

FIUS



TRENDS

2022

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Legal issues have long played a paramount role in the lives of our corporations in Brazil. The Brazilian legal system is complex and bureaucratic, so knowing how to navigate legal rules is essential for economic agents.

In addition, the world is also undergoing major and evident transformations, derived not only from the social and health crisis experienced in the last two years but also from the new contours that globalization has taken on. As a result, organizations have been imposed the adoption of new practices that start from new assumptions based on transparency, and social and environmental responsibilities demanded by modern times.

Having this extremely challenging environment in mind, Finocchio e Ustra Sociedade de Advogados prepared this material. Our goal is to provide our clients' key leaders and the market in general with a macro view from our experts of the legal issues on the corporate agenda in 2021 and what will be, in our understanding, the main legal topics for the year 2022.

Octavio Lopes S.T.B. Ustra

José Luis Finocchio Jr.

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FELIPE CERVONE

felipe.cervone@fius.com.br

ANDREA O. B. TINCANI

andrea.bittar@fius.com.br

BUSINESS AND M&A

The year **2021** brought important legislative milestones for the Brazilian corporate world in the hope of creating a more attractive national environment for investments given international practices and the troubled post-pandemic and political-economic environment we are going through.

Thus, it is worth starting with the approval of new legal frameworks for the innovation environment, which is essential for the economic scenario expected for the coming years. In this regard, we highlight the approval of the legal framework for startups and innovative entrepreneurship (Supplementary Law 182/2021), the legislation that created rules for the incentive and control of the venture and seed capital, as well as ways of investing in innovative ideas in experimental regulatory environments (so-called sandboxes).

There have also been important changes that impact companies, particularly the changes in the Corporate Law (Law 6,404/76) that seek to create an environment of greater improvement in the investment market (highlighting plural voting), and the changes in the legislation for opening companies (Law 14,195/21) that shorten the time to register and obtain a CNPJ (Corporate Taxpayer ID Number), which historically was a negative point in Brazil cost.

In **2022**, the prospect of a challenging year for Brazilian politics and economy is expected to continue. However, given the devaluation of the Brazilian Real against strong foreign currencies (especially the US dollar) and the rise in the capitalization of investment funds, we expect the consolidation of economic sectors experienced in 2021 to persist, on top of growth in the volume of operations of mergers and acquisitions of companies (M&A), and also the continuity of the processes of IPO of companies in the financial market.

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It is worth highlighting the publication of Law 14,286, which reformed the regulation of the foreign exchange market, foreign capital in Brazil, and Brazilian capital abroad. The new regulation modernizes the treatment of the issue in Brazil and provides for less bureaucracy in order to create a more attractive business environment for investors, facilitating foreign trade and the flow of resources and investments in the country.

Furthermore, given the new social and market paradigms, it is worth highlighting the growth in corporate adjustments to the best ESG practices, which require constant attention to the impacts generated by corporate governance. On the other hand, this will attract more investors and funds already oriented towards investments in companies adhering to these policies.

The estate planning industry, aimed at family businesses, will also be very busy. In addition to compliance issues perceived as fundamental for the business venture, State Planning will suffer the effects of potential tax changes and the growing approach by multinational groups and venture capital firms.

Finally, new business models in the financial area will be an important part of the legal industry noteworthy. We believe that there will be an even greater expansion in fintech and open banking (a new ideology of standardized sharing of data and services by financial institutions and other institutions authorized to operate by the Central Bank), and also an increase in the number of clients seeking to create their financial structures to better explore the opportunities and bottlenecks present in their markets.

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LUIS FELIPE D. SILVEIRA

felipe.silveira@fius.com.br

INFRASTRUCTURE

There is great expectation from economic agents regarding the performance of the infrastructure sector for this year 2022.

There are indeed great opportunities. Due to, among other factors, the maturity of municipal, state, and federal administrations (and also of the regulatory authorities) regarding the concessions, the fiscal difficulties faced by the Public Power (and aggravated by almost two years of the pandemic of COVID-19, indicating greater adherence to the initiatives of Public-Private Partnerships PPP's), as well as, and especially, to the new sectoral regulatory frameworks approved by the National Congress in the last two years.

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Among the sectors that should have the attention of investors throughout 2022 and the coming years, the energy and transport sectors stand out, which have gained recent regulatory incentives that promise significant changes in these markets.

