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Private Clients Commission (PCC)

Working Session on Art Law

THE ART OF DEALING WITH ART

National Report of Sri Lanka

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A. Background

The Private Client Commission's focus this year will be the art market, which has grown at an extraordinarily fast pace in recent years. In January 2015 the world's two largest auction houses Christie's and Sotheby's announced an increase in their quarterly revenue of around 17% year on year, while in February Sotheby's broke the record for the highest sales total at any London auction with a staggering figure of GBP186 million. The art fair Art Basel recently attracted record attendance with 92,000 visitors in 2014. Needless to say, this growing market has led to a growing need for legal advice.

The Private Client session will address some of the most important aspects of the rules governing art assets which we, as private clients lawyers, will need to deal with now and in future. In particular, we will be considering the tax issues which arise in connection with the ownership and acquisition of artworks, and the legal requirements which our clients must consider when buying and selling art (including cultural heritage schemes and the recovery of stolen art). We will also consider succession law and art, bearing in mind that, while artworks can act as a convenient repository for wealth which will appreciate over time, for many families they will have more personal connotations as well, having been passed down through generations or serving as a powerful indicator of individual taste.

B. Introduction

Please return the completed Questionnaire and your answers to the case studies below by **Saturday 28 February 2015**.

Please answer the following questions (including those following the case study), with reference to statute and case law as appropriate. We would be particularly interested in any illustrative examples of case law which may be relevant to the issues raised. Please provide answers which are as detailed as possible, including where relevant explanations of why a particular question or fact pattern does not raise any issues in your country.

C. Questionnaire

Introductory questions

1. In which jurisdiction(s) do you practise art law? Do your answers cover other jurisdictions as well?

Sri Lanka only.

2. How long have you been practising in the art law field?

Art & law related matters rarely arise in practice in Sri Lanka.

In the course of 19 years of legal practice in Sri Lanka, I have advised in regard to an art related matter once.

3. How would you describe the majority of your art law cases:

- | | |
|--|--|
| <input type="checkbox"/> Inheritance law related | <input type="checkbox"/> Trade law related |
| <input type="checkbox"/> Tax law related | <input type="checkbox"/> Insurance law related |
| <input type="checkbox"/> IP law related | <input type="checkbox"/> Litigation |
| <input checked="" type="checkbox"/> Corporate matter of art dealers incl. art dealer/artist relationship | <input type="checkbox"/> other: _____ |

4. Would you describe Art Law as your main area of practise? How much of your working time do you spend on art law related matters (in %)?

I would not even describe it as an area of practice.

5. What are the major changes and challenges relating to your work on art law related matters in recent years (in a broad sense, eg. acquisition of clients, required expertise, material law questions)?

Does not arise

Taxation

6. What determines liability to tax of moveable assets for individuals in your country (e.g. habitual residence, domicile)?

Section 2 of the Inland Revenue Act no.10 of 2006 imposes liability to tax in respect of the profits and income of every person for that year of assessment:

- wherever arising, in the case of a person who is resident in Sri Lanka in the year of assessment; and
- arising in or derived from Sri Lanka, in the case of every other person

For the purposes of the Inland Revenue Act, “profits and income arising in or derived from Sri Lanka” includes all profits and income derived from services rendered in Sri Lanka or from property in Sri Lanka, or from business transacted in Sri Lanka, whether directly or through an agent.¹

This would extend to any profits arising from an art work like any other item of movable property.

Section 79 of the Inland Revenue Act defines a resident as follows: “An individual who is physically present in Sri Lanka for one hundred and eighty three days or more during any year of assessment, shall be deemed to be resident in Sri Lanka throughout that year of assessment”.

Except in certain special cases, (which do not fall to be considered in the answer to this question), there is no capital gains tax in Sri Lanka. There is also no gifts tax, wealth or capital tax and there is no estate duty or inheritance tax in Sri Lanka.

7. What determines liability to tax for structures holding moveable assets in your country?
 - The residential status of the entity for the purposes of the Inland Revenue Act.
 - Where and how the profits or income arise.

