

The passage through the Northern Sea Route: the cases decided in Russian courts

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The Northern Sea Route (hereinafter referred to as “NSR”) is a strategic and important sea route. Its importance has been highlighted by many in the past and it still attracts the attention of both the shipowners and governments.

There have been conducted a significant number of studies on the NSR, most of which highlight its utmost importance for commercial shipping and call for more detailed legal regulation. However, the majority of writings are focused on jurisdictional issues, surrounding NSR, rights of coastal states, etc.

For this reason, we have prepared an overview of Russian legislation and emerging case law on Northern Sea Route. The case law is entirely focused on the issues of passage through NSR and is based on decisions of Russian commercial courts, excluding maritime arbitration courts.

Statutory requirements for passage through NSR

The legislation on NSR in Russia consists of three main statutes. It is the Act No. 132-FZ, amending some legislative acts of Russian Federation in the part of state regulation of merchant shipping in NSR (hereinafter referred to as Northern Sea Route Act 2012), Merchant Shipping Code, which has been amended by Northern Sea Route Act in July 28 2012, as to include the rules of passage through NSR (hereinafter referred to as “Code”) and the Order of Ministry of Transport of Russian Federation No. 7, dated January 17 2013 on approval of Rules of passage through NSR (hereinafter referred to as “NSR Rules”).

The Northern Sea Route Act 2012 is brief and contains four provisions. They are mainly directed at amending other legislative acts, concerning NSR passage, nevertheless it is a main statute, which initiated the separate treatment of NSR in Russian legislation.

The Merchant Shipping Code is a major act that regulates almost all aspects of admiralty, maritime and shipping law in Russia. The general rules of passage through NSR are regulated by the Art. 5 (1) – 5 (4).

These rules define the status of the NSR (Cl. 5.1.), refers to detailed rules, specified in bylaw (Cl. 5.2.), which lay general rules on sailing in the seaway of NSR, icebreaking, ice pilotage and pilotage on different routes in the NSR. The Cl. 5.3. grants the authority to NSR Administration to supervise permission granting process, monitor the conditions in NSR, approval of navigation equipment in vessels, inform the public about updates in NSR, provide recommendations on further development of NSR passage and improvement, collaborate in search and salvage operations, license pilots and provide authorization for passage through the NSR subject to compliance with rules of marine and environmental safety.

The NSR Rules is a document that provides detailed exposition of the rules of passage through the NSR. Particularly, it outlines the procedure of gaining permission to pass through the NSR, by listing a set of necessary documents to be submitted for the permission. It also provides in detailed what has been stated in the Code and should be viewed as a supplementary to the Code on NSR passage.

Case law

Since the adoption of Northern Sea Route Act 2012, only three cases on the NSR have been decided in Russian courts. Two of them were decided in commercial courts and one in the court of general jurisdiction.

They are as follows: (i) *Northern Administration for State Sea and River Transport Control v. A.S. Konstantinov* (Case No. A 05-15629/2013), decided by Arkhangelsk Commercial Court in May 27 2014 (hereinafter referred to as “*Lida*” case); (ii) *Linear Department of the Northern Administration for State Sea and River Transport Control v. K.A. Kudinov* (Case No. 5-390/2014), decided by Oktyabrsk District Court of Arkhangelsk City in October 22, 2014 (hereinafter referred to as “*Murmansk*” case); and (iii) *Northern Administration for State Sea and River Transport Control v. OOO “Severnegtegazflot”* (A05-10578/2014), decided by Commercial Court of Arkhangelsk in October 29 2014 (hereinafter referred to as “M-52” case).

One should note that all three cases were decided in Arkhangelsk courts, a place where one of the important sea ports in Russia is located. Besides, all cases are initiated as administrative proceedings by governmental body, authorized to supervise shipping activities in the region.

No permission for low ice class vessels unless extreme necessity occurs

In the *Lida* case, the court took a rational and flexible approach. It chose to follow not only the letter of law, but also took into consideration the special circumstances surrounding the case.

