Public Policy, Security of State and Latest Special Presidential Powers: Old and New Hurdles in Recognition and Enforcement of Foreign Arbitral Awards in Russia

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Abstract

This article discusses Russian regulatory framework and local courts' attitude towards public policy (public order) concept when considering recognition and enforcement of foreign arbitral awards. Specifically, it establishes that in Russia public policy is intimately linked to the notion of security of state. The latter is predominantly defined via the orders of the President of Russia who has both executive and policy-making powers in this regard. Thus, to a large extent, public order of the Russian Federation depends on and is shaped by its President. Given the fact that the President of Russia can exercise extensive discretion in his orders and decrees on this subject, the author further argues that public order is an extremely fluid concept in Russia. Lastly, the article further analyses the new security-related powers given to the Russian President and their impact on arbitration and the recognition of foreign arbitral awards on the territory of the Russian Federation.

Introduction

In relation to the recognition of foreign arbitral awards under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention), courts can use only limited grounds as per the Convention to deny granting such applications. Arguably, the most problematic of these grounds is the violation of public policy (or public order) of the country where recognition and enforcement is sought.[1]

The above is especially relevant in Russia since the most often ground invoked for refusal in recognition and enforcement of foreign arbitral awards is the violation of Russian public policy.[2] Frequently this is because the local courts tend to

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[1] Article V(2)(b) of the New York Convention.

[2] See the study of court cases from 2008–2017 conducted by the Working Group of the Russian Arbitration Association as reported at Russian Arbitration Association, "Application of the New York Convention in Russia" (21 November 2018), *https://arbitration.ru/en/press-centr/news/application-of-the-new-york-convention-in-russia*

establish a link between the concepts of "public policy" and "security of the state". The latter notion is predominantly determined through orders issued by the President of Russia and not via laws enacted by the Parliament; thus, quite a fluid concept that could be adjusted on a regular basis. Moreover, recently the Parliament granted the Russian President additional "security" powers to enact protective measures in the event that foreign and/or international bodies/organisations make decisions or perform actions that are contrary to the interests and/or public order of the Russian Federation.[3]

This article will discuss the regulatory framework and courts' attitude towards public policy concept and highlight its unusually close link to the security of the state, a notion regarding which the Russian President has substantial executive and policy-making powers. It will then proceed with an analysis as to whether the new special powers given to the President of the Russian Federation are applicable to foreign arbitration awards and what measures could potentially be enacted to hinder their recognition and enforcement.

Public policy in Russia: judiciary's approach

As is the case with many jurisdictions worldwide, Russian legislation does not contain the definition of public order or public policy. It is true that generally it is very difficult to provide for a uniform definition of a public policy. For example, following its review of public policy as a defence to the recognition and enforcement of arbitral awards under the New York Convention in the more than 40 jurisdictions (including Russia), the International Bar Association (IBA) concluded that public policy is an evolving concept which is impossible to define precisely.[4] Thus, the report concluded, it should be the task of state courts to attempt to define this notion.[5] However, when doing so the courts often have to consider non-legal grounds.

The IBA Report highlighted that in the vast majority of jurisdictions a violation of public policy implies a breach of fundamental or basic principles or values upon which the foundation of society rests, such as justice, fairness or morality.[6] Similarly, the United Nations Commission on International Trade Law (UNCITRAL) describes public policy exception as a safety valve which should be used only in exceptional circumstances when "it would be impossible for a legal system to recognise an award and enforce it without abandoning the very fundaments on which it is based".[7] International arbitration practitioners emphasise that in most jurisdictions public policy is construed narrowly and applied exceptionally when the violation of public policy is so "blatant", "flagrant" or

/?sphrase_id=48700 [Accessed 14 May 2023]; see also William Spiegelberger, *Enforcement of Foreign Arbitral Awards in Russia* (Juris Publishing, 2014), p.85.

[3] See added para.6(B) to art.8 of the Federal Law of the Russian Federation No. 390-ФЗ "On Security" dated 28 December 2010 (hereinafter referred to as the Law).

[4] International Bar Association, *Report on the Public Policy Exception in the New York Convention* (2015), p.18.

[5] IBA, *Report on the Public Policy Exception in the New York Convention* (2015), p3.

[6] IBA, *Report on the Public Policy Exception in the New York Convention* (2015), p.6.

[7] UNCITRAL, *UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)*, 2016 edn (United Nations Publication, 2016), p.240.

"intolerable" that the recognition and enforcement of an arbitral award should be refused.[8]

Since Russian legislation does not contain a definition of public policy, this has resulted in a number of conflicting court judgments on the application of this ground for refusal of recognition of an arbitral award. For example, the courts refused to enforce arbitral awards citing a violation of Russian public policy in cases when:

a) the arbitration respondent had not properly been notified about the date, time and place of arbitration proceedings;[9]
b) enforcement would affect the rights of the third parties;[10]
c) enforcement would lead to the insolvency of the defendant, which is a municipal entity;[11]
d) there was lack of proportionality of penalty imposed by the arbitral award in relation to the consequences of the breach;[12]
e) the award is incompatible with mandatory provisions of Russian law regulating the creation and activities of joint ventures;[13]
f) the recognition and enforcement of the award would lead to preferential treatment of one of the creditors of a bankrupt entity;[14]
g) there are inconsistencies between the amounts stipulated in the partial and final arbitral award;[15]
h) there is an absence of any indication of the nature of the obligation in an arbitration award;[16]

[8] Paul Stothard and Alexa Biscaro, "Public Policy as a Bar to Enforcement" (2018) 10 *Norton Rose Fulbright International Arbitration Report* 23.

