



**ABA Section of
International Law**
Your Gateway to International Practice



NEWSLETTER

INTERNATIONAL PRIVATE CLIENT COMMITTEE (IPCC)

DECEMBER
2017

NOTE FROM THE CO-CHAIRS

Caroline Abela and Agnès Proton

Dear International Colleagues,

For those of you who attended the last Section Fall Conference in Miami, you already know that this has been a great event, where our Committee had various opportunities to be active and get involved.

For the others, here is a quick review of our the IPCC events:

Our **joint Breakfast and Dinner** organized with the International Family Law Committee on **Thursday October 26th 2017** came out to be, as predicted, so friendly and very productive. During these gatherings, we have tuned up the 2018 New York Conference programs that will spread from the five IFLC proposals which passed the selection last month. The IPCC will be involved in most of them. During the Dinner, we enjoyed the warm atmosphere of a genuine Greek restaurant, where all attendants from both Committees networked and mingled in a relaxing mode, as if hanging out in a Cycladic island for a few hours.

On **Friday October 27th 2017 4:30 pm – 6:00 pm**, our Committee held its Program which was announced as follows:

Giving Across Borders:

The Law and Practice of International Philanthropy in the 21st Century

Every year, billions of dollars of charitable gifts and grants pass from U.S. donors, private foundations, and charitable funds to organizations and efforts abroad. Recent and continuing global crises and challenges – humanitarian, environmental and cultural – in the Americas and other regions have elevated interest among charitable individuals, families, businesses and organizations in deploying funds and resources outside of the U. S.. At the same time, an ever-increasing number of individuals, families and businesses in the U. S. have deep connections to people, communities, and traditions in other countries. Naturally, when these individuals, families and businesses become interested in charitable giving, they often want to support organizations or institutions in those countries. With these trends likely to continue, client interest in cross-border giving will widen and grow. This panel will cover topics essential to the attorney practicing in this area, including the tax rules applicable to domestic and international giving, antimoney laundering and anti-terrorism financing rules, innovative ideas and best practices for international philanthropy, and hot topics regarding U.S. philanthropy in the America.



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Committee Sponsor: *International Private Client Committee*

Co-Sponsors: *Latin America and Caribbean; NGO and Not-For-Profit Organization*

ABA Co-Sponsors: *RPTeL International Tax Planning; RPTeL Charitable Organizations and Planning Group Panel Chair &*

Moderator: *Frederick K. Schoenbrodt, Bressler Amery & Ross, P.C., Florham Park, NJ*

Speakers: *Robert J. Desiderio, University of New Mexico School of Law, Albuquerque, NM Michele A. W. McKinnon, McGuireWoods LLP, Richmond, VA Judith Reyes, The Rockefeller Foundation, New York, NY Bruce Zagaris, Berliner Corcoran & Rowe LLP, Washington, DC*

This has been a most interesting session, well attended with many interactive exchanges. The participants could realize that the topic is far broader and technical than the novices in this field would expect.

This is why this Newsletter is offering a “catching-up session” to its readers, and for this we thank all the Speakers, moderated by our Vice-Chair Frederick Schoenbrodt, for having provided the following articles, in which they highlight some of the issues they discussed in Miami.

At all counts, congratulations to all Panelists for this (other!) successful program.

Last, because this Newsletter is also your tool and media, we are introducing a new rubric in this Issue, where we will publish our Members’ Professional Announcements.

So do not hesitate to let us know about professional updates and breaking news that you would wish to share within the Committee!

2017 FALL MEETING REPORT



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At the Fall Meeting of the ABA’s Section of International Law, the International Private Client Committee sponsored a program entitled “Giving Across Borders: The Law and Practice of International Philanthropy in the 21st Century.” Reflecting the broad interdisciplinary nature of international philanthropy, the program was co-sponsored by several other committees, including the SIL Latin America and Caribbean Committee, the SIL NGO and Not-for-Profit Organizations Committee, and the International Tax Planning Committee and Charitable Organizations and Planning Group of the ABA’s Real Property, Trust and Estate Law Section.

