



INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION

ICCA  
PROJECTS

Does a Right to a  
Physical Hearing Exist  
in International  
Arbitration?

# **RUSSIAN FEDERATION**

Roman Zykov

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### **a. Parties' Right to a Physical Hearing in the *Lex Arbitri***

1. *Does the lex arbitri of your jurisdiction expressly provide for a right to a physical hearing in arbitration? If so, what are its requirements (e.g., can witness testimony be given remotely, etc.)?*

Short answer: No.

The Russian legal system has adopted two arbitration laws – one for international commercial arbitration, and the other, for domestic arbitration, which also regulates the registration of permanent arbitration institutions in Russia.

The International Commercial Arbitration Law of the Russian Federation (No. 5338-I, dated 7 July 1993, as amended on 25 December 2018) (“ICAL RF”) is based on the UNCITRAL Model Law.<sup>1</sup> Article 24(1) of ICAL RF reads: “Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party”. The cited article envisages three possible scenarios when oral hearings may take place: (i) The parties themselves may agree on the need for the oral hearings; (ii) If the parties disagree on the need for the oral hearings, but one party nevertheless requests it, the arbitral tribunal shall hold such hearings; (iii) If there is no agreement by the parties, the arbitral tribunal ex officio decides whether to hold oral hearings for the presentation of evidence or for oral argument.

Notably, Article 24(1) of ICAL RF employs the term “oral hearing” without specifying whether the evidentiary hearing shall be held in a physical or another form. Therefore, there is no mandatory provision in the ICAL RF for holding a physical hearing. Depending on which of the three above scenarios take place, it is the parties or the arbitral tribunal who decides on the mode of oral hearings, i.e., a physical or else.

Like the UNCITRAL Model Law, Article 18 of the ICAL RF requires the arbitrators to ensure that the parties are treated with equality and each party is given a full

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<sup>1</sup> Law of the Russian Federation on the International Commercial Arbitration, No. 5338-I, dated 7 July 1993, as amended on 25 December 2018.

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opportunity of presenting his case.<sup>2</sup> Given the consensual nature of arbitration, the arbitration procedure is chiefly a product of what the parties agree to. And if the parties fail to agree, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate so long as they comply with Article 18.

Furthermore, with respect to domestic arbitrations, Article 27(4) of the Law on Arbitration (No. 382-FZ dated 29 December 2015, as amended on 27 December 2018) (“AL RF”) provides that if the parties to a domestic arbitration so agree, the hearing may be carried out by means of videoconference.<sup>3</sup>

Consequently, there is no default rule that there shall be a hearing, let alone a physical hearing.

In addressing the question of the physical hearings, one should also consider the provisions of the applicable arbitration rules. Violation of the applicable arbitration rules may lead to challenging the arbitral tribunal and eventually the arbitral award.

In particular, Article 30(1) of the Rules of Arbitration of International Commercial Disputes of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (“ICAC”) reads that: “An oral hearing *shall be held* to allow the parties to present their case on the basis of the evidence submitted by them and the oral debate to be held”.<sup>4</sup> Furthermore, Article 30(6) permits a video hearing: “A party may request the arbitral tribunal in advance to participate in the hearing by means of videoconferencing. Such a request is considered by the arbitral tribunal bearing in mind the circumstances of the case, the opinion of the other party and technical feasibility. The arbitral tribunal may hear witnesses or experts by means of videoconferencing”. Therefore, the Rules of Arbitration of ICAC view a physical hearing as a default option, which the parties may alter, if necessary.

Article 46(1) of the Arbitration Rules of the Arbitration Centre at the Russian Union of Industrialists and Entrepreneurs (“AC RSPP”) requires that: “The arbitral tribunal having deemed that a case is ready for proceedings, shall conduct a hearing for its consideration”.<sup>5</sup> Furthermore, by arbitration hearing the Rules quite clearly mean a physical hearing, as Article 46(3) provides that:

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<sup>2</sup> UNCITRAL, Model Law on International Commercial Arbitration, available at <[https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998\\_Ebook.pdf](https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf)> (last accessed 22 January 2021).

