

Isaidat Law Review

A comparative approach to knowledge

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Isaidat Law Review covers all aspects of comparative and transnational law. It is also dedicated to the neighbouring fields of legal anthropology, law and language, law and arts, law and the cognitive sciences, as well as to the dialogue between law and other disciplines. Articles are subject to double blind peer review.

La linea editoriale della Isaidat Law Review coinvolge tutte le aree del diritto comparato e transnazionale. Accoglie inoltre articoli sui temi contigui dell'antropologia giuridica, sui rapporti tra lingua e diritto, diritto e arti, nonché sull'apporto delle scienze cognitive al diritto e, più in generale, sul dialogo tra il diritto e le altre discipline. I contributi che appaiono sulla rivista sono soggetti a una procedura di peer review a doppio cieco.

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NOTA EDITORIALE

Pur non essendo una rivista squisitamente dedicata al tema Law & Arts, la ISAIDAT LAW REVIEW ha saputo riconoscere e valorizzare il lavoro dei tanti giuristi che, con numeri ogni giorno crescenti nel mondo, dedicano la loro indagine allo studio di quel rapporto misterioso quanto proficuo che, su vari piani, lega il diritto alle arti e queste al diritto.

Il diritto delle arti, del resto, si caratterizza per la mutidisciplinarietà e la pressante attualità, aspetti che hanno sempre indirizzato le scelte editoriali della ISAIDAT LAW REVIEW.

Lo scorso dicembre è apparso infatti, con Prefazione del Presidente di ISAIDAT ed Editor della ISAIDAT LAW REVIEW, Rodolfo Sacco, un apprezzato Special Issue 2020 for Law and Arts che ha raccolto – raggruppandoli rispettivamente nelle due sezioni "Law In and Around Opera" e "The Visual Arts: A Legal Caleidoscope" – alcuni pregevoli contributi firmati, come è da indirizzo e vocazione della Rivista, sia da studiosi già affermati a livello internazionale sia da studiosi in crescita ai quali auguriamo lo stesso divenire.

La raccolta ha seguito così due filoni di quel vasto e interessante mare di rapporti che interrogano reciprocamente il diritto e le arti. Una prima sezione ha accolto infatti alcuni studi dedicati all'osservazione del diritto dentro e intorno all'opera (di Micco; Rouland) mentre la seconda sezione ha voluto offrire al lettore un ventaglio di riflessioni elaborate intorno ad alcuni profili giuridici che emergono sempre più vigorosi da quel grande serbatoio di domande che sono per noi le arti visive (Jayme; da Nóbrega; Moustaira; Magri; Franca Filho).

Visto l'entusiasmo che ha accompagnato e accolto lo Special Issue 2020, ISAIDAT LAW REVIEW ha scelto di incoraggiare, in particolare tra i comparatisti, la prosecuzione degli studi e delle ricerche in questo campo del sapere giuridico. Con questo intento la Rivista ha quindi deciso di dedicare il suo primo numero ordinario del 2021 alla raccolta di alcuni preziosi contributi che indagano a vario titolo il diritto e le arti nel loro vicendevole rapporto.

Prende forma così il presente numero, diviso in tre sezioni - "The Arts and the Market", "Enhancement and Protection" e "Law and Literature" - a cui si aggiunge, per la prima volta, una IV parte "Reviews and Recommendations"; ciascuna autonoma, ciascuna parte del tutto.

Se è infatti vero che i tre temi possono facilmente formare oggetto di altrettante e distinte analisi, è però altrettanto vero che nessuno di questi, per la sua stessa completezza, potrà mai davvero rinunciare a uno sguardo, sia pur parziale, verso gli altri due. Non è infatti più possibile parlare di protezione e valorizzazione senza mai parlare di mercato; e, sia pur in un modo meno evidente, anche le analisi di law and literature trovano in fondo la loro validità e il loro interesse solo ove intersechino, sia pur velatamente, il reale e il tempo presente.

Con questo spirito, i primi due contributi (Fiorentini; Silveira, Covelo de Abreu, Cabral) ci portano, attraverso l'esame di due profili tra loro molto diversi, al centro di quel delicato dedalo di rapporti che, in vario modo, esiste tra le arti, il loro diritto e il mercato.

