CONTENTS

PREFACE AND ACKNOWLEDGMENTS ............................................................................. 15
NOTES ON CONTRIBUTORS .......................................................................................... 17

PART I

ESSAYS

AN OVERVIEW OF BRAZILIAN LAW
Marçal Justen Filho ........................................................................................................ 23
1 The constitutionalizing of Brazilian law ................................................................. 23
2 The organization of the Brazilian State ............................................................... 24
2.1 Republic ........................................................................................................ 24
2.2 Federation .................................................................................................... 24
2.3 The separation of powers ............................................................................. 24
2.4 The Public Ministry ("Ministério Público") and the Courts of Accounts .......... 25
2.5 The role of the Courts of Accounts ................................................................. 26
3 The lack of Administrative Jurisdiction in Brazil .............................................. 26
4 The universality of judicial review ..................................................................... 26
5 Constitutional control ......................................................................................... 27
6 The principle of legality ...................................................................................... 27
7 Due process of law .............................................................................................. 27
8 Legislated law and the effectiveness of legal precedent .................................... 28
9 The non-application of the "common law - statutory law" dichotomy .............. 28
10 The existence of an "Administrative Law" .......................................................... 29
11 The capitalist regime and free enterprise ........................................................... 29
12 The undertaking of economic activity by the government .............................. 29
13 The existence of public monopolies ................................................................. 30
14 The existence of public services ....................................................................... 30
15 The delegation of public services to the private sector .................................... 31
16 The independent regulatory agencies ............................................................... 32
17 Contracts between the State and the private sector ......................................... 32
18 The necessity of public procurement ................................................................. 33
19 The Union’s legislative power to regulate public procurement ...................... 34

CONTROL OF THE INDEPENDENT REGULATORY AGENCIES
Alexandre Wagner Nester ............................................................................................ 35
1 Introduction: the paradigm shift of the State’s economic activity .................... 35
2 The independent regulatory agencies, their characteristics and political autonomy ................................................................. 38
3 The control over the independent regulatory agencies’ activities
3.1 Social control
3.2 Political control
3.3 Economic and financial control
3.4 Control through management contracts
3.5 Control resulting from due legal process
3.6 The Public Ministry control
3.7 Judicial review
4 Conclusion

ADMINISTRATIVE PROCEDURE AND THE INDEPENDENT REGULATORY AGENCIES

André Guskow Cardoso

1 Introduction
1.1 The emergence of independent regulatory agencies in Brazilian law
1.2 The independent agencies introduced in Brazilian law and the regulated sectors
1.3 The concentration of State powers under the independent regulatory agencies
2 The growing submission of State activity to procedural forms
2.1 Procedure as a means to control Public Administration activity
2.2 Procedure as a means to ensure broad participation of those who will be affected by Public Administration performance
3 The role of Brazilian independent regulatory agencies
3.1 The different forms of performance of the independent regulatory agencies
3.1.1 Enforcement of regulatory rules
3.1.2 Rulemaking
3.1.3 Adjudication
3.2 Consequences on the administrative procedure to be adopted
4 Administrative procedure and independent regulatory agencies
4.1 Constitutional provisions
4.2 Law n. 9.784/1999 provisions
4.3 The various provisions in the agencies’ internal acts
4.4 Common notes to the administrative procedure in the major independent regulatory agencies
4.4.1 Rulemaking procedure
4.4.2 The administrative procedure for imposing sanctions
4.4.3 Administrative procedure for dispute resolution
4.4.4 The administrative procedure for adjudication

RULEMAKING POWER OF INDEPENDENT REGULATORY AGENCIES IN BRAZIL

Diogo Albaneze Gomes Ribeiro

1 Independent regulatory agencies
2 The regulatory competence in the Brazilian law
3 The regulatory competence of the independent regulatory agencies in Brazilian law
4 Examples of rulemaking activity of independent regulatory agencies
5 The limits of the rulemaking power of independent regulatory agencies in different sectors
6 The control of the regulatory agencies normative acts
6.1 The Judiciary’s control
6.2 The control through the legislative power
7 The conflict between the norms of independent regulatory agencies with those of other agencies or sectors

COMPETITION LAW ENFORCEMENT IN REGULATED SECTORS

Marçal Justen Neto

1 Introduction
2 Competition law enforcement by independent regulatory agencies
3 Competition law enforcement by antitrust authorities
4 Limits and exemptions from competition law enforcement in regulated sectors
5 Competition law enforcement in regulated sectors
5.1 Telecommunications
5.2 Electricity
5.3 Oil, gas and biofuels
5.4 Health
5.5 Transportation
5.6 Civil aviation
5.7 Banking
6 Public procurement and competition