8. Has your country planned or proposed to introduce any new taxes on individuals who are either non-resident or non-domiciled with moveable assets in your country?

No.

¹ Section 2(2) of the Inland Revenue Act.

9. Has your country planned or proposed to introduce any new taxes on structures holding moveable assets in your country?

No.

10. Does your country have any favourable tax schemes in life or on death for people who own items of significant cultural value? If so, is an election required to participate in these?

No.

Buying and selling art

11. Is there any specific legal basis such as statutory codes or laws, or guidelines or regulations applied by market players or dealers which is applicable to art transactions (whether domestic or foreign² dealers are involved) in your jurisdiction (please also indicate, if any legislative procedures are currently planned or ongoing):

No, except in so far as otherwise referred to, there are no specific statutory codes, laws or guidelines or regulations applicable to art transactions only. Currently there aren't any new legislative proposals.

a. Are such requirements applicable to any person trading art? Or does it depend on certain criteria, such as legal entity/private person (i.e. a collector selling one of his pieces of art), size or revenue/profit?

There are no specific statutory provisions, codes, guidelines or regulations applicable to art transactions in Sri Lanka.

In terms of section 2 of the Auctioneers and Brokers Ordinance no. 15 of 1889, (which was enacted to make provision for the licensing of auctioneers and brokers), "No person shall carry on the trade or business of an auctioneer or a broker in any area

² Foreign art dealers, who for example sell at an art fair in your country.

within the administrative limits of any local authority except under the authority of a licence issued by the Chairman³ under this Ordinance.”

As apparent from the wording of the Ordinance, the requirement for a licence is to regulate auctions generally and the provision is not specifically only applicable to auctioneers of artworks.

For the purposes of the said Ordinance, no person shall be deemed to carry on a trade or business as an auctioneer who does not sell at any public auction property, movable or immovable, of the *aggregate value of fifty rupees and upwards* or to carry on trade, or business as a broker who does not at any time buy or sell for another, property, movable or immovable, of the *aggregate value of fifty rupees and upwards*.⁴

Where a transaction involves a seller or buyer who is deemed to be a non-resident for the purposes of the Exchange Control Act no. 14 of 1972, any applicable provisions in the Exchange Control Act would need to be taken into consideration.

In terms of section 7 of the Exchange Control Act, except with the permission of the Central Bank (acting through the Controller of Exchange), a person resident in Sri Lanka is prohibited from making a payment to a person who is a non resident for the purposes of the Exchange Control Act.

If the art/painting which is the subject of the transaction falls within the provisions of the Antiquities Ordinance no. 9 of 1940 or the Cultural Property Act no. 73 of 1988 then there are certain requirements that are applicable.

The Antiquities Ordinance was enacted to provide for the better preservation of the antiquities of Sri Lanka, and of sites and buildings of historical or archaeological importance in Sri Lanka.

In terms of section 36 of the Antiquities Ordinance, the exportation of antiquities from Sri Lanka is prohibited without a permit of the Director General of Archaeology. This

³ In terms of the Auctioneers and Brokers Ordinance, “Chairman” includes (a) in relation to any Municipal Council, means the Mayor of that Council and (b) in relation to any other local authority, means the Chairman of that local authority and “local authority” includes any Municipal Council, Urban Council, Town Council or Village Council.

⁴ Section 8 of the Auctioneers and Brokers Ordinance. Rs. 50 is approximately 40 cents US\$. The monetary figure is meaning less in the context of today since one can hardly buy anything for Rs. 50 and the said figure does not appear to have been amended since 1889!

provision would be applicable to a painting only if the painting in question is deemed to be an “antiquity” in terms of the Antiquities Ordinance.

In terms of the Antiquities Ordinance, an antiquity is defined as:

- (a) any ancient monument, or
- (b) any of the following objects lying or being or being found in Sri Lanka which date or may reasonably be believed to date from a period prior to the 2nd day of March, 1815:
 - statues, sculptured or dressed stone and marbles of all descriptions, engravings, carvings, inscriptions, *paintings*, [our emphasis], writings, and the material whereon the same appear, all specimens of ceramic, glyptic, metallurgical and textile art, coins, gems, seals, jewels, jewellery, arms, tools, ornaments, and
 - all other objects of art which are movables proper.