In the energy sector, two points deserve attention. The first is public lighting that after the transfer of the management of public lighting assets to municipalities in 2012, generated difficulties for municipal governments in carrying out this operation, which is why many municipalities have successfully tried to transfer the management of these assets to the private sector, which should increase this year. The second concerns photovoltaic energy, which has gained great momentum with the enactment of Law 14,300/2022.

As for the transport sector, important regulatory frameworks were established by Law 14,273/2021 with emphasis on the railways and cabotage, which will allow greater agility and autonomy for private investment in railway networks, as well as create an important alternative to road transport, concerning the transit of goods, especially around the Brazilian coast.

It is worth noting that Brazil will formally join the World Trade Organization Government Procurement Agreement in 2022, which should facilitate the participation of foreign economic agents in bidding processes involving the concession of valuable infrastructure assets.

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LUIS FELIPE D. SILVEIRA

felipe.silveira@fius.com.br

RAÍSSA S. M. FANTON

raissa.martins@fius.com.br

BUSINESS AGREEMENTS AND ARBITRATION

The year **2021** deepened the changes brought about by the pandemic, highlighting several aspects of the digital transformation that affects the area of business agreements. This scenario included the identification of the facilities brought by the digital signature, which enabled considerable cost savings to corporations and more.

It is certainly possible to say that the business sector was able to perceive the advantages of using technologies in contract management. It allows better identification and management of risks and substantial reduction in the costs linked to the corporate contractual area through automation and contract management tools, a reality that, as we understand it, is here to stay.

Another highlight in the year 2021 was related to the discussions on the application of inflation adjustment rates. In fact, the considerable increase in inflation rates led to the review of many agreements in progress and brought the need to negotiate this issue in advance for future contracts. There is also a noticeable increase in judicial discussions about the aforementioned, based on the change in the economic scenario and the current unpredictability of the world's economy.

As for **2022**, the trend towards a more holistic and technological approach to corporate contractual matters will, in our view, be even stronger. The existence of automation tools, which are already widely used by large corporations, should advance to medium-sized companies, and contractual risk management should be expanded.

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It is also worth mentioning the growing trend to adopt smart contracts, especially in technology companies, also consolidating new and important markets linked to the extended reality, such as NFTs (non-fungible tokens).

Another main point that should be reinforced even more in **2022** is the use of alternative dispute resolution, which encompasses mediation and arbitration. Specifically, concerning mediation, it is likely that the institute will continue to grow (it grew 486% in 2021) and further validate its advantages in this environment of global economic crisis. For companies with a high volume of demands, mediation and conciliation, supported by analytics tools, will be avidly sought after and may have a decisive impact on reducing contingencies.

As for arbitration, there is also a tendency for its growth towards complex litigation cases and an indication that it will no longer be restricted to high-value processes. Naturally, the cost reduction already observed in some arbitration chambers and the advantages of arbitration (speed of conflict resolution, procedural flexibility, technicality, etc.) will be even more noticeable in the risk matrices that involve contractual discussions. Moreover, the maintenance index of court decisions has also shown the legal certainty that arbitration provides to the parties involved.

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MARCO A. B. OROSZ

marco.orosz@fius.com.br



COMPLIANCE AND DATA PROTECTION

The year **2021** did not disappoint expectations and kept matters related to corporate compliance on the rise, with topics such as ESG becoming increasingly present. In short, what was already important has become even more. And the challenge has been not only to make companies adequate to the new practices, but also to **demonstrate this to the market** – that is, to consumers, financial institutions, third sector organizations, among other stakeholders.

Furthermore, in **2021**, the **General Data Protection Law – LGPD** came into force, a rule that should change the way civil society and the private sector treat data that can identify people. The Judiciary already considers it in its decisions in all spheres, including labor; and the performance of the **National Data Protection Authority (ANPD)**

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in 2022 should bring news to all those attentive to this matter.

If in 2018 there were doubts about the effectiveness of the Law, the more than 500 decisions that took into account the LGPD made it clear that legal adequacy and changes in corporate culture are imperative, and that the enforcement is worldwide.

Given the reasonable increase in security breach incidents that unduly expose personal data, and the combination of compliance with data protection, **cyber security** is sure to be on the agenda in **2022**. The question that has been tormenting the sleep of companies and IT managers for years remains: are we reasonably protected against an intrusion attempt? And more, how will we react?