PUBLIC Procurement: General Rules

Cesar A. Guimarães Pereira

1 Constitutional basis
2 Applicable rules
3 Auditing bodies: the importance of TCU
4 Coverage
5 Principles and purposes
6 Methods, thresholds and publicity
7 Single-source procurement: direct award
8 Types of bidding: evaluation criteria
9 Standard procedure (sealed competitive bidding)
10 Qualification phase
11 Evaluation (judgment) phase
12 Award and execution of the contract
13 Fraud and penalties
14 Specific topics
14.1 Purchases and price registration
14.2 Pre-qualification (shortlist stage)
14.3 Small companies (Complementary Law n. 123/2006)
14.4 Biddings for the 2016 Rio Olympics
14.5 “Buy national” (PPM n. 495)
REVERSE AUCTION AS A METHOD OF PUBLIC PROCUREMENT
Ana Lucia Ikenaga, Mayara Ruski Augusto Sá, Thalita Bizerril Duella Mendes ............. 95

4.2 Outline of the reverse auction (pregão) ............................................................... 96
4.3 Applicability ............................................................................................................ 97
4.4 Application of general rules of public procurement .............................................. 98
4.5 Types of reverse auction ......................................................................................... 100
4.6 Procedure of the common reverse auction ............................................................ 101
4.7 The role of government officials ............................................................................. 101
4.8 Invitation for bids .................................................................................................... 101
4.9 Public session .......................................................................................................... 102
4.10 Registration ............................................................................................................ 102
4.11 Declaration of knowledge ....................................................................................... 102
4.12 Envelopes .............................................................................................................. 102
4.13 Opening of proposal envelopes .............................................................................. 103
4.14 First ranking .......................................................................................................... 103
4.15 The minutes of the auction .................................................................................... 103
4.16 Bidding phase ........................................................................................................ 103
4.17 Second temporary ranking .................................................................................... 104
4.18 Judging the bidders qualification .......................................................................... 105
4.19 Presentation of samples and their evaluation .......................................................... 106
4.20 Disqualification ...................................................................................................... 106
4.21 Final ranking of the bids ....................................................................................... 106
4.22 Administrative appeal or protest ............................................................................ 106
7 Procedure in online reverse auction ......................................................................... 107
7.1 Registration ............................................................................................................ 107
7.2 Invitation for bids ................................................................................................... 108
7.3 Submission of proposals ......................................................................................... 108
7.4 Virtual public session ............................................................................................. 109
7.4.1 Bidding phase ..................................................................................................... 109
7.4.2 Disconnections .................................................................................................. 110
7.4.3 Ending the bidding phase .................................................................................... 110
7.5 Appeals or protests ................................................................................................. 111
8 The participation of international bidders ................................................................. 111
9 The advantages and disadvantages of reverse auction ............................................ 112
9.1 Advantages of reverse auction .............................................................................. 113
9.2 Disadvantages of reverse auction ......................................................................... 113

PUBLIC PROCUREMENT FINANCED BY INTERNATIONAL AGENCIES
IN BRAZIL
Rafael Wallbach Schwind ............................................................................................. 115
1 Introduction ............................................................................................................... 115
2 The importance of this issue ..................................................................................... 116
3 The regime under Law n. 8.666 .............................................................................. 117
4 The prerequisites for the application of article 42, 5th paragraph, Law n. 8.666........ 117
4.1 First prerequisite: existence of funds necessarily of foreign origin......................... 117

BDJUR
THE SYSTEM OF PROTESTS AND APPEALS IN BRAZILIAN PUBLIC BIDDINGS LAW
William Romero

1 Introduction........................................................................ 123
2 The challenge to the Invitation for Bids (IFB): article 41, 1st and 2nd paragraphs, Law n. 8.666........... 123
3 Appeals to be brought by bidders against decisions made during the bidding procedure: article 109, I, Law n. 8.666........ 124
4 Representation to the Court of Accounts: article 113, 1st paragraph, Law n. 8.666... 125
5 Protests under the basic policy on procurement and contracting of IDB (Inter-American Development Bank) and of IBRD (World Bank).................. 126
6 Conclusion.................................................................. 129

PUBLIC PROCUREMENT BY STATE GOVERNMENTS
Dina Oliveira de Castro Alves

1 The Federative Republic of Brazil: vertical division of the legislative competence.................. 131
2 Concurrent competences in public biddings and administrative contracts................. 131
2.1 The scope of the term general rules ................. 132
2.2 The supplementary competence of the States................. 132
3 The State exercise of supplementary competence: case studies.................. 133
4 Conclusion.................................................................. 134

GOVERNMENT CONTRACTS IN BRAZILIAN LAW
Aline Licia Klein, Guilherme Fredherico Dias Reisdorfer, Karlin Olbertz