<sup>3</sup> Law of the Russian Federation on Arbitration, No. 382-FZ dated 29 December 2015, as amended on 27 December 2018.

<sup>4</sup> ICAC, The Rules of Arbitration of International Commercial Disputes, available at <[mkas.tpprf.ru/upload/iblock/fd9/fd91e3315ec67621225835bc71d3de5e.docx](https://mkas.tpprf.ru/upload/iblock/fd9/fd91e3315ec67621225835bc71d3de5e.docx)> (last accessed 22 January 2021; emphasis added).

<sup>5</sup> AC RSPP, Arbitration Rules, available at <<https://arbitration-rspp.ru/en/documents/regulation/>> (last accessed 22 January 2021).

“The Arbitration Centre may summon the parties to the arbitration to attend the arbitration hearing at the request of the presiding arbitrator. A notice on the time and place of the arbitration hearing shall be given in advance; each party to the arbitration shall be given the necessary time to appear before the arbitral tribunal, taking into account the circumstances of the case and the time necessary *to arrive to the arbitration hearing*”.<sup>6</sup>

In practice, most domestic and international arbitral tribunals seated in Russia hold physical hearings, with the rare exception when the hearings are conducted by videoconferencing or the cases are decided on the documents only.

2. *If not, can a right to a physical hearing in arbitration be inferred or excluded by way of interpretation of other procedural rules of your jurisdiction's lex arbitri (e.g., a rule providing for the arbitration hearings to be “oral”; a rule allowing the tribunal to decide the case solely on the documents submitted by the parties)?*

Short answer: No.

Both Article 24(1) of the ICAL RF and Article 27(1) of the AL RF contain identical provisions, which provide: “[...] the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party”.

Therefore, neither of the Articles requires to hold a hearing if the parties do not specifically ask for that, let alone a physical hearing. If one of the parties so requests, the tribunal shall have an oral hearing.

**b. Parties’ Right to a Physical Hearing in Litigation and its Potential Application to Arbitration**

3. *In case the lex arbitri does not offer a conclusive answer to the question whether a right to a physical hearing in arbitration exists or can be excluded, does your jurisdiction, either expressly or by inference, provide for a right to a physical hearing in the general rules of civil procedure?*

Short answer: Yes.

Russian courts for civil matters have two branches: (a) courts of general jurisdiction (for non-commercial cases), and (b) state commercial (*arbitrazh*) courts (for commercial

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<sup>6</sup> Emphasis added.

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cases). The procedure before the courts of general jurisdiction is regulated by the Civil Procedure Code (“CPC”),<sup>7</sup> and that before the state commercial (*arbitrazh*) courts is governed by the Arbitrazh Procedure Code (“APC”).<sup>8</sup> The hearing provisions under the CPC and APC do not regulate arbitration.

As a general rule, Article 155 CPC requires that the claims be resolved in the “court sittings”. In 2013, the CPC was supplemented with Article 155.1(1), which permits the parties to take part in the court sittings by means of videoconferencing, upon the request of any of the parties and subject to the technical capabilities of the courts.

This is the same for the economic (commercial) cases. As a rule of default, Article 153(1) APC requires that the claims be resolved in the court sittings. However, in 2010 the APC was supplemented with Article 153.1(1), which permits the parties to take part in the court sittings by means of videoconferencing, upon the request of any of the parties and subject to the technical capabilities of the courts. In such case, the court session is recorded. Under exceptional circumstances, the cases tried by the courts in closed court hearings (without the presence of the press or other non-parties) may not be organized by means of videoconferencing.

It is notable that the CPC and APC use the term “court sitting”. The term “court sitting” refers to a physical meeting of the judge and the parties, as opposed to the term “oral hearing” used by the Russian Law on International Commercial Arbitration and the Law on Arbitration. The term “oral hearing” literally means the power of the arbitral tribunal to hear oral arguments, but not necessarily to organize a physical sitting (hearing). Such terminological difference gives additional support to the notion that the term “oral hearing” does not translate into a physical hearing, whereas the term “court sitting” used in the rules of civil procedure, subject to a video hearing exception, equates to a physical sitting of the court and the parties.

