Memorandum - CONFIDENTIAL - DRAFT

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| To | |  | | --- | | [AAA] | | Date | [] |
| Copy To | |  | | --- | | [BBB] | | File Ref | [] |
| From | [CCC] | Direct Dial | [] |

*Confidential & Privileged*

**Provisions of Russian law applicable to promissory notes**

1. introduction
   1. You have asked us to analyse a number of questions raised in the memorandum from the [BBB] law firm ("**[BBB] Memorandum**"). The questions relate to the issuance, acquisition and transfer of promissory notes under Russian law.
   2. We understand that our opinion is sought for the purposes of the proceedings before the Dutch District Court brought by [DDD] ("**D**") under [] promissory notes ("**Promissory Notes**") allegedly issued by [EEE] ("**E**"). In these proceedings [FFF] ("**F**") enjoys the rights of defendant.
2. Background
   1. E is purported to have issued the Promissory Notes to [GGG] ("**G**") and [HHH] ("**H**") in [*year*], to a total value of RUB [].
   2. Article [] of E’s charter[[1]](#footnote-1) reads: "*Any transaction with property or monetary funds of the Company (including transactions resulting in the encumbrance or possible alienation of property) that is binding on the company shall be entered into by the President or a person authorised by the President and acting under an appropriate power of attorney only together with the Financial Director or a person authorised by the Financial Director and acting under an appropriate power of attorney, through the procedure set down in this Charter and the Regulations of the Company that set down the procedure for entering into such transactions and have been approved in accordance with the Charter.*"
   3. The Promissory Notes were signed by Mr. L allegedly on behalf of E. We have been provided with a copy of his power of attorney No. [] dated [*date*] that was issued on behalf of E by the president of [] (the management company of E). Under this power of attorney Mr. L was empowered, in particular, to sign promissory notes. We have also been provided with a copy of a power of attorney dated [*date*] that was issued by Mr. M, the financial director of E ("**Powers of Attorney**"). According to the copy of the power of attorney issued by Mr. M the original of the power of attorney was certified by a notary. Under this power of attorney Mr. L was empowered to fulfil Mr. M’s duties as the financial director of E and, in particular, to sign promissory notes together with E’s President (or his proxy).
   4. The Promissory Notes contain blank endorsements and were transferred within E’s group and, supposedly, ultimately purchased by D from [III] ("**I**") and [JJJ] ("**J**") under agreements dated [*date*] and [*date*]. I and J are companies alleged to be affiliated with E.
   5. On [*date*], E issued a press-release. E announced that in the autumn of [*year*], a company that was not a member of the E’s group presented a promissory note for payment that had initially been issued to G. According to E’s corporate regulations, such a promissory note could only be negotiated within E’s group. After it was presented E initiated an internal investigation and found that certain unidentified promissory notes initially issued to G might have been stolen by G’s management[[2]](#footnote-2). It is unclear whether the Promissory Notes were among the promissory notes that had allegedly been stolen.
   6. On [*date*], E was declared bankrupt and receivership proceedings were commenced.
   7. On [*date*], D filed an application with the Arbitrazh Court of the City of Moscow (i.e. the court that was considering E’s bankruptcy case). D asked the court to include its claims under the Promissory Notes in the register of E’s creditors. The originals of the Promissory Notes were appended to D’s application.
   8. On [*date*], the Arbitrazh Court of the City of Moscow denied D’s application.
   9. On [*date*], the ruling by the Arbitrazh Court of the City of Moscow was upheld by a decree of the 9th Arbitrazh Appellate Court.
   10. The courts denied D’s application because D had failed to prove that:

* it was the lawful holder of the Promissory Notes;
* E had duly issued the Promissory Notes and, therefore, E was obligated under the Promissory Notes[[3]](#footnote-3).
  1. The receivership proceedings for E were completed on [*date*].
  2. On [*date*], D filed a motion with the Arbitrazh Court of the City of Moscow seeking the return of the originals of the Promissory Notes via post.
  3. On [*date*], the Arbitrazh Court of the City of Moscow denied the motion on procedural grounds. On [*date*], the ruling by the Arbitrazh Court of the City of Moscow was upheld by the appellate court.
  4. Some time later, D filed a second motion with the Arbitrazh Court of the City of Moscow seeking the return of the originals of the Promissory Notes to Mr. S, D’s representative.
  5. The Arbitrazh Court of the City of Moscow denied D’s second motion on [*date*]. On [*date*], the appellate court annulled this ruling and remanded the case for rehearing. On [*date*], the Arbitrazh Court of the City of Moscow denied D’s second motion again[[4]](#footnote-4).
  6. On [*date*], D filed a third motion with the Arbitrazh Court of the City of Moscow seeking the return of the originals of the Promissory Notes. On [*date*] the Arbitrazh Court of the City of Moscow denied D’s third motion stating, *inter alia*, that D had not proven its title to the Promissory Notes. The ruling of the Arbitrazh Court of the City of Moscow was upheld by the 9th Arbitrazh Appellate Court[[5]](#footnote-5) and the Supreme Arbitrazh Court of the Russian Federation ("**SAC**")[[6]](#footnote-6).
  7. We understand that, at this point, the originals of the Promissory Notes are in E’s bankruptcy case files.

1. Assumptions and caveats
   1. This description of events surrounding the issuance, transfer and presentation for payment of the Promissory Notes is based on information received from [AAA], [BBB], Mr. AS and the court acts rendered in the course of the E bankruptcy proceedings (case No. []) and related cases.
   2. We have also reviewed E’s charter, which was approved on [*date*] (a copy obtained from the [] database), and the press-release, which was published on E’s website on [*date*] (the website is no longer functioning so we accessed the press-release using the [] internet archive).
   3. Unless stated otherwise, we refer to the versions of laws that were effective at the point in time in question.
   4. The conclusions below constitute our opinion based on our analysis of law, court practice and jurisprudence and our experience. We cannot guarantee that other persons, state authorities and/or institutions, including the courts, will reach the same conclusions.
2. CONCLUSIONS
   1. We believe that the following conclusions can be drawn:

*Regarding invalidity of the transfer of the Promissory Notes*

Article 169 of the Russian Federation Civil Code ("**RCC**") provides that transactions made for a purpose contrary to the fundamental principles of the legal order or morality are void. We believe it unlikely that Article 169 of the RCC applies to a transaction that is part of a tax evasion. However, an argument can be made that it applies to transactions forming part of a money laundering scheme.

It could also be argued that E (as the debtor under the Promissory Notes) may be released from the payment to D if it proves that D, when it acquired the Promissory Notes, had known or should have known that E’s sale of the Promissory Notes to H/G or any agreements by which the Promissory Notes were sold on ("**Transactions**") were invalid under Article 169 of the RCC.