The panel consisted of Professor Robert J. Desiderio of the University of New Mexico School of Law and Sanchez, Mowrer & Desiderio, P.C. (Albuquerque, NM), Michele A. W. McKinnon of McGuireWoods LLP (Richmond, VA), Bruce Zagaris of Berliner Corcoran & Rowe, L.L.P. (Washington, D.C.) and Judy Reyes of The Rockefeller Foundation (New York, NY). The panel was chaired by Frederick K. Schoenbrodt, II, of Bressler, Amery & Ross, P.C. (Florham Park, NJ) and a vice-chair of the International Private Client Committee.

The panel’s objective was to provide a high-level overview of the law governing international philanthropy, particularly charitable gifts and grants passing from U.S. donors, private foundations, and charitable funds to foreign organizations or in support of charitable efforts abroad. The program was divided into three sections, each of which is summarized briefly below.

Part I: Traditional Giving and Grantmaking in the International Context

Professor Robert J. Desiderio, Partner, Sanchez, Mowrer & Desiderio, P.C.

Michele A. W. McKinnon, Partner, McGuireWoods LLP

As a general matter, U.S. tax law allows an income tax deduction for a charitable contribution to an organization that meets four requirements, including (i) the organization must be organized and operated exclusively for charitable purposes, (ii) the organization must be created under U.S. law, (iii) the organization must prohibit political activity and lobbying and (iv) the organization must prohibit private inurement and private benefits to individuals or entities. Professor Desiderio and Ms. McKinnon noted that the second



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requirement, requiring that the organization be a U.S. organization, created a significant limitation on U.S. donors obtaining an income tax charitable deduction for contributions to foreign charities. However, planning opportunities do exist for U.S. donors interested in international philanthropy and those opportunities are summarized below.

Before discussing the techniques by which a U.S. donor may obtain an income tax deduction for a contribution to a foreign charity, the panelists briefly discussed the rules governing deductibility of charitable contributions for estate and gift tax purposes. In general, contributions to organizations that qualify for an income tax deduction would also qualify for an estate and gift tax deduction. In addition, in the estate and gift tax context, the charitable deduction is available for contributions to foreign charities that meet the general requirements imposed on section 501(c)(3) organizations under U.S. tax law. As a result, the client with international charitable objectives and an estate that will be subject to federal estate tax may find that a bequest or gift under a will, will substitute or beneficiary designation (i.e., a contribution occurring at death from estate assets) is a tax-efficient way to support the client's favorite foreign charities.

Professor Desiderio and Ms. McKinnon discussed at length the major planning opportunities that exist for clients who wish to make tax-deductible contributions to foreign charities. Those opportunities include utilizing reciprocal deductibility authority available in certain tax treaties (e.g., income tax treaties with Mexico, Israel and Canada allow for reciprocal deductibility of contributions to charitable organizations), contributions to U.S. charities that conduct operations abroad (e.g., the American Red Cross), contributions to U.S. "Friends of" organizations, and contributions to U.S. private foundations. With respect to these strategies, the panelists made the following points that are notable to achieve a general understanding:

- Contributions to U.S. charities that conduct operations abroad cannot be earmarked for a specific foreign recipient organization as the U.S. organization will be viewed as merely serving as a conduit to the foreign donee.
- A U.S. "Friends of" organization is a U.S. charity that is created and operated to support programs that are operated by one or more non-U.S. charities. The U.S. organization is independent from the foreign organization. This balance of affiliation and independence is often reflected in the constitution of the U.S. organization's board, which typically shares members with the supported organization's board while ensuring that a majority of the "Friends of" board remains independent of the supported organization.
- If a U.S. donor creates a private foundation (organized as either a not-for-profit corporation or a trust), the foundation will then make grants to charitable recipients. As privately managed tax-exempt organizations, private foundations are subject to a variety of technical rules governing their operations to guard against abuse and ensure the satisfaction of the foundation's charitable purpose. U.S. private foundations may make grants to foreign charities, subject to the foundation's obligation to exercise "expenditure responsibility" over the funds granted abroad. If expenditure responsibility is not exercised, the foreign grant will be treated as a taxable expenditure, requiring correction and triggering excise taxes.
- The specific requirements of expenditure responsibility are detailed in I.R.C. section 4945(h) and Treas. Reg. section 53.4945-5(b), (c)(1) and (d). Those requirements include a pre-grant inquiry and a written agreement obligating the return of any funds not used for the agreed-upon purpose and a commitment not to use the granted funds for political, legislative or non-exempt activity, regular grantee reports to the grantor and maintenance and availability of the grantee's books and records, and the foundation's disclosure to the IRS of expenditure responsibility grants on the foundation's annual information return.
- Finally, the panel discussed the opportunity to avoid expenditure responsibility through a foundation's good faith effort to establish that the foreign charity would have qualified as a tax-exempt organization under sections 501(c)(3) and 509(a)(1), (2) or (3) if it had applied for U.S. recognition as a public charity. This can be accomplished via an "equivalency determination" based upon the opinion of U.S. counsel that the foreign charity is equivalent to a U.S. public charity or an affidavit of the foreign charity, either of which should include certain key information regarding the organization's operations, support, structure and applicable law.



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Part II: AML/CFT Considerations in International Philanthropy

Bruce Zagaris, Partner, Berliner, Corcoran & Rowe LLP

Compliance with Anti-Money Laundering and Combating the Financing of Terrorism (AML/CFT) rules and policies are of critical importance for any activity in which assets are moving across international borders. Mr. Zagaris explained that this is no less important for gifts and grants passing from the U.S. to foreign charitable organizations. He provided examples of U.S. organizations that were determined to be engaged in circumventing sanctions or funding terrorist activities abroad and which, as a result of that determination, had their assets frozen.

Mr. Zagaris explained that the Financial Action Task Force (FATF), an intergovernmental task force that develops and promotes the adoption of international standards to combat money laundering, has issued specific recommendations relating to the operation of nonprofit organizations (FATF Recommendation 8, Best Practices on Combating the Abuse of Non-Profit Organisations). Recommendation 8 is available online. These recommendations include the application of enhanced customer due diligence practices governing the receipt, use and disbursement of funds by a nonprofit organization. Mr. Zagaris highlighted a variety of U.S. laws and policies that also require attention from organizations operating abroad, including Executive Order 13224 (allowing freezing of the assets of individuals connected to terror financing), the *Foreign Corrupt Practices Act*, and the Office of Foreign Assets Control (OFAC) list of sanctioned programs and countries and designated individuals and companies. The consequences of careless grantmaking in this context can be severe, including revocation of tax-exempt status, freezing of assets, and liability for damages (and possibly enhanced damages) resulting from the illicit activity.

To comply with these best practices, a U.S. private foundation or other grantmaking organization should gather as much information as possible about the potential grantee, including the jurisdictions where the grantee conducts charitable work, current and historical operational data, and the organizations that the grantee supports or funds, and vet the grantee and its affiliated persons against the OFAC list of designated individuals and companies. In addition, the U.S. organization should require certification from the grantee organization that it does not and will not engage in or support illicit activities. In general, Mr. Zagaris explained, the necessary AML/CFT protective practices should emerge from and complement a larger organizational commitment to a careful and well-informed grantmaking process and overall good governance and, in turn, improve the governance, transparency and accountability of recipient foreign organizations.

Part III: Legal Aspects of Program Related Investments

Judy Reyes, Associate General Counsel, The Rockefeller Foundation

Ms. Reyes concluded the panel's presentation by discussing the use of program related investments (PRIs) by private foundations. A program related investment is an investment made by a foundation that is meant to accomplish one or more charitable purposes. Highlighting the essential charitable characteristics of a PRI, Ms. Reyes described a PRI as "a grant disguised as an investment." In fact, a PRI may count towards a foundation's required annual 5% minimum distribution.