The details of the case are as follows. The plaintiff, *Northern Administration for State Sea and River Transport Control*, initiated the administrative proceeding against defendant, *Mr. A.S. Konstantinov*, the private entrepreneur, for the breach of Art. 1443 (1) of the Administrative Liability Code of the Russian Federation.

In the opinion of the plaintiff, the defendant violated abovementioned provision by failing to obtain the permission of NSR Administration to pass through the NSR. The *Lida* vessel, of which the defendant was a ship manager, sailed from the *Sabetta* sea port through NSR without permission of the NSR Administration. By doing so, the defendant did not only violate the provisions of Administrative Liability Code but also few other significant regulations.

First of all, the defendant violated the Clause 151 of the Decree of the Government of Russian Federation No. 620 “About approval of technical rules on maritime transport safety” (hereinafter referred to “Technical Rules”). Second, the defendant violated the

provisions of NSR Act 2012, the Code and NSR Rules by failing to obtain to pass through NSR from NSR Administration.

The defendant did not reject the charges of the plaintiff. He informed that that the permission to pass the NSR was sought but failed due to the low ice class of the ship. Moreover, the defendant argued that the *Lida* was sent for sailing through NSR out of urgent necessity. In the opinion of the defendant, should it lie in the *Sabetta* port, it would have had serious consequences not only for the vessel but crew too.

Having considering the facts and circumstance, presented by the parties, the court found that the plaintiff failed to prove that the defendant had a choice either to obtain the permission to pass through the NSR or safely lay the ship in the *Sabetta* port.

Particularly, the judge pointed to the testimony, contained in inspection certificate, which stated that: “*the winter cold lay-up without additional special actions, related to drying ‘Kingston’ valve board enclosures and box cooler, is impossible*” since “*in winter cold lay-up, the water in ‘Kingston’ valve board enclosures and box cooler freeze down and lead to the damage of the fridges in the main engine and hull*” (IC No. 14.02231.190 dated 21.03.2014).

Moreover, in the response to the letter, the director general at OOO “Mercury”, Capt. S.V. Kruglov wrote: “since the navigation in the port sea way does not cease during the year and the whole sea way is busy, there is no available space for anchoring the vessel for lay up in declared regime of exploitation reserve in the sea way” (Response No. 0175/C-12:00 dated 22.04.2014 to the letter No. 2 dated 22.04.2014).

This evidence, in the opinion of the court, speaks about special circumstances, which made merely impossible for the defendant to leave the *Lida* in the *Sabetta* port. For this reason, the court held that the defendant is not in breach of the law since he was acting in the state of urgent necessity. Since the Art. 2.7 of Administrative Liability Code exempts liability for wrongdoing if such act is conducted in the state of urgent necessity, the conduct of the defendant was thus exempted.

Lack of authority excludes liability

In the *Murmansk* case, the court rejected unreasonable and unjustified charges of the plaintiff by establishing the direct implication for imposing liability for unauthorized passage through the NSR.

The details of the case are as follows. The plaintiff, *Linear Department of the Northern Administration for State Sea and River Transport Control*, initiated the administrative proceeding against defendant, *Mr. K.A. Kudinov*, manager of fleet department at Belomor Fishing Company, for the breach of Art. 1443 (1) of the Administrative Liability Code of the Russian Federation.

The plaintiff alleged that the defendant, holding a position of manager of fleet department at Belomor Fishing Company, allowed the *Murmansk* vessel to sail without the license of the NSR Administration for passage through the NSR.

In the opinion of the plaintiff, the defendant violated the provisions of the Technical Rules, failing to comply with safety requirements upon exploitation of the vessel, as prescribed by Art. 149 of the Rules and by not complying with legislation on NSR, as prescribed by Art. 151 of the Rules.

The defendant did not reject the charges but argued that his direct implication has not been established in this case. Particularly, he demonstrated that even though he signed the task for voyage for the captain of the *Murmansk* vessel, the task did not indicate that the voyage encompasses the NSR.