As a matter of Russian law, in case of invalidity of a transaction under Article 169 of the RCC, the parties to the transaction may be required to return everything received under the transaction to the revenue of the Russian Federation. It is a matter of Dutch procedural law and practice whether the Dutch court will apply such consequences in this case.

Under Article 170(1) of the RCC, a transaction that is entered into without an intention to create legal consequences is invalid as a mock transaction. We believe it might be argued that some or all the Transactions are invalid because the money that was paid to E for the Promissory Notes was, the Russian courts established, in fact E’s money (and, therefore, the transactions with the Promissory Notes were not actually genuine transactions aimed at the sale of the Promissory Notes).

E might be released from payment under the Promissory Notes if it proves that D knew or should have known, at the time D acquired the Promissory Notes, that some or all of the Transactions were invalid.

Under Article 170(2) of the RCC, a transaction that is entered into for the purpose of hiding another transaction is invalid as a sham transaction. The court will not apply the terms of a sham transaction but will proceed on the basis of what the parties to the sham transaction actually had in mind. The Transactions were allegedly entered into to hide other transactions that were intended to avoid taxes/launder money.

Under Article 168 of the RCC, a transaction that is entered into in violation of the law is invalid. Given that tax evasion and money laundering are prohibited by Russian law, it may be argued that transactions intended to avoid taxes/launder money are invalid.

In view of the above points, we believe that it could be argued that the Transactions are invalid under Articles 170(2) and 168 of the RCC.

E might be released from payment under the Promissory Notes if it proves that D knew or should have known, at the time D acquired the Promissory Notes, that some or all of the Transactions were invalid.

We believe that there is a good argument that the Russian rules on limitation periods will not prevent F from making a defence based on the invalidity of one or several Transactions under Articles 168, 169 and 170 of the RCC (see paragraphs 4.1 (2)-(3) above).

*Regarding the original of the Promissory Notes*

Russian law provides that the party demanding payment under promissory notes must hold the originals of the promissory notes and must present them to the debtor and, in the event of non-payment, to the court that considers the holder's claim against the debtor.

According to certain judgments, when an original is confiscated, e.g. by the investigative authorities, the holder of the promissory note may pursue a claim under it on the basis of a notarised copy or a copy authorised by the authority in question. However, there is also court practice according to which a claim under a copy of a promissory note cannot be upheld.

When an original is lost or destroyed, the rights under the lost or destroyed promissory note may be reinstated by a court. The process by which rights to a lost promissory note are reinstated is governed by Russian procedural law. It is a matter of Dutch law whether this procedure may be applied by Dutch courts.

*Regarding the power of attorney*

A promissory note issued by a company must be signed by a person authorised either by the company's charter (i.e. the president) or a power of attorney. If a promissory note is signed by an unauthorised person or a person acting *ultra vires* under a power of attorney the person will be personally obligated under the promissory note, unless the issuance of the promissory note is subsequently approved by the issuer.

There might be an argument that Mr. L was not duly authorised to sign the Promissory Notes. This is because Articles [•], [•] and [•] of E’s charter can be interpreted as providing that a binding obligation can only be undertaken on behalf of E by two authorised signatories. This is supported by the Russian court judgments in the D case.

The defendant may dispute in a Russian court the existence of the original power of attorney, under which a promissory note was signed, or the authenticity of the copy of the power of attorney provided by the claimant. If the defendant proves that it has reasonable grounds to dispute such existence or authenticity and the claimant fails to prove that the original did, indeed, exist (in particular, where the claimant fails to present the original to the court) the claim made under the promissory note may be denied. The process of assessing evidence is governed by Russian procedural law. We believe the question of whether, in a comparable situation, a Dutch court would uphold or deny the claim would depend upon Dutch procedural law.

*Presentation of the Promissory Notes for payment*

Some of the Promissory Notes should have been presented for payment in [*city*]. The consequence of a promissory note's not being presented for payment or being incorrectly presented for payment (e.g., after the time limit stated in the promissory note or if the promissory note is not presented for payment or is presented in the wrong place) is that the holder of the promissory note loses its rights of recourse against the endorsers, and the other obligated parties, with the exception of the issuer. Another consequence is that the interest and penalties for non-payment in Articles 48 and 49 of the Provisions[[7]](#footnote-7) would not accrue/be charged if the promissory note is not presented for payment or is incorrectly presented for payment (this rule does not apply to the interest stated in the Promissory Notes themselves). Under Articles 43 and 44 of the Provisions, there is no requirement to present a promissory note for payment if the issuer is declared bankrupt and the holder may apply to court even before the promissory note's maturity date. E was declared bankrupt on [*date*] and, after that, D filed a claim with the court to have its claims under the Promissory Notes included in the register of E’s creditors. From the standpoint of Russian law, D’s actions complied with the rules on place and time of presentation. However, we understand that the judgment declaring E bankrupt has not been recognised in the Netherlands. We cannot offer an opinion as to whether the lack of recognition will mean that the Dutch court will disregard all action taken by D in the course of the Russian proceedings; this will depend upon Dutch law.

1. ANALYSIS
   1. Does Russian law provide for (general and/or specific) rules that would render legal transactions null, void or otherwise unenforceable if these are part of a greater illegal scheme aimed at the evasion of tax and/or designed to launder money?
      1. Article 169 of the RCC
   2. In paragraph 2.1 of the [BBB] Memorandum there is a reference to Article 3:40(1) of the Dutch Civil Code, which, arguably, may be applicable under Dutch law to transactions aimed at tax evasion or money laundering.
   3. There is a similar article in the RCC (Article 169) (although it applies in a different way), which reads as follows:

"*A transaction made knowingly for a purpose contrary to the fundamental principles of the legal order or morality is void.*

*When both parties to such a transaction have intent – in the event that both parties have performed the transaction– everything received by them under the transaction will be recovered to the revenue of the Russian Federation, and, if one party has performed the transaction, everything it has received from the other party and all consideration due from it to the first party shall be recovered for the revenue of the Russian Federation.*"