[9] See Decision of the Supreme Court of the Russian Federation No. 306-ЭС19-8787 in the case No. A57-31314/2017 dated 17 June 2019 as cited in Sergey Treshchev and Elena Malevich, "Enforcement of international arbitration awards in Russia" (IBA, 4 September 2019), *https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=B75B728A-1D7E-4264-8473-20DEAC97F771* [Accessed 14 May 2023].

[10] See Decision of the Supreme Court of the Russian Federation No. 305-ЭС16-19572 in the Case No. A40-147645/2015 dated 28 April 2017 as cited in Lorenzo Sasso, "The Russian Arbitration Reform: Between Lights and Shadows" (2019) 8 *Russian Law Journal* 79, 100. See also Decision of the Arbitrazh (Commercial) Court of the West Siberian region in the Case No. A45-33999/2019 dated 25 February 2020.

[11] See Decision of the Federal Arbitrazh (Commercial) Court of the Volga-Vyatka Region in the Case No. A43-10716/02-27-10isp dated 17 February 2003 as cited in Sasso, "The Russian Arbitration Reform: Between Lights and Shadows" (2019) 8 *Russian Law Journal*. See also Chaman Lal Bansal and Shalini Aggarwal, "Public policy paradox in enforcement of Foreign Arbitral Awards in BRICS countries: A comparative analysis of legislative and judicial approach" (2017) 59 *International Journal of Law and Management* 1279, 1284.

[12] See Decision of the Federal Arbitrazh (Commercial) Court of the Volga-Vyatka Region in the case No. A82-10555/2005-2-2 dated 25 May 2006 as cited in Sasso, "The Russian Arbitration Reform: Between Lights and Shadows" (2019) 8 *Russian Law Journal* 98–99. See also a reference to this practice by Russian courts in Nigel Blackaby et al, *Redfern and Hunter on International Arbitration*, 6th edn (Oxford University Press, 2015), para.11.118.

[13] See Decision of the Supreme Arbitrazh (Commercial) Court of the Russian Federation No. 2853/00 dated 14 January 2003 as cited in Sasso, "The Russian Arbitration Reform: Between Lights and Shadows" (2019) 8 *Russian Law Journal*.

[14] See Decision of the Arbitrazh (Commercial) Court of the Moscow Region in the Case No. A40-30440/2019 dated 4 March 2020 as cited in Russian Arbitration Association, *Overview of Russian Court Practice relating to Arbitration and Cross-Border Judicial Proceedings* (2020), p.123 and in Dmitrii Andreev et al, "Foreign arbitration from Russia, interim measures and bankruptcy // Review of practice in the first quarter of 2020" (*Zakon.ru*, 21 May 2020), *https://zakon.ru/discussion/2020/05/21/inostrannyj_arbitrazh_iz_rossii_obespechitelnye_mery_i_bankrotstvo__obzor_praktiki_za_i_kvartal_2020* [Accessed 14 May 2023].

[15] See Decision of the Arbitrazh (Commercial) Court of the Moscow Region in the case No. A40-163027/2019 dated 18 March 2020 as cited in Russian Arbitration Association, *Overview of Russian Court Practice relating to Arbitration and Cross-Border Judicial Proceedings* (2020), p.111.

[16] See Decision of the Arbitrazh (Commercial) Court of the Moscow Region in the case No. A40-124600/2019 dated 10 June 2020 as cited in Russian Arbitration Association, *Overview of Russian Court Practice relating to Arbitration and Cross-Border Judicial Proceedings* (2020), p.116.

i) there was an unclear dispute resolution authority named in the arbitration clause.[17]

As can be seen from the above, the notion of public policy has been applied extremely widely by the Russian courts and in practice this has sometimes led to reconsideration of the whole case on merits (despite this not being permitted under law).[18] As has correctly been noted by a contemporary Russian legal scholar: "Inspired by Russian present-day reality, the institute of public policy ceased to play any special protective role and became a moderator for state control of jurisdictional decisions, imposed from the outside of the national court system (in other words, foreign court judgments, foreign arbitral awards)".[19]

In the light of this inconsistent and varied practice by local courts, some guidance as to the meaning and application of public policy as the ground for refusal of the recognition and enforcement of an arbitral award was offered by the Supreme Arbitrazh (Commercial) Court of the Russian Federation in its Informational Letter,[20] wherein a number of court decisions were given for illustrative purposes on how to deal with this issue. In spite of the obvious usefulness of these guidelines (which is illustrated by a substantial decrease of court cases granting public policy motions in the following years),[21] a number of commentators indicated certain inconsistencies and confusion[22] which led to the absence of a uniform approach among the Russian courts. Some authors further commented that despite the clear shift towards a narrower interpretation of a public policy ground following the Informational Letter, local courts continued to apply this ground "on apparently protectionist and anti-arbitration instincts, especially where high value awards were concerned".[23]

In December 2019 the Supreme Court of the Russian Federation published its Resolution No.53 "On Russian courts' cooperation and control over international commercial arbitration"[24] (hereinafter referred to as the Resolution). The Resolution highlighted a number of important aspects for the courts to consider whenever they touched upon the issues of recognition and enforcement of arbitration awards. In particular, the Supreme Court provided the definition and applicable test for

[17] See Decision of the Arbitrazh (Commercial) Court of the Moscow Region in the case No. A40-337611/2019 dated 3 September 2020 as cited in Russian Arbitration Association, *Overview of Russian Court Practice relating to Arbitration and Cross-Border Judicial Proceedings* (2020), p.91.