La seconda sezione, invece, accogliendo i quattro contributi che la compongono (Ludwig, Cenini, Pessoa Alcoforado, Carballeira Rivera), offre al lettore un'idea artico-

lata della ricchezza di temi e di prospettive che interrogano il giurista in relazione al binomio valorizzazione e protezione dei beni culturali attraverso gli strumenti del diritto e, spesso, anche attraverso le sue lacune. Si affrontano infatti temi complessi e di frontiera come il ruolo della soft law - e in particolare della due diligence - nella protezione dei beni culturali, quello relativo a quali siano le "forme giuridiche" più efficaci nella valorizzazione e nella gestione delle opere d'arte, alla riflessione in chiave comparante circa l'opportunità di dotare il Brasile di un codice dei beni culturali sulla scia dell'esperienza italiana, a quello relativo ai problemi che pone al diritto la dotazione immateriale dei beni culturali.

Un po' come a chiosa di questo numero, la terza sezione che qui volutamente è dotata di un unico contributo (Zeidler, Guss), si sposta poi su un piano di indagine apparentemente più astratto e più teorico, capace però di dare al lettore un affresco d'insieme preciso e inatteso sulla molteplicità possibile degli approcci d'indagine al tema diritto e letteratura nonché alcuni mirabili spunti di riflessione sulle cosiddette Aesthetics of law; anche qui, il plurale è d'obbligo.

Infine, inaugurando la quarta sezione dedicata alle recensioni e alle segnalazioni di lettura, il presente numero della ISAIDAT LAW REVIEW offre qui la recensione (Longobucco) dell'opera Saggi di diritto del mercato dell'arte, a cura di Fabio dell'Aversana, in "Quaderni di Diritto delle Arti e dello Spettacolo", SIEDAS (Società Italiana Esperti di Diritto delle Arti e dello Spettacolo). Con l'intento di offrire al lettore un ulteriore riscontro dell'opera pubblichiamo, in calce alla recensione, il contributo del curatore del volume (Dell'Aversana), dedicato anch'esso alla circolazione dei beni culturali tra norme giuridiche e regole di mercato.

Ringraziamo infine gli Autori che hanno contribuito alla realizzazione del presente numero 1/2021 e ringraziamo altresì la ISAIDAT LAW REVIEW per avere ancora una volta accolto e sostenuto questo prolifico sforzo di ricerca.

Torino, aprile 2021

Domenico di Micco
Geo Magri

EXPORT RESTRICTIONS RELATED TO THE PROTECTION OF BRAZILIAN CULTURAL HERITAGE AND DUE DILIGENCE WHEN IMPORTING CULTURAL GOODS FROM BRAZIL

Marcos Ludwig[*]

When assessing an opportunity for importing cultural goods from Brazil, foreigners should be alert to possible restrictions under Brazilian law before concluding and executing the transaction with the Brazilian counterparties. Due diligence is recommended either in cases of permanent import (or, from the Brazilian perspective, permanent export), such as in transactions that contemplate a purchase, donation, or others in which the transfer of title over the goods is contemplated, or in cases of temporary import (or, from the Brazilian perspective, temporary export), such as in transactions that contemplate a loan, lease, or others in which no transfer of title is contemplated and, therefore, the goods are expected to return to Brazil. In this regard, in addition to tax and customs aspects, contractual provisions, insurance arrangements, and, depending on the circumstances, even anti-money laundering laws and regulations, it is important to consider export restrictions (from a Brazilian law perspective) related to the protection of Brazilian cultural heritage.

Nel valutare la possibilità di importare beni culturali dal Brasile, prima di concludere ed eseguire la transazione con le controparti brasiliane, occorre prestare particolare attenzione alle restrizioni previste dalla legge brasiliana. Un'attenta due diligence è quindi raccomandata sia nei casi di importazione permanente (o, dal punto di vista brasiliano, di esportazione permanente), come avviene in caso di acquisto, di donazione, o di altre fattispecie che prevedono il trasferimento della titolarità del bene, sia nei casi di importazione temporanea (o, dal punto di vista brasiliano, di esportazione temporanea), come avviene nelle transazioni che contemplano un prestito, una locazione, o altre operazioni in cui non è previsto il trasferimento del titolo e per le quali il bene dovrebbe poi tornare in Brasile. Per queste ragioni, oltre agli aspetti fiscali e doganali, alle disposizioni contrattuali, agli accordi assicurativi e, a seconda delle circostanze, anche alle leggi e ai regolamenti antiriciclaggio, è importante conoscere e tenere presenti le restrizioni all'esportazione (dal punto di vista del diritto brasiliano) relative alla protezione del patrimonio culturale brasiliano.

