

Pledge managers and nominal accounts: recent amendments

In December 2020, a number of amendments were introduced to the laws governing syndicated lending in Russia, streamlining administration and enforcement of syndicated secured loans.

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Syndicated secured loans are characterised by a broad, changing composition of lenders.

One key issue typically arises at the outset of these transactions: how should lenders and their counsel structure the security, to ensure it is legal and may be validly and efficiently enforced?

Clearly, requiring each lender to sign a pledge agreement and/or to register its security interest from time to time is sub-optimal. Over the last several decades, various practical solutions were developed on the Russian syndicated loan market. Initially, many lenders and their counsel relied on so-called 'parallel debt' clauses (the legality of which did not receive significant attention of the courts). In 2013, Russian law was amended to create the mechanism of a pledge manager (i.e., security agent) acting in the interests of all lenders in the syndicate.

In December 2020, several laws were passed aimed at resolving certain technical issues arising in the administration and enforcement of the Russian syndicated secured loans, which we will discuss below.

The amendments contemplated by such laws will become effective 180 days after the date of their official publication with exceptions stated in the Federal Law 22.12.2020 № 447-FZ "On Amendments to the Federal Law "On Syndicated Credit (Loan) and the Amendments to the Legislative Acts of the Russian Federation" and Certain Legislative Acts of the Russian Federation."

Status of the pledge manager under Russian law

Article 356 of the Russian Civil Code provides:

- The appointment of a pledge manager is effected by an agreement on pledge management;

- Any lender or any third party may act as such;
- Only an individual entrepreneur or a commercial organization may be a pledge manager;
- A pledge manager acts for and on behalf of all the lenders who entered into the pledge management agreement and must exercise its rights in the best interests of all such lenders.
- Individual secured lenders may not enforce a pledge independently during the life of the pledge management agreement. However, they may, vote for the approval of certain actions, if so provided in the pledge management agreement.

In addition to these basic provisions of the Russian Civil Code, Federal Law dated 31 December 2017 No. 486-FZ "On Syndicated Loans" (the "**Syndicated Loan Law**") allows the pledge manager to register the resultant encumbrances under the security in the names of and on behalf of the other lenders, simplifying the collateral registration process. The details on the pledge manager must be reflected in the respective registers depending on the type of collateral (e.g., the Unified State Register of Real Estate, Unified State Register of Legal Entities, etc.).

Where the borrower and the lenders make a syndicated loan agreement containing express provisions regarding security management, the facility agent may perform the role of the pledge manager. However, under Part 1 of Article 4 of the Syndicated Loan Law, the facility agent must be one of the participants in the syndicate. In this regard, the participation of a facility agent in relation to a nominal account opened by it for the purpose of fulfilling its duties leaves open the issue - in what

capacity is such agent performing a particular action (as account holder or beneficiary)?

What happens to a pledge management agreement when a lender leaves?

Before the recent amendments, Article 356 of the Russian Civil Code did not answer the question on the fate of the pledge management agreement, where a lender leaves a syndicate.

Now, under the amendments, upon termination of the rights of one pledgee, the pledge management agreement ceases solely in relation to that particular pledgee, unless otherwise provided by law (or by the agreement itself or follows from its essence). If the identity of the departing pledgee was of particular importance for the persons remaining in the syndicate, the pledge management agreement may provide for the possibility of terminating the pledge management agreement.

New obligations of the pledge manager

The amendments also provide for the following new obligations of the pledge manager:

- to maintain separate records of the rights (claims) of the lenders and the register of all lenders;
- to keep separate records of property received in the interests of each lender, as well as to open a nominal account for crediting monetary funds received in favor of lenders, and the beneficiary (beneficiaries) of which is the lender.

This amendments will make cooperation of the lenders and pledge manager more transparent.

Indication of the pledge manager during pledge registration

Another amendment states that in case of conclusion of a pledge management agreement or a syndicated loan agreement containing security management provisions, information on each individual pledgee does not have to be indicated in course of registration of such pledges under Article 339¹ of the Russian Civil Code. Instead, the pledge manager should indicate itself as the pledgee, with a note that it is acting as a pledge manager.

It is ordinarily more important to third parties checking public registries to see the existence of a pledge and the name/designation of the facility agent or the pledge manager, than to see the name of each individual syndicate member (pledgee). An obligation continually to update the registry to reflect each new syndicate member (pledgee) would be both burdensome and costly (with such cost being passed on to

the borrower). This amendment resolves this conundrum and should streamline the administration of pledges during the life of the syndicated loan.

Nominal accounts in syndicated loans

As previously noted, the participation of a facility agent in relation to a nominal account opened by it for the purpose of fulfilling its duties leaves open the issue of the capacity in which it might be performing a particular action (e.g., as account holder or beneficiary).

To differentiate between these capacities, Paragraph 1 of Article 8601 of the Russian Civil Code has been supplemented with a provision stating that where provided by law, the account holder can simultaneously be one of several beneficiaries, while in relations with the bank such a person is obliged to indicate each time that he is acting as an account holder or as a beneficiary.

Funded sub-participations

The amendments to the Syndicated Loan Law allow a participant in a syndicate of lenders to enter into one or more funded participation agreements with third parties (thus sharing risk in their respective loan).

The Russian loan market has needed the legalization of such a legal structure for some time now. This will therefore be a welcome change, which will hopefully add the interest and liquidity to the secondary market of the syndicated loans governed by Russian law.

Bankruptcy proceedings in syndicated loans

In addition to the amendments described above, the Syndicated Loan Law was amended to include the concept of a single claim by the facility agent in bankruptcy (on behalf of the syndicate).

Under this new concept, all claims of the participants in the syndicate of lenders for the repayment of principal, payment of interest and other amounts owing under the loan (minus any claims which may be made independently by any one or more participants in the syndicate under a special procedure prescribed by law) are recognized as a single, aggregated claim.

In order to implement and protect a single claim, the facility agent is recognized as the bankruptcy creditor and performs the procedural actions provided for by the Federal Law dated 26 October 2002 No. FZ-127 On Insolvency (Bankruptcy) in the bankruptcy proceedings and exercises the rights of a bankruptcy creditor in name and in the interest of all syndicate members (with the exception of those members who choose to participate in the bankruptcy proceedings independently).

The above amendments are welcome technical changes, which should help to promote Russian syndicated lending.

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