[18] Bansal and Aggarwal, "Public policy paradox in enforcement of Foreign Arbitral Awards in BRICS countries: A comparative analysis of legislative and judicial approach" (2017) 59 *International Journal of Law and Management* 1284; Muruga Ramaswamy, "Enforcement of ICSID and Non-ICSID Arbitration Awards and the enforcement Environment in BRICS" (2018) 15 *International Journal of Business, Economics and Law* 73, 78; Anton Maurer, *The Public Policy Exception Under the New York Convention: History, Interpretation and Application*, Revised edn (Juris Net, 2013), pp.223–224. Mikhail Antonov, "Executing the Decisions of Foreign Courts and the Question of Sovereignty in Russia" (2012) Working Research Paper Series: LAW WP BRP 07/LAW/2012.

[19] Sergey Kurochkin, "Violation of Public Policy of the Russian Federation as a Ground for Refusing Recognition and Enforcement of Foreign Judgments and Arbitral Awards" (2014) 2 *Russian Law: Theory and Practice* 117, 127–128. See also Antonov, "Executing the Decisions of Foreign Courts and the Question of Sovereignty in Russia" (2012) Working Research Paper Series: LAW WP BRP 07/LAW/2012.

[20] Informational Letter of the Presidium of the Supreme Arbitrazh (Commercial) Court of the Russian Federation No. 156 dated 26 February 2013.

[21] Russian Arbitration Association, "Application of the New York Convention in Russia" (21 November 2018).

[22] Boris Karabelnikov, "The Supreme Arbitrazh Court of the Russian Federation explains public policy" (2013) 5 *Zakon* 115; Vsevolod Baibak, "Observe Public Order" (*Russian Business Gazette 15(893)*, 23 April 2013)*https://rg .ru/2013/04/23/arbitraj.html* [Accessed 14 May 2023]; Natalia Shinyaeva, "Public order is not a club" (*Vegas Lex*, 4 April 2013), *https://vegaslex.ru/media/press_statements/63369/* [Accessed 14 May 2023].

[23] Maurer, *The Public Policy Exception Under the New York Convention: History, Interpretation and Application* (2013), p.230.

[24] Dated 10 December 2019.

the application of public order violation as a ground for refusal of recognition and enforcement of an arbitral award.

According to the Resolution, public order is a collection of fundamental legal principles having the highest imperative and universal character, a unique social and public significance, and forming the basis of the economic, political and legal system of the Russian Federation. The Supreme Court further addressed the previous inconsistent practice of courts and emphasised that the refusal to recognise and enforce an arbitral award on a basis of violation of public policy of the Russian Federation should be upheld only in extraordinary circumstances, providing a specific (albeit limited) list of instances when the courts should not refuse recognition and enforcement.[25]

However, the most novel aspect of the Resolution is the introduction of the two-stage test for setting aside or refusal to enforce arbitral awards on the ground of breach of public policy. According to the Supreme Court, when examining a possible violation of public policy, the courts should establish that:

a) there is a breach of the fundamental principles that form the basis of the economic, political or legal system of the Russian Federation; and

b) such breach may result in the infringement of the sovereignty or security of the state, or affects the interests of large social groups, or violates the constitutional rights and freedoms of individuals or legal entities.

It is notable that the Supreme Court placed considerable attention on the economic and political fundamental principles with emphasis on those before legal, which perhaps signifies the priorities that the courts should follow when considering a possibility of public policy violation. Furthermore, the inclusion of economic and political criteria in the context of public policy requires a judge to evaluate expediency rather than analyse the legality of the recognition and enforcement of the arbitral award.[26] This, of course, necessitates the judge to apply certain skills that are beyond their legal training. As one practising counsel has commented, the enforcement of a perfectly legally correct foreign arbitral award which is fully delivered in accordance with Russian law may theoretically be recognised as contravening public policy due to a particular judge's interpretation of non-legal considerations of public order.[27]

[25] As such, according to para.51 of the Resolution, this ground is not applicable when a) the respondent did not take part in the arbitration proceedings; b) an arbitral tribunal applied foreign law rules that do not have equivalent provisions under Russian law; and/or c) the debtor does not file objections to the forced execution of the arbitral award. Unfortunately, this does not include some other instances/examples as outlined earlier in this section.

[26] Dmitry Davydenko and Eugenia Kurzynsky-Singer, "Substantive Ordre Public in Russian Case Law on the Recognition, Enforcement and Setting Aside of International Arbitral Awards" (2010) 20 *The American Review of International Arbitration* 209, 213. The authors link it to the socialistic legal doctrine which was alien to the principle of separation of powers.

[27] Svetlana Bjorkman, "The Conception of Public Policy and Its Applicability with Respect to Enforcement of Awards of International Commercial Arbitration in the Russian Federation" (2013) 6 *International In-House Counsel Journal* 1.

Security of state: the Russian President's domain

Importantly, any such breach of the fundamental principles needs potentially to result, inter alia, in the infringement of the sovereignty or security of the state, which is a very unusual requirement for public policy considerations. Notably, in the late 1990s and early 2000s several authors commented on the possibility of state immunity as was established in Soviet doctrine becoming a reason for refusal of the enforcement of arbitral awards against Russian state entities.[28] The test established by the Supreme Court not only confirms this, but further expands the boundaries of the public policy concept, as security of the state may not be limited to state-owned enterprises and their activities.