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1. PROTECTION OF BRAZILIAN CULTURAL HERITAGE: OVERVIEW

Brazilian authorities are constitutionally bound to promote and protect the cultural heritage, that is, all material and immaterial goods that bear reference to the identity, action and memory of the different groups that form the Brazilian society (Brazilian Constitution, Article 216). The entity in charge of protecting the Brazilian cultural heritage at the national level is the National Historic and Artistic Heritage Institute (*Instituto do Patrimônio Histórico e Artístico Nacional*) ('IPHAN'), a federal public administration entity linked to Brazil's Ministry of Tourism (which absorbed the attributions, staff, and resources of the former Ministry of Culture, extinguished by the President of the Republic in January 2019, as set forth in Decree No. 10,108, of 7 November 2019)[1].

To classify goods as cultural property, the IPHAN must observe the general criteria and procedures set forth in Decree-Law No. 25, of 30 November 1937 (the 'PHAN Law'). In particular, the IPHAN must assess whether the conservation of a given material or immaterial good qualifies as a matter of public interest (*interesse público*) either for its linkage to memorable facts of the history of Brazil or for its exceptional value of archeologic or ethnographic, bibliographic, or artistic nature. Classification depends on an act of inscription (*tombamento*) of the goods by the IPHAN, separately or in group.

The protection is expected to apply solely to those cultural goods that have "national representativeness, signification or importance" (IPHAN Ordinance No. 375, of 19 September 2018, article 29). Accordingly, the IPHAN must avoid protecting by inscription (*tombamento*): (i) material goods that do not enable cultural fruition; (ii) complete sets of works of artists or architects; or (iii) goods associated with the memory or life of personalities that are not related to social processes of collective interest (article 30). Furthermore, certain works of foreign origin located in Brazil are specifically excluded from the national historic and artistic heritage and, as such, not subject to the protection set forth by the PHAN Law. This is the case of works of foreign origin that belong to diplomatic or consular representations or to commercial stores of historic or artistic objects in Brazil, for instance.

Art works and traditional crafts that date prior to the end of the monarchic period (i.e. before 15 November 1889) are subject to protection as long as they were (i) produced in Brazil, or (ii) originated in Portugal but incorporated to the national milieu, or (iii) produced outside of Brazil but representing personalities that are either Brazilian or related to the History of Brazil, as well as the country's landscape and customs (Law No. 4,845, of 19 November 1965; IPHAN Ordinance No. 375, of 19 September 2018, article 41). The permanent export of such artworks or traditional crafts is prohibited under Brazilian law.

[1] Acts of promotion and protection of cultural heritage can also be taken by competent authorities at the state or municipal levels, subject to special regulations within their respective authorities in accordance with the same general principles set forth in the Brazilian Constitution (Article 216). In the State of Rio de Janeiro, for example, the competent authority is the State Cultural Heritage Institute (*Instituto Estadual do Patrimônio Cultural*) ('Inepac'), a state-level public administration entity linked to the State of Rio de Janeiro's Secretariat of Culture and Creative Economy. In the exercise of its statutory duties, the Inepac consults an expert advisory board led by the director-general of the Inepac and composed of other eleven members: a representative of the Brazilian Historical and Geographical Institute ('IHGB'), a representative of the Brazilian Architectures Institute ('IAB'), a representative of the IPHAN and eight experts nominated by the State Governor.

Special rules apply for the protection of the material cultural heritage of native peoples (*povos indígenas*), of traditional peoples and communities of African origin (*povos e comunidades tradicionais de matriz africana*), of maroon communities (*quilombos*) and certain other cases (IPHAN Ordinance No. 375, of 19 September 2018, article 61 ff.).

