

CROSS-BORDER RECEIVABLES TRENDS

The Single Group Facility: Simplifying Cross-Border Receivables Finance

BY RONALD BIEMANS
AND TOM GEVERS

In November of 2021, SFNet announced its first Cross-Border Finance Essay Contest, sponsored by Goldberg Kohn Ltd. Members of SFNet's International Finance and Development Committee judged the essay submissions on content, originality, clarity, structure and overall contribution to furthering and expanding understanding and discourse within the field of cross-border finance. This essay is the first-place essay

The authors of the winning essays have been invited to participate on a panel at SFNet's 78th Annual Convention in Austin, TX, Nov. 9-11. The third place essays were published in the September issue of *TSL* and the second place winner was published in the October issue.

To unlock the receivables cross-border financing potential in Europe, which was historically frustrated by the commercially unsuccessful multi-local market practice of providing scattered bilateral receivables facilities on a country-by-country basis, we designed the Single Group Facility solution ("SGF") establishing a single receivables pool. The main advantages are a) its scalability and flexibility through consolidated asset pooling on a "plug-and-play" basis that smoothly (de-) connects relevant geographies (on and off balance sheet), b) relief for the clients in operating their working capital management and c) a single source of funding.

The SGF solution was implemented as a pilot in 2015. Currently it covers more than 21 European jurisdictions, USA, Canada, Australia and is accepted by the European ABF market as a valid and tested solution for cross-border receivable finance. Multiple European and US banks, aided by their legal professionals, participated in this (syndicated) solution over the past seven years.

Description of the Solution

The solution is based on a customary receivable finance

program as offered by ABLs in their core markets. Europe was the real challenge, as these markets cover more than 27 jurisdictions with their own legal system. Local operational entities of the client each have their own country receivables ledgers. What the solution does is to elevate this receivables financing to a pan-European level. It centrally pools the receivables ledgers in scope under uniform conditions. Country ledgers are intra-group transferred to a special financing company of the client (the "SFC"). This operating company enters into a financing or purchase agreement with the asset-based lender. The receivables are legally and economically owned by the SFC. The advantage is that increased working capital is unlocked for the client, enabled by a pooled receivables ledger with uniform conditions irrespective of geography.

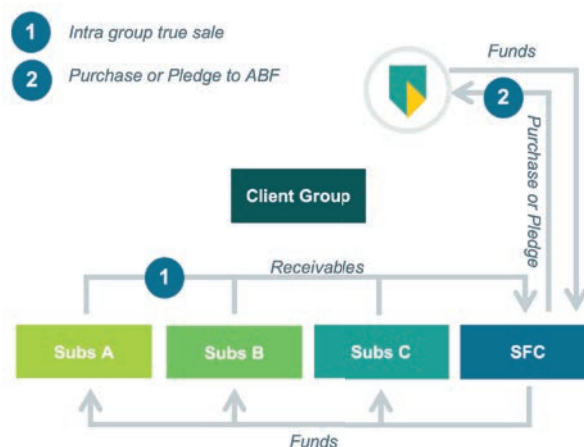


■ **RONALD BIEMANS**
ABN AMRO Asset
Based Finance



■ **TOM GEVERS**
ABN AMRO Asset
Based Finance

Single Group Facility: One Asset Pool on Group Level



All involved group companies of the client are part of the credit base in their capacity as borrower, guarantor or obligor.

To match bank lending, leverage and syndications documentation, a single set of LMA-based English documentation is available that can be directly linked to LMA lending and/or syndication documentation.

The client is typically a large corporate, with operational entities (“Opcos”) in multiple geographies. The client consolidates all receivables of the Opcos by pooling them into the SFC through a true sale assignment. The true sale of the receivables to the SFC provides the same collateral value as if the receivables would have been directly originated by the SFC. Because of the pan-European context, the law governing the receivables may differ as this is subject to the law governing the supply contracts.

The true sale assignment from the Opcos to the SFC is, when applicable,¹ governed by the regulation regarding choice of law in the European Union. This regulation, often referred to as “Rome I,” is implemented in the laws of the EU member states and applied by the courts of these member states. The cornerstone of Rome I for any receivable finance program is that it gives a rule for which law(s) govern(s) the assignment between the assignor, assignee and the debtor in a European context². As a result, a true sale assignment of receivables can be governed by the chosen (lender-friendly) law of the Netherlands, in combination with local perfection requirements if and when applicable for debtor collection in a specific member state. Despite the choice of law for the true sale assignment, the law governing the receivable continues to apply between assignee and debtor. As a result, specific requirements for collection, such as notification of the debtor, must be observed. Also a few European member states have their own specific member state interpretation of Rome I. For those countries, a true sale assignment under local law is (also) chosen to eliminate any uncertainty about the enforceability of the sale.