1 Introduction........................................................................ 141
2 Public contracts and private contracts.................. 141
2.1 Public contracts and private contracts under Brazilian law................. 142
2.2 The scope of government contracts................. 143
2.3 Administrative contracts.................. 144
3 The creation of the administrative contract.................. 145
3.1 Planning the contract.................. 146
3.2 Choosing the most advantageous contract.................. 147
3.3 The contract's formalities and content.................. 148
4 The State's powers and the private party's rights in the performance of government contracts... 149
4.1 The basic benchmarks of the contract's execution ......................................................... 148
4.2 The administrative contract's system of execution .......................................................... 149
4.2.1 The execution of private law contracts ........................................................................ 149
4.2.2 The execution of administrative contracts in the strict sense (governed by public law) ...................................................................................................................... 150
4.2.2.1 Unilateral modification of the contract (jus variandi) .................................................... 150
4.2.2.2 Supervision and sanctioning of the contracted private party ...................................... 152
4.2.2.3 The temporary provisional overtaking of human and material resources .............. 153
4.2.2.4 Stay on the contract's execution ............................................................................... 154
4.2.3 The possibility of subcontracting and the assignment of contract .................................. 154
4.2.4 Receiving the contracted object and the private party's liability .................................. 155
4.2.5 The guarantee of the economic-financial balance of administrative contracts .......... 155
5.1 The guarantee's legal provision ...................................................................................... 156
5.2 The moment in which the relation between costs and benefits is established ................ 156
5.3 Prerequisites of the right to restore the contract's balance ............................................ 156
5.4 The lack of discretion in rebalancing the contract's equation .......................................... 156
5.5 The extension of the restoration of the balance ............................................................... 157
6.1 Mechanisms for the restoration of the economic-financial balance .................................. 157
6.2 Termination of administrative contracts ......................................................................... 157
6.2.1 Normal termination ..................................................................................................... 157
6.2.2 Abnormal termination .................................................................................................. 157
6.2.3 Causes that lead to the contract's rescission ................................................................. 157
6.2.1.1 Rescission due to reasons attributed to the private contractor ................................ 158
6.2.1.2 Rescission due to reasons attributed to the Administration ....................................... 158
6.2.1.3 Rescission due to reasons not attributable to any of the parties .................................. 158
6.2.2 Types of rescission ...................................................................................................... 158
6.2.2.1 Rescission due to the Administration's unilateral act .................................................. 158
6.2.2.2 Out of court rescission .............................................................................................. 158
6.2.2.3 Judicial rescission ..................................................................................................... 159
6.2.2.4 Rescission by the resolve of bodies of control ......................................................... 159
6.2.3 The need for a due administrative procedure ............................................................... 159
6.2.4 Damages award due to the contract's rescission .......................................................... 160
6.2.5 The contract's annulment ............................................................................................ 160

CONCESSIONS OF PUBLIC SERVICE

Cesar A. Guimarães Pereira ........................................................................................................... 163
1 Introduction ....................................................................................................................... 163
1.1 Administrative law in Brazil ............................................................................................. 163
1.2 Public services .................................................................................................................. 164
1.3 Direct and indirect provision of public services ............................................................... 165
1.4 Concessions and PPP ....................................................................................................... 166
2 Concession of public services as one of many forms of service provision ....................... 166
3 Features of the concession agreement ................................................................................ 167
4 A trilateral legal bond ........................................................................................................... 168
5 Prior public bidding ............................................................................................................ 169
6 Adequate service ................................................................................................................ 171
7 Allocation of risk and protection of the economic and financial balance .......................... 171
Passage and adoption of new arbitration laws: Brazil sets the stage for the growth of arbitration

Increased judicial acceptance of arbitration: the rise of the STJ

Review of STJ decisions on private commercial matters

Analysis of decisions involving state-owned entities

Summary of court attitudes towards arbitration

The effect of the STJ's current jurisprudence

Development of competent and reliable regional institutions: arbitration takes hold for domestic matters and begins to spread internationally

Growing expertise: Brazil’s practitioners, scholars, arbitrators, and students join the international club

International recognition and assertion of power: gaining the attention of the world and making a statement internationally

Conclusion

Arbitration in Brazil

Felipe Scripes Wladeck, Paulo Osternack Amaral

Abortion

Initial considerations

Objective requirements

Subjective requirements

How to establish arbitration in Brazil

Submission agreement and arbitration clause

The courts' position on the sufficiency of the arbitration clause

The arbitration clause’s autonomy

The arbitrators

Equivalence between arbitrators and State judges

Relation between arbitrators and State judges

The arbitrator’s appointment

The arbitrator’s duties

Arbitration in administrative contracts

Application and legal authorization

Procedural aspects

Limits: respect to publicity and legality

The legislative and case law inclination: the suitability of arbitration to solve disputes stemmed from administrative contracts

The arbitral procedure

The arbitral award and the means for its review

The structure, effects and autonomy of the arbitral award

The application of appeal requesting the clarification of the arbitral award

The judicial review of the arbitral award

Judicial review of foreign arbitral awards

Judicial review of national arbitral awards

The courts’ current inclination: the respect for arbitration

Brazil’s adoption of the New York Convention