2. 1970 UNESCO CONVENTION

Brazil approved the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property on 28 November 1972 (Legislative Decree No. 71), deposited its instrument of ratification with UNESCO on 16 February 1973 and promulgated its content internally on 31 May 1973 (Decree No. 72,312).

By adhering, Brazil undertook, "at the request of the State Party of origin, to take appropriate steps to recover and return any such cultural property imported after the entry into force of this Convention in both States concerned, provided, however, that the requesting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property. Requests for recovery and return shall be made through diplomatic offices. The requesting Party shall furnish, at its expense, the documentation and other evidence necessary to establish its claim for recovery and return. The Parties shall impose no customs duties or other charges upon cultural property returned pursuant to this Article. All expenses incident to the return and delivery of the cultural property shall be borne by the requesting Party." (1970 UNESCO Convention, article 7(b)(ii)).

Within this national legal and regulatory framework, the 1970 UNESCO Convention is implemented in Brazil by the IPHAN.

3. PROCEDURE FOR EXPORT PERMISSION

In addition to the authority and duty of regulating, evaluating potential impacts, supervising and conserving the Brazilian material cultural heritage, the IPHAN is the entity in charge of reviewing and deciding on the cases of export of cultural goods that depend on prior authorization, namely: (i) temporary export of art works and traditional crafts produced in Brazil before the end of the monarchic period (i.e. before 15 November 1889); (ii) temporary export of movable cultural goods protected by inscription (*tombamento*); (iii) temporary export of archaeological goods; (iv) consignment of archaeological material for analysis abroad; (v) temporary export of art works and traditional crafts originated in Portugal and incorporated to the national milieu during the colonial and imperial regimes (i.e. before 15 November 1889); and (vi) temporary export of art works and traditional crafts (painting, sculpture and graphic arts) that, although produced abroad before the end of the monarchic period (i.e. before 15 November 1889), represent personalities that are either Brazilian or related to the History of Brazil, as well as the country's landscape and customs (IPHAN Ordinance No. 375, article 41).

If the local superintendent of the IPHAN finds that the cultural property or artwork is protected under Brazilian law, either because of an inscription as cultural heritage or subject to another cause of restriction, permanent export will not be available. In such cases, the IPHAN may authorize exceptionally a temporary export or exit of the goods (*saída temporária*), but this must be granted by an act of the president of the IPHAN, following a favourable decision of the IPHAN's Cultural Heritage Advisory Board (De-

cree No. 9,238, of 15 December 2017, articles 13, item III, and 26, item IX; IPHAN Ordinance No. 375, of 19 September 2018, articles 40 and 41).

In such case, the owner, cultural institution, or attorney-in-fact must fill in a form of application for authorization of temporary export of protected cultural goods (*solicitação de autorização de exportação temporária de bens culturais protegidos*) and file it with the superintendent of the IPHAN located in the respective State of Brazil at least 90 days prior to the intended date of exit. The applicant must indicate all technical information about the object (type, title (if any), date, authorship, materials, dimensions, production techniques, marks, inscriptions, status of conservation) and enclose three photos of the object and a copy of personal identification and, if acting through an attorney-in-fact, of the power-of-attorney. The applicant must also include in the form of application information about the exhibition, a detailed route of transportation of the goods, expected date of return of the goods to Brazil, an evaluation of the goods for insurance purposes, the indication of the parties responsible for packaging, for loading and unloading, for transportation, and for insurance, and the indication of the lots for shipping purposes (if applicable). The applicant will be required to deliver a copy of the insurance policy fifteen calendar days in advance of the intended date of exit. Recently, the IPHAN has committed to respond to the application and issue the authorization within 90 calendar days from the date of filing.

If the local superintendent of the IPHAN finds that the cultural property or artwork is not (or not yet) protected under Brazilian law, permanent export will generally be authorized (Decree No. 9,238, of 15 December 2017, article 24, item VI; IPHAN Ordinance No. 375, of 19 September 2018, articles 40 and 41).