4. *If yes, does such right extend to arbitration? To what extent (e.g., does it also bar witness testimony from being given remotely)?*

Short answer: No.

The rules of civil procedure established by the CPC RF and APC RF do not extend to the arbitration proceedings. Consequently, arbitral tribunals seated in Russia are not bound to hold physical hearings by virtue of the provisions of the rules of civil procedure.

### c. **Mandatory v. Default Rule and Inherent Powers of the Arbitral Tribunal**

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<sup>7</sup> Civil Procedure Code, enacted on 14 November 2002, No. 138-Φ3, last amended on 31 July 2020.

<sup>8</sup> Arbitrazh Procedure Code, enacted on 24 July 2002 No. 95-Φ3, last amended on 9 June 2020.

5. *To the extent that a right to a physical hearing in arbitration does exist in your jurisdiction, could the parties waive such right (including by adopting institutional rules that allow remote hearings) and can they do so in advance of the dispute?*

Short answer: N/A

The right to a physical hearing in arbitration *does not exist* under Russian *lex arbitri*. Furthermore, the parties may expressly agree to have or not to have the hearings. If the parties or arbitration rules are silent on the need for an oral hearing, the arbitral tribunal may decide whether to hold a hearing or not.

However, some of the arbitration rules of the Russian arbitration institutions provide for an “oral hearing” as a default option, from which the parties may opt out by an express agreement at any time.

Pursuant to the ICAL RF, if there is no such waiver, the arbitral tribunal shall hold a hearing only if so requested by a party. Consequently, if none of the parties insists on having an oral hearing, the tribunal may proceed without one. As arbitration is based on the parties’ agreement, they can waive the need for an oral hearing.

6. *To the extent that a right to a physical hearing in arbitration is not mandatory or does not exist in your jurisdiction, could the arbitral tribunal decide to hold a remote hearing even if the parties had agreed to a physical hearing? What would be the legal consequences of such an order?*

Short answer: No.

If both parties agree to hold a physical hearing, but the tribunal decides to hold a remote hearing, of course depending on the circumstances of a case (e.g., applicable arbitration rules, applicable procedural rules established by the tribunal, the reasons for a remote hearing), the arbitral tribunal’s order to that effect will most likely not be binding on the parties because it is contrary to their explicit agreement to hold physical hearings. There is no procedure for invalidation of the tribunals’ orders in state courts, but the award may be subject to a challenge on the ground that “the arbitral procedure was not in accordance with the agreement of the parties” under Article 34.2(1) of ICAL RF.

**d. Setting Aside Proceedings**

7. *If a party fails to raise a breach of the abovementioned right to a physical hearing during the arbitral proceeding, does that failure prevent that party from using it as a ground for challenging the award in your jurisdiction?*

Short answer: Yes.

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Article 4 of the ICAL RF and Article 4 of the AL RF require a party to an arbitration seated in Russia to raise its objections about any violations of the dispositive provisions of the Arbitration Law or any requirement of the arbitration agreement during the arbitration. Failure to raise such objections prevents a party from raising them at a later stage, including in the setting aside proceedings.<sup>9</sup>

Article 4 of both Russian laws is a replica of the UNCITRAL Model Law: “A party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefor, within such period of time, shall be deemed to have waived his right to object”.

Given the wording of Article 4, the party shall raise its objections in a clear manner and without “unnecessary delay”.

Since the statutes do not foresee a default right to a physical hearing, there may be such a right only by virtue of the parties’ agreement to hold one. Such an agreement can be stipulated in the arbitration clause itself, by reference to the arbitration rules, or by a separate agreement during the arbitration. Consequently, if the parties agreed to hold a physical hearing, yet in fact there was no physical hearing and a party did not raise its objections during the arbitration, that party waives its right to use such argument as a ground for challenging the award in Russia.

