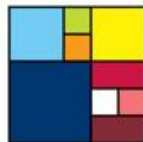


Court Is in Session: *Analyzing the Importance of Trial in Aviation Accident Cases*

Dublin, Ireland
October 19th, 2018

Sigrid Preissl
Attorney at the Paris bar



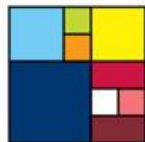
Bourayne & Preissl
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CHOICE OF JURISDICTION: TRIAL CONSIDERATIONS

Article 28 (1) of the Warsaw Convention

An action for damages must be brought, at the option of the plaintiff, in one of the specified fora:

- The domicile of the carrier,
- The carrier's principal place of business,
- Establishment of the carrier through which the contract was made, or
- The place of destination.

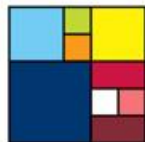


CHOICE OF JURISDICTION: TRIAL CONSIDERATIONS

Article 33 (1) of the Montreal Convention

Adds three other fora:

- In death and personal injury litigation, the place in which the passenger has his principal and permanent residence,
- the domicile of the actual carrier, or
- the actual carrier's principal place of business.

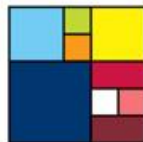


CHOICE OF JURISDICTION: TRIAL CONSIDERATIONS

No « *Forum non conveniens* » - Welcome to France !

- **LARGE CHOICE OF FRENCH FORA:**

- **Articles 14 and 15 Civil Code:** French party may sue or be sued in France even if there is no other link to France than its nationality (“**privilege of jurisdiction**”)
 - Both natural and legal persons
 - Not mandatory, possible to renounce
 - Not applicable if international treaty or EU law provides binding rules of jurisdiction
 - Not applicable if choice of law clause, arbitration
 - Not applicable if proceedings already pending before foreign court



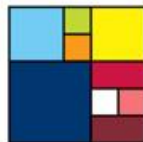
CHOICE OF JURISDICTION: TRIAL CONSIDERATIONS

➤ **Article 42 French Code of Civil Procedure:**

If several defendants, choice offered to plaintiff to bring case before court having jurisdiction for one of the defendants.

➤ **Article 46 French Code of Civil Procedure:**

- Tort: Choice between place of the casual event causing liability or place where the damage is suffered. Alternative offered to plaintiff
- Contract: place of performance

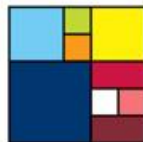


CHOICE OF JURISDICTION: TRIAL CONSIDERATIONS

In a nutshell



- **Wide discretion in France to choose legal venue**
- **No dismissal on “forum non conveniens” grounds possible**
- **Political willingness to promote “France as international place of law”**



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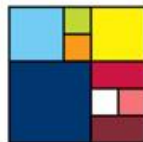
CHOICE OF JURISDICTION: TRIAL CONSIDERATIONS

- The doctrine of “forum non conveniens” before French Courts : Crash WEST CARIBBEAN
 - Charter flight from Panama City to Fort-de-France (Martinique, France)
 - Crashed on August 16th 2005 off VENEZUELA
 - Operated by West Caribbean Airways (Colombia)
 - Chartered from US Company NEWVAC Corporation



CHOICE OF JURISDICTION: TRIAL CONSIDERATIONS

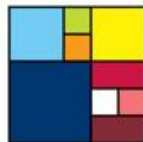
- Passenger claims brought before US District Court for Southern District of Florida
- NEWVAC Corporation incorporated in Florida sued as “contracting carrier” under article 39 Montreal Convention
- District Court dismissed claim on basis of forum non conveniens, affirmed by 11th Circuit Court of Appeals:
 - “Forum non conveniens” as available procedural tool under article 33 (4) Montreal Convention
 - Balance of interests favors litigation in France
 - Courts in France are “adequate and available”



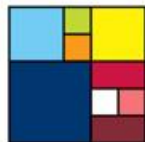
CHOICE OF JURISDICTION: TRIAL CONSIDERATIONS

- While case pending in USA, introduction of declaratory claim in France by plaintiffs, requesting Court of FORT DE FRANCE to deny jurisdiction.
- French Court in 1st instance and Appellate Court rejected argument: forum non conveniens available tool under article 33 (4) Montreal Convention

BUT...