The Cultural Property Act⁵ is an Act to provide for the control of the export of cultural property and to provide for a scheme of licensing to deal in cultural property. A person cannot, without a proper license issued by the Controller of Exports, export or attempt to export a cultural property from Sri Lanka.

Therefore, if a work of art falls within the definition of cultural property as contained in the interpretation of the term cultural property under and in terms of the Cultural Property Act, a person who is seeking to export such work of art should do so only after obtaining a license from the Controller of Exports to so export.

Further, in terms of section 18 of the Cultural Property Act, no person can, by himself or by any other person on his behalf, carry on the business of selling or offering to sell any cultural property, except under the authority of a licence issued under section 19 of the Act.

⁵ The Cultural Property Act was enacted into law by an Act of Parliament. However, we have been informed by the Ministry of National Heritage of Sri Lanka that the provisions in the Cultural Property Act were never implemented since most of the provisions therein are already covered under the Antiquities Ordinance. With the change of Government in January 2015, discussions are ongoing to implement the Cultural Property Act.

For the purposes of the Cultural Property Act, “cultural property” is interpreted to include cultural property which on religious or secular grounds is specifically designated⁶ by the Minister with the approval of the Cabinet, as being of importance for archaeology, prehistory history, literature, art or science, and which belongs to one of the following categories:-

- (i) rare collections and specimens of fauna, flora, minerals and anatomy;
- (ii) property relating -
 - (a) to history, including the history of science and technology, military and social history; or
 - (b) to the life of national leaders, thinkers, scientists and artists; or
 - (c) to events of national importance;
- (iii) products of archaeological excavations or of archaeological discoveries;
- (iv) elements of artistic or historic monuments or archaeological sites which have been dismembered;
- (v) antiquities more than one hundred years old, such as inscription, coins, currency notes and engraved seals;
- (vi) objects of ethonological interest;
- (vii) pictures, paintings and drawings produced entirely by hand;
- (viii) original marks of statutory art and sculpture;
- (ix) original engravings, prints and lithographs;
- (x) rare manuscripts, old books, documents, drawings, maps, plans and publications of special interest;
- (xi) postage revenue and similar stamps;
- (xii) archives;

⁶ Since the Cultural Property Act has not been implemented, according to the verbal information we received, there are no designations made by the Minister as at March 31, 2015.

(xiii) articles of furniture more than one hundred years old; and

(xiv) old musical instruments.

For the purposes of the Cultural Act, an “antiquity” includes any of the following objects lying or being found in Sri Lanka, and has been in existence for more than one hundred years - statues sculptured or dressed in stone and marbles of all descriptions, engravings, carvings, inscriptions, *paintings*, writings, and the material whereon the same appear all specimen of ceramic, glyptic, metallurgics and textile art, coins, gems, seals, jewels, jewellery, arms, tools, ornaments, furniture, household utensils, and all other objects of art which are movable property.

Further, if a person wishes to import or export a piece of art/painting, the provisions of the Imports and Exports (Control) Act no. 1 of 1969 would be applicable. The Imports and Exports (Control) Act no. 1 of 1969, as amended is an Act to provide for the control of the importation and exportation of goods and for the regulation of the standards of exportable goods.

In terms of the Act, no person should import into, or export from, Sri Lanka any goods except under the authority, or otherwise than in accordance with the conditions, of a licence issued in that behalf under this Act by the Controller.

The Act provides that “goods” includes any article, animal, substance or property whatsoever.

According to the Department of Import and Export Control, no specific license has to be obtained for the importation of paintings/artworks. Certain types of artwork however are prohibited from being imported into Sri Lanka, such as any art/painting/drawing that ridicules any religious belief system or any ethnicity.

Referring to the specific example of a foreign art dealer who sells at an art fair in Sri Lanka, although the rules are not entirely clear, it is likely that such a person would have to apply for a business category ETA and visa.

