

Law on Syndicated Loans Amended

14 April 2021

On 22 December 2020, the Russian President signed a federal law¹ that would introduce amendments (the “Amendments”) to the regulations on syndicated loans, including the targeted federal law (the “Law”).² The Amendments, save for certain provisions, will come into force on 21 June 2021. The Amendments will apply to relations arising after the effective date of the Amendments. Parties to agreements entered into prior to the effective date of the Amendments may agree to apply certain Amendments (e.g., provisions relating to pledge records) retroactively.

The Amendments were adopted to meet long-standing market demands. They are designed to raise the appeal of syndicated facility agreements governed by Russian law (“Agreements”) to potential lenders, including by developing the secondary market for syndicated loans and by strengthening the protection of lender rights in the event of bankruptcy or other adverse events on the borrower’s side. In particular, the Amendments simplify the procedure for substituting lenders under an Agreement and the registration of pledges securing the claims of lenders under such Agreement. The Amendments also introduce regulations on agreements relating to the funding of participation in loans (“Financing Agreements”) and on specifics of the participation of lenders in the bankruptcy proceedings in respect of the borrower under an Agreement and make other changes to the regulations on syndicated loans.

However, a number of questions raised following the adoption of the Law remain unanswered. For example, the Law as amended by the Amendments:

- will not regulate certain basic rights of borrowers, including the right to claim a utilisation of the facility under a utilisation request;

¹ Federal Law No. 447-FZ dated 22 December 2020 on Amendments to the Federal Law on Syndicated Loans and Amendments to Certain Legislative Acts of the Russian Federation and to Certain Legislative Acts of the Russian Federation.

² Federal Law No. 486-FZ on Amendments to the Federal Law on Syndicated Loans and Amendments to Certain Legislative Acts of the Russian Federation dated 31 December 2017. See also our Client Update available at: <https://www.debevoise.com/insights/publications/2018/01/law-on-syndicated-loans-adopted-in-russia>.

- limits the scope of persons who can become members of a syndicate of lenders (a “syndicate”) or act as facility agents. This contrasts with international practice, which generally allows any person to join a syndicate or act as a facility agent provided that such person is entitled to do so under the applicable laws; and
- fails to expressly regulate the situation where the number of the syndicate members is reduced to one—it is unclear how such an Agreement would be treated under the Law.

We set out below a summary of the key Amendments.

Assignment of Rights under an Agreement by the Facility Agent

The Amendments modify the approach to the assignment of rights and transfer of obligations by a facility agent. The Law does not currently permit a facility agent (who, as required by the Law, must also be a member of a syndicate) to assign its rights and/or transfer its obligations as a syndicate member to another person unless it ceases to act as a facility agent under an Agreement; a facility agent may preserve such rights and obligations only if so provided by the relevant Agreement or by a resolution of the syndicate members. The new regulations stipulate that as a general rule, the facility agent will keep its powers and authority upon the assignment of its rights and/or transfer of its obligations as a syndicate member. However, this may be changed by the relevant Agreement or by a resolution of the syndicate members. The new approach is generally consistent with international practice.

Borrower’s Pre-Approval of Lender Substitution

The Amendments specify that an Agreement may contain a borrower’s pre-approval of the assignment of rights and/or transfer of obligations (including the obligation to extend the loan) by a syndicate member, either to (i) a specific person or to (ii) any person who can act as a syndicate member under the Law.

Financing Agreement

The Amendments codify the right to make a Financing Agreement.³ It follows from the Amendments that Financing Agreements are a separate type of contract and that the provisions of the Russian Civil Code pertaining to loan agreements and facility agreements do not apply to them. Agreements similar to the Financing Agreement are widely used in international practice.

A Financing Agreement can be entered into by a syndicate member (or any person that can act in such capacity) and a third party (a so called “external member”). The following persons can act as external members: (i) Russian or foreign individuals who are qualified investors under Russian law, (ii) Russian or foreign legal entities or (iii) any persons that can be syndicate members, including Russian banks and the state development corporation VEB.RF.

Parties to a Financing Agreement share the investment risks; a syndicate member will not be liable to an external member for the failure of the borrower or facility agent to perform their obligations under an Agreement.