Furthermore, in 2022, **diversity** will remain a popular topic; wide and real diversity, not limited to genders or races. How much of your Code of Conduct or diversity quotas are actually and genuinely complied with? This question will be on the agenda in corporations.

Finally, as mentioned here, one of the challenges for the coming years will be the need to demonstrate and prove your company's compliance. Have you noticed the number of contracts under which we accept to be **audited** by our clients, suppliers, and third parties, for the most varied subjects? Or the number of forms filled in, and questionnaires answered to register the company as a supplier of products and services to this or that client? If the company is 100% comfortable with this situation, then that is good news. The fact is that compliance, and social and environmental adequacy will be topics that are increasingly demanded by economic actors and will also have a great impact on results.

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LUCIANA C. P. MORALLES

luciana.moralles@fius.com.br



ENVIRONMENTAL, SUSTAINABILITY, AND REGULATORY

The **year 2021** was a challenging year for environmental and regulatory matters. The results of the extension of the pandemic impacted various regulatory and public health issues, especially from the perspective of climate change. Water crises, prolonged droughts, more severe fires, as well as pressure from stakeholders and investors to better manage ESG-related risks, generated the need for greater caution and control of environmental and regulatory variables.

In 2022, issues related to Sustainability and Climate Change will be further discussed. As a result, the private sector will be called upon to actively participate in global issues regarding new regulatory and environmental rules implementation. In addition, there will be a sense of urgency in mitigating transition risks, materialized

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by the new environmental scenario generated by the climate and health crisis, such as: (i) scarcity of natural resources, (ii) water crisis, (iii) solid waste management, (iv) environmental footprint, (v) deforestation in the Amazon impacting the international trade of agribusiness products, (vi) protection of biodiversity and (vii) energy transition to a low carbon economy.

Banks and the financial market in **2022** will continue to be asked to contribute to the environmental agenda through new green credit lines and to lead regulation for a reliable disclosure of information from publicly traded companies (Sustainability Reports, International Rating Agencies of ESG e). This movement on publicly traded companies will have a ripple effect on the positioning of medium and small companies, which will be audited in terms of environmental and regulatory compliance.

In this sense, having greater traceability of the socio-environmental practices of your supply chain will be essential to remain competitive, win markets, and not be exposed to reputational risk. Knowing how to monitor, track and have reliable data from partners will be indispensable for the business.

The Judiciary will also be a space for the effectiveness of the new demands brought about by the transition to a low-carbon, circular and more efficient economy regarding natural resources. Governance, environmental, and social practices considered inadequate will be penalized. Climate Litigation will impact businesses, in the sense that these issues will be on the judiciary's agenda with an urgency bias. Additionally, there will be, as we understand, social pressure to bring answers to complex problems that often demand joint international action.

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CAMILA SOMADOSSI

camila.somadossi@fius.com.br

RAÍSSA S. M. FANTON

raissa.martins@fius.com.br

BUSINESS DISPUTES

Brazil has one of the highest numbers of lawsuits per capita worldwide, which makes the subject of business litigation evidently notable for our companies and generates debates in 2021.

The notorious increase in discussions about the scope of contractual obligations led to several lawsuits to review contracts for excessive onerosity. Another issue that became popular in the Judiciary and tends to increase in 2022, involves litigation related to the LGPD (General Data Protection Law) considering that some time has elapsed after the Law came into force and the beginning of the ANPD (National Data Protection Authority) activities.

The need for strategic and personalized management of each company individually became even more evident in 2021. The number of lawsuits, especially in cases of repetitive demands, proved to be important for information management as well as the use of indicators to help companies in decision-making. Additionally, for specific and strategic litigation cases, the prior collection of data by the Judiciary, with a clear, visual approach and based on risk management, brought better results.

These are relevant points for companies to consider in **2022** and in the years to come: action more focused on data, risk management, and decision analysis tools. Our perception is that there will be an alignment of strategic, technical, and financial management with information. The idea is to adapt legal action to the final objective of each company (more clients, lower number of complaints and default rates, and increase sales), all in order to outline the best strategy for conducting the cases.

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A vision based on internal data, market data, and especially data from the Judiciary will be increasingly applied to analysis focused on the root causes. And other data essential to litigation demands (places with the highest number of lawsuits, districts with the highest rates or value of conviction, among others) will become more and more common and assertive. Monitoring these indexes together with a dynamic elaboration and validation of the thesis will guarantee a strong performance, with efforts concentrated on the main themes and strategies for each group of lawsuits.

