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A new status for Security Agents under French law

Ordinance n°2017-748 of May 4, 2017 adopted in furtherance of the so-called “Sapin II” Law on transparency, fight against corruption and modernization of the economy, adds a new element to the concept of Security Agent in the context of syndicated loans, thereby offering banks and other institutions an efficient and secure device comparable to what is known, in particular in Anglo-Saxon countries, as the “Security Trustee”.

This widely welcomed reform should contribute to improve the competitiveness of the French finance industry with respect to syndicated financing.

The implementation of large-scale or international financings most often requires the involvement of several lending banks structured in a *banking pool*, also called *banking syndicate*. The loan but also the risks (the term used being “risk syndication”) is thus shared between the lenders who benefit from the same security interests that are most of the time created and managed by a single entity (usually one of the lenders) called “security agent”.

Until 2007, French law did not provide for any legal mechanism suitable for this type of financing arrangements aimed at enabling a person, acting on behalf of several creditors, to implement, manage and, as the case may be, enforce security interests.

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The concept of “security agent” was first introduced by Law n°2007-211 of February 19, 2007 which incorporated into the French Civil Code Article 2328-1 that reads as follows *“any security interest may be created, registered, managed and enforced on behalf of the creditors of a secured obligation by a person appointed for this purpose in the agreement which creates the obligation”*.

Yet, this move forward soon appeared modest and, above all, insufficient to meet the objectives pursued by the aforementioned law, i.e. in particular making French law more attractive as regards the signing of bank syndication agreements.

The main shortcoming of the security agent status created in 2007 was that such agents could only be appointed to manage security interests, i.e. securities granted over real or moveable property to guarantee the repayment of the loan, the members of the banking pool being responsible for managing any potential personal guarantees (*cautionnements* (i.e. standard guarantees) first demand guarantees, delegations).

In addition, there were uncertainties as to the powers of the security agents, in particular with regard to the possibility to bring a legal action and to declare to the receiver the claims of the lenders when the debtor enters insolvency/bankruptcy proceedings. As such, there was no satisfactory answer to the question of whether, in such a case, each lender ought to personally declare its claim or the security agent was entitled to declare the claim of the banking pool under its terms of appointment underlying the legal regime applicable to security agents.

In these circumstances, this French security agent regime, quickly criticized by practitioners, has been largely disregarded over the past ten years.

The latest changes to this regime introduced by the “Sapin II” Law create a more flexible status (Articles 2488-6 to 2488-12 of the French Civil Code) that will enter into force on October 1, 2017 and apply to security agents appointed as from that said date.

The main features of the new status are as follows:

- The security agent, just like a trustee, will directly hold the security interests and personal guarantees granted in favor the members of the banking pool. Such security interests and guarantees are created in the name of the security agent that will keep them separated from its own estate and that will be entitled to receive the proceeds upon enforcement (article 2488-6 of the French Civil Code).

The creation of a separate estate dedicated to the management of the security interests and guarantees held by the security agent provides greater legal certainty to lending creditors as the assets and rights included in that estate will be ring fenced in the event the security agent enters insolvency/bankruptcy proceedings (Article 2488-10 of the French Civil Code).

In addition, as the security agent will henceforth act in its own name on behalf of the lenders, any transfer by a lender of its participation in the financing or change of members in the banking pool will not have any impact on the security interests and guarantees.

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- The new regime complements that created in 2007 as its scope is now extended to all types of security interests and personal guarantees and no longer limited to security interests over assets. As such, the security agent will be entitled to register, manage and enforce personal guarantees, security promises and foreign security interests. It will also be entitled to assign professional security interests used as collaterals or to transfers claims that secure the guaranteed obligation.
- Another important feature is that the security agent may, within the limits of the powers expressly conferred upon it by the creditors in the terms of appointment, exercise any rights, bring legal actions on behalf of the secured creditors and declare the claims held by the latter in the debtor's insolvency/bankruptcy proceedings without having to be granted a special authorization from them (Article 2488-9 of the French Civil Code).

Professionals now have until October 1, 2017 to amend their contractual documentation accordingly.

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