* 1. Prior to 2008, according to court practice, transactions aimed at tax evasion were considered void under Article 169 of the RCC[[8]](#footnote-8).
  2. However, on 10 April 2008, the Plenum of the SAC clarified the issue in Decree No. 22[[9]](#footnote-9), which gave examples of transactions to which Article 169 of the RCC could be applied. That list did not include transactions carried out to evade tax or launder money and Decree No. 22 marked the end of the practice of applying Article 169 of the RCC to transactions involved in tax evasion.
  3. In 2015, the Plenum of the Supreme Court of the Russian Federation ("**SC**") stated that the fact that the law has been broken, specifically, that taxes have been evaded does not in and of itself mean that the transaction in question was conducted in the knowledge that it was contrary to the fundamental principles of the legal order or morality[[10]](#footnote-10). Therefore, we believe that the clarification given by the SAC and SC would make it very difficult to apply Article 169 of the RCC to a transaction that is part of a tax evasion scheme. Transactions aimed at money laundering (i.e. transactions with respect to the proceeds of crime) are not specifically mentioned in the above decisions of the SAC and SC and we believe that an argument can be made that such transactions can be declared invalid under Article 169 of the RCC[[11]](#footnote-11).
  4. Under Article 169 of the RCC, the consequences of invalidity of a transaction are that, in case both parties entered into such a transaction knowingly for a purpose contrary to the fundamental principles of the legal order or morality, everything received by them under the transaction will be recovered to the revenue of the Russian Federation. In this case, if E received money in return for issuing the Promissory Notes (and our understanding is that it did receive the money when it sold the Promissory Notes to G and H), the application of consequences of invalidity provided in Article 169 of the RCC could result in E’s being obliged to pay the money to Russia.
  5. Such consequences, however, do not take place automatically: either a party to the transaction must make a respective application (and in this case the statute of limitations with respect to such application has most likely expired), or the court considering the case decides to apply such consequences upon its own initiative. Had this case been heard by a Russian court, we cannot exclude that the court would have decided to apply these consequences. This may not necessarily be the case with the Dutch court, although this is of course a matter of Dutch procedural law and practice.
  6. We note that the Russian rules on limitation periods should not apply to F’s objections based on the invalidity of the Transactions: a void transaction is deemed to be invalid irrespective of whether there is a judgment declaring it so. Therefore, F does not need to counterclaim that the Transactions were invalid. F’s objections would not be time barred. This conclusion is supported by court practice[[12]](#footnote-12).
  7. If F succeeds in proving that at least one of the Transactions is invalid under Article 169 of the RCC, and that D was aware of the grounds of invalidity at the time when it purchased the Promissory Notes, it will be able to argue that E shall be released from an obligation to pay under the Promissory Notes. This is for the following reasons.
  8. Article 17 of the Provisions[[13]](#footnote-13) reads as follows:

"*Persons sued on a bill of exchange*[[14]](#footnote-14) *cannot set up against the holder defences founded on their personal relations with the drawer or with previous holders, unless the holder, in acquiring the bill, has knowingly acted to the detriment of the debtor*".

* 1. Article 17 was clarified by the SAC and SC in a joint decree – No. 33/14 dated 4 December 2000[[15]](#footnote-15).
  2. Paragraph 15 of the Joint Decree No. 33/14 reads as follows:

"*If a claim for payment on a note is filed, the person liable under the note will have no right to refuse to honour it on the basis that there are no grounds for liability or that it is invalid, except in the cases defined by Article 17 of the Provisions.*

*Proceeding from Article 17 of the Provisions, the person against whom the claim is made under the note will be entitled to make objections that flow from his personal relations with the lawful bill holder who has brought the action.*

*The debtor will be entitled to refer to his personal relations with other persons, including previous note holders,* ***only when the note holder acquired the bill in the knowledge that he was acting to the debtor's detriment, that is, he knew that there were no legal grounds for the issue (transfer) of the note before or at the time of its acquisition.***

*These circumstances attesting to the bill-holder's bad faith are to be proved by the person against whom the claim is presented.*

***The person liable under the note will be released from payment if he proves that the creditor who has filed the claim knew or should have known when he acquired the note that it was invalid or that there was no obligation to form a basis for the issue (transfer) of the note or that he was acquiring the note as a result of deception or theft or that he had taken part in deception with respect to the note or in its theft, or that he knew or should have known of these circumstances before or at the time he acquired the note.***

*Any application of Article 17 of the Provisions must proceed on the basis that "personal relations" between the person against whom a claim is made under the bill and the other parties involved in dealings with the bill means all of his relations with them based on legal facts reference to which or refutation of which would force them to substantiate their claim other than by reference to the procedure envisaged by Article 16 of the Provisions.*

*Personal relations include relations involved in a transaction between specific parties or deceitful conduct on the part of the note-holder aimed at obtaining the signature of the obligor, and other relations that were known to the persons between whom the dispute concerning performance under the note has arisen.*"

* 1. Paragraph 13 of the Joint Decree No. 33/14 reads as follows:

"*The court may deem the transactions on the basis of which the note was issued or transferred invalid in the cases stipulated by the Code.* ***The court's invalidation of these transactions will not render the note invalid as a security and will not break the chain of endorsements.*** *The invalidation will result in application of the general consequences of a deal's invalidity directly among its parties (Article 167 of the Code).*"

* 1. We have also found cases that illustrate the defendant's burden of proof under Article 17 of the Provisions[[16]](#footnote-16).
  2. Therefore, to be released from payment under the Promissory Notes, E/F must prove that, before or when purchasing the Promissory Notes, D knew or should have known about the grounds of invalidity of at least one of the Transactions under Article 169 of the RCC.
     1. Article 170 of the RCC
  3. Article 170 of the RCC reads as follows:

*"1. A mock transaction, i.e. a transaction made only for appearances without an intent to create the legal consequences corresponding to it, is void.*

*2. A sham transaction, i.e. a transaction that is made for the purpose of covering another transaction is void. The rules relating to the transaction that the parties actually had in mind will be applied, taking into account the nature of the case*."