As a matter of fact, litigation will make less sense to companies with numerous lawsuits in the civil, consumer and labor areas. On the other hand, an approach based on structured analytics and risk maps, in line with the strategic planning of the companies will be more effective. This will result in financial and operational gains in the medium and long term, also allowing companies to have an increasingly in-depth knowledge of the legal consequences of their business.

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Undoubtedly, **2021** was an intense year in terms of tax issues. Important topics were discussed by the judicial and administrative bodies, highlighting the unconstitutionality of the inclusion of ICMS (goods and services tax) in the PIS (social integration program) and COFINS (social security financing contribution) calculation basis (known as Tese do Século), which resulted not only in a considerable asset for companies but also in a series of other discussions in the tax area called Teses Filhotes.

In addition to the Tese do Século, our Judiciary took a stand on other relevant issues: the non-taxation of software by ICMS, non-taxation of Selic (interest rate) levied on undue tax by the IRPJ (corporate income tax), and CSLL (social contribution on net income), the impossibility of excluding ICMS on CPRB (social contribution on gross income), the impossibility of levying ICMS on transfer operations, among others.

As if the merits discussed were not enough, these actions resolved by the Federal Supreme Court brought another important (and perhaps unwanted) output: with the Modulação dos Efeitos, that is, with the guarantee that the recovery of values from the past would only apply to those taxpayers who had filed a lawsuit prior to the start of the trial, the Judiciary ended up creating and encouraging the culture of tax litigation; after all, if the tax unduly paid in the past can only be received by those who filed the lawsuit, the risk analysis between litigating or not litigating has become quite unbalanced (and in favor of litigation).

At the administrative level, there was also a lot going on. The issue of levying taxes on ICMS incentives and the issues related to the possibility of taking PIS/COFINS credits were discussed a lot at the Federal Revenue Office and the CARF (administrative council of tax appeals), with impacting decisions in favor and against taxpayers. It was also an intense year at the legislative level. The tax reform did

BRUNO M. SANTO

bruno.santo@fius.com.br

JULIANA C. AMARO

juliana.amaro@fius.com.br

LEANDRO LUCON

leandro.luccon@fius.com.br

PEDRO H. BUFFOLO JR.

pedro.buffolo@fius.com.br

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not go through, but long-awaited rules did, such as Supplementary Law 186, which extended ICMS tax benefits that are very important for business planning.

Another relevant topic in 2021 was the rules to settle tax debts. Such measures, although clearly encouraged by the economic crisis scenario, indicate an increasing openness of the Tax Authorities to create alternative methods for the resolution of disputes, with the transaction figure playing an important role in this scenario.

For 2022, the scenario of uncertainties and opportunities still thrives. Many relevant judgments must be finalized by the STF (Supreme Court), and further discussions deserve the attention of the companies. In this sense, there are discussions about the possibility of excluding the ISSQN (municipal services tax) from the PIS/COFINS (social security financing contribution) base, about the possibility of excluding PIS/COFINS from its base, and about the limitation of the concept of input for purposes of PIS/COFINS. But two discussions, in particular, deserve attention: the first deals with the reflexes of the ICMS decision on transfer operations (since, depending on what the STF says, many tax planning will be affected and will need important adjustments), and the second deals with the consequences of the recent decision of the STF on the difference in rates - Difal of ICMS in interstate operations with goods destined for capitalization or to the final consumer (there will be many questions about the possibility of collecting Difal still in 2022 and also about the possibility of the collection to continue on the basis on which they were first established). To see the list of relevant topics, [click here](#).

Of course, the managers should be focused on the issues above, but not exclusively. An effective tax planning of the operation will still prove to be increasingly necessary as well as the improvement of the performance in tax areas. Finally, giving attention to what is known as Robotic Process Automation (RPA) and on attempts at tax reform will be very important.

LABOR

The COVID-19 pandemic has led the planet to serious health and humanitarian crisis, something unprecedented in contemporary history. And the world of work, of course, had to be reinvented at lightning speed. Some trends that were already noticed in the job market, even before the health crisis, grew with the arrival of the virus.

The flexibilization of labor rules, new forms of hiring, and accommodation of the informal market were already on the agenda of the day, even before the virus dissipated in Brazil. However, amid the uncertainties generated by the pandemic, especially economic ones, organizations had to adapt to a new work reality quickly.