The Department of Immigration and Emigration lists the following types of activities as the types of activities for which a business category ETA/visa is appropriate.

- participate in business meetings and negotiations

- participate in Conferences, workshops and seminars
- to take part in short term training programs (less than one month)
- participate in symposium in art, music and dance events

Depending on the facts, however, it may be necessary to apply for and obtain an entry visa and subsequently convert that to a residence visa with a work permit in order to engage in such activity.

- b. Are there different requirements for selling, leasing (eg. investment), lending (eg to a museum)?

No.

- c. Are there differences in regard to the type of art (eg. age, origin etc.)? If so, what are the determining factors/definition of such art?

As mentioned previously, the age and origin of the art would determine whether the art is an antiquity and/or cultural property, in which case the foregoing provisions would be applicable.

- d. Are there any other factors that determine the applicability of such requirements/ duties (eg. price, temporary transaction (eg. loan for an exhibition))?

None.

- e. What, in your jurisdiction, would be defined as a piece of art of national importance? Please provide details, including whether there is legislation in place which governs or imposes restrictions on dealing with art of national importance.

Please refer answer to question 11(a) whereby the definition of a cultural property in terms of the Cultural Property Act has been explained and the restrictions that are imposed in dealing with such property were explained. In terms of section 11 of the Cultural Property Act, the Minister of Cultural Affairs in consultation with the Cultural Property Board and with the approval of the Cabinet may from time to time by Notification published in the Gazette specify the categories of cultural property that shall be registered under this Act, having due regard to the following considerations—

- the necessity for conserving such category of cultural property,

- the need to preserve such objects within Sri Lanka for the better appreciation of her cultural heritage,
- such other factors as will or are likely to contribute to the safeguarding of the cultural heritage of Sri Lanka.

In terms of section 12 of the Cultural Property Act, no person should own or have in his/her custody or possession any cultural property specified in the Notification referred to in section 11 unless such cultural property is registered by the registering officer and such officer has issued a certificate of registration in respect of such property.

The definition of “antiquities” under the Antiquities Ordinance was also explained in the answer to question 11(a). We have also explained the relevant requirements applicable when dealing with antiquities.

The definitions of antiquities and cultural property in the Antiquities Ordinance and Cultural Property Act include “paintings”. Certain antiquities and cultural property could be deemed to be of national importance and protection is afforded to the same in terms of the said Ordinance/Act. Whether or not an antiquity or cultural property is deemed to be of national importance could be determined by the Archaeological Commissioner. If an antiquity or cultural property is so determined, (in the opinion of the Commissioner), to be of national importance and such antiquity/cultural property is owned by or in the custody or possession of any person, is in danger of being destroyed, defaced, misused, allowed to fall into decay or where the character of such property is about to be, or is being, or has been, changed, he shall with the concurrence of the Board give directions to the owner or the persons who have custody or possession of such cultural property to safeguard such property.

12. What are the consequences if the requirements referred to in question 11 are not met? To what extent may the art dealer be held liable?

Any person who owns or has the custody or possession of any cultural property, and who fails to make an application under section 15, or transfers the ownership or custody or possession of any cultural property and fails to notify such transfer to the registering officer, under section 16 is guilty of an offence and is, upon conviction after summary trial before a Magistrate, be liable to a fine not exceeding one thousand rupees

or to imprisonment of either description for a period not exceeding one year or to both such fine and imprisonment.

Please refer to the answer to question 11(a) with regard to the obligation of a person who wishes to export a cultural property to obtain a licence in terms of the Cultural Property Act.

In terms of section 12 of the Cultural Property Act, no person should own or have in his/her custody or possession any cultural property specified in the notification referred to in section 11 of the Act unless such cultural property is registered by the registering officer and such officer has issued a certificate of registration in respect of such property.

In terms of section 15 of the Cultural Property Act, where any person transfers the ownership or custody or possession of any cultural property registered under section 12, such person shall intimate within fourteen days from the date of such transfer, the fact of such transfer to the registering officer of the administrative district within which such person resides.