* + - 1. Mock transactions
  1. The judgment of the Arbitrazh Court of the City of Moscow dated [*date*] (case No. []) ("**Judgment**") established that E issued promissory notes[[17]](#footnote-17) in the context of a tax evasion scheme: proceeds from the sale of oil by E were transferred to E’s subsidiaries and, when E needed funds (for example, when E needed funds to purchase shares in Sibneft), the proceeds were transferred back to E under promissory notes; in fact the proceeds always belonged to and were controlled by E[[18]](#footnote-18).
  2. Based on the facts established in the Judgment and on the assumption that the Promissory Notes were issued and transferred for the same or similar purposes as the promissory notes which are dealt with in the Judgment, we believe that the Transactions may be regarded as mock (and, thus, void). In particular, neither E nor G/H intended to create legal consequences that corresponded to the Initial Sale Transaction: in fact, the Promissory Notes were always purchased by G/H using E’s funds.
  3. Please note that, in 2005, the SAC ruled in relation to a specific case that a transaction cannot be declared mock if it has been performed[[19]](#footnote-19). In 2015 the SC issued clarification to the effect that a transaction may be declared mock even if it has been performed, provided that the performance was only formal (e.g. an entity enters into a sale-purchase agreement but remains in control of the assets sold)[[20]](#footnote-20). We believe that the SC's position may be applicable here: given that E never lost control over the funds transferred to its subsidiaries, the Transactions may be regarded as mock a transaction.
  4. The general consequences of invalidity of a void transaction (which also apply to invalidity pursuant to Article 170 (1) of the RCC) are set out in Article 167 of the RCC and provide that each party shall return to the other party everything received under the transaction. In this case this would mean that, if the consequences of invalidity were applied, E would have to return the money it received in return for the Promissory Notes, to H/G and H/G would have to return the Promissory Notes to E.
  5. However, same as with the consequences of invalidity of a transaction under Article 169 of the RCC (see paragraph 5.7 above), these consequences can be applied either upon application of a party to the transaction (and the statute of limitations for such an application has most likely expired), or upon the court's own initiative. Had this case been heard by a Russian court, we cannot exclude that the court would have decided to apply these consequences. This may not necessarily be the case with the Dutch court, although this is of course a matter of Dutch procedural law and practice. Also, it could be argued on the basis of the conclusions in the Judgment, that E should not return the money to H/G because the money was effectively owned by E.
  6. F will be able to argue that E shall be released from an obligation to pay under the Promissory Notes in the same way as in case of invalidity of one of the Transactions pursuant to Article 169 of the RCC (please see paragraphs 5.9 – 5.15 above).
     + 1. Sham transactions
  7. Alternatively/in addition to the above, we believe that the Transactions, if made to conceal the legalisation of proceeds of crime and/or tax evasion, might be regarded as sham transactions (Article 170(2) of the RCC).
  8. If so, the court will look at the actions that the parties actually had in mind. The law expressly prohibits the legalisation of proceeds of crime and tax evasion[[21]](#footnote-21), so the court should not order the money to be repaid to D. This approach has been confirmed by the Russian courts in a dispute amongst [OOO], [KKK] and [NNN] ([OOO] brought a claim against [KKK] and [NNN] to have loan agreements between [KKK] and [NNN] declared invalid[[22]](#footnote-22)). Although, please note, we have not found other court cases supporting this conclusion. We believe that Article 168 of the RCC (which provides that a transaction which does not comply with the requirements of law is void, unless the law provides that it is voidable) could be referred to in addition.
  9. With respect to the consequences of invalidity and the effect of invalidity on E’s obligation to pay please be referred to paragraphs 5.20 – 5.22 above).
  10. Would such rules apply to loan agreements?
  11. Articles 168, 169 and 170 of the RCC would apply to loan agreements between E and [NNN]. The consequences of the invalidity of the loan agreements under Articles 168, 169 and 170 of the RCC would be same to the consequences described in paragraphs 5.6 and 5.20-5.21 above.
  12. Is it required that the party demanding payment under promissory notes is the holder of the original promissory notes?
      1. Does Russian law require a party that claims payment based on a promissory note to be in possession of the original promissory notes?
  13. Article 142 of the RCC reads as follows:

"*A security is a document meeting certain statutory requirements that certifies rights under obligations undertaken and other rights that can only be exercised or transferred if the document (certified security)* ***is presented.***"

* 1. In addition to this, the Provisions incorporate Articles 38 and 39 of the Uniform Law, which are referred to in the [BBB] Memorandum.
  2. Article 142 of the RCC was further clarified in paragraph 6 of Joint Decree No. 33/14:

"*6. When considering claims to have a note honoured, the courts shall take into account that the claimant is obligated to submit to the court* ***the original*** *document on which he bases his claim, because a right certified by a security can only be exercised if it is presented (Item* *1 of* *Article 142 of the Code)*.

*A document must be treated as original if it bears the handwritten signature of the person that drew it up or was undertaking the obligation.*

*At the same time, the claimant's not possessing the bill cannot serve as a stand-alone ground for rejecting the claim if the court establishes that the bill was handed over to the defendant for the purposes of payment but the claimant did not receive payment. In this case the claimant has an obligation to prove those facts (Item* *2 of* *Article 408 of the Code).*"

* 1. Therefore, Russian law provides that the party demanding payment under promissory notes must hold the original promissory notes. It must present the originals of the promissory notes to the debtor and, if payment is not forthcoming, to the court. The exception to this rule is described in paragraph 6 of Joint Decree No. 33/14 (see above); we understand that it does not apply in the present case.
  2. If the holder of a promissory note does not present the original to the court, its claim under the note may be dismissed[[23]](#footnote-23).
  3. Please note that there is court practice according to which the original promissory note need not be submitted to the court when the note had been confiscated by third parties (e.g. law enforcement authorities). In that situation, the holder of the promissory note was allowed to plead its claims on the basis of a notarised copy or a copy authorised by the law enforcement authorities[[24]](#footnote-24). However, we have also found at least two cases in which the Russian courts stated that a claim under a copy of a promissory note cannot be upheld[[25]](#footnote-25).
  4. As we understand it, D initially presented the originals of the Promissory Notes to the Russian court within the framework of E’s bankruptcy. Therefore, D complied with the requirements of Russian law. However, D has failed to get the originals of the Promissory Notes back from the Arbitrazh Court of the City of Moscow and has brought the claim in the Dutch Court on the basis of unauthorised copies of the Promissory Notes. We also understand that D has not filed an application to have the confiscated Promissory Notes declared invalid and restore title over the Promissory Notes (see paragraphs 5.34-5.36 below).
     1. Does the Russian legal system provide for statutory rules or case law that regulate what happens if an original promissory note is lost or destroyed?
  5. Under Article 148 of the RCC, rights under lost registered securities are reinstated by a court in accordance with procedural legislation.
  6. The procedure for restoration of title over registered securities (including promissory notes) is set out in Chapter 34 of the Civil Procedure Code ("**CPC**")[[26]](#footnote-26). In summary, if the court reinstates rights under a lost promissory note, the drawer of the promissory note must issue a replacement promissory note. If the drawer refuses to issue a replacement promissory note and/or to honour the note, the note-holder can demand payment in court despite not having the original promissory note[[27]](#footnote-27).
  7. The reinstatement of rights under a lost promissory note is governed by Russian procedural law. It is a matter of Dutch law whether this procedure may be applied by Dutch courts.
     1. Does it matter whether the party that demands payment is the original holder or the subsequent holder to whom the promissory notes were indirectly transferred / is it relevant whether the holder is / was specifically mentioned on the promissory notes?
  8. As we have said in paragraphs 5.27-5.33 above, the holder of a promissory note (be it the original or a subsequent holder) must submit the original of the promissory note to the court. Therefore, we believe that the answer to both questions in this context is no.
  9. What are the formal requirements for issuing and acquiring promissory notes?
     1. Regarding the statement "*Promissory notes contain the signature of an unauthorized person*"
        1. Does Russian law require that promissory notes are signed by the issuer or someone authorised by the issuer?
  10. According to Article 75 of the Provisions, a promissory note must be signed by the drawer (issuer).
  11. Paragraph 4 of Joint Decree No. 33/14 clarifies that, if a promissory note is issued by a company, the promissory note should be signed by a person authorised to perform such transactions either by statute (i.e. the general director) or by a power of attorney.
      + 1. What are the legal consequences under Russian law if a promissory note was not properly signed on behalf of the issuer? Does such affect the validity of the note? Does it matter whether the party that demands payment is the original holder or the subsequent holder to whom the promissory notes were indirectly transferred?
  12. According to Articles 8 and 77 of the Provisions, Article 183(1) of the RCC[[28]](#footnote-28) and paragraph 13 of Joint Decree No. 33/14[[29]](#footnote-29), if a promissory note is signed by an unauthorised person acting as a representative or a person acting *ultra vires* under a power of attorney, that person becomes personally obligated under the promissory note, unless the issuance of the promissory note is subsequently approved by the issuer.
  13. We believe that it should not matter whether the party demanding payment is the original holder or a subsequent holder of the promissory note because the above issue relates to the identity of the debtor – the issuer of the promissory note.
  14. Leaving aside the question relating to the existence of originals of the Power of Attorneys (please see section (d)(i)(C) below), we believe that an argument could be made that Mr. L was not duly authorised to sign the Promissory Notes.
  15. It might be argued, in particular, that Articles [•], [•] and [•] of E’s charter imply that there must be two co-signatories for a transaction resulting in the alienation of E’s property:

Article [•] of E’s charter reads as follows: "*Any transaction involving property or monetary funds of the Company (including transactions resulting in the encumbrance or possible alienation of property) that is binding on the company shall be entered into by the President or a person authorised by the President and acting under an appropriate power of attorney only together with the Financial Director or a person authorised by the Financial Director and acting under an appropriate power of attorney, through the procedure set down in this Charter and the Regulations of the Company that set down the procedure for entering into such transactions and have been approved in accordance with the Charter.*"

Article [•] of E’s charter reads as follows: *The Company's Financial Director, in accordance with his competence, ... will, together with the Company's President, enter into transactions through the procedure set down by this Charter and the Transaction Regulation adopted in accordance herewith...*" Article [•] of E’s charter reads as follows: " *The Financial Director is empowered to sign, together with the Company's President, financial (banking, accounting) documents of the Company, in compliance with the provisions of article [•] and sub**section 2 of this article of the Charter.*"Article [•] of E’s charter reads as follows: "*In the event that the President and the Financial Director disagree as to whether individual transactions or business operations should be conducted, the Company's President may effect the transaction or business operation on his own and immediately inform the Company's Board of Directors of this.*"

Article [•] of E’s charter reads as follows: "*Transactions that give rise to obligations for the Company, including transactions for the acquisition, disposal or alienation of the Company's property, or transactions that make such alienation possible, or, equally, transactions to secure the Company's obligations, will, where the transaction is for more than the equivalent of USD* *1 (one) million, be concluded only by the Company's President and Financial Director (or persons issued with appropriate powers of attorney) acting together, in accordance with* *Articles [•] and [•] of the Charter and the Company's Transactions Regulation.*"

* 1. Therefore, although Mr. L was authorized to sign the Promissory Notes by both the President and the Financial Director of E, it may be argued (although we believe that it is not a particularly strong argument) that a single person (such as Mr. L) could not issue the Promissory Notes without a signature from E’s President or Financial Director or a person (other than Mr. L) authorised by either the President or the Financial Director.
  2. Please also note that D might have an argument that E subsequently approved the issuance of the Promissory Notes. Specifically, E did not object when E’s bank account was credited with the funds received from G and H; it is highly likely that E subsequently used the funds in its business operations – and the transfer of funds from a bank account usually requires the will of the company's chief executive office.
  3. If F succeeds in proving that Mr. L was not authorized to sign the Promissory Notes on behalf of E, the consequence would be that Mr. L, and not E, will be the person liable under the Promissory Notes. Objections regarding authority of Mr. L could likely be raised against D as a subsequent holder of the Promissory Note even if D had no knowledge of the 'two signature' clause in E’s charter.
     + 1. Under Russian law, should the party that demands payment under promissory notes submit the original power of attorney (or a validated copy thereof) when promissory notes are signed in the name of the company by someone other than the executive director?
  4. The assessment of evidence is governed by Russian procedural law so we believe that the question of whether, in a comparable situation, a Dutch court would uphold or deny the claim will depend upon Dutch procedural law.
  5. Under Russian procedural law, the question of whether the claimant (holder) must submit an original power of attorney or a copy is a procedural one and depends on the defendant's position. If the defendant (issuer or another debtor) does not dispute that the promissory note was signed by an authorised person or does not dispute the copy of the power of attorney provided by the claimant, the court may rely on the copy. The defendant may dispute in a Russian court the existence of the original power of attorney, under which a promissory note was signed, or the authenticity of the copy of the power of attorney provided by the claimant. If the defendant proves that it has reasonable grounds to dispute such existence or authenticity and the claimant fails to prove that the original did, indeed, exist (in particular, where the claimant fails to present the original to the court) the claim made under the promissory note may be denied
  6. We have found at least one case in which the Russian cassation court ruled that the holder of promissory notes must submit the original of the power of attorney under which the promissory notes were issued, especially when the authenticity of the power of attorney is disputed by the defendant (the issuer)[[30]](#footnote-30).
     + 1. Does it matter whether the party that demands payment is the original holder or the subsequent holder to whom the promissory notes were indirectly transferred?
  7. We believe it does not matter in this context whether the party demanding payment is the original holder or a subsequent holder to whom the promissory notes were indirectly transferred.
     1. Regarding the statement "*Contrary to the 'two signature clause' from the issuing company's charter, the Promissory Notes only contain one signature*"
        1. Does the Russian legal system provide for statutory rules or case law that regulates what happens if a promissory note is signed by one person on behalf of the issuing company, when, following the issuing company's charter / articles of association, two signatures are required?
  8. According to Article 174 of the RCC[[31]](#footnote-31), the authority of an executive body of a company (e.g. the president or the general director) to enter into a transaction may be limited in the company's charter. We believe that Russian law does not prohibit adopting limits upon the executive body's authority in the company's charter such as the 'two signatures clause' in Article [•] of E’s charter. However, we believe that Article 174 of the RCC is not applicable under the current circumstances.
  9. Article 174 of the RCC applies when a transaction is entered into by an executive body of a company in violation of the limitations set out in the company's charter or by a representative under a power of attorney in breach of the limitations set out in the contract between the representative and the represented. The Promissory Notes were signed by Mr. L, who was not an executive body of E. We are not aware of any contract between E and Mr. L containing the same or similar limitations as are set out in Article [•] of E’s charter. Therefore, as explained in section (d)(i)(B) above, Article 183 of the RCC will apply to the issue of authorisation of Mr. L.
     + 1. Under Russian law, could the company invoke the 'two signature clause' against a third party that had no knowledge of the clause? If not, would it make a difference that D, as a subsidiary of the E-group with the same director as the top entities knew or should have known about the 'two signature clause'?
  10. The SAC has clarified that Article 183(1) of the RCC applies irrespective of whether the other party to the transaction knows that it is dealing with an authorised person or a person acting *ultra vires*[[32]](#footnote-32).
      1. Regarding the statement "*Promissory notes are not acquired on a lawful basis*"
         1. Under Russian law, what are the requirements for the acquisition and transfer of promissory notes?
  11. If a promissory note is acquired under a sale-purchase agreement, the acquisition of the promissory note is regulated by that agreement and the provisions of the RCC governing sale-purchase agreements.
  12. Promissory notes may be transferred in two ways:

By endorsement (including blank endorsement);

By ordinary assignment.