The court found that (i) the job description of the defendant had no indication that he was responsible for maritime safety of the ship; (ii) the obtaining permission to pass through the NSR was not a part of job description of the defendant; and (iii) the defendant is not a person, whose actions led to the breach of Technical Rules.

The court held that the defendant was not liable for unauthorized passage through the NSR since the direct implication of the defendant in the wrongdoing was not established.

Penalty for failing to obtain the permission depends on the amount of damages

In *M-52* case, the court relied on principle of justice and fairness notwithstanding the defendant's negligent conduct, which was manifested in failure to obtain the permission to pass through the NSR.

The details of the case are as follows. The plaintiff, *Northern Administration for State Sea and River Transport Control*, initiated the administrative proceedings against the defendant, OOO "*Severneftegazflot*", for the breach of Art. 1443 (1) of the Administrative Liability Code of the Russian Federation.

The plaintiff alleged that the barge, which was towed by *M-52* vessel (which belongs to the defendant) at the request of its owner from *Sabetta* sea port, located in Ob lap of Karsk sea, sailed and passed through NSR without permission from the NSR Administration (meaning the tug, not the barge). Moreover, in the opinion of the plaintiff, by acting so, the defendant violated the Technical Rules by letting *river-sea* type vessel to sail and pass the NSR.

The defendant denied its liability, claiming (i) that it is not a subject to liability under Art. 14.43 (1) of Administrative Liability Code of Russian Federation; (ii) that the Technical Rules does not extend to the vessel of *river-sea* type, because it did not sail into foreign sea port; (iii) that the Northern Sea Route pass rules were violated because of utmost necessity, since towing the barge was accomplished due to the request of shipowner because of difficult ice condition, which excludes liability under Art. 27 of Administrative Liability Code.

The court found that (i) allegation of the defendant that it is not a subject to liability under Art. 14.43 (1) is not valid because it is based on incorrect interpretation of the law; (ii) the position of the defendant that the Technical Rules does not extend to the vessel of *river-sea* type is incorrect, because by the virtue of the clause 5 (a) the ships of *river-*

sea type are viewed as a subject to technical regulations; (iii) there is no evidence, showing that the defendant acted in the state of emergency neither there is any evidence of the defendant's attempts to gain permission from Northern Sea Route Administration to cross Northern Sea Route.

The court also held that the defendant violated the Art. 1 (1) and 2 of the Technical Rules, which prescribe sailing with valid ship documents, classification certificates, which certify that the ship complies with the requirements of Technical Regulations.

However, taking into account the fact that the actions of the defendant did not result in any serious consequence or damage, the court decided to diminish the amount of administrative fine from 100 000 Roubles (app. USD 2 000), as prescribed in the Administrative Liability Code, to 20 000 Roubles (App. USD 400), in accordance with constitutional principle of justice and fairness.

Concluding remarks

The cases, examined in present article, demonstrate the flexible and rational approach of Russian courts towards the issue of unauthorized passage through NSR. It is clear that the failure to obtain the permission to pass through NSR is viewed as a serious violation of the law. However, since there are special circumstances, inherent to the NSR, the court was compelled to make concessions.

First of all, it is weather condition in the NSR region and surrounding areas. The low temperature almost make impossible to leave vessels in the ports. So if shipowners lack necessary documents either to pass through the NSR or to obtain the permission to pass through NSR, the courts are willing to forgo their wrongdoing, given the disastrous weather conditions in the ports.

Second, the courts are willing to reduce the threshold for financial penalty, notwithstanding the minimum established by the law. The reason is the specific conditions of the NSR, which cannot be changed or prevented by human intervention.

All of this speaks about one thing. The shipowners should not abuse such generosity of Russian courts and make all possible to obtain all necessary documents, including permission to pass through NSR. However, should it be impossible for some objective reasons, the shipowners can always rely on rational and balanced approach of the courts on establishing their fault in such cases.