In such case, the owner, cultural institution, or attorney-in-fact must fill in a form of application for authorization of exit of artworks from the country (*solicitação de autorização de saída de obras de arte do País*) and file it with the superintendent of the IPHAN located in the respective State of Brazil. The applicant must indicate technical information about the object (type, title (if any), date, authorship, materials, dimensions, and production techniques) and enclose photos of the object (from at least two angles), a copy of personal identification and, if acting through an attorney-in-fact, of the power-of-attorney. Recently, the IPHAN has committed to respond to the application and issue the authorization within fifteen business days from the date of filing.

In the exercise of its supervision authority, the IPHAN must avoid the occurrence of harmful conducts against the material cultural heritage and irregularities in the trade of works of arts and antiques; control the movement of protected cultural goods; monitor and support actions against the illegal traffic of cultural goods; and promote the compensation of damages caused to the Brazilian material cultural heritage, among other actions (article 49). The IPHAN maintains an integrated system of knowledge and management of the Brazilian cultural heritage (*Sistema Integrado de Conhecimento e Gestão*) ('SICG') and has the duty to keep it updated (IPHAN Ordinance No. 375, articles 95 to 99). Among other data, the SICG was designed to serve as a repository of information about the status of cases of disappearance, theft, or robbery of protected cultural property.

4. SANCTIONS IN CASE OF VIOLATION OF EXPORT RESTRICTIONS

In the event of an attempt to export cultural property from Brazil in violation of restrictions, the person held liable by the IPHAN after an administrative inquiry proceeding will be subject to a fine of 50% of the value of the goods (PHAN Law, Article 15; IPHAN Ordinance No. 262, of 14 August 1992, article 14). In case of repeated offence, the amount of the fine will be doubled (i.e. 100% of the value of the goods). The competent government authorities in Brazil will seize the goods and keep them as security until the conclusion of the proceeding and the full payment of the fine.

The owner is responsible to the IPHAN for the integrity of the goods until their return to Brazil (IPHAN Ordinance No. 262, article 10). The owner also has the obligation to notify the IPHAN within 30 calendar days from the date of return of the goods to Brazil, enclosing a technical report (*laudo técnico*) about their status of conversation and the number of the import statement issued by the Brazilian tax authorities (IPHAN Ordinance No. 262, article 13). In case of non-compliance, the owner may be precluded from obtaining new authorizations from the IPHAN for a period of two years.

In addition to these legal consequences in the administrative sphere (IPHAN), the person held liable for the breach may also be subject to criminal prosecution for smuggling (*contrabando*) or other offenses pursuant to the Brazilian Penal Code (Decree-Law No. 2,848, of 7 December 1940), depending on the circumstances.

5. CONCLUSION

In general, Brazilian law grants favourable legal treatment to a good faith purchaser of movable property in relation to certain legal effects, including the degree of liability in case of loss or damage to the property during the possession and the extent of compensation to which the purchaser may be entitled in case of dispossession (articles 1,217 and 1,219 of Law No. 10,406, of 10 January 2002 – the Brazilian Civil Code). Even acting in good faith, however, the purchaser of cultural property is not expected to be able to retain ownership in case of a valid title claim made by a lawful owner that can demonstrate that the sale of the cultural property resulted, directly or indirectly, from illegal export or other illicit conduct under the 1970 UNESCO Convention, the 1995 UNIDROIT Convention or applicable Brazilian laws and regulations. The dispossessed purchaser may be entitled to compensation depending on the circumstances.

To mitigate the risk of a potential title claim of restitution from the Brazilian authorities or a lawful owner, foreigners importing Brazilian cultural goods should take reasonable actions to review the legal title that the seller claims to have over the property, including appropriate evidence of provenance, when available. The depth of due diligence that is expected in each case depends on the value, origin and other characteristics of the goods, the expertise and trustworthiness of the parties involved, and other circumstances of the purchase.

In any event, foreigners should check if the cultural goods to be imported from Brazil are subject to protection under Brazilian laws as cultural heritage and if IPHAN granted the required authorization, as the case may be, for permanent export (from the Brazilian perspective), such as in transactions that contemplate a purchase, donation, or others in which the transfer of title over the goods is contemplated, or for temporary export (again, from the Brazilian perspective), such as in transactions that contemplate a loan,

lease, or others in which no transfer of title is contemplated and, therefore, the goods are expected to return to Brazil.