

Eurojuris Congress, Dubai 2018 “IBR”

Joint session with the Corporate Group
Legal considerations in cross-border group financing with a
focus on cross-border cash-pooling
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Introduction: food for thought

I. CPA

- A. CPA in general
- B. CPA in specific case

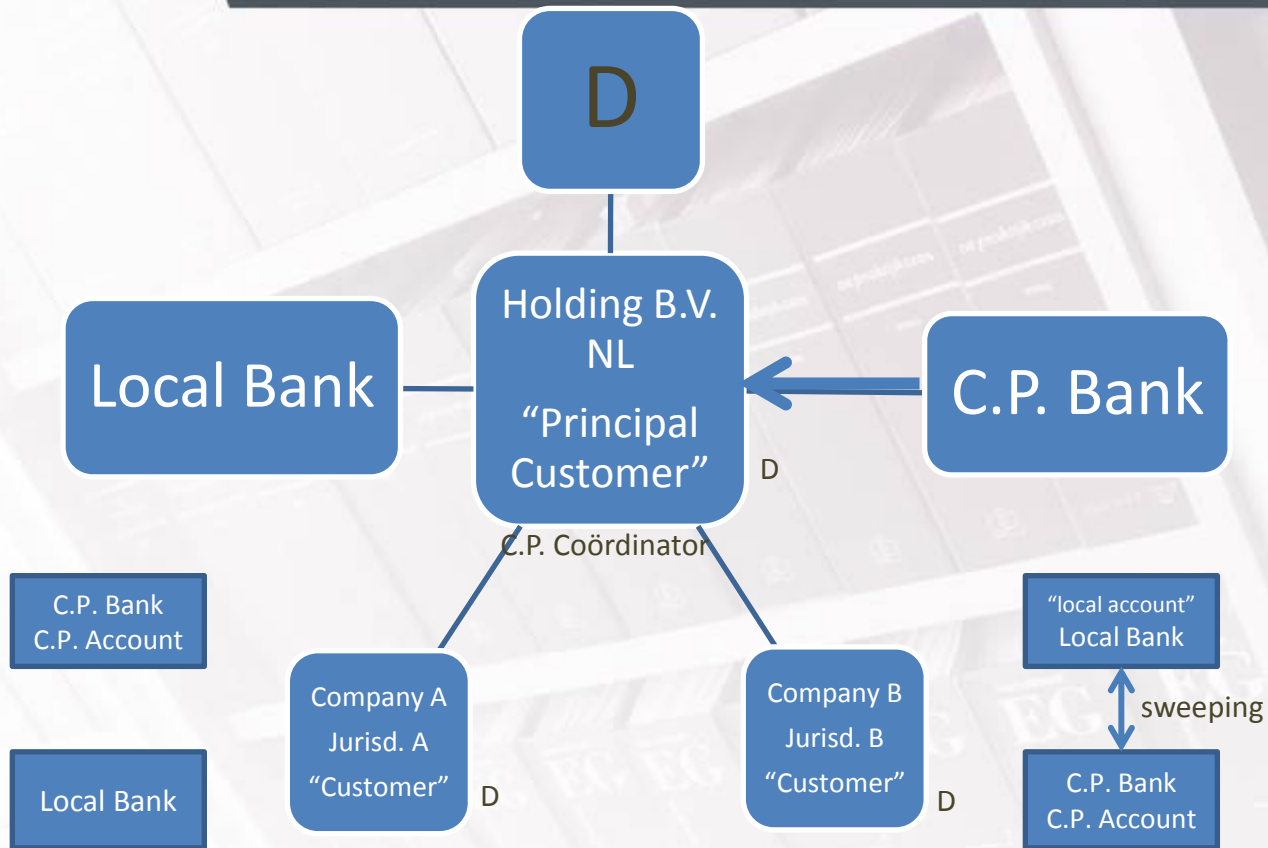
II. Some legal considerations CPA in case of distress/insolvency

Discussion / Q&A

CPA in general (I.A)

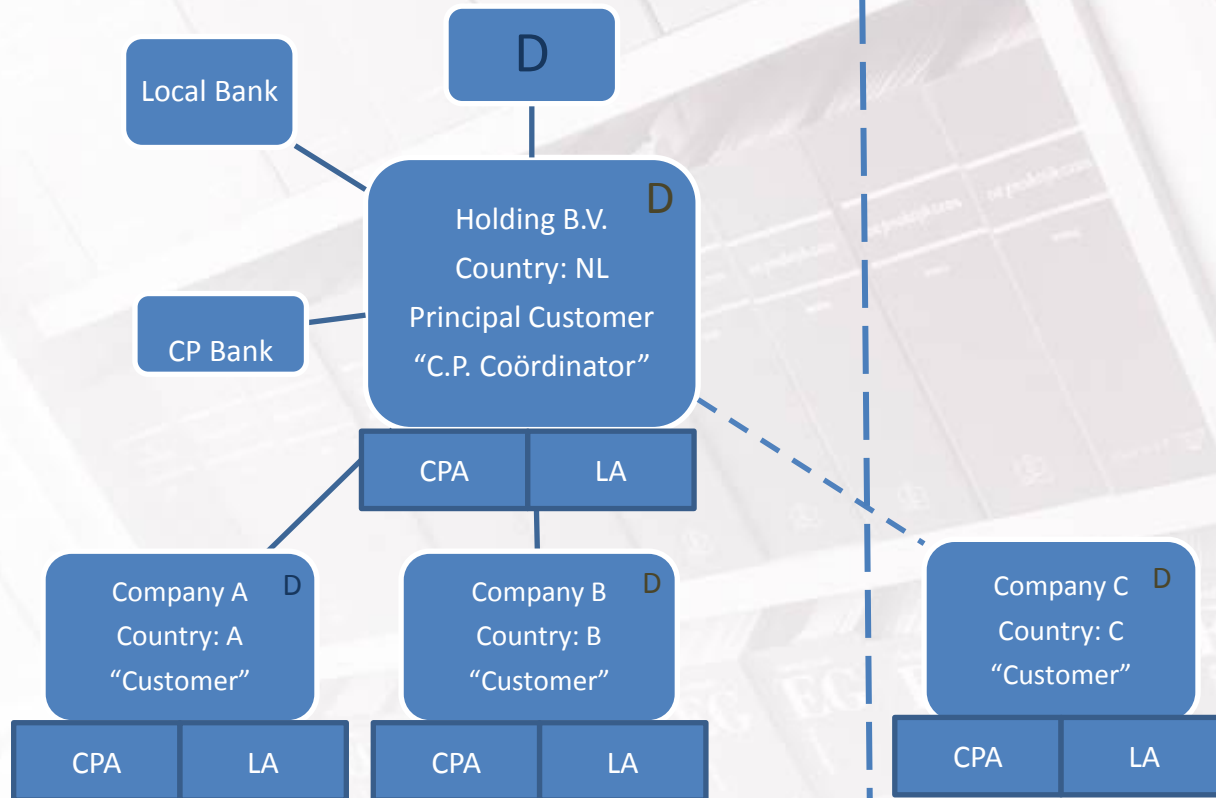
- **idea:** cash management, excess cash → group needs
- **physical C.P.:** - excess cash moves to entity within the corporate group, “cash pool leader”
- intercompany loans by and to C.P.-leader
- **notional C.P.:** - no physical movement of funds
- bank appointed to maintain and monitor a consolidated, cross-border, enterprise cash position
- participants with excess balances receive interest
- participants with cash deficits receive interest-bearing loans from the bank
- **practise:** - bank advances funds to C.P. participants with deficit of cash
- bank receives guarantees from C.P. participants (pledge credit amounts CP-accounts)
- balance positive
- right to offset!
- control system: - Trigger Amount: minimum on L.A.
- Maximum Sweeping Amount
- advantage: interest due over the balance
- disadvantage: costs

I.A



I.B Situation 1

Situation 2



Accession agreement

I.B

1. **Situation 1:**
 - interest accrues from day to day
 - D director of all companies
 - CPA: new customer clause (P.C.-authorised)

2. **Situation 2:**
 - Holding acquires all shares in Company C [D director of all company C]
 - Company C joins CPA (accession agreement)
 - accession agreement signed by: CP Bank, Principal Customer, Company C

3. **Situation 3:**
 - Company A: distress

4. **Situation 4:**
 - Partial termination by CP Bank towards all participants with exception of Holding with immediate effect (sit. 3), a.o. right to set-off remains valid

I.B

5. **Situation 5:**
 - transfer by CP Bank of € mio from CP-Account Company C to CP Bank (!)

6. **Situation 6:**
 - one day after 5: Company A bankrupt

7. **Situation 7:**
 - two weeks after 5: susp. of payment Company C → Bankrupt
 - two months after 5: susp. of payment Holding B.V. → Bankrupt

II. Some legal Considerations (distress)

To consider in each jurisdiction:

Civil law

- are legal requirements for setting-off met?
- third party pledge
- authorisation [acceptance beforehand of an unknown party according to the CPA]
- subrogation rights
- right of recourse

Corporate law

- by laws, in acc. with goal (CPA = loan?)
- capital maintenance rules
- conflict of interest and decision-making process
- accounting standards (valuation receivables, explanation accountant)
- undercapitalization (de facto)

Directors liability

- consequences of accession
- 2:251,2 DCC: Board of Dir. informs at least once a year the Supervisory Board in writing about a.o. financial risks and the management and control system of the company
- misleading annual accounts? (valuation receivables)

Insolvency

- challenge: (“Pauliana”)
 - setting of
 - accession to CPA (various perspectives)
 - transfer of amount(s)
- art. 4 (2) (m) jo. Art. 13 Insolvency Regulation

Discussion / Q&A