Any person who by himself or by other person on his behalf, sells or attempts to sell any cultural property to a person outside Sri Lanka in contravention of section 18 of the Cultural Property Act, or contravenes the provisions of section 19 or section 20, shall be liable on conviction after summary trial before a Magistrate, to a fine not exceeding five thousand rupees or to imprisonment of either description for a period not less than three years or to both such fine and imprisonment.

13. If an expert makes an error (e.g. attributing a painting incorrectly) under what circumstances would he be liable?

The expert may be liable for negligence under the Roman Dutch law as applicable in Sri Lanka. Negligence under Roman Dutch law involves two elements; (1) there is a duty of care owed by the defendant to the plaintiff and (2) a breach of that duty. Therefore, the expert would be liable in negligence if the expert owed a duty of care to whomever his erroneous opinion was communicated and if that duty was breached by attributing the painting incorrectly.

14. From a practice point of view, what are the major legal challenges in relation to trading art in your jurisdiction and what advice do you give clients with respect to art transactions?

Does not arise.

It should be noted that the Sale of Goods Ordinance (generally speaking) recognises the principle of *caveat emptor*. The Sale of Goods Ordinance contains certain provisions relating to implied warranties – which are therefore warranties that are implied by Statute.

Section 13 of the said Ordinance provides *inter alia* that in a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is -

.....

- (b) an implied warranty that the buyer shall have and enjoy quiet possession of the goods and
- (c) an implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made.

Further section 15 states “Subject to the provisions of the Sale of Goods Ordinance and of any enactment in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:

.....

- (3) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade”.

“Goods” are defined under the SOGO to include all movables except moneys.

Therefore, artwork/paintings would also be considered as “goods” for the purposes of the Sale of Goods Ordinance and, a dealer/buyer who is proposing to enter into an art sale transaction should be mindful of the aforementioned statutory implied warranties.

Title issues and recovering stolen art

15. How does one establish title to art in your jurisdiction? We would be particularly interested in relevant case examples involving modern forms of art such as graffiti.

There is no specific register of title in regard to works of art. As per the principles of the Roman Dutch common law, possession of a movable is *prima facie* evidence of the title of the possessor thereto.

The provisions contained in Chapter I (dealing with copyright rights) of the Intellectual Property Act no. 36 of 2003 are relevant as well. An author of an original artistic creation has certain economic and moral rights in respect of such right.

Section 9 of the Intellectual Property Act provides as follows with regard to the economic rights of an author –

- (1) Subject to the provisions of sections 11 to 13 the owner of copyright of a work shall have the exclusive right to carry out or to authorize the following acts in relation to the work "
- (a) reproduction of the work ;
 - (b) translation of the work ;
 - (c) adaptation, arrangement or other transformation of the work ;
 - (d) the public distribution of the original and each copy of the work by sale, rental, export or otherwise ;
 - (e) rental of the original or a copy of an audiovisual work, a work embodied in a sound recording, a computer program, a data base or a musical work in the form of notation, irrespective of the ownership of the original or copy concerned ;
 - (f) importation of copies of the work, (even where the imported copies were made with the authorization of the, owner of the copyright)
 - (g) public display of the original or a copy of the work.
 - (h) public performance of the work ,
 - (i) broadcasting of the work and
 - (j) other communication to the public of the work.
- (2) The provisions of subsection (1) of this section apply to both the entire work and a substantial part thereof.
-
- (3) Notwithstanding the provisions of paragraph (d) of subsection (1) the owner of a work or a copy of a work lawful made or person authorized in that behalf, is entitled without the authority of the owner of the copyright, to sell or otherwise dispose of that copy.