In fact, whilst the term "security of the state" may have a broad meaning, including political,[29] Russian legislation consists of a number of acts that allow determination of the likely scope of the security of the state, including from different perspectives, such as economic or energy. In essence, "security of the state" is interpreted via the prism of normative acts forming national strategy plans which aim to protect certain values and principles deemed to be of fundamental importance to the Russian state.[30]

Some general provisions in relation to the security of the state are included in the Constitution of the Russian Federation. However, substantive regulation is found in the Federal Laws and, specifically, in a number of Presidential Orders. The Federal Law of the Russian Federation No. 390-ФЗ "On Security" dated 28 December 2010 is widely considered to be a centrepiece of such regulation. However, as opposed to its earlier version from 1992,[31] it does not contain any defined concepts,[32] but is focused on detailing state authorities' security responsibilities and powers. As such, according to arts 4(2) and 8 of the Law, it is the prerogative of the President of the Russian Federation to determine the directions of state security and national security strategy.

With regards to the latter, from time to time (on average every six years) the Russian President issues orders outlining national security strategy. The latest Strategy of the National Security of the Russian Federation (hereinafter referred

[28] Eugen Salpius, "Recent Developments in Arbitration in Central and Eastern Europe" (1996) 2 *Arbitration and Dispute Resolution Law Journal* 175; Simon Zinger, "Navigating the Russian Shipping Industry: Making the Most of International and Russian Law for Successful Arbitration against Russian Parties" (1995) 8 *University of San Francisco Maritime Law Journal* 141, 171; Glenn Hendrix, "Business Litigation and Arbitration in Russia" (1997) 31 *The International Lawyer* 1075, 1077; Kaj Hober, *Enforcing Foreign Arbitral Awards against Russian Entities* (Transnational Juris Publications, 1994), pp.83–106; Daniel Michalchuk, "Filling a legal vacuum: the form and content of Russia's future state immunity law suggestions for legislative reform" (2001) 32 *Law and Policy in International Business* 487, 497.

[29] Davydenko and Kurzynsky-Singer, "Substantive Ordre Public in Russian Case Law on the Recognition, Enforcement and Setting Aside of International Arbitral Awards" (2010) 20 *The American Review of International Arbitration* 210.

[30] Kurochkin, "Violation of Public Policy of the Russian Federation as a Ground for Refusing Recognition and Enforcement of Foreign Judgments and Arbitral Awards" (2014) 2 *Russian Law: Theory and Practice* 120. See also Robert Larsson, *Russia's Energy Policy: Security Dimensions and Russia's Reliability as an Energy Supplier* (Swedish Defence Research Agency Report, 2006), p.48. Though for some significant time the prevailing opinion was that security of the state only relates to national defence matters, see D.V. Troshyn, "Methodological problems of implementing the conceptual and legal basis for strategic planning and ensuring the national security of Russia" (2013) 11 *National Interests: Priorities and Security* 14, 15; see also Sergunin Aleksandr Anatolevich, "The concept of 'Military Security' and the Evolution of the Military-Political Thinking of Post-Soviet Russia" (2012) 2 *Security Issues* 119.

[31] Federal Law No. 2446-1 "On Security" dated 5 March 1992.

[32] In fact, this is largely considered as a substantial drawback of the restated Law, see I.A. Aleksandrov, "On the issue of changes in the national security strategy of the Russian Federation in 2021" (2021) 3 *Science Vector of Togliatti State University: Legal Sciences Series* 6.

to as the National Security Strategy) was adopted by Presidential Order No. 400 dated 2 June 2021. This document forms the basis for long-term strategic planning which, inter alia, outlines national security interests and priorities.[33] Fundamentally, it emphasises the intimate link between national security and the social and economic development of the country.[34] It also outlines Russian general security policies in different areas, such as the economy, energy, information and other security perspectives.[35] Given the link between public order and national security as well as extensive policy-making powers of the Russian President regarding the latter, it is clear that Russian public policy to a very large extent is determined and shaped by the country's president and his issued orders.

The Russian National Security Strategy is a peculiar document that has been closely analysed by foreign governments,[36] international security organisations,[37] think tanks[38] and international relations and political science scholars.[39] From a legal standpoint, arguably, the most important provisions of the National Security Strategy are outlined in its art.5. This article provides for a number of definitions, such as "national security", "national interests", "strategic national priorities", "threats to national security", etc. Undoubtedly, these definitions are used by courts and other public authorities when dealing with security and other related issues since the National Security Strategy seemingly aims to show the practical aspects of national security implementation and not just its strategic planning.[40]

Pursuant to the National Security Strategy, national security is defined as a state whereby national interests of the Russian Federation are protected from external and internal threats.[41] Threats are defined as a set of conditions and factors that create a direct or indirect possibility of causing damage to the national interests of the Russian Federation, whereas national interests are defined as objectively significant needs of the individual, society and state in security and sustainable development.[42]

[33] Article 1 of the National Security Strategy.

[34] See art.3 of the National Security Strategy.

[35] It is worth noting that some more detailed security strategies/doctrines were developed in these areas, see the Strategy on Economic Security of the Russian Federation until 2030 adopted by Presidential Order No. 208 dated 13 May 2017; the Doctrine on Energy Security of the Russian Federation adopted by Presidential Order No. 216 dated 13 May 2019; the Doctrine on Food Security of the Russian Federation adopted by Presidential Order No. 20 dated 21 January 2020; the Doctrine on Information Security of the Russian Federation adopted by Presidential Order No. 646 dated 5 December 2021, etc.

[36] UK House of Commons, "Russian grand strategy" (16 January 2023) *https://commonslibrary.parliament.uk/research-briefings/cdp-2023-0009/* [Accessed 14 May 2023].

[37] Julian Cooper, "Russia's updated National Security Strategy" (2021) 2 *Russian Studies Serieshttps://www.ndc.nato.int/research/research.php?icode=704* [Accessed 14 May 2023].