* 1. Given that the Promissory Notes have a blank endorsement, we will not analyse here usual endorsement or assignment and will concentrate on blank endorsements.
  2. In this regard, Article 16 of the Provisions[[33]](#footnote-33) reads as follows:

*"16. The possessor of a bill of exchange is deemed to be the lawful holder if he establishes his title to the bill through an uninterrupted series of endorsements, even if the last endorsement is in blank. Cancelled endorsements are deemed not to be written. When an endorsement in blank is followed by another endorsement, the person who signed the last endorsement is deemed to have acquired the bill by the endorsement in blank.*

*Where a person has been dispossessed of a bill of exchange, in any manner whatsoever, the holder who establishes his right thereto in the manner mentioned in the preceding paragraph is not bound to give up the bill unless he has acquired it in bad faith, or unless in acquiring it he has been guilty of gross negligence.*"

* 1. Paragraph 9 of the Joint Decree No. 33/14 further clarifies this point:

"*…If the last endorsement is a blank one (that is, if it does not name the endorsee), the lawful note holder will be deemed to be the person in actual possession of the note: that person may exercise all rights under the note, including the right to demand payment…* ***The lawful note holder need not prove the existence or validity of his rights, they are presumed to exist and be valid.******The burden of proving the opposite lies with the note debtor****.*"

* 1. As noted in paragraph 2.4 above, the Promissory Notes had blank endorsements made either by H or G, therefore, neither a subsequent holder of the Promissory Notes nor J and I, as the holders from which D acquired the Promissory Notes, were required to endorse the Promissory Notes.
  2. Therefore, F will need to prove that D is not a lawful holder of the Promissory Notes.
     + 1. Under Russian law, does the circumstance that the promissory notes might have been stolen make a difference in what the party demanding payment has to prove with regard to the acquisition of the promissory notes?
  3. As noted in paragraph **Error! Reference source not found.** above, according to paragraph 15 of the Joint Decree No. 33/14, "*The person liable under the note will be released from payment if* ***he proves that the creditor who has filed the claim knew or should have known when he acquired the note*** *that it was invalid or that there was no obligation to form a basis for the issue (transfer) of the note or that he was acquiring the note as a result of deception or theft or that he had taken part in deception with respect to the note or in its theft, of that he knew or should have known of these circumstances* ***before or at the time he acquired the note****.*"
  4. Therefore, F would need to prove that D knew or should have known that the Promissory Notes were stolen by G’s management when D acquired them. We believe that this might be difficult to prove because E published its press-release concerning the theft of certain promissory notes by G’s management in [*year*] (i.e. almost two years after D acquired the Promissory Notes). Furthermore, it is unclear from the press-release whether the Promissory Notes were among the promissory notes that were allegedly stolen by G's management.
     + 1. Under Russian law, can a holder of a promissory note demand payment if it cannot be established that the holder acted in good faith?
  5. To be exempted from payment, the issuer of a promissory note must prove that the holder acted in bad faith. Paragraph 14 of Joint Decree No. 33/14 clarifies what can be regarded as bad faith:

"*14. It follows from Article 16(2) of the Provisions that, where a person has been dispossessed of a promissory note, in any manner whatsoever, the holder who establishes his right thereto in the manner mentioned in* *Article 16 of the Provisions (i.e. the lawful note-holder) is not bound to give up the note unless he has acquired it in bad faith, or unless in acquiring it he has been guilty of gross negligence.*

*Where the holder of a note has lost it in any manner whatsoever apart from at the applicant's free will the holder may bring an action to recover the bill.*

*A purchaser will be deemed not to be bona fide if he, before or at the time of the acquisition, knew that the owner or a person empowered to deal with the note had been dispossessed of the note other than at their own free will. The purchaser will be guilty of gross negligence when he, by virtue of the conditions under which the note was dealt with, should have known that the owner or person empowered to deal with the note had been dispossessed of the note other than at their own free will (and, in particular, if he acquired the note after the owner published in the press notice that the note had been lost or stolen and the purchaser of the note could not have been unaware of this fact according to the facts of the case).*

*The burden of proving the purchaser's bad faith or gross negligence lies with the person seeking to recover the note.*"

* 1. Taking into account that the Promissory Notes contain blank endorsements (which increases the risk of their being sold by an embezzler) and that the total debt under the Promissory Notes is RUB [•] (a significant sum), it might be argued that D, as a bona fide purchaser, should have checked that the seller was the lawful owner of the Promissory Notes (i.e. check all previous transactions that led to its holding them). Other factors that might be relevant to determining whether D was a bona fide purchaser include whether the Promissory Notes were sold to D at a discount and whether D paid for the Promissory Notes.
  2. What are the formal requirements related to the presentation of promissory notes?
     1. Regarding the statement "*Some Promissory Notes are not presented at the place of payment stipulated in the promissory notes*"
        1. Does the Russian legal system provide for statutory rules or case law that regulate what happens if a promissory note is presented for payment in another place than where it should have been presented?
  3. Paragraph 23 of Joint Decree No. 33/14 reads as follows:

"*23. The bill must be presented for payment at the place of payment stated in the bill or, if no place of payment has been expressly stated, then* ***at the place stated alongside to the name of the payer*** *(acceptor) of the bill of exchange (**Article 2 of the Provisions)* ***or at the place that the promissory note*** *was drawn up (**Article 76 of the Provisions).*

***The obligations under the bill of direct debtors - the bill holder of a promissory note and the acceptor of a bill of exchange – can only be properly performed if the bill is presented for payment at the proper place. The place of payment may be defined as a populated centre or specific address****.*

*A demand for payment that is presented at a place other than that shown in the bill under the above rules as the place of payment cannot be deemed to have been properly presented* […]

*If several places of payment are named in a single bill, it will be deemed defective in form and the defect in it may not be rectified under* *Article 2 or* *76 of the Provisions.*

