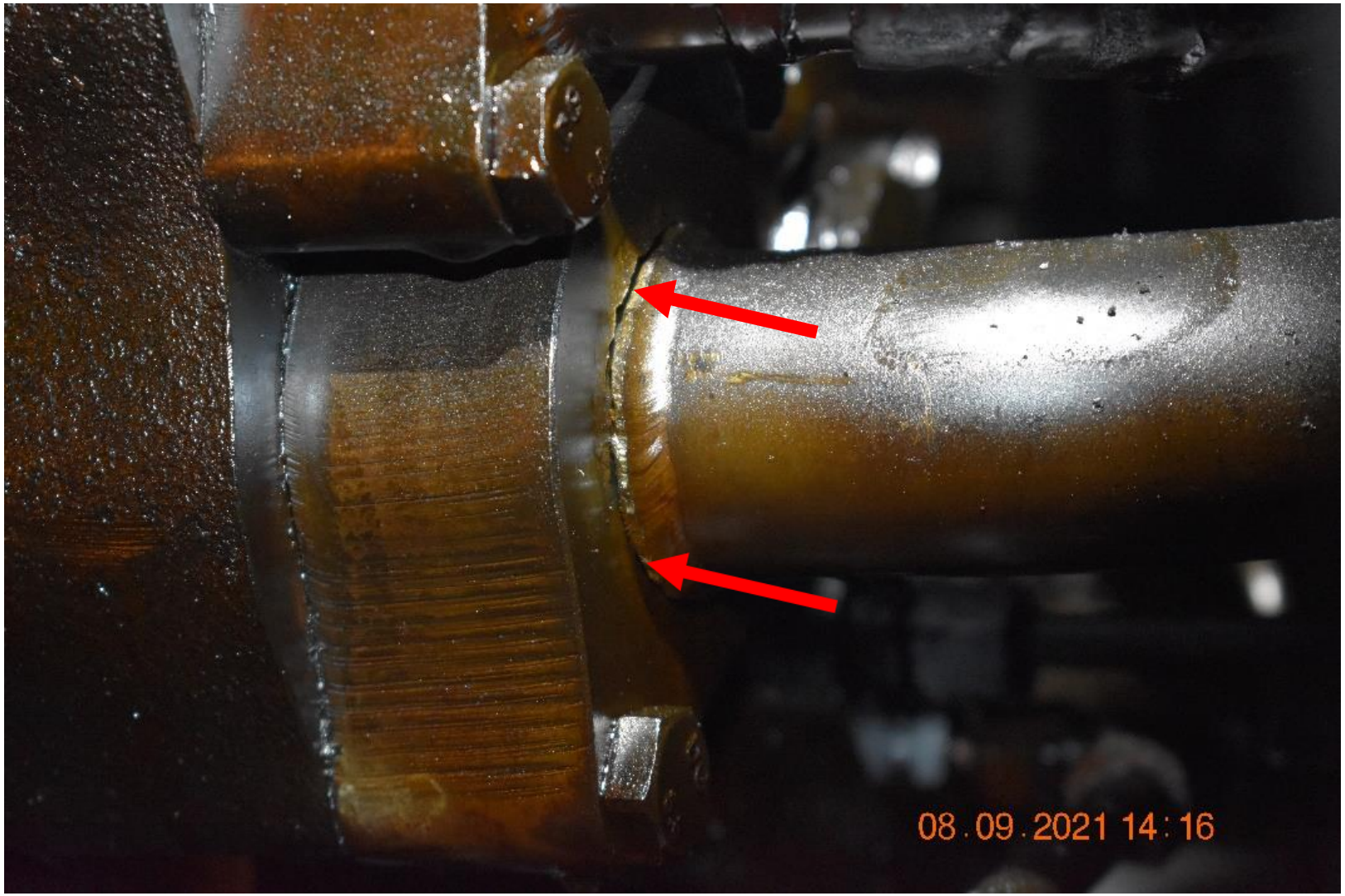
Engine Room Fire



Seaworthy?

Engine Room Fire

Seaworthy?

Engine Room Fire

Seaworthy?
Container Collapse

Seaworthy?

Preservation of Evidence

Seaworthy?
Preservation of Evidence

Seaworthy?
Structural Failure

Seaworthy?
Structural Failure

Seaworthy?
Passage Planning

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