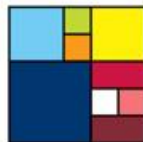
- French Supreme Court (“*Cour de Cassation*”):
7.12.2011:
 - Article 33 (1) and 46 of Montreal Convention offer choice of jurisdiction
 - Choice by plaintiff and by plaintiff **ALONE**
 - A national procedural rule (“forum non conveniens”) cannot impose/oblige/force such choice
- France has no jurisdiction as plaintiffs chose **NOT** to bring lawsuit to French forum as place of destination.



CHOICE OF JURISDICTION: TRIAL CONSIDERATIONS

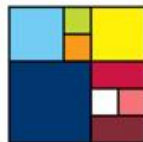
FOCUS: Jurisdiction re recourse claim of manufacturer against carrier in FRANCE

- Airbus 320-211 Crashed on May 3rd, 2006 into Black Sea, off the coast of Sochi
- Flight 967 operated by Armavia Airlines from ARMENIA to SOCHI, RUSSIA
- Settlement concluded between carrier and family members of victims
- Introduction of legal proceedings in France against manufacturer (AIRBUS) at its French headquarters in TOULOUSE. Claim based on product liability.



CHOICE OF JURISDICTION: TRIAL CONSIDERATIONS

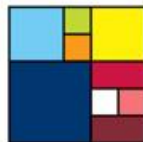
- AIRBUS delivers a third party claim against ARMAVIA AIRLINES to be guaranteed and held harmless against any conviction to pay out damages
- Jurisdiction based on article 333 French Code of Civil Procedure: *“The third party is bound to appear before the Court having jurisdiction of the original claim, without having the possibility to decline its territorial jurisdiction, even based on a jurisdiction clause”*.
- ARMAVIA AIRLINES asked the French Court to decline jurisdiction based on article 28 of the Convention of Warsaw



CHOICE OF JURISDICTION: TRIAL CONSIDERATIONS

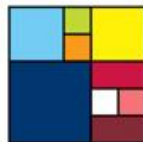
- March 12, 2013, Court of Appeals of TOULOUSE **rejects jurisdiction against ARMAVIA AIRLINES** in France:
 - Warsaw Convention does not distinguish between the grounds of a claim against the carrier (transport contract or tort law or other) nor between the parties acting against the carrier (passengers or manufacturers or others)
 - All claims against a carrier need to be brought before jurisdiction of article 28 Warsaw Convention
 - **No jurisdiction in TOULOUSE (AIRBUS)**

BUT...



CHOICE OF JURISDICTION: TRIAL CONSIDERATIONS

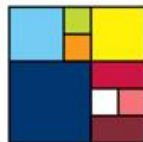
- March 4, 2015: French Supreme Court overrules Court of Appeals:
 - Based on articles 1 (scope), 17 (liability), 24 (limits of liability) and 28 (jurisdiction) of the Warsaw Convention.
 - **The Warsaw Convention is not applicable to a recourse claim of a manufacturer against the carrier**
 - Article 28 (jurisdiction) does not apply
- Questions:
 - applicable to Montreal Convention ?
 - What about specific liability regime of Warsaw Convention? Time bar ?



CHOICE OF JURISDICTION: TRIAL CONSIDERATIONS

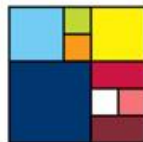
Types of damages taken into account by French Courts

- **Physical and moral damages**
 - Compensation for the loss of a close relative
- **Pathological grief**
 - Compensation for the psychological damages suffered because of the death of a close relative, beyond “usual grief”
- **Fear of imminent Death**
 - Compensation for the fear experienced by a conscience person minutes or seconds before death (transmittable to the members of estate)
- **Anxiety Damages**
 - Compensation for the fear suffered waiting for news after crash



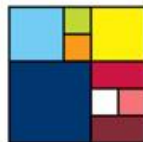
COMPARATIVE FAULT AND JOINT LIABILITY

- Passenger claim against carrier (based on contract)
- Passenger claim against other parties (manufacturer, maintenance, air control, airport, etc.) based on tort law:
 - Article 1240 and 1241 Civil Code (general liability in tort)
 - Article 1245 Civil Code (Product liability)
- Question of procedural strategy (length of proceedings, jurisdiction, etc).



COMPARATIVE FAULT AND JOINT LIABILITY

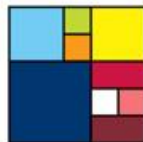