In this sense, (i) a large part of the face-to-face work has given way to remote work (from home); (ii) the industrial parks were quickly remodeled to comply with strict sanitary protocols; (iii) geographic barriers to hiring were overcome; (iv) managers had to learn to lead at a distance; (v) the mental illness of the workers aggravated; (vi) the consequences of mandatory vaccination in the employment contract cause controversy; (vii) legislative inflation led to legal uncertainty; anyway, work relationships were very challenged in the almost two years of the pandemic.

In the legislative scope, the year 2021 still felt the effects of Law 14,020/20, which established the Emergency Employment and Income Maintenance Program. In addition, we had numerous provisional measures of a labor nature published and we had important changes with the review of regulatory standards (NRs) for safety and health at work, recognition of burnout syndrome as an occupational disease, simplification of the eSocial (a government online platform for employers) and the entry into force of the Data Protection Law, which had important impacts on employment relations.

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VERIDIANA M. POLICE

veridiana.police@fius.com.br

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Finally, labor matters of great importance were on the agenda of the Federal Supreme Court (STF) in 2021, which will remain in the year 2022. The highlights were the index for labor credit adjustment, defined as IPCA-e (consumer price index) in the pre-judicial phase, and as Selic interest rate when in the Labor Court, which will certainly impact the entire provisioning made by the companies. In addition, the STF found that the loser pays rule was unconstitutional, which was one of the main points of the labor reform and which may increase the litigation of labor issues. There are other relevant topics on the STF agenda to be considered this year 2022, including those dealing with the professional driver's working hours, effects of collective bargaining, mass layoffs, and intermittent work.

In addition, topics such as regulating the remote work, mental health, moral and sexual harassment in the work environment, vaccination, LGPD, practical reflexes of the revision of the Regulatory Norms (NRs), and the mandatory communication of health and safety data work via eSocial, among others, should be very well addressed by companies in their human resources policies, avoiding, as much as possible litigation of issues that can be better resolved from a preventive perspective.

Ultimately, organizations must prepare to face the challenges that lie ahead in 2022, as with the slowdown of the pandemic, amid a scenario of economic retraction, high inflation, unemployment at record levels, elections ahead, work relationships will certainly take on many new contours.

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MILTON R. GATO JUNIOR

milton.gato@fius.com.br

FOREIGN TRADE

Foreign trade operations have undergone significant changes in recent years, and 2021 was no different. Among these various changes, we highlight the evolution of the Single Foreign Trade Portal, the implementation of **New Import and Export Processes**, and the improvement of the respective customs declarations, all of them in the sense of increasing the dynamism of the activities related to import and export.

From the legislative point of view, the movement was also extensive, ranging from the long-awaited extensions of the Drawback Regime and the Special Customs Regime, to the frustration with the reinstatement of the additional 1% COFINS rate by Law 14,288 to the absence of the expected reduction of the AFRMM (additional freight for the renovation of merchant shipping) by BR do Mar (cabotage incentive program).

We cannot forget, also, the public consultation on the attributes of the Mercosur Common Nomenclature – NCM, whose results will certainly have an impact during this year 2022, given that such attributes will be part of the DUIMP Product Catalog.

For the year 2022, many of these issues will be deepened, making importers and exporters closely monitor them for planning possible impacts of the new rules, especially those that can bring greater dynamism to their operations.

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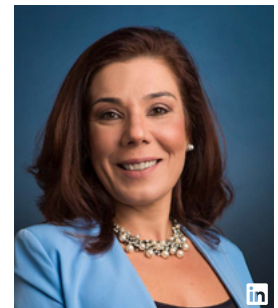
JOSÉ L. FINOCCHIO JR.