[38] Dmitri Trenin, "Russia's National Security Strategy: A Manifesto for a New Era" (Carnegie Endowment for International Peace, 6 July 2021), *https://carnegiemoscow.org/commentary/84893* [Accessed 14 May 2023]; Michel Duclos, "Russia's National Security Strategy 2021: the Era of 'Information Confrontation'" (Institut Montaigne, 2 August 2021) *https://www.institutmontaigne.org/en/expressions/russias-national-security-strategy-2021-era-information-confrontation* [Accessed 14 May 2023].

[39] Charap, Samuel et al, *Russian Grand Strategy Rhetoric and Reality* (RAND Corporation, 2021); Roger Kanet, *Routledge Handbook of Russian Security* (Routledge, 2019); Matthew Sussex, "The triumph of Russian national security policy? Russia's rapid rebound" (2017) 71 *Australian Journal of International Affairs* 499; Katri Pynnöniemi, "The Asymmetric Approach in Russian Security Strategy: Implications for the Nordic Countries" (2019) 31 *Terrorism and Political Violence* 154.

[40] Mikhail Komarov and Vladimir Matveev, "Theoretical Analysis of the Main Provisions of the National Security Strategies of the Russian Federation in 2015 and 2021" (2021) 3 *National Security and Strategic Planning* 5, 7.

[41] Which ensures implementation of the constitutional rights and freedoms of citizens, a decent quality and standard of their life, civil peace and harmony in the country, protection of the sovereignty of the Russian Federation, its independence and state integrity and socio-economic development of the country.

[42] Some directions as to the areas of national interests are laid out in art.25 of the National Security Strategy.

The above definitions have been receiving considerable attention by Russian legal scholars. In fact, there has been some significant criticism of the terms employed by the National Security Strategy due to their lack of clarity and a number of methodological and conceptual shortcomings which results in them not performing their purpose and sometimes even contradicting one another and other policies/regulations.[43] It is also evident that despite certain definitions remaining unchanged since their introduction, their scope and substance has been evolving.[44] Thus, Komarov and Matveev point out that the latest National Security Strategy completely changed the object of national security which is now solely focused on the vague and counterintuitive notion of national interests.[45] Ovchinnikov and Kazakova agree that national interests form the core of the country's security,[46] whereas Troshyn stated that throughout the National Security Strategy national interests are simply used as state needs.[47] Kazantsev goes even further by stating that national interests should not be restricted just to the territory of the Russian Federation, but go beyond any geographical limitations.[48] This allows for an extremely broad interpretation of the above-mentioned terms and their inconsistent application by state authorities and courts.

It is also worth noting that courts are indeed burdened with some responsibilities regarding national security implementation: pursuant to art.5(5) of the National Security Strategy, all public authorities participate in the implementation of a wide spectrum of measures (legal, political, organisational, informational, economic, military, etc) aimed at counteracting perceived threats to national security. Importantly, relevant provision does not limit the implementation of relevant measures to executive and/or legislative bodies only, which means that, given the distinction as per the Russian Constitution,[49] the judiciary is also involved.[50]

[43] See generally Bidova Bela Bertova, "Legal implementation of national interests: a general theoretical study of the conceptual foundations" (PhD Thesis, the Chechen State University, 2021); Aleksandrov, "On the issue of changes in the national security strategy of the Russian Federation in 2021" (2021) 3 *Science Vector of Togliatti State University: Legal Sciences Series* 5; Vladimir Nazarov and Dmitriy Afinogenov, "Problems of the General Theory of National Security Development in the Context of National Security Strategy of The Russian Federation Adjustment" (2020) 1 *Vlast* 10; Vladimir Redkous, "Topical issues of ensuring economic security in the Strategy of National Security of the Russian Federation dated 2 July 2021" (2021) *Law and Order* 23. Although see alternative praising views, V. Surguladze, "The ideological dimension of the national security strategy of the Russian Federation: A comparative analysis of the documents of 2015 and 2021" (2022) 12 *Bulletin of the Financial University: Humanities and Social Sciences* 60; Ivan Radikov, "Russia's National Security Strategy 2021: Continuity and Development" (2021) 17 *Political Expertise: POLITEX* 371; Komarov and Matveev, "Theoretical Analysis of the Main Provisions of the National Security Strategies of the Russian Federation in 2015 and 2021" (2021) 3 *National Security and Strategic Planning* 5, 7.

[44] S. Mityakov, "Transformation of Threats, National Interests and Priorities in the Concept and Strategies of the National Security of Russia" (2021) 3 *Development and Security* 4.

[45] Komarov and Matveev, "Theoretical Analysis of the Main Provisions of the National Security Strategies of the Russian Federation in 2015 and 2021" (2021) 3 *National Security and Strategic Planning* 8.

[46] A. Ovchinnikov, "National Interests of Russia: Concept and Types" (2014) 2 *North Caucasian Legal Bulletin* 7; M. Kazakova, "National interests: on the issue of understanding and content of the concept" (2010) 3 *Mordovia University Bulletin* 26.

[47] In fact, this is how national economic interests are defined in the Strategy on Economic Security of the Russian Federation until 2030, see art.7(3): objectively significant economic needs of the country, the satisfaction of which ensures the implementation of the strategic national priorities of the Russian Federation.

[48] S. Kazantsev, "National Interests, Strategic Goals and Long-Term Security of the Russian Federation" (2021) 15 *The World of New Economy* 40, 42. In another extreme position, Resnyanskiy argued that national interests should also include the prevailing Russian ideology applicable to its citizens, see S. Resnyanskiy, "Ideology and national interests of Russia" (2013) 2 *Problem analysis and State Management Design* 117.

