

# Freight forwarder liable for depriving cargo interest possibility to declare general average

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## Facts

## Decision

## Comment

### Facts

A Danish company (K) bought 1,995 pairs of shoes from a Thai manufacturer with a gross weight of 2,447kg for €59,232. K booked the transport of the goods with a Danish freight forwarder (S). The shoes were loaded into a container for sea carriage and S subcontracted the transport to a Danish shipping line which, in turn, subcontracted to a Swiss shipping line that performed the carriage on the vessel NN owned by a Swiss shipowner (R). The vessel carried 3,222 containers.

On 3 October 2017 a fire broke out in two containers loaded on deck. The fire was extinguished by the vessel's crew. The container with the shoes was delivered to K on 11 October 2017 where it was ascertained that the shoes had been significantly damaged by water. K was not informed that this was due to a fire on board the vessel.

It was set out in the survey report prepared by R's appointed surveyor that the two containers in which the fire originated contained charcoal (for water pipes). On 3 October 2017 smoke was detected in the containers and a fire alarm set off. The crew carried out the firefighting operation with water hoses and injected water into the burning containers. The firefighting operation resulted in water entering cargo hold 1 where K's container was stowed. It was reported that ash was visible on top of the containers in cargo hold 1 and there was approximately "10 cm of water on the tank top of the no. 1 cargo hold". During a survey of the vessel, it was ascertained that the hatches had been damaged from the heat generated by the fire. The cause of the fire was deemed to have been the charcoal self-igniting.

K and its insurers (cargo interest) brought proceedings against S and R before a Danish court.

In support of its claim, the cargo interest submitted that the fire on board the vessel and the firefighting operation meant that K would have been entitled to claim general average to the effect that the damage to K's cargo should have been compensated by general average contributions from all interested parties in accordance with the York Antwerp Rules on general average. K submitted that R was liable for omitting to inform K of the fire and releasing all cargo on board, resulting in K being deprived of the possibility to obtain general average contributions from the other interested parties.

S denied liability and submitted that it even if R was at fault, S was not liable as it was not vicariously liable for R.

R denied liability and submitted that:

- the firefighting operation did not constitute a general average act as there was no common peril;
- any right to declare general average had been forfeited due to the fact that K had failed to declare general average;
- R had no obligation to declare general average;
- K could have declared general average if it had wanted to; and
- R (under the bill of lading issued for the carriage) had contracted out of any obligation to exercise lien in cargoes on board and collect security from the cargo interest involved.

### Decision

The court decided that R was liable towards K as it had failed to provide timely information about the fire and

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the firefighting operation in such a manner that K had been deprived the possibility that it would otherwise have had to declare general average:

*A fire onboard a containership may quickly develop and put the ship and its cargo at risk. Irrespective that the fire was limited to two containers, a case of general average pursuant to Rule A of the York-Antwerp Rules was present and cargo was sacrificed for the common safety of property exposed to common danger. It follows from the York-Antwerp-rule III that damage done to a ship and cargo, or either of them, by in extinguishing a fire on board the ship, shall be allowed as general average.*

*Even that R was under no obligation to declare general average, R ought to have had informed the cargo interest affected about the incident in order that they had been given a possibility to protect their interests. The court finds that R by not informing K has failed to fulfil its duty to protect the interest of the cargo and, thus, has acted negligently in relation to K who was deprived from a real possibility to have the damages compensated by means of general average contributions. It is, thus, undisputed that K was not aware that the water damage to the cargo was caused by the fire-fighting onboard the vessel until the cargoes onboard had been delivered to the cargo owners. As the cargo interest involved are only liable for contribution in general average to the extent of the goods but not personally, Section 465 of the Danish Merchant Shipping Act, it was impossible for K to obtain contributions in general average from these interest. For contribution in general average of cargo or other goods, the owner shall be liable.*

The court further found that S was vicariously liable towards K for R's liability and was S's subcontractor.

### **Comment**

It stems from the judgment that a contracting carrier may incur liability where a general average situation is deemed to have occurred if it fails to provide information to its customer about the concrete circumstances that give rise to the general average situation, even when the contracting carrier holds no information about said circumstances. In many instances, no specific contractual regulation will have been agreed between the contracting carrier and its carrier to apply in such cases.

The costs and resources necessary to collect security from a significant number of cargo owners in connection with declaration of general average in relation to a container vessel will often be substantial and against this background the losses stemming from minor cargo damage may be considered insignificant by comparison. However, this does not exclude the possibility that the cargo interest affected may seek to obtain compensation from its losses where it has not been informed of the circumstances which would have provided a possibility to declare general average and, by such means, obtain compensation for the cargo damage.

*For further information on this topic please contact [Jesper Windahl](#) at WSCO Advokatpartnerselskab by telephone (+45 3525 3800) or email ([jw@wsko.dk](mailto:jw@wsko.dk)). The WSCO Advokatpartnerselskab website can be accessed at [www.wsko.dk](http://www.wsko.dk).*

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