Section 10 of the IPA states the following with regard to the moral rights of an author:

- (1) The author of a work shall independently of his economic rights and even where he is no longer the owner of those economic rights have the following rights:
 - (a) to have his name indicated prominently on the copies and in connection with any public use of this work as far as practicable;
 - (b) the right to use a pseudonym and not have his name indicated on the copies and in connection with any public use of his work;
 - (c) to object to any distortion mutilation or other modification of or other derogatory action in relation to his work which would be prejudicial to his honour or reputation.
- (2) No right mentioned in subsection (1) shall be transmissible during the life time of the author; however on the death of the author, the right to exercise any of those rights shall be transmissible by testamentary disposition or by operation of law. The author may waive any of the moral rights mentioned in subsection (1), provided that such a waiver is in writing and clearly specifies the right of rights waived and the circumstances to which the waiver applies.

Provided that where a waiver of the rights under paragraph (c) of subsection (1) specifies the nature and extent of the modification of other action in respect of which the right is waived, subsequent to the death of the author the physical person or legal entity upon whom or which the moral rights have devolved shall have the right to waive the said rights.

16. What principles or rules apply to the recovery of stolen, illicitly exported or looted art?

In the absence of any general statutory provisions governing the recovery of stolen, illicitly exported or looted art, the provisions of the Antiquities Ordinance may be applicable if the art/painting is deemed to be an antiquity as defined under and in terms of the Antiquities Ordinance.

Section 15A of the Antiquities Ordinance states that: “Any person who commits theft within the meaning of section 366 of the Penal Code, in respect of antiquity, in the possession of any other person shall be guilty of an offence under this Ordinance and shall on conviction after summary trial before a Magistrate be liable to a fine not less than twenty five thousand rupees and not exceeding two hundred and fifty thousand rupees or to imprisonment of either description for a term not less than two years and not more than five years or to both such fine and imprisonment.”

Section 44 of the Antiquities Ordinance states: “Every person who commits a breach of any provision of this Ordinance or of any regulation shall be guilty of an offence and shall, where no penalty is specially provided by this Ordinance for such offence be liable on conviction to a fine not less than fifty thousand rupees and not exceeding two hundred and fifty thousand rupees or to imprisonment of either description for a term not exceeding five years or to both such fine and imprisonment.” Therefore if a person fails to obtain a license in terms of section 36 of the Ordinance to export an art/painting which is deemed to be an antiquity such person will be guilty of an offence in terms of section 44.

17. Does your jurisdiction participate in any international restitution schemes to assist in the recovery of stolen, illicitly exported or looted art?

Sri Lanka is a member of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation. However its term expires at the 39th General Conference UNESCO in 2017. The members are elected and facilitate bilateral negotiations for the restitution of "any cultural property which has a fundamental significance from the point of view of the spiritual values and cultural heritage of the people of a Member State or Associate Member of UNESCO and which has been lost as a result of colonial or foreign occupation or as a result of illicit appropriation”.

Succession

18. What determines succession to moveable assets in your country?

In the case of testate succession, Sri Lankan law allows almost complete testamentary freedom. The principle freedom of testation is enshrined in section 2 of the Wills Ordinance. In terms of section 2 of the Wills Ordinance the testator has the freedom to dispose of his/her movable or immovable property in his/her last will as he/she chooses.

In the case of intestate succession, section 21(2) of the Matrimonial Rights and Inheritance Ordinance states that “inheritance *ab intestato* to the movable property of a person deceased

shall be governed and regulated by the law of the country in which he had his domicile at the time of his death”.

The proviso to the section states that “provided that when any person shall have his domicile in any part of Sri Lanka, such domicile shall, so far as it relates to the inheritance to his movable property, be deemed to be in the Maritime provinces” and “provided also that if a person dies leaving movable property in Sri Lanka, in the absence of proof of his domicile elsewhere, the inheritance to such property shall be governed by the following provisions of this Ordinance”.

19. Are there any restrictions as to who can inherit artworks of national importance?
No.

20. How would an individual donate artworks to an institution or charity during his/her lifetime or on death?
 - During lifetime – by act or deed of gift.
 - On death – by Last Will.

Case study

You are very pleased to receive a referral of two new clients from one of the many charming AIJA members you met at the London Congress 2015. Suzanne is Argentinian and Frederick is English, and they married in a lavish ceremony in Venice in 2011, attended by many celebrities and paparazzi. The couple have two children: Alberto (born in 2012) and Victoria (born in 2014).