There are precedents when Russian courts have applied Article 4 of ICAL RF (for international commercial arbitral awards) or AL RF (for domestic arbitral awards). Although the cases related to challenges to the arbitrators’ jurisdiction,<sup>10</sup> and challenges of the arbitrators,<sup>11</sup> the courts effectively invoked Article 4 and declared that a party had waived its right to raise its objections in court because it had failed to raise them in an affirmative and timely manner during the arbitration proceedings. Therefore, it is likely that the courts will treat the parties’ failure to raise objections as to the lack of a physical hearing during the arbitration as a waiver to use this ground in the setting aside proceedings.

8. *To the extent that your jurisdiction recognizes a right to a physical hearing, does a breach thereof constitute per se a ground for setting aside (e.g., does it*

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<sup>9</sup> Art. 4 of the Arbitration Law of the Russian Federation. See also the commentary to Art. 4 of the Arbitration Law in Vladimir KHVALEI, ed., *Article-by-Article Commentary to the Russian Arbitration Laws* (RAA 2017).

<sup>10</sup> Resolution of the Presidium of the Supreme Arbitrazh (Commercial) Court of the Russian Federation N 207/04, Case No. A40-11425/03-30-89, dated 11 May 2005; Ruling of the Supreme Court of the Russian Federation No. 45-Г01-38, dated 21 January 2002.

<sup>11</sup> Resolution of the Presidium of the Supreme Arbitrazh (Commercial) Court of the Russian Federation No. BAC-15217/11, Case No. A40-27101/11-141-232, dated 12 December 2011; Ruling of the Supreme Court of the Russian Federation No. 5-Г01-48, dated 24 April 2001.

*constitute per se a violation of public policy or of the due process principle) or must the party prove that such breach has translated into a material violation of the public policy/due process principle, or has otherwise caused actual prejudice?*

Short answer: N/A

The jurisdiction does not recognize a right to a physical hearing (or even an oral hearing) as a default option.

9. *In case a right to a physical hearing in arbitration is not provided for in your jurisdiction, could the failure to conduct a physical hearing by the arbitral tribunal nevertheless constitute a basis for setting aside the award?*

Short answer: It depends on the parties' agreement.

Pursuant to Article 19(1) of the ICAL RF and the Article 19(1) of the AL RF, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. Therefore, if the parties agree that a physical hearing shall be held, and the arbitral tribunal fails to honour the parties' agreement, it may constitute a ground for annulling the arbitral award before the Russian courts. However, the court's decision on the annulment of the arbitral award will depend on the circumstances of the case and the wording of the parties' agreement.

If there is no agreement between the parties (whether it is stipulated in the arbitration clause or by reference to the arbitration rules), the arbitral tribunal may conduct the arbitration in such a manner it considers appropriate (see Article 19(2) of the ICAL RF and Article 19(2) of the AL RF), provided that it does not violate any provision of the law.

#### **e. Recognition/Enforcement**

10. *Would a breach of a right to a physical hearing (irrespective of whether the breach is assessed pursuant to the law of your jurisdiction or otherwise) constitute in your jurisdiction a ground for refusing recognition and enforcement of a foreign award under Articles V(1)(b) (right of the party to present its case), V(1)(d) (irregularity in the procedure) and/or V(2)(b) (violation of public policy of the country where enforcement is sought) of the New York Convention?*

Short answer: Most likely yes, if the parties agreed to a physical hearing.

As a starting point, the law does not enshrine the right to a physical hearing. Consequently, the right to a physical hearing arises only if the parties specifically agreed to hold a physical hearing (by virtue of the *lex arbitri*, arbitration rules or the parties'



agreement prior or during the arbitration). If the tribunal fails to organize a physical hearing, it will most likely be deemed to be in violation of the parties' agreement.