As mentioned above, the main advantage is the fact that the client has a single source of funding, available at central level for the company treasurer and under a single finance contract. The whole international receivable portfolio can be monitored from a central borrowing base portal (“Client Portal”) providing insight at aggregate, Opco, receivable debtor or invoice level. This enables the client to benchmark credit management activities of Opcos throughout the group.

Furthermore, specific ABF covenants, like dilution, can be applied over the aggregate portfolio. As a result, the outperforming Opcos can compensate for lower performing Opcos that would otherwise default under their local arrangement. As such, the facility can be optimized for maximum utilization.

New Opcos can easily join the facility and start assigning their receivables to the SFC. This is considered by the market as a huge advantage to clients that have a “buy and build”

strategy, as they basically have their finance already in place prior to the acquisition. For each Opco, a capacity opinion is delivered, stating that it is allowed to enter the facility. Next to the eligibility criteria for the receivables of the new Opco, generic conditions like (country-) concentration over the total portfolio apply.

Commercial Proposition

Prospects look for a solution that enables them to optimize their receivables financing across multiple jurisdictions in an international context, whereby a smooth operation is key. The SGF solution is considered to be a substantial low risk working capital building block in debt structures for large corporates, mitigating the overall risk profile of the exposures.

For prospects that have delegated their Opco working capital management to strong local board of directors with local decision authority, a central solution like the SGF is not the most appropriate one. These prospects aim for a basic country by country approach. For prospects that aim to be (or are) more strongly centrally organized, a central source of funding to the CFO is desirable to manage group cash flows. These prospects are interested in the SGF as it enables them to establish such central funding with a single set of contracts and smooth operations. In particular, private equity owned corporates apply the solution as it is scalable and supports central cash flow management and financial integration of acquired companies.

To have the SGF solution set up in such way that the asset-based lender can enforce its security to recover all outstanding amounts in an insolvency of the client, the solution is implemented according to specific (legal) requirements as confirmed by legal capacity and enforceability opinions for the entities and jurisdictions involved, provided by external legal advisors of selected law firms.

If the requested amount of funding requires multiple financial institutions to participate, the SGF solution has the flexibility to be established as a club deal or syndication. As such we have already successfully deployed the solution in partnership with e.g. (leading) Dutch, US, UK, German, French, Italian and Belgian banks and financial institutions. These banks and financial institutions have performed their own credit risk and legal analysis on the structure over the years, seconded by their experienced legal advisers.

Operations

In case of a club deal or syndication, ABN AMRO acts as agent and runs the facility on behalf of the participants. This covers the facility, the security and the receivables base management.

Asset Management of the SGF solution is similar to any other receivables client contract with multiple entities. Each

¹ Rome I applies to all EU member states except Denmark. As from December 31, 2020 the UK continues to apply the rules set out in Rome I (re-incorporated into UK law under the terms of the EUWA)

² Rome I also gives rules on how to determine which law is applicable if parties fail to make a choice of law. In this context article 14 sub 1 and 2 Rome I give a rule for which law applies between the assignor and assignee to establish a true sale and which law governs the claim and its transferability.

involved entity that originates receivables has its own account number and incoming payment account in the asset based core system so that the borrowing base and debtor payments can be monitored and reconciled. Borrowing base information is digitally uploaded from the client's entities through API's.

Clients have direct insight in the borrowing base through a web-based Client Portal. This portal is also accessible to funding partners to have full insight in the facility on an continuing basis.

As part of the generic on-boarding process, audits are performed on the receivables portfolio and administration processes of the client. The result is part of the asset risk due diligence and also part of the periodic monitoring of the receivables base as agreed in the documentation.

During the regular annual client review process, periodic audits are performed and may, if required, validate the internal ABF operations of a client file. The audits are performed by reputable external asset auditors that are short listed by leading US and European banks and ABL lenders. The external auditors also have a global and European coverage thus executing audits locally in all geographies involved.

Risk

The solution is designed for large corporates, the majority of which have better ratings, though non-investment grade ratings are possible as part of specific credit approval. Counterparties are therefore considered skilled and experienced professionals supported by reputable external advisors on their various fields of expertise.