[49] See arts 10, 11 and 118. See also Federal Constitutional Law No 1-ФКЗ "On Judicial System of the Russian Federation" dated 31 December 1996 (as amended).

[50] Whilst the idea of the judiciary being a state organ (public authority) is not expressly mentioned either in the Constitution and/or Federal Law, Russian legal scholarship seems to interpret relevant provisions accordingly, see Boris Edidin, "Courts in the system of public authorities of Russia" (PhD thesis, Russian Academy of Justice, 2005);

Therefore, Russian courts should take an active role and have a duty to participate in the implementation of the national security of the state along with other public authorities.[51]

An example of a broad interpretation and implementation of national security policy by the judiciary in an arbitration context can be found in the decision of the Supreme Court No. 305-ЭС1818-20885 dated 23 April 2019. According to the facts of the case,[52] Banwell International Ltd and Rosshelf were in dispute in relation to an agreement for the pledge of shares in Lotos Shipbuilding Plant. The dispute was submitted to the London Court of International Arbitration wherein the arbitral tribunal found in Banwell's favour. Banwell then sought to enforce the arbitral award in Russia. The first instance court approved recognition and enforcement of the award. However, Rosshelf promptly filed an appeal which was upheld. The matter went to the Supreme Court which denied recognition and enforcement of the award on the basis of violation of the public policy of Russia. According to the Supreme Court, Rosshelf is an entity of strategic importance with the Russian Federation being its ultimate beneficiary. Thus, the Supreme Court concluded, enforcement of this foreign arbitral award could potentially infringe the security of the state by causing damage to the Russian Federation: instead of transferring monies to the Russian state budget as per normal circumstances, the entity would be obliged to make payment to a foreign company. Hence, this essentially non-legal argument was decisive for the Supreme Court to resolve in favour of Rosshelf and refuse recognition and enforcement of the London Court of International Arbitration award.

Latest special Presidential powers and their impact on arbitration

As has been identified above, in Russia public order is closely linked to the security of the state. The Russian President exercises considerable policy-making and executive powers regarding the security of the country. Thus, to a large extent the public order of the Russian Federation depends on and is shaped by its President. Given the fact that the President of Russia can exercise some vast discretion in his orders and decrees on this subject, the public order is indeed a fluid concept in Russia. As if the above was not sufficient, as a result of international developments regarding the world's reaction to the Russian invasion of Ukraine, the Russian President recently received further "security-related" extraordinary powers which may have some drastic long-term effect, including on the recognition and enforcement of arbitral awards in Russia.

On 17 March 2023 the International Criminal Court issued warrants of arrest for Mr Vladimir Putin (the President of the Russian Federation) and Ms Maria Lvova-Belova (Commissioner for Children's Rights in the Office of the President of the Russian Federation) in the context of (alleged) responsibility for war crimes

Igor Noskov, "Judicial Activity: Concept, Types, Main Characteristics" (PhD thesis, Russian State University of Justice 2016).

[51] A similar provision is included in art.7 the Strategy on Economic Security of the Russian Federation until 2030 as adopted by Presidential Order No. 208 dated 13 May 2017 and art.37(a) of the Doctrine on Energy Security of the Russian Federation as adopted by Presidential Order No. 216 dated 13 May 2019.

[52] See also a comment in Alexander Vaneev, *Dimitriy Mednikov and Maxim Kuzmin, "Russia" in Global Arbitration Review, The European Arbitration Review 2020: A Special Report* (Law Business Research, 2019), pp.66–71.

committed in occupied areas of Ukraine.[53] This event has had some profound impact within Russia and its legislation. In particular, the members of the Russian Parliament promptly reacted by enacting a number of changes to the existing legal framework dealing with the recognition and performance of foreign and international organisations' decisions on the territory of the country. In fact, much of the media's attention has been dedicated to analysing the new article in the Criminal Code of the Russian Federation, which provided for up to five-years' imprisonment for assisting in the performance of decisions of international organisations or foreign state bodies relating to the criminal prosecution of Russian officials and military personnel.[54] However, another important legislative change was made to the Federal Law "On Security" which has largely been unnoticed, perhaps due to a subtle way in which it was introduced: Russian legislators decided to include an additional provision in the final review of the bill connected to the mode of peacekeeping missions.[55]

According to the recent amendment, the legislators granted additional powers to the President of the Russian Federation to enact "measures to protect the Russian Federation and its citizens in the event that foreign and (or) international (interstate) bodies (organisations) make decisions or perform actions that are contrary to the interests of the Russian Federation and (or) the fundamentals of the public order of the Russian Federation".[56] This is indeed a significant development: as opposed to changes made to the Criminal Code, this provision is not limited just to Russian officials or military personnel. The fact that the sheer scope of this provision allows for its application in a variety of contexts[57] perhaps signifies how rushed and likely inattentive to consequences the Russian legislators were when granting such special powers to the President.

Notably, the enacted provision has entitled the Russian President to act in the event that the interests of the Russian Federation and/or its public order are affected. As discussed above, it is actually the President of Russia himself who determines national interests of the country via the adoption of the National Security Strategy. Furthermore, the public order, at least within the meaning attributed to this concept by Russian judiciary, is closely linked to the security of state, which is another area where the President of Russia has significant executive and policy-making powers. Therefore, the Russian President has some significant discretion as to when and under what circumstances to activate these additional powers without any viable legislative restrictions.