In order to assess how the court will qualify such a procedural violation, i.e., would it fall under Article V(1)(b) of the New York Convention (inability to present its "explanations"), Article V(1)(d) of the Convention (the arbitral procedure was not in accordance with the agreement of the parties) or Article V(2)(b) (violation of public policy), we propose a brief review of the application of each of those Articles by the Russian courts.

*Application of Article V(1)(b) of the NYC.* The Russian text of Article V(1)(b), worded as "was unable to present its explanations", is different from the English text, which uses the phrase "unable to present his case".<sup>12</sup> Russian case law has not articulated a legal position on the content and scope of the right of the party to present its explanations. In our view, the right to present explanations in the Russian context shall be read as a broader right to present the case in general. Therefore, the right of the party to present its case goes beyond just the evidentiary hearings and shall be understood as an overall possibility to present its case, starting from the commencement of the arbitration and until the award is made. Such right can be utilized through the parties' written submissions, presentation of documentary evidence, witness statements, expert reports, oral hearings, and other legitimate means.

The award debtors most frequently invoke this Article V(1)(b) to resist the recognition and enforcement of foreign arbitral awards in Russia. According to the Study on the Application of the New York Convention in Russia between 2008-2019 held by the Russian Arbitration Association ("RAA"), Article V(1)(b) was invoked in 50 out of 590 cases related to the recognition and enforcement of foreign arbitral awards (representing approximately 8,5% of all cases under the New York Convention during that period).<sup>13</sup> This is the second most frequently invoked ground under the New York Convention, following Article V(2)(b) (violation of public policy), which has been invoked 73 times. At the same time, in the last few years, Russian courts have tended to limit the use of Article V(1)(b).

If the parties had specifically agreed to hold a physical hearing, but the arbitral tribunal decided otherwise, it may be a ground for refusing to recognize and enforce a foreign arbitral award. However, the award debtor will have to prove that it was unable to properly present its explanations due to the tribunal's refusal to hold a physical hearing. The court will examine the right to a physical hearing according to the law applicable to the arbitration (*lex arbitri*) and will analyze whether such breach had

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<sup>12</sup> Roman ZYKOV, ed., "Commentary to Article V(1)(b)" in *Recognition and Enforcement of Foreign Arbitral Awards in Russia and Former USSR States* (RAA 2019) pp.111-126.

<sup>13</sup> RAA, "The RAA Study on the Application of the New York Convention in Russia during 2008-2017" (2018) at <[https://mansors.com/upload/medialibrary/bcd/RAA-STUDY-RECOGNITION-ENFORCEMENT-AWARDS-NY-CONVENTION-2018\\_eng.pdf](https://mansors.com/upload/medialibrary/bcd/RAA-STUDY-RECOGNITION-ENFORCEMENT-AWARDS-NY-CONVENTION-2018_eng.pdf)> (last accessed 22 January 2021).

caused actual prejudice based on the evidence and even the explanations of the arbitral tribunal. The burden of proof that the requirements of Article V(1)(b) are present is with the party against which the recognition and enforcement of the foreign arbitral award is sought.

*Application of Article V(1)(d) of the NYC.* Pursuant to Article V(1)(d), the recognition and enforcement of a foreign arbitral award may be refused if the party proves that the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.

This Article applies if the courts find that procedural violations were material, such as the wrong number of arbitrators, incorrect composition of the arbitral tribunal, the use of a language in the arbitration not agreed by the parties, the place of arbitration and other procedural violations of the parties' agreement.

Minor derogations from the agreed procedure, generally speaking, should not lead to the refusal to recognize an arbitral award under Article V(1)(d). Minor derogations, which include derogation from the agreed method of composition of the tribunal (e.g., if the parties agreed to appoint the chairperson, but it was done by an arbitral institution instead), minor delays in making an arbitral award, acceptance of late evidence, application of a wrong version of the arbitration rules (if it does not lead to material violations), denial of an oral hearing, if an oral hearing is provided for under the procedural rules agreed upon by the parties, will not lead to the refusal to recognize and enforce a foreign award provided that they did not lead to a material breach of a party's rights or did not fundamentally affect the outcome of the case.<sup>14</sup>

There have been only a few cases in which Article V(1)(d) of the Convention was applied in Russia. In 590 cases between 2008 and 2019, Article V(1)(d) was invoked only nine times and, in most cases, the court dismissed the challenges based on this ground. As a matter of fact, Article V(1)(d) is most often used in conjunction with Article V(1)(b) (lack of notification / inability to present a case), Article V(1)(c) (excess of the arbitrators' mandate) and Article V(2)(b) (public policy).