Within the spectrum of available investments, a PRI will generally have a lower expected financial return, increased risk and increased social return (as compared to other traditional investments, including negatively or positively screened social investments). Note, however, that under the private foundation rules, foundation managers may incur excise taxes if they engage in jeopardizing investments (i.e., not made with ordinary business care and prudence). Ms. Reyes explained that PRIs are an exception to the jeopardizing investment rules and an investment's characterization as a PRI in an opinion of counsel can limit manager liability. The three essential requirements of a PRI are:

- The primary purpose of the investment is to accomplish one or more charitable purposes;
- A significant purpose of the investment is not the production of income or the appreciation of property; and
- The purpose is not influencing legislation or intervening in any political campaign of any candidate for public office.



The Rockefeller Foundation
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The typical forms of PRIs include below-market loans, guarantees/letters of credit, and equity investments, and any PRI should be documented in the same manner that a traditional investment would be documented and include a legal opinion. Ms. Reyes explained in detail the terms that must be negotiated and documented including use of proceeds and advancement of the charitable purpose, interest and financial return, funding milestones, exit terms, reporting requirements, and other traditional investment terms. Completing a significant PRI is a complex commercial transaction that requires familiarity with sophisticated business transactions and the law applicable to private foundations generally and PRIs specifically.

Ms. Reyes further explained the use of PRIs in the international context and key additional considerations that can arise when investing abroad, including important social and cultural differences (e.g., who is deemed “low income” in another country, dynamics of negotiations), financial and practical considerations (e.g., currency exchange risks, translations) and legal considerations (e.g., host country law, AML/CFT, Foreign Corrupt Practices Act, OFAC sanctioned countries and designated individuals lists). She explained the experience of The Rockefeller Foundation using PRIs in India to finance the expansion of solar plants in India. She described challenges and lessons learned, which are relevant to any foundation using PRIs in international contexts, including managing different investment regulations and restrictions on foreign investment, complex negotiations, and managing the for-profit partner and ensuring its commitment to the charitable purposes of the foundation’s investment. The use of international PRIs, while a powerful philanthropic tool, must be undertaken carefully and with an awareness of the substantial complexity in first bringing the investment to fruition and then managing it to a successful result.

ABA SIL IFLC SPRING PANEL PROPOSALS

Proposal 1

Henrietta Mason, Diane Le Grand de Bellerocche & Eliza Hebditch

ACCEPTED

Committees Submitting Forum Proposal

International Private Client Committee (IPCC)
International Family Law Committee (IFLC)

We will ask for sponsorship/support from the Europe Committee, the International Tax Law Committee and the International Litigation Committee.

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Forum Panel Title

“For Better, For Worse” - Examining the Impact of Pre-Marital Agreements and Regimes on International Succession

Forum Panel Description

The International Private Client Committee and the International Family Law Committee would like to put forward a joint proposal to consider in detail the interrelationship between pre-marital agreements and succession on death.

Multi-jurisdictional enforceability and the rights of parties to pre-marital agreements will be the subjects of panels presented by the International Family Law Committee at the Washington Spring 2017 Section meeting. Both proposing committees would like to continue and enhance the discussion by considering how prenuptial agreements concluded in one jurisdiction affect the rights of heirs, third parties and tax authorities in the event of the death of the patron. Substantive and procedural issues of cross border jurisdiction and enforceability, as well as fundamental principles of forced heirship and testamentary freedom, will be considered in the context of a case study requiring advisers to disentangle these complex legal issues.

Other Comments for Consideration

This fits extremely well with the overall theme of the New York spring meeting – the meeting of public and private law. There are important public policy considerations around the rights of the surviving spouse, including whether for example in common law countries it can be right (ethically, politically) to have the widow of a rich man cast upon the state.