*The direct debtor under the bill shall prove his objections that the bill holder has not presented him with the original bill or has not given him an opportunity to check at an appropriate place and within an appropriate period that the person who has presented the claim has the original of the bill and rights to it as holder. The bill holder may refute such objections by providing any proofs not prohibited by law (including by a notary's act protesting the bill or certifying presentation of the bill for payment, or a document issued by the debtor) (**Articles 49 and* *50 of the Civil Procedure Code of the RSFSR;* *Articles 52 and* *53 of the Arbitrazh Procedure Code of the Russian Federation).*

*A creditor who is unable to refute the objections of the direct debtor that the bill has not been properly presented for payment will be deemed to have exceeded the time limit. In this event the court will proceed on the basis of the rules in* *Article 406 of the Code. The court shall assess in the same way the parties' arguments and objections when the demand for payment of the bill has been made against the direct debtor for the first time by an action being brought in court.*

*If the creditor refuses to issue a receipt, to return the debt document (the bill) or to state in the receipt that it cannot be returned, the debtor may delay performance. In this event the creditor will be deemed to have exceeded the time limit (**Articles 406 and* *408 of the Code*)."

* 1. We understand that [*city*] is both the place that the Promissory Notes listed in paragraph 5.2 of the [BBB] Memorandum were drawn and the place stated alongside the name of the payer (E). Therefore, the Promissory Notes should have been presented for payment in [*city*].
  2. However, please note the following:

First, the consequence of a promissory note's not being presented for payment or being incorrectly presented for payment (e.g. after the time limit stated in the promissory note or in the wrong place or when it is not presented at all) is that the holder of the promissory note loses its rights of recourse against the endorsers and other parties liable, with the exception of the issuer[[34]](#footnote-34). In other words, the holder (D) is still entitled (within the limitation period for actions) to make a claim against the issuer (E).

Another consequence is that the interest and penalties for non-payment specified in Articles 48 and 49 of the Provisions will not accrue / be charged if the promissory note is not presented for payment or is presented for payment incorrectly. Please note that this rule does not apply to the interest stated in the Promissory Notes themselves[[35]](#footnote-35).

Second, according to Articles 43 and 44 of the Provisions, there is no requirement that a promissory note must be presented for payment if the issuer is declared bankrupt. The holder may apply to court even before the maturity date of the promissory note.

As you are aware, E was declared bankrupt on [*date*], after which D filed a claim with the court to have its claims under the Promissory Notes included in the register of E’s creditors. From the standpoint of Russian law, D’s actions complied with the rules on place of presentation.

* 1. However, as we understand it, the judgment by which E was declared bankrupt has not been recognised in the Netherlands. We cannot, therefore, offer an opinion as to whether this lack of recognition means that the Dutch court would also disregard all acts by D in course of the Russian proceedings – the consequences will depend on Dutch law.
     1. Regarding the statement "*A number of Promissory Notes is presented too late*"
        1. Under Russian law, what are the requirements with regard to the timely presentation of promissory notes?
  2. The analysis in paragraphs 5.5-5.10 of the [BBB] Memorandum is the same as for Russian law.
  3. The consequences of a promissory note's not being presented for payment on time are the same as those described in paragraph 5.67 of this memorandum.

\* \* \*

We would be glad to answer any further questions you may have.