[53] International Criminal Court, "Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova" (17 March 2023), *https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and* [Accessed 14 May 2023].

[54] See art.284.3 of the Criminal Code: provided for up to five year imprisonment for assisting in performance of decisions of international organisations in which the Russian Federation does not participate, or foreign state bodies on the criminal prosecution of officials of Russian authorities in connection with their official activities, as well as other persons in connection with their military service or stay in volunteer formations contributing to the fulfilment of the tasks assigned to the Armed Forces of the Russian Federation.

[55] More specifically, amendments to the Federal Law N 93-ФЗ "On the procedure for the provision by the Russian Federation of military and civilian personnel for participation in activities to maintain or restore international peace and security" dated 23 June 1995.

[56] See added para.6(B) to art.8 of the Law.

[57] And possibly applicable both internally and externally, see Ivan Rodin, "Up to five years will be given for supporting West" (17 April 2023) *Nezavisimaya Gazeta* (Independent Newspaper), *https://www.ng.ru/politics/2023-04-17/3_8708_west.html* [Accessed 14 May 2023].

The explicit reference to the decision-making powers is illustrative in that the scope of the provision is not limited to foreign and/or international bodies that pass resolutions, declarations, etc, but also includes judicial and quasi-judicial authorities. In fact, Russian legal analysts agree that whilst the aim of the new provision was to counter any decision by the International Criminal Court or from similar international public bodies, this inadvertently has opened up a possibility of blocking any decisions by other organisations, such as the European Court of Human Rights or the United Nations Human Rights Committee.[58]

To date, the context of arbitral awards being affected by the new amendments has not been discussed among academics and practitioners. However, given that arbitral institutions are indeed organisations with a decision-making power,[59] they are likely to fall under the scope of application of the newly added provision.[60] This may have some further overreaching consequences, such as regarding implementation of and compliance with any partial awards and interim measures ordered by arbitral tribunals.

The above conclusion is also supported by the recent "anti-arbitration" policy which has seemingly been adopted in Russia. This includes, inter alia, the requirement for any foreign arbitral institutions to acquire a special license from the Russian Ministry of Justice in order to administer Russia-seated international arbitrations and seek enforcement of institution's arbitral awards without the risk of such enforcement being denied by Russian courts. More substantially, in 2020 the Russian Parliament approved changes to arbitration regulation by establishing the exclusive competence of courts in Russia for cases in which one or more parties are a sanction-affected Russian person/entity. In other words, arbitration clauses in contracts between foreign and Russian entities became unenforceable, which clearly goes against the fundamental principles of international arbitration and even basic rules of contract law. Moreover, even if the arbitration process outside Russia was initiated by a sanction-affected Russian person/entity itself, but the final outcome was against such party, the rendered award is unlikely to be recognised and enforced in Russia on a basis of public policy.[61]

Furthermore, the Russian Supreme Court was quick to apply these provisions in *Ural Transport Machinery v PESA*,[62] thus establishing a precedent for lower courts to apply in their practice. In this case it decided that the Russian party could

[58] Andrey Karev and Zoya Svetova, "The Law outside of law" (19 April 2023), Novaya Media *https://novaya.media/articles/2023/04/19/zakon-vne-zakona* [Accessed 14 May 2023]; see also "European Court of Human Rights and Art.284.3 of the Criminal Code of the Russian Federation. Will they be prosecuted for assisting in the execution of ECtHR decisions?" (24 April 2023), The Centre of International Law on Chistykh Prudakh *https://european-court-help.ru/evropejskij-sud-i-st-284-3-uk-rf-budut-li-privlekat-k-ugolovnoj-otvetstvennosti-za-okazanie-sodejstvija-v-ispolnenii-reshenij-espch/* [Accessed 14 May 2023]; "The State Duma has tightened the Criminal Code. Who faces a life sentence and is it dangerous now to apply to the ECtHR?" (18 April 2023) *BBC News* Russia, *https://www.bbc.com/russian/news-65317985*.

[59] Remy Gerbay, *The Functions of Arbitral Institutions* (Kluwer Law International, 2016).

[60] Even though the effect on individual tribunals and *ad hoc* arbitration is somewhat unclear, the literal interpretation of the newly added provision ("bodies/organisations" that "make decisions or perform actions") allows to suggest that *ad hoc* tribunals are also within its scope.

[61] Jürgen Mark and Olena Oliinyk, "The consequences of the sanctions against the Russian Federation and of the Russian countermeasures for international arbitration and litigation" (27 July 2022), *https://globallitigationnews.bakermckenzie.com/2022/07/27/the-consequences-of-the-sanctions-against-the-russian-federation-and-of-the-russian-countermeasures-for-international-arbitration-and-litigation/#_ftnref6* [Accessed 14 May 2023]; Katie McDougall, "Impact of international sanctions on arbitral proceedings" (2022), *https://www.nortonrosefulbright.com/en/knowledge/publications/92ca5faf/impact-of-international-sanctions-on-arbitral-proceedings* [Accessed 14 May 2023].