Because of the lender-friendly nature of Dutch law and the high quality of the Dutch legal system and its commercial courts, the SGF contracts are, post-Brexit, governed by Dutch law with the Dutch courts as chosen forum. Also, the SFC is a Dutch entity, bringing it under the protection of Dutch Insolvency law and subsequently the European Insolvency regulations.³

The solution is a receivable finance program like any other receivable program offered by ABN AMRO, where financing is provided against eligible and enforceable receivables. For this enforceability it makes no difference whether these receivables are directly originated or purchased (true sale) receivables, as long as the true sale is perfected and enforceable against the debtors. This enforceability is validated (legal enforceability opinion) by specialised law firms at the local level of the intra-group seller (Opco) and the purchaser (SFC). Receivable finance programs, including receivables governed by multiple local laws, are common practice for ABN AMRO.

An advantage of consolidated asset pooling is that a bankruptcy of an Opco is a rather remote event. This Opco is not a borrower under the receivables finance facility as the

SFC is the Borrower/Seller, and the receivables are not legally/economically owned any more by the Opco. They are thus not part of its bankruptcy estate. The receivables are recovered by debtor payments on the designated bank accounts and the facility may continue if the other Opcos are still in going concern status.

Worldwide collection of receivables to recover any outstanding amounts are common practice. As a basic rule, a receivables financier must be able to disclose (notification) the program even within an insolvency situation of an Opco. If not, the program is disclosed from start for that Opco. These requirements are part of the legal enforceability opinions and covered in the documentation. In addition, all Opcos are also guarantor under the aggregate facility. Any shortfall (if any) due to a bankruptcy of an Opco can be recovered under such guarantee.

Three levels of security



The structure may have three levels of security depending on credit risk of the prospect

The first level establishes legally valid and enforceable rights on the receivables:

- Assignment (pledge or true sale) of all receivables of the SFC
- Security over incoming bank accounts by way of cash dominion at ABN AMRO and/or local security
- Security over credit insurance payments as loss payee

The second level in addition the first, mitigates structure and credit risk. It also adds to the performance of the individual Opcos and SFC regarding their obligations, as all are liable for the performance of the others.

- Guarantees from all Obligor, including all Opco's, to mitigate structure risk (internal assignment) and credit risk (remote credit base)
- Corporate guarantee from top holding to support structure

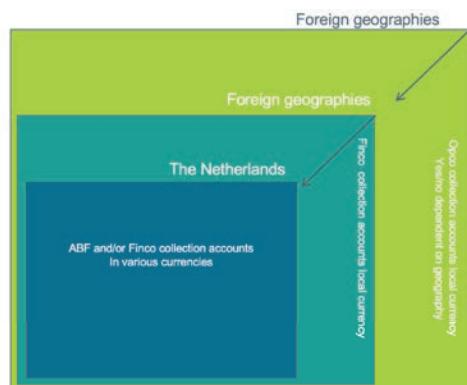
³. The EU Insolvency Regulation (EU 2015/848) sets the rules for the opening of insolvency proceedings within the EU; it provides automatic recognition to insolvency proceedings across the EU, legitimizing their status in each of the member states that have adopted it; and subject to certain safeguards it ensures that the insolvency proceedings can be enforced, allowing insolvency officeholders to deal with assets wherever they may be. For the UK, it no longer applies to main insolvency proceedings opened after 31 December 2020. After 31 December, for the UK, the law of the UK and the relevant domestic laws of each of the individual member states instead apply.

risk (internal assignment) and credit risk (remote credit base)

The third level can be added to incorporate boot collateral at local level.

- Security pledge over local receivables if (i) not all eligible receivables are assigned and negative selection might occur and/or (ii) additional local collateral is required to

Single Group Facility: Setup and acceleration of cash dominion



support (local) credit risk. (Operational impact for Opco needs to be considered as well as local legal costs)

Collection Accounts

The SGF solution applies different cash dominion options and may include acceleration triggers to change from one option to a more strict option if and when required.

The most secured (legal) control on the incoming debtor payments (cash) is cash dominion by applying controlled collection accounts of ABN AMRO, established in The Netherlands at ABN AMRO Bank at the SFC level and/or for each operational entity, covering the required (multi-) currencies.

Depending on the client's financial strength, cash dominion can be at the SFC. It holds accounts in its own name. These accounts are secured by security pledges and cash sweeps. The advantage is that the SFC may have less difficulties in opening foreign accounts as these are opened in the client's own name. These local accounts might be necessary to avoid costly international payments for local currency payments. As security (pledge) on local pledged accounts might not stick in an insolvency in some countries, debtors must be timely instructed to pay on controlled collection accounts. Documentation covers such notification and payment instruction at specified events, like an Event of Default. Typically, the borrowing base will be updated at ABN AMRO daily or once a week, by having the client digitally submitting a new debtor ledger through API. The debtor payments are also taken into account. From a risk perspective, cash dominion at the SFC is preferred over cash dominion at the Opco as the SFC is considered far more bankruptcy remote than an Opco.