Frederick comes from a wealthy family and has inherited many artworks which are kept at his family's rural mansion. Last time Frederick visited his family home, he decided to give Alberto a painting for his third birthday so he put a label reading "For Alberto" on the back of his favourite Rembrandt.

Suzanne also has a keen interest in art, and has built up her own extensive collection. Suzanne and Frederick currently travel the world, going to galleries and attending auctions to find pieces to add to Suzanne's collection. They are considering moving to your country and living there

until the children go to university. Suzanne would like to bring her collection with her, initially to hang in their new home but she is also considering selling some pieces through auction houses.

21. What pre-arrival tax planning opportunities in relation to Suzanne's artworks would you advise?

Customs Importation Duty would be applicable to the importation of paintings and drawings if imported for commercial purposes. The current general duty is 15%. Certain other levies/charges are also payable at the point of importation.

No custom duty is general payable on personal effects. Therefore if a painting/artwork is imported into Sri Lanka by Suzanne's or Frederick's as a part of their personal effects, there wouldn't be any customs duty payable.

Exchange Control – if Suzanne is going to be regularly selling art, she would be advised to establish a company, (an investment of USD 1 million would likely be required if such sales fall to be considered as retail activity), since if she is deemed to be a non resident for the purposes of the Exchange Control Act, any person who is resident for the purposes of the Exchange Control Act, cannot make a payment to her by virtue of section 7 of the Act and permission would have to be obtained by the Controller of Exchange each and every time a payment is made from a resident of Sri Lanka to Suzanne. Therefore, to avoid this complication Suzanne could incorporate a Sri Lankan company for this purpose.

22. Once they have moved to your country, what estate and tax planning opportunities should Frederick and Suzanne consider in relation to their artworks?

As explained in the answer to question 18, if Suzanne/Frederick dies intestate, section 21(2) of the Matrimonial Rights and Inheritance Ordinance would apply and the (intestate) succession to the artworks, which are movable property, would be governed and regulated by the law of the country in which he/she had his/her domicile at the time of his/her death.

In the event that the last domicile of Suzanne and Frederick cannot be proved to be elsewhere, and they have movable property in Sri Lanka, the provisions of the Matrimonial Rights and Inheritance Ordinance would apply. In such event, the surviving spouse would be entitled to half of the share of the movable property and the children would be entitled to the other half in equal portions.

If Suzanne and Frederick wish the art works (in Sri Lanka) to devolve in a manner other than as set out in the Matrimonial Rights and Inheritance Ordinance, it would be necessary for each of them to make a Last Will.

It is reiterated here that the Wills Ordinance allows almost complete freedom of testation and therefore Suzanne and Frederick may leave their respective art works to whomever they wish.

That stated, it is important to note that under and in terms of section 2 of the Wills Ordinance, freedom of testation is applicable only to immovable or movable property *in* Sri Lanka. Therefore the Last Wills they execute separately or the joint last will they execute together would be operate and not be open to challenge in so far as artwork that is *in* Sri Lanka is concerned.

It should be noted that in most circumstances, a Sri Lankan Court, following the judgment in the case of *Ratnasingham v. Tikiribanda Dassanaiké and Others* would consider that it does not have jurisdiction over movable property situated outside of Sri Lanka.⁷

23. Who will have a financial claim to the artworks if either Frederick or Suzanne dies without leaving a Will?

By financial claim, it is presumed that this means the right to inherit or some form of claim bases on forced heirship provisions. Please refer to the response to question 22. There may be a claim pursuant to any forced heirship provisions in respect of artworks situated outside Sri Lanka.

⁷ *Ratnasingham v. Tikiribanda Dassanaiké and Others* (1998) 1 SLR 8.