Pursuant to a Financing Agreement, an external member will undertake to provide funds to the syndicate member (or a person that can act in such capacity). In turn, the syndicate member will undertake to (i) execute the relevant Agreement and/or (ii) exercise its rights and perform its duties under the Agreement, any inter-creditor agreement and/or pledge management agreement and (iii) upon the full performance of the Agreement, transfer the funds to the external member in the manner and within the period set forth in the Financing Agreement.

As a general rule, an external member would not have any of the rights or obligations of a lender under an Agreement. The rights and obligations of any syndicate member, other than the obligation to extend the loan, can be transferred to an external member if:

- the Financing Agreement permits—it appears that the borrower’s consent to such transfer must be obtained in advance or immediately prior to the transaction; or
- initial bankruptcy procedure is initiated against the syndicate member.

³ The regulations in effect allow the execution of the Financing Agreements by virtue of the “freedom of contract” principle. However, there is a risk that such non-defined agreements might be deemed to be loan agreements, commission agreements or other types of agreements.

The Financing Agreement may provide for a syndicate member's obligation to:

- comply with the instructions of an external member while executing the relevant Agreement and/or performing its obligations under the Agreement, the inter-creditor agreement and/or the pledge management agreement or obtain the external member's consent prior to taking these actions. The syndicate member's failure to comply with such obligations does not affect the validity of the relevant Agreement, inter-creditor agreement and/or pledge management agreement or the relevant actions taken pursuant to such agreements. However, such failure to comply will entitle the external member to claim damages from the syndicate member or to seek other remedies under the relevant Financing Agreement. The syndicate member shall not follow the instructions of the external member if such instructions contradict the Agreement. However, it may be more reasonable to give an external member who is acting in good faith the right to claim damages or seek other remedies against a syndicate member who has failed to notify the external member of any resolutions of the syndicate taken pursuant to the Agreement that would be inconsistent with the Financing Agreement;
- if requested by the external member, inform the external member of any exercise of rights by the syndicate member under the relevant Agreement, inter-creditor agreement and/or pledge management agreement. In addition, the syndicate member must notify the external member of any delay by the borrower to make a repayment under the Agreement.

Pursuant to the Amendments, the provisions relating to Financing Agreements will apply:

- to any agreement between an external member and a third party if, under the terms and conditions of such agreement, the external member raises funds from such third party and the rights and obligations of the external member and the third party under such agreement are similar to those of the syndicate member and the external member under the Financing Agreement, respectively; and
- to an agreement to fund participation in a facility under a facility agreement other than an Agreement.

Bankruptcy of the Borrower under the Syndicated Loan⁴

The Amendments clarify the bankruptcy process in respect of the borrower or a person providing security for the borrower's obligations (the "security provider") under the Agreement.

As a general rule, a facility agent or any syndicate member may recommend to the syndicate members the initiation of bankruptcy proceedings against a borrower or security provider.

The decision to initiate bankruptcy proceedings against a borrower or security provider will be made by a simple majority of the syndicate or such other number of votes as provided for in the Agreement. If the syndicate decides to initiate bankruptcy proceedings, the facility agent will become a bankruptcy creditor acting on behalf of the syndicate members (other than the syndicate members participating in the bankruptcy proceedings independently). In particular, the facility agent will, among other things:

- file the petition for the bankruptcy of the borrower or the security provider with the *arbitrazh* court;
- if the initial bankruptcy procedure is applied in respect of the debtor, file a request to include a consolidated claim of the syndicate members arising out of the Agreement in the creditors claims register of the debtor;
- after the consolidated claim of the syndicate members is included in the creditors claims register, enforce the rights of the syndicate members that are pledgees; and
- participate in creditors meetings, including by voting on matters raised at such meetings in accordance with the resolutions passed by the syndicate, etc.

An Agreement may entitle one or several syndicate members, except the facility agent,⁵ to participate in bankruptcy proceedings independently. A member participating in bankruptcy proceedings independently:

- may exercise its rights in the bankruptcy proceedings independently, other than the right to receive satisfaction in respect of obligations;

⁴ These provisions came into effect on 2 January 2021.