Clients may prefer to keep their cash management structure in place, maintaining their own local accounts at the operational entities. The debtors of the operational entities will continue to pay into these local accounts, which are secured by security pledges and cash sweeps. As security (pledge) on local pledged accounts might not stick at insolvency in some countries, debtors might need to be timely instructed to pay on controlled collection accounts. Documentation covers such notification and payment instruction at specified events, like an Event of Default which is continuing.

Insolvency

The SFC's sole purpose is to consolidate receivables and pool them to ABN AMRO. Intercompany claims of group companies on the SFC (including those resulting from the internal transfer) are subordinated or pledged to ABF, and cannot be freely enforced (including any local Opco administrator). As such, the SFC is structured in a bankruptcy remote way as much as possible and is assumed to be the last entity within the group that may become insolvent. In case of the (theoretically) SFC's insolvency, the Dutch receiver has the same position vis-à-vis ABN AMRO as in any regular insolvency involving secured receivables in The Netherlands.

The receivables financed or purchased by ABN AMRO are not part of a local Opco's insolvency. These are sold to the SFC and the SFC is the legal owner. Secondary security comprised of local bank accounts, local (other) receivables and guarantees can also be enforced by ABN AMRO with the legal support of the local law firms involved in the design and implementation of the facility.

The key interest is access to the (operational) IT-systems of the client where the order and debtor data is stored. Under Dutch law, the Dutch receiver is obliged to collaborate and to submit this data to enable ABN AMRO to execute its rights. It is common practice that this is subject to a negotiated estate contribution with the receiver.

In the event of a local Opco's insolvency, the other (group) subsidiaries of the client are (also) guarantors and jointly liable vis-à-vis ABN AMRO in the event of a deficit. Due to the size and rating of the clients, it is unlikely that the entire company will collapse at once. Certain parts may be part of a restructuring and as such the joint guarantee in favour of ABN AMRO has value. Nevertheless, due to the international angle, an enforcement may appear more complex in execution even within the context of the EU Insolvency Directive 2015 covering a harmonized approach to cross-border EU insolvencies.

ABN AMRO has performed several large and complex full recoveries of international receivable portfolios, with debtors located around the globe in joint and close collaboration with the respective receivers.

Conclusion

Since its introduction in 2015, the Single Group Facility

solution provides for optimisation of funding by applying a simplified structure for cross-border asset pooling on client group level. It has been applied in multiple transactions in combination with lending and in syndications both on a single set of LMA based documentation. The solution is scalable and flexible as regards to connecting and disconnecting geographies and funding partners. In particular the solution is applied by PE-owned companies because of its scalability, facilitating central cash flow management and financial steering of acquired companies. 🇳🇱

Ronald Biemans joined ABNAMRO 12 years ago after a career as an attorney at law, insolvency practitioner and corporate finance. At ABNAMRO ABF he held various positions including CRO NL and head of Group Risk for NL, UK, GE and FR, prior to his current position as head of International Structuring & Origination. He was a strong promotor of setting up the International Clients ABL team covering structured working capital management solutions in 2016. With its award winning European cross border solutions, the team shows evidence of winning new business across Europe, delivering innovative ABL structures and creative documentation, growing market share while maintaining credit quality and developing teams.

He holds master degrees in Dutch Law and European & International Law. He also holds post-graduate degrees in Insolvency Law, Finance & Security Law and Finance.

Tom Gevers is responsible for International ABL Structuring at ABN AMRO Asset Based Finance. He has over 20 years of experience in asset-based lending in various senior positions including head of Financial Restructuring & Recovery and manager International

Business Development. Prior to his career at ABN AMRO Asset Based Finance, Gevers has been senior consultant at McKinsey & Company, general manager Vendor Trade Finance at DLL and international product manager at Philips. Tom has a degree in Technology from Eindhoven University and a post doctorate degree in Insolvency Law at Radboud University Nijmegen.



In the event of a local Opco's insolvency, the other (group) subsidiaries of the client are (also) guarantors and jointly liable vis-à-vis ABN AMRO in the event of a deficit. Due to the size and rating of the clients, it is unlikely that the entire company will collapse at once. Certain parts may be part of a restructuring and as such the joint guarantee in favour of ABN AMRO has value. Nevertheless, due to the international angle, an enforcement may appear more complex in execution even within the context of the EU Insolvency Directive 2015 covering a harmonized approach to cross-border EU insolvencies.