24. In relation to question 23, would the position be different if Frederick and Suzanne were not married?

Yes. If Frederick dies intestate with no spouse, the illegitimate child would not inherit from the father. Section 33 of the Matrimonial and Inheritance Rights Ordinance specifically provides that: "Illegitimate children inherit the property of their intestate mother, but not that of their father or that of the relatives of their mother." The artworks would therefore pass to the other categories of interstate heirs of Frederick provided for in terms of the Matrimonial Rights and Inheritance Ordinance, namely the parents of Frederick, and/or as the case may be the siblings of Frederick. In the case where the deceased unmarried Frederick has only one surviving parent, his surviving parent would be entitled to half a share and his brothers and sisters would inherit in equal shares the other half or, the children of his deceased siblings, would inherit as the case may be. In the event that there are no intestate heirs, the estate would escheat to the State by virtue of section 34 of the Ordinance.

In the case of Suzanne, the principle of "the mother makes no bastard" means that the artworks would devolve on her child/the children by virtue of section 33, which has been already referred to previously in this answer.

25. When either Suzanne or Frederick dies, what estate tax will be payable on the artworks?
No estate tax would be payable in Sri Lanka.

26. Has Frederick made an effective gift of the Rembrandt to Alberto for succession and for tax purposes?

It would appear that the Rembrandt is in a rural mansion in Frederick's native Argentina. The requisites for a valid gift *inter vivos* would likely therefore be governed by Argentinian law. Argentinian law would therefore determine whether the label is sufficient as a matter of Argentinian law to transfer ownership of the Rembrandt to the minor Alberto and the capacity of Alberto to own property.

In Sri Lanka, transfers of movables are subject to the provisions of section 17 of the Registration of Documents Ordinance which provides that:

“No.... bill of sale⁸ of movable property shall be of any force or effect in law or give...the transferee any lien, charge, claim, right, or priority to, over or in respect of such property unless - such property is actually delivered into the possession and custody of the.... transferee or of some person (other than thetransferor) on behalf of the...transferee and continues to remain actually, ostensibly and bona fide in such possession and custody from the date of the...bill of sale until such time as the... transferee seeks to enforce his rights as such to, over, or in respect of such property; or,

- such... bill of sale is created by an instrument in writing signed by the person effecting the same or by some person thereto lawfully authorized by him, and unless such writing shall, within twenty-one days, (exclusive of Sundays and public holidays), from the date thereof, have been duly registered in the office of the Registrar of Lands for the district in which such property shall be at the time of such.... bill of sale, or in the office of the said Registrar for each of such districts, when such property is at the time of such....bill of sale in more than one district.

It is an open question whether the definition of a bill of sale, (which includes an assignment), would cover an *inter vivos* gift. If the definition does include an *inter vivos* gift, then, if Alberto, (or someone such as Frederick on his behalf), is not in possession of the Rembrandt, the instrument should be tendered to the Land Registry for registration in the Register of Movables of the Land Registry having jurisdiction over the place in Sri Lanka where the art work is situated. If the definition of bill of sale is not wide enough to cover an *inter vivos* gift, then Frederik would have to argue that the common law permits gifts of movables and Frederik could execute a deed of gift in respect of the art work.

If it is assumed that there is a formal deed of gift executed to gift the Rembrandt. Case law suggests that a gift requires acceptance by a competent person to be fully completed, which is based on the principle that a donation is a contract to which there must be two parties. A father making a donation cannot accept it on his child's behalf.⁹

⁸ Section 16 of the Registration of Documents Ordinance provides that - "bill of sale" includes any assignment, transfer, declaration of trust without transfer, and any other assurance of movable property, whether absolute or by way of mortgage....

⁹ Wellappu v. Mudalihami D.C., Chilaw, 2,275.

In terms of the Roman Dutch law, in a case of a donation/gift to a minor, the law requires a present acceptance by the natural or legal guardian of the minor, or by himself, after he has attained majority. According to the Roman Dutch law the mother and father stood in the relationship of natural guardians.

According to the factual scenario outlined, the Rembrandt is not in the possession of Alberto, (who is a three year old child), though it may be argued that possession thereof is held by Frederick on behalf of Alberto in his capacity as the natural guardian of Alberto.