⁵ The facility agent is entitled to file a petition for bankruptcy of the debtor and participate in the bankruptcy proceedings against the debtor as a syndicate member independently only if every member of the syndicate acts independently. This amendment is not entirely consistent with the general focus of the Law on splitting the legal personality of the syndicate member and the facility agent.

- may not vote on all or certain resolutions of the syndicate relating to the bankruptcy proceeding;
- if its claims are satisfied, will not receive the funds due to it in its bank account; such funds will instead be transferred to the account opened by the facility agent; and
- if it is a pledgee, will be treated as a subsequent pledgee in relation to the syndicate members that are pledgees represented in the bankruptcy proceedings by the facility agent. However, the Amendments do not clarify whether there can be several ranks of priority of subsequent pledgees or how the relations between several subsequent pledgees would be regulated if more than one syndicate member opted to participate in bankruptcy proceedings independently.

Pledge Records

The Amendments simplify the procedure for recording the pledge in the Russian registers, including the Unified State Register of Legal Entities, the Unified State Register of Taxpayers, the National Shipping Register, the Unified State Register of Rights to Aircraft and Transactions Therewith, etc. Pursuant to the new regulations, if (i) an Agreement authorises the facility agent to act as the security agent or (ii) a pledge management agreement is in place, the registration of the pledge requires the respective notification or register to contain details of the security agent rather than details of the pledgees.⁶ Any change in the composition of the syndicate members, except for the replacement of the security agent, will no longer require amendments to be made to the respective registers. As a practical matter, this change will reduce the administrative and financial burden on the parties to a transaction.

Other Changes

The Amendments further specify that:

- a bilateral loan agreement or facility agreement can be transformed into an Agreement if the parties to the bilateral agreement and a third party enter into an agreement under which such third party (i) undertakes, together with the original

⁶ The effective version of the Law states that the procedure where the respective notification or register is required to contain the details of the security agent without the details of the pledgees is of limited application (e.g., for registration of notification of a pledge securing obligations under the Agreement, in the register of notifications of pledge of movable property or for registration of a pledge of uncertificated securities by the registrar or depositary).

lender, to extend funds to the borrower in the amount of, and in accordance with the terms of, such agreement and/or (ii) accedes to the original obligations on the lender's side. In both cases the Law fails to define the legal nature of such agreement (it appears that this is a non-defined contract of adherence and amendment to the existing loan agreement or facility agreement in respect of the financing amount and other terms and conditions) or clearly distinguish between these two agreements or between such agreements and a partial substitution of parties to obligations on the lender's side. The express requirement under the Amendments to have the borrower as a party to such agreement potentially limits the ability of the parties to transform a bilateral agreement into an Agreement. In particular, the Amendments do not state whether such a transformation is possible without the borrower's consent if the abovementioned agreement is made between the original lender and a new lender and the bilateral agreement made between the original lender and the borrower already includes provisions on transformation of such bilateral agreement into the Agreement acceptable for the borrower.

- the Agreement will also be deemed concluded if the claims under the bilateral loan agreement or facility agreement are partially assigned to a new lender provided that (i) the original lender and the new lender enter into an inter-creditor agreement (it is unclear if the provisions of such agreement can be included in the assignment agreement) and (ii) the borrower agrees that the Law will apply to the relations to which the borrower is a party. Similar to the above example, this approach is not entirely consistent with international practice where a lender can join a bilateral agreement without the borrower's consent provided that the assignment terms and conditions (e.g., the assignment is made to a lender's affiliate or the assignment is made while a default has occurred and is continuing) and/or the form of the assignment agreement are agreed in advance.
- an entity that is not a syndicate member may act as a facility agent.
- with a view of exercising the lenders' rights under an Agreement, a facility agent may (and if provided under by the Agreement, e.g., in the event of participation in bankruptcy proceedings against the borrower, must) open a nominal account to which the syndicate members (and in certain cases, a facility agent and/or a security agent who are not members of the relevant syndicate) will be beneficiaries.
- the borrower may be obliged to pay a remuneration fee to the facility agent and/or security agent and reimburse any expenses incurred by such agents, which is in line with international practice.

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Please do not hesitate to contact us with any questions.

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