jose.finocchio@fius.com.br



OCTÁVIO USTRA

octavio.ustra@fius.com.br



VERIDIANA M. POLICE

veridiana.police@fius.com.br



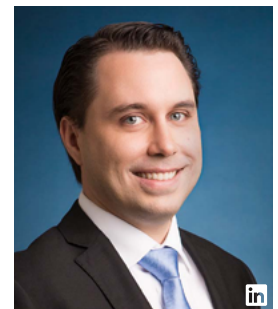
FELIPE L. F. CERVONE

felipe.cervone@fius.com.br



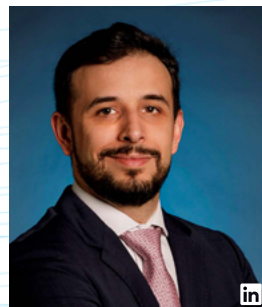
CAMILA SOMADOSSI

camila.somadossi@fius.com.br



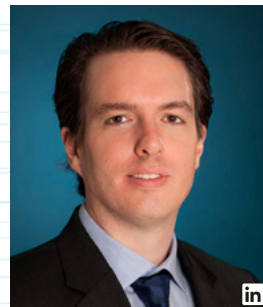
LEANDRO LUCON

leandro.lucon@fius.com.br



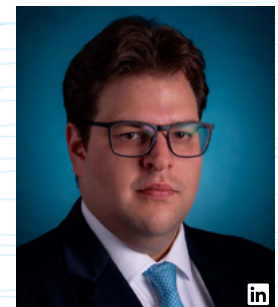
GUILHERME CREMONESI

guilherme.cremonesi@fius.com.br



LUIS FELIPE D. SILVEIRA

luisfelipe.silveira@fius.com.br



BRUNO M. SANTO

bruno.santo@fius.com.br



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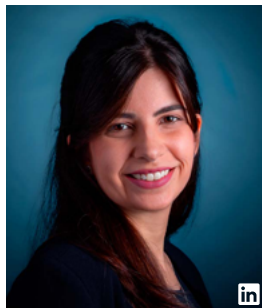
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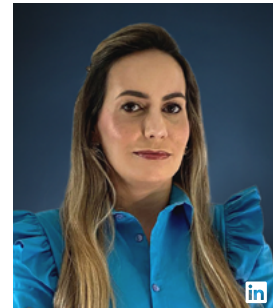
MEET THE TEAM



RAÏSSA S. M. FANTON
raissa.martins@fius.com.br



PEDRO H. BUFFOLO JR.
pedro.buffolo@fius.com.br



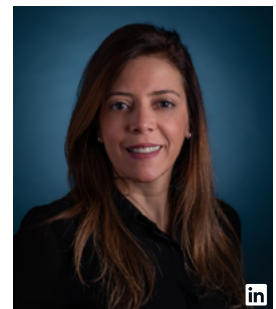
JULIANA C. AMARO
juliana.amaro@fius.com.br



MAURÍCIO PRAZAK
mauricio.prazak@fius.com.br



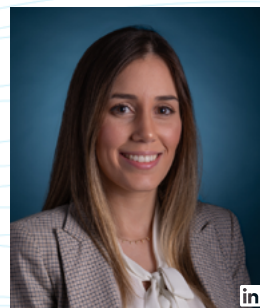
ANDREA O. B. TINCANI
andrea.bittar@fius.com.br



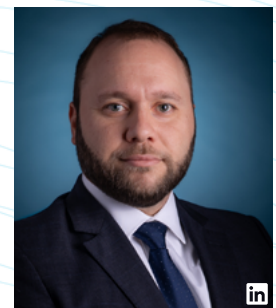
CIBELE F. GONÇALVES
cibele.goncalves@fius.com.br



ENÉIAS Q. DE AMORIM
eneias.amorim@fius.com.br



FERNANDA P. SAMPAIO
fernanda.sampaio@fius.com.br



JOSÉ THOMAZ LAPA
jose.lapa@fius.com.br



MEET THE TEAM

GET TO KNOW OUR PARTNERS AND COORDINATORS

BUSINESS AND M&A

INFRASTRUCTURE

BUSINESS AGREEMENTS AND ARBITRATION

COMPLIANCE AND DATA PROTECTION

ENVIRONMENTAL, SUSTAINABILITY, AND REGULATORY

BUSINESS DISPUTES

TAX

LABOR

FOREIGN TRADE

MEET THE TEAM



LUCIANA C. P. MORALLES
luciana.moralles@fius.com.br



MARCO A. B. OROSZ
marco.orosz@fius.com.br



MILTON R. GATO JR.
milton.gato@fius.com.br



NEVILLE DE O. LOPES
neville.lopes@fius.com.br



RODRIGO DA C. FERREIRA
rodrigo.ferreira@fius.com.br



TALITA ORSINI GARCIA
talita.orsini@fius.com.br



FINOCCHIO & USTRA

WWW.FIUS.COM.BR