*Application of Article V(2)(b) of the NYC.* According to the Guidelines issued by the Russian supreme judicial instances (e.g., Information Letter No. 156 of the Supreme Arbitrazh Court) public policy "is extraordinary" and shall apply only "in exceptional cases".<sup>15</sup> Russian courts regularly declare that "violation of public policy" shall be applied restrictively, even though public policy has been invoked in approximately 12% of the cases in the past 12 years (it was invoked in 73 cases out of 590 cases between 2008-2019).<sup>16</sup>

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<sup>14</sup> R. ZYKOV, ed., "Commentary to Article V(1)(d)" in *Recognition and Enforcement*, fn. 12 above, pp. 138-148.

<sup>15</sup> Information Letter No. 156 of the Presidium of the Supreme Arbitrazh Court of the Russian Federation. Summary of Arbitrazh Courts' Rulings in Cases for Application of Public Policy as the Ground to Deny Recognition and Enforcement of Foreign Judgments and Awards, 26 February 2013.

<sup>16</sup> RAA, "The RAA Study", fn. 13 above.

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The court will examine the right to a physical hearing according to the law applicable to the arbitration (*lex arbitri*) and will analyze whether such breach has caused actual prejudice based on the evidence and even explanations of the arbitral tribunal.<sup>17</sup>

However, given that Russian state courts are permitted by law to hold court sittings by videoconferencing, and consequently are familiar with videoconferencing and have a high degree of IT literacy, a plea of violation of public policy because of the lack of a physical hearing in arbitration is unlikely to find sympathy with a Russian judge.

### f. COVID-Specific Initiatives

11. *To the extent not otherwise addressed above, how has your jurisdiction addressed the challenges presented to holding physical hearings during the COVID pandemic? Are there any interesting initiatives or innovations in the legal order that stand out?*

Short answer: Yes.

The arbitration rules of some of the Russian arbitration institutions provide for the possibility to organize virtual hearings. Others do not explicitly mention virtual hearings, but do not preclude the parties and tribunals from having them.

There have been a plethora of articles and webinars on this issue and the general view is that although virtual hearings are not the same as the physical hearings, in the present circumstances it is the way forward.

Russian state courts had had virtual hearings for over a decade, already before the COVID-19 pandemic. During that time, virtual court hearings were organized via special hearing rooms in the courts of various Russian regions, so the parties could take part in the hearings that were taking place in another region without the need to travel across thousands of kilometers and across several time zones. In view of the pandemic, when the courts were unable to hear cases physically, Russian courts were quite receptive to the idea of using the out of court video platforms, to allow access to the hearing rooms in more hearings. It is known that the courts have used Skype, Zoom and even WhatsApp. Already in April 2019 the Chairman of the Council of Judges had informed the judges they were authorized to use any video platforms they deemed appropriate, provided that it will be possible to identify the persons taking part in the proceedings.

On 21 April 2020, the Supreme Court of the Russian Federation held a court hearing of a civil case via WhatsApp.

A working group in the Parliament also proposed a draft law amending and supplementing procedural laws to enable the wider use of virtual hearings by the Russian courts, to make justice more accessible.

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<sup>17</sup> R. ZYKOV, ed., “Commentary to Article V(2)(b)” in *Recognition and Enforcement*, fn. 12 above, pp.177-199.

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Furthermore, under the Parliamentary proposal, the use of videoconferencing will also encompass criminal proceedings (examination of witnesses, etc.).