1. We have reviewed the charter which was approved on [*date*]. [↑](#footnote-ref-1)
2. See [*URL*] [↑](#footnote-ref-2)
3. We understand that D did not submit the Powers of Attorney when D’s application was considered by the first instance court. D submitted unauthorised copies of the Powers of Attorney to the appellate court but the appellate court ruled them inadmissible. The courts found that the Promissory Notes had been signed by Mr. L alone in breach of Article [] of E’s charter. [↑](#footnote-ref-3)
4. We have not been able to determine whether the ruling of [*date*] was appealed. [↑](#footnote-ref-4)
5. Decree of the 9th Arbitrazh Appellate Court dated [*date*] in case No. []. [↑](#footnote-ref-5)
6. Ruling of the SAC No. [] dated [*date*] in case No. []. [↑](#footnote-ref-6)
7. Decision of the Central Executive Committee and the Council of People's Commissars of the USSR No. 104/1341 of 7 August 1937 "On Putting into Operation the Provisions on the Bill of Exchange And on the Promissory Note" ("**Provisions**") (Appendix 1 – English translation from the Garant Database). [↑](#footnote-ref-7)
8. See e.g. Ruling of the Constitutional Court of the Russian Federation No. 226-O dated 8 June 2004 (Appendix 2). [↑](#footnote-ref-8)
9. Decree of the Plenum of the SAC No. 22 dated 10 April 2008 ("**Decree No. 22**") (Appendix 3 – English translation from the Garant Database). [↑](#footnote-ref-9)
10. See paragraph 85 of Decree of the Plenum of the SC dated 23 June 2015 No. 25 ("**Decree No. 25**"): "*Violation of the law or other legislative act by a party to a transaction, in particular, evasion of taxes does not in itself mean that the transaction is made knowingly for a purpose contrary to the fundamental principles of the legal order or morality*." (see also Appendix 4 – English translation from the Garant Database). [↑](#footnote-ref-10)
11. Please note, however, that until 2013 as a matter of Russian law, proceeds of a tax evasion offence could not be a subject of a money laundering offence. [↑](#footnote-ref-11)
12. See paragraph 71 of Decree No. 25: "... *The defendant's objection that the claimant's demand was based on a void transaction must be assessed by the court on the merits regardless of whether the limitation period for declaring the transaction invalid has expired.*" (see also Appendix 4 – English translation from the Garant Database). [↑](#footnote-ref-12)
13. The Provisions regulate dealings with promissory notes in Russia. The Provisions are based on the Uniform Law For Bills of Exchange and Promissory Notes (Geneva, 1930) (the "**Uniform Law**"). [↑](#footnote-ref-13)
14. This rule also applies to promissory notes (Article 77 of the Provisions). [↑](#footnote-ref-14)
15. Joint Decree of the Plenum of the SAC and the Plenum of the SC No. 33/14 dated 4 December 2000 ("**Joint Decree No. 33/14**") (see also Appendix 5 – English translation from the Garant Database). [↑](#footnote-ref-15)
16. See e.g. Decree of the Presidium of the SAC No. 13433/12 dated 3 June 2014 (Appendix 6); Decree of the Presidium of the SAC No. 13603/10 in case No. A40-18477/09-38-51 dated 15 February 2011 (Appendix 7); Decree of the Federal Arbitrazh Court of the Volga Region in case No. A65-4295.2010 dated 3 September 2012; Decree of the Federal Arbitrazh Court of the Severo-Zapadniy Region in case No. A56-16999/2009 dated 3 August 2011; Decree of the Federal Arbitrazh Court of the Povolzhsky Region in case No. A12-10127/04-C47 dated 10 February 2005. [↑](#footnote-ref-16)
17. We do not know for sure that the Judgment covered the Promissory Notes. We assume that the Promissory Notes were issued for the same or similar purposes as the promissory notes which are dealt with in the Judgment. [↑](#footnote-ref-17)
18. It is not quite clear to us at this stage how this conclusion correlates with the fact that in the criminal judgment against Messrs. [•] and [•] that was rendered in the second criminal case against them (case No. [•]) (the "**Second Criminal Judgment**"), the court found that they had been involved in the legalisation of proceeds from the sale of embezzled oil and that the legalisation scheme involved the issuance and transfer of promissory notes. Please let us know if you wish us to explore this issue further. [↑](#footnote-ref-18)
19. Decree of the Presidium of the SAC No. 2521/05 dated 1 November 2005 (Appendix 8). [↑](#footnote-ref-19)
20. See Paragraph 86 of Decree No. 25: "*86.* *A mock transaction, i.e. a transaction made only for appearances without an intent to create the legal consequences corresponding to it, is void (Art. 170(1) of the RCC). It should be borne in mind that the parties to such a transaction might, for the sake of appearances, also carry out some sort of formal performance of it. For example, in order to avoid enforcement against a debtor's moveable property, a sale-purchase agreement or trust deed might be executed and transfer acts drawn up for the property, whist the seller or grantor actually retains control of it. Similarly, if the parties to a mock transaction have the transfer of title to immovable property state registered for the sake of appearances, this will not prevent the transaction being classed as void under Art. 170(1) of the RCC.*" (see also Appendix 4 – English translation from the Garant Database). [↑](#footnote-ref-20)
21. See, e.g., Articles 174, 174.1, 198 and 199 of the Criminal Code of the Russian Federation (Appendix 9 – English translation from the Garant Database). [↑](#footnote-ref-21)
22. See Decree of the Federal Arbitrazh Court of the Volga Region in case No. [•] dated [*date*] which was supported by Ruling of the SAC No. [•] dated [*date*]. [↑](#footnote-ref-22)
23. See, e.g., Decree of the Presidium of the SAC No. 11986/06 dated 16 January 2007 (Appendix 10), Decree of the 9th Arbitrazh Appellate Court in case No. A40-114723/2015 dated 9 February 2016, Decree of the 9th Arbitrazh Appellate Court in case No. A40-134888/2015 dated 30 December 2015. [↑](#footnote-ref-23)
24. See e.g. Decree of the Federal Arbitrazh Court of the Volga District dated 21 September 2011 in case No. A55-19425/2010; Decree of the Federal Arbitrazh Court of the Northwest Region in case No. A66-1502/2005 dated 29 February 2008. [↑](#footnote-ref-24)
25. Decree of the Presidium of the SAC No. 6644/02 in case No. A40-17759/01-55-223 dated 26 November 2002 (Appendix 11), Decree of the Federal Arbitrazh Court of the Volga Region in case No. A55-15995/2008 dated 4 June 2009. [↑](#footnote-ref-25)
26. For ease of reference, the provisions of Chapter 34 of the CPC are reproduced in full in Appendix 12 to the memorandum (English translation from the Garant Database). [↑](#footnote-ref-26)
27. See e.g. Decree of the Presidium of the SAC No. 5131/05 in case No. A40-25420/04-35-301 dated 18 August 2005 (Appendix 13) and Decree of the 9th Arbtirazh Appellate Court in case No. A40-126956/2013 dated 17 September 2014, upheld by Decree of the Arbitrazh Court of the Moscow Region dated 3 February 2015. [↑](#footnote-ref-27)
28. Article 183 of the RCC (in the applicable version) reads as follows: "*1. In the absence of powers to act on behalf of another person or if such powers have been exceeded, the transaction will be treated as having been entered into in the name and interests of the person who concluded it, unless the other person (the represented person) directly approves the transaction after the fact. 2. The subsequent approval of a transaction by the represented person will create, change or terminate his civil-law rights and duties under the transaction from the time it is concluded.*" According to Russian case law, such transactions can be deemed approved directly by implicative conduct on the part of the represented person (see paragraph 5 of Informational letter of the SAC No. 57 dated 21 October 2000 (Appendix 14 – English translation from the Garant Database). [↑](#footnote-ref-28)
29. Paragraph 13 of the Joint Decree No. 33/14 reads as follows: "*13. Under Articles 8 and 77 of the Provisions, a person who has signed a promissory note or a bill of exchange as the representative of a person on whose behalf he is not authorized to act, will be liable under the bill himself and, if he has paid on it, will enjoy the same rights as were enjoyed by the person who was named as the represented party. Representatives who have exceeded their powers will find themselves in the same position. Proceeding from the above, a person who has received a note from a representative not possessing sufficient powers to issue (transfer) the note, cannot demand performance from the person on whose behalf the note is issued (transferred). However, he can demand payment from the person who has signed the note, in the same amount and under the same terms as if the person on whose behalf the note is issued (transferred) had issued (transferred) the bill himself. When cases are considered it should also be taken into account that if the represented person approves the deal made on his behalf, the represented person will, by force of Item 2 of Article 183 of the Code, be liable under the note, unless otherwise arises from the specifics of the conclusion of certain deals*". [↑](#footnote-ref-29)
30. Decree of the Federal Arbitrazh Court of the Eastern Siberia District in case No. A58-2109/05 dated 6 March 2007 (Appendix 15). [↑](#footnote-ref-30)
31. Article 174 of the RCC (in the applicable version) reads as follows: "*If a person's powers to conclude a transaction are limited by contract or the powers of a body of a legal entity are limited by its constitutional documents in comparison to the powers defined in a power of attorney or statute or the powers apparent from the situation in which the transaction was concluded, and, in concluding it, the person or body went beyond those limits, the transaction may be declared invalid by a court at the suit of the person in whose interests the limitations were established only if it can be proven that the other party knew or patently should have known of the limits*". [↑](#footnote-ref-31)
32. See paragraph 4 of Informational Letter of the Presidium of the SAC No. 57 of 23 October 2000: "*Article 183(1) of the CC RF applies regardless of whether the other party knew that the representative had no powers or was acting ultra vires*" (see also Appendix 14 – English translation from the Garant Database). [↑](#footnote-ref-32)
33. According to Article 77 of the Provisions, this article is applicable both to bills of exchange and promissory notes. [↑](#footnote-ref-33)
34. See Article 53 of the Provisions. [↑](#footnote-ref-34)
35. See e.g. Decree of the Federal Arbitrazh Court of the Moscow District in case No. KG-A40/7030-05-P dated 2 August 2005. [↑](#footnote-ref-35)