Other questions include whether parties’ personal autonomy to waive their rights against their spouse’s estate should be limited by the state compelling them to make provision for their spouse.

And then there are questions about how we should provide for the providing spouse:

- What is the fair measure?
- Is it fairer to give her a fixed percentage of her deceased husband’s estate, or is it fairer to give her an allowance that is measured in the same way as it might be on divorce?

Proposal 2

David B. Starks & Dr. Markus Zwicky

ACCEPTED

Committees Submitting Forum Proposal

International Family Law Committee
International Private Client Committee

Committee Co-Sponsoring Forum Proposal

International Tax Law Committee
Young Lawyers’ Interest Group

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Forum Panel Title

Intergenerational Transfers: Lessons to be Learned from Family Owned Enterprises in Transition

Forum Panel Description

Aging business owners whose biggest part of their family fortune is the family business often wish to see an orderly intergenerational transfer of those businesses. However, such transfers face a myriad of issues requiring significant care and planning.

This diverse panel of lawyers with specific expertise will detail the problems and solutions facing such clients: how to integrate (or squeeze out) children; how to work through the structures and cultural differences impacting every cross-border family business; what to do about untimely divorces (theirs and their children's); how to assure the validity of marital agreements, wills, trusts and foundations; and how to manage the tax aspects and impacts of any transfer solution chosen (e.g., sale of shares).

Other Comments You Would Like Us To Consider

There are a number of public policy questions to consider in this panel and to compare between jurisdictions. For example, should the state encourage Family business owners to pass on the family business from generation to generation by giving them inheritance tax relief to enable them to do so?

Does it make a difference what kind of business it is? For example, would it or should it be different if it was a family owned bank or a family owned dairy farm?

What about divorce in the family? Is it right that it can be possible to shield a wife's claims from the increase in value in the business?

To what extent (if at all) is it and should it be possible to pierce the corporate veil in divorce or contested succession litigation? Comparison between jurisdictions

Proposal 3

Frances Auchincloss Goldsmith

ACCEPTED

Forum Panel Title

"Examining Civil and Common Law Approaches to the Conduct of Estate Litigation"

-or-

"Till Death Do Us Differ: A Comparison of the Approach of Civil and Common Law Jurisdictions to the Conduct of Estate Litigation"

Committees Submitting the Panel

International Family Law Committee
International Private Client Committee

Contact for the Panel

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****It is with great sadness that we have been advised that Mr. William J Keough, who originated the panel, has passed away.*



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Forum Panel Description

There can be nothing more profoundly personal than a death within a family. Disputes arising out of the devolution of a deceased estate are characterised by high levels of emotion on the part of beneficiaries and other family members who feel unfairly excluded from a Will. In conducting litigation in relation to such disputes, lawyers must nonetheless abide by their legal and ethical obligations as Officers of their Courts.

It is proposed that this panel look at cross-jurisdictional approaches to the conduct of estate litigation with an emphasis on cost disclosure obligations/entitlements, dealing with recalcitrant personal representatives, capacity issues and the duty of executors to put all relevant matters before the Court.

Other Comments You Would Like Us To Consider

This panel discussion fits in well with the theme of the NY Spring 2018 Meeting by identifying different approaches to the application of due process in Estate Litigation.

This panel will look at how different jurisdictions afford due process thereby ensuring:

- (i) fairness to all parties to the proceedings; and
- (ii) fundamentally, ensuring that the wishes of the testator are considered and the proceedings that seeks to test the validity of the instrument that reflects such wishes (ie: the Will) are conducted in a fair manner reflecting a commitment to the Rule of Law.

To what extent does the approach taken by practitioners in a common law jurisdiction differ from the approach taken by practitioners in a civil law jurisdiction?

Do practitioners' obligations differ in cases where a person has died without a Will? Should it? What if the only beneficiary is/are minors?

