

Client Update

Law on Syndicated Loans Adopted In Russia

On 1 February 2018, Federal Law No. 486-FZ on Syndicated Loans and Amendments to Certain Legislative Acts of the Russian Federation dated 31 December 2017 (the “Law”) comes into force.¹

The Law introduces general regulation of a syndicated facility agreement (the “Agreement”) and specifies a procedure for registration of a pledge as security under the Agreement. Along with the standard documentation for syndicated facility agreements (the “Russian LMA”)² and a bundle of amendments to the Civil Code of the Russian Federation (the “Russian Civil Code”), including those on financial transactions coming into force on 1 June 2018,³ the Law is intended to encourage lenders and Russian borrowers to enter into syndicated facility agreements governed by Russian law.

The Law, however, sets only the basic regulation of the relations between the parties to the Agreement and should be tested in practice, including by conforming to the Russian LMA.

Below is a summary of the principal provisions of the Law.

¹ The provisions of the Law in respect of syndicated facility agreements will apply to relations arising after the effective date of the Law; however, the parties to agreements concluded earlier may agree to apply the Law retroactively.

² The standard documentation was prepared by the Association of Banks of Russia in 2015.

³ See Federal Law No. 212-FZ on Amendments to Parts One and Two of the Civil Code of the Russian Federation and Certain Legislative Acts of the Russian Federation dated 26 July 2017. Our brief analysis of this law is available at https://www.debevoise.com/~media/files/insights/publications/2017/08/20170831_amendments_to_russian_civil_code_will_change_regulation_of_financial_contracts.pdf.

SCOPE OF AGREEMENT

Under the Agreement, at least two⁴ lenders (the “syndicate”) extend funds to the borrower, and the borrower undertakes to repay such funds together with the accrued interest and, if applicable, to make other payments to the syndicate. Unlike international practice, the Law does not allow a syndicate to be created with a sole lender also acting as facility agent. The Law allows facility agreements previously entered into by the borrower and various lenders to be novated to form a single syndicated facility agreement, provided that all lenders under the facility agreements being novated will become the members of the syndicate.

To the extent not regulated by the Law, the provisions of the Russian Civil Code (including in respect of loan and facility agreements) will apply to the members of syndicated lending. It should be noted that the lawmakers dropped the idea to directly apply the provisions on partnership to the relations of the syndicate members.

RIGHTS AND DUTIES OF THE PARTIES TO THE AGREEMENT

The Borrower and Lenders

Any legal entity or sole entrepreneur may act as borrower under the Agreement. The Law sets forth an exhaustive list of lenders, which includes, among others:

- Russian banks, Vnesheconombank and other Russian legal entities (e.g., special project finance companies) if provided so by the federal laws; and
- foreign banks, international financial organisations, and foreign legal entities that may enter into facility agreements based on their governing law.

As a general rule, no member of the syndicate is responsible for failure of the other members of the syndicate to provide funds to the borrower. Any claim of each member of the syndicate against the borrower is independent.⁵

Although the Law gives rather close attention to the creditors’ rights, it does not regulate certain basic rights of the borrower, including the right to claim for utilisation of the facility under a utilisation request.

⁴ Within the meaning of the Law, the Agreement will terminate if there is only one member left in the syndicate. However, it is not clear whether such agreement will automatically be novated into a bilateral facility agreement.

⁵ The amount of cash funds to be made available to the borrower by each member of the syndicate is established in the Agreement as a fixed amount or a share of the cash funds to be provided to the borrower at a particular period during the term of the Agreement.

The Arranger

The Law allows a potential borrower to enter into an agreement for arranging a syndicated facility with a person able to be a member of a syndicate (the “arranger”). Such agreement may include an exclusivity provision restricting:

- the borrower from parallel negotiations with other potential lenders; and
- each of the arrangers from parallel negotiations with other potential lenders that are not members of the syndicate,

in each case, in connection with conclusion of the Agreement on similar terms.

The Facility Agent

The facility agent is a member of the syndicate who, in accordance with the Agreement, shall maintain the register of members of the syndicate, account for the cash funds made available to the borrower and ensure the execution of the rights of the syndicate members (including the rights to demand or ensure performance by the borrower or third parties of their obligations under the Agreement). Only a Russian or a foreign bank, Vnesheconombank or an international financial institution may act as facility agent. The Law provides that the facility agent shall be a member of the syndicate. The facility agent shall not assign its rights and/or obligations under the Agreement without simultaneous termination of its appointment as the facility agent (this is inconsistent with international practice).

Other members of the syndicate may not exercise their rights on their own if the facility agent is granted the power to exercise such rights.

The members of the syndicate (but not the borrower, as is common in international practice) will pay a remuneration fee to the facility agent and reimburse any expenses incurred by it pro rata to the amount of cash funds provided to the borrower. If the facility agent acted without, or in excess of, its authority, a member of the syndicate can, within three months after becoming aware of such actions, recover damages and a penalty from it.

The rules governing commission contracts apply to the obligations of the facility agent.⁶

The Security Agent

The Agreement may provide that the facility agent will act as a security agent with respective rights and obligations (this is consistent with international practice). Alternatively, members of the syndicate can exercise their rights as pledgees on their own or engage a third party security agent to exercise such rights on their behalf which will unlikely be used in practice.

⁶ For that purpose the Russian LMA uses agency arrangements structured as commission contract.

DECISION MAKING BY SYNDICATE MEMBERS

According to the Law, the syndicate members should include in the Agreement provisions regulating the procedure for making decisions by the creditors and performing their obligations in respect of the borrower and other parties in connection with the extension of the syndicated facility, as well as servicing and repayment thereof (intercreditor agreement).

The procedure for making decisions by members of the syndicate (including in respect of nomination, powers and authority, and instructions to the facility agent) is governed by the rules of the Russian Civil Code on resolutions adopted at meetings unless otherwise provided under the Agreement. For example, the parties will likely disapply the requirements of the Russian Civil Code related to voting in person, quorum determination and preparation of the minutes of the meeting. The number of votes of each member of the syndicate depends on whether a utilisation of the credit amount has taken place:

- **prior** to a utilisation, such number of votes is determined pro rata to the commitment of each member of the syndicate; and
- **after** a utilisation, the votes are allocated pro rata to the amount of funds effectively provided by each member of the syndicate to the borrower.

The first method for allocation of votes is usually used in international practice regardless of whether a utilisation has taken place.

ASSIGNMENT AND NOVATION

The Law sets forth the following specifics for novation of the Agreement and assignment of rights under it:

- rights/claims under a monetary obligation which a member of the syndicate has under the Agreement may be assigned to another person only with the right to participate in making decisions of the syndicate and other rights envisaged by the Law and the Agreement;
- a member of the syndicate may assign its rights under the Agreement without the consent of the other members of the syndicate unless otherwise provided under the Agreement; however, it is not clear whether the Agreement may require the borrower's consent in such case (this requirement is common in international practice);
- a member of the syndicate may assign its obligation to participate in commitments and/or all its rights and obligations under the Agreement only to a person who is able to be a member of the syndicate under the Law; the Agreement may include a preliminary consent of the borrower for the assignment by a member of the syndicate of its obligation to participate in commitments;

- if the facility is a secured one, then substitution of a member of the syndicate is only permitted with its simultaneous replacement as a party to the security agreements; and
- assignment of rights and/or novation by members of the syndicate does not affect the validity of the powers of the facility agent, security agent or other parties authorised to act on behalf of members of the syndicate as set forth in the Agreement.

AMENDMENTS TO CERTAIN LEGISLATIVE ACTS

The Law provides for a special procedure for the registration of a pledge securing the borrower's obligations under the Agreement where a security agent has been appointed:

- if the notary records the pledge of movable property in the notarial register of pledges of movable property or the registrar or depositary records the pledge of uncertificated securities, the details of the security agent rather than the pledgee (the person in whose favour the encumbrance has been created) should be provided;
- if the pledge of a share in the charter capital of a limited liability company is recorded with the Unified State Register of Legal Entities, the registration entry must contain details of the pledgees, pledge agreements and pledge administration agreement; and
- if the mortgage is recorded with the Unified State Register of Immovable Property, the registration entry must contain details of the security agent and the pledge administration agreement in addition to the details of the pledgees.

The lawmakers decided not to abandon the requirement for the provision of details of pledgees on whose behalf the security agent is acting in respect of certain types of pledges. Thus, the issue of the update of pledge registration records in the event of any changes in the composition of the pledgee members of the syndicate remains unresolved.

* * *

Please do not hesitate to contact us with any questions regarding the above matters.

MOSCOW

Alan Kartashkin
akartashkin@debevoise.com

Daria A. Serebrova
daserebrova@debevoise.com

Dmitry A. Karamyslov
dakaramyslov@debevoise.com

Olga S. Panfilova
ospanfilova@debevoise.com