[62] *Ural Transport Machinery Construction Company JSC v Pojazdy Szynowe PESA Bydgoszcz Spolka Akcyjna*, Decision No 309-ЭС21-6955 (1-3) dated 9 December 2021.

unilaterally switch the jurisdiction to a Russian court instead of being subject to an arbitration clause because international sanctions deprive Russian parties from "defend[ing] their rights in the courts of foreign states, international organizations or arbitration tribunals outside the territory of the Russian Federation".[63] According to the Supreme Court, this discriminatory and biased practice is a fact and does not need to be proved or evidenced by Russian parties.[64]

Finally, it is worth analysing what measures can be implemented by the President of Russia in line with these new special powers. When the amendments to the Law "On Security" were passed, one of their authors, the head of the parliamentary defence committee, did not elaborate on the nature of measures, but only stated that they will be aimed at "reducing the dependence of our country and society on toxic and biased Western institutions".[65]

In essence, the Russian President exercises a variety of executive and policy-making powers,[66] which allows for a number of measures to be implemented. Importantly, the President could enact decrees and orders that affect the Russian public in general or target individuals and companies. The latter seems to be a viable option for blocking the recognition and performance of certain foreign arbitral awards in the territory of Russia, especially made by institutions or concerning parties from the Russia's own list of "unfriendly countries".[67] Such order could be made if a Russian court grants permission to recognise and enforce a foreign arbitral award or even before or during recognition and enforcement being sought in Russian courts.

As an example of an individual target order, on 25 April 2023 the Russian President, referring to its powers under the Law "On Security", issued an order "On Temporary Administration of Certain Property"[68] which effectively allows for the expropriation of movable and immovable property, shares, proprietary rights and other assets on the territory of Russia belonging to companies from countries deemed unfriendly by Russia. Russian legal practitioners highlighted that the presidential order does not contain any criteria for the introduction of temporary administration, thus it could be applied to a variety of foreign entities.[69] Furthermore, the preamble of the order clearly states that its purpose is a retaliatory response to the actions by the United States (US) and countries and organisations that support the US in restricting proprietary rights of Russian companies and individuals, thus damaging Russia's national interests. An interesting aspect of it is that the published order contains a list of entities to which such temporary

[63] *Ural Transport Machinery Construction Company JSC v Pojazdy Szynowe PESA Bydgoszcz Spolka Akcyjna*, Decision No 309-ЭС21-6955 (1-3) dated 9 December 2021 at 6–7.

[64] Which goes against the findings of the latest Russian Arbitration Association (RAA) survey where the London Court of International Arbitration (LCIA) and the International Chamber of Commerce (ICC) are clearly the most preferred arbitral institutions for Russian arbitral parties, see RAA, "The 2022 Russian Arbitration Association Survey: The Impact of Sanctions on Commercial Arbitration" (2022), *https://arbitration.ru/en/arbitration-association/working-groups/analysis-of-sanction-s-impact-on-russian-arbitration/* [Accessed 14 May 2023].

[65] Karev and Svetova, "The Law outside of law" (19 April 2023), Novaya Media *https://novaya.media/articles/2023/04/19/zakon-vne-zakona* [Accessed 14 May 2023].

[66] See generally arts 80–93 of the Constitution of the Russian Federation.

[67] The list is compiled by the Russian Government as per the instructions by the President of Russia in his order No. 95 "On the temporary procedure for fulfilling obligations to certain foreign creditors" dated 5 March 2022. At the time of writing the list consists of 49 countries, including all G7 states and all EU Members.

[68] Order No. 302.

[69] Yulia Litovtseva, "Temporary management of property of foreign persons" (2023), Pepeliaev Group, *https://www.pgplaw.ru/analytics-and-brochures/alerts/vremennoe-upravlenie-imushchestvom-inostrannykh-lits/* [Accessed 14 May 2023].

administration is applied—initially there were three such foreign companies (Uniper SE, Fortum Russia B.V. and Fortum Holding B.V.), but by September 2023 nine more entities were added (Carlsberg Sverige Aktiebolag, Carlsberg Deutschland GmbH, Amedia Eastern Europe AS, Produits Laitiers Frais Est Europe, Danone Trade LLC and Hoppy Union LLC). Hence, the Presidential orders can indeed be personalised and aim at a specific entity or individual. The only way for the affected companies to regain control over their assets would be via a reverse order from the President of Russia.[70]

In the context of arbitral awards, it may seem as plausible that certain high value foreign arbitral awards as well as awards made against Russian state-owned enterprises may individually be blocked, possibly even before an interested party makes an application for the award recognition and enforcement in Russia. Additionally, it is possible that any attempt to enforce such awards in other jurisdictions by seizing Russian assets located there may result in some retaliatory measures enacted against such party or even countries that allowed recognition and enforcement of such an award.

Alternatively, a blanket order may be issued prohibiting all or certain categories of awards from being recognised and enforced on the territory of Russia. This is a less likely course of action, yet not unrealistic due to highly politicised and retaliatory decision-making in the country in recent years.[71]

Conclusion

Russian public order is the core obstacle in the recognition and enforcement of foreign arbitral awards to date. Not least this is because the country's public order is closely related to the security of state as determined by the President of the Russian Federation. The Russian President has significant powers in determining the scope of state security and, consequently, the public order itself. Moreover, the latest powers further allow him to enact additional unrestricted measures to counter the effect of any decisions or actions made by international or foreign bodies, including arbitral tribunals, that are contrary to the Russian state's interests and public order. Hence, the recognition and performance of foreign arbitral awards could be blocked under the pretext of threats to national security, even before an interested party makes an application for the award recognition and enforcement in Russia. Foreign companies and investors should be mindful of these new legislative developments which may further hinder the functioning of international arbitration in Russia.

[70] Anastasia Stognei et al, "Russia seizes subsidiaries of Finland's Fortum and Germany's Uniper" (26 April 2023) *Financial Times*, *https://www.ft.com/content/aa7ffb41-bcb9-4983-a312-1473fa0513b8* [Accessed 14 May 2023].

[71] As an example of such blanket order, the President of Russia relied on its powers under the Law "On Security" to ban all direct flights to Georgia in 2019. The ban was lifted only in May 2023.