Proposal 4

Dr. Markus Zwicky & Maritza Rodriguez

ACCEPTED

Forum Panel Title

Employing a Family Member: Challenges and Pitfalls between Family Ventures and Family Feuds

Co-Sponsors

International Employment Law Committee
International Private Client Committee

Chair

Markus Zwicky, Zwicky Windlin & Partner, Zug, Switzerland

Speakers

Martine Hoogendoorn, Doorn en Keizer B.V., Amsterdam, Netherlands
Ronald Meissner, LL.M., Oppenhoff & Partner, Frankfurt am Main, Germany,
Pierre-Alain Conil, LL.M, Notary, Morel d'Arleux, Hurel & Billecocq, Paris, France
Michael Teitler, Teitler & Teitler, New York (invited)

Contact for the Panel

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Forum Panel Description

Employing a family member may seem like the easiest solution to many entrepreneurs or company directors, but can ultimately create more problems than it resolves as it can either qualify as a misuse of corporate assets, be subject to disputes within the family when certain members are more implicated than others.

- Employing a Spouse or Child: Financial Implications between Employment Law and Family Law;
- issues upon divorce;
- issues upon death;
- how to drag in, how to squeeze out;
- options for sale of shares;
- family constitutions and shareholder agreements;
- other challenges;
- tax and white collar crime issues, when board meetings are held at the family dinner table.

This case could form the facts of a case study. The main points are that the wife was the daughter of the founder of the company, and her husband ended up taking over the running of it. She and her siblings were not watching carefully, and the husband siphoned millions of pounds out of the company for himself. He did not provide proper accounts to the other family members and no-one pulled him up for that for years. His actions were only really discovered in the context of the divorce. This is a real lesson in proper governance of a family business.

<http://www.familylawweek.co.uk/site.aspx?i=ed178308>

Proposal 5

Frances Auchincloss Goldsmith

Not Yet Accepted

Forum Panel Title

Negotiating in an ever-changing world: making sure legal ethics remain intact across borders.

Forum Panel Description

Negotiations can be sufficiently difficult before factoring in cross-border legal issues. Determining what the crux of the situation is for a foreign party and how the elements you have negotiated will play out in all the jurisdictions involved are the preliminary steps in undertaking negotiations in an international context. In addition to these cross-border specific questions, we will also be looking into how ethical rules are perceived throughout various jurisdictions, such as what constitutes confidential correspondence and is it ever appropriate to divulge any of your client's secrets or actual position during negotiations if it can bring the other party closer to your goals.

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Committees Co-sponsoring the Forum Proposal

International Ethics Committee

TELECONFERENCE

Jointly held property and United States federal gift and estate taxation in the case of non-United States domiciliaries - March 2018

Host

Private Client Committee Presenter: Carmina Y. D'Aversa, Esquire, formerly with the International Estate and Gift Tax Program of the Internal Revenue Service - www.carminataxlaw.com

Date

Last Friday in March 2018 as the first agenda item to the IPCC conference call that month – More details to follow

Description

Despite the expected doubling of the five million United States dollars (indexed for inflation) exemption amount for US federal estate taxation of US citizens and domiciliaries, the threshold of sixty thousand US dollars in the case of non-US domiciliaries is expected to remain the same, and the gift tax will not be eliminated. Ms. D'Aversa will identify the gift tax traps and corresponding compliance requirements for non-US domiciliaries who unwittingly create joint tenancies in US property, and discuss the potential estate tax audit ramifications of joint tenancy ownership.

LAW FIRM ANNOUNCEMENTS

Diane Le Grand De Bellerocche and Duncan Fairgrieve are pleased to announce the creation of the law firm BeFair Avocats as of September 1, 2017.

By bringing together our complementary skills and experience of cross border matters, as French “avocats” and English solicitor / barrister, we have created a Paris-based law firm to provide advice in international matters ranging from international private client issues to international business and contract law.

To find out more, please do visit our website at www.befair-avocats.com. We will of course be pleased to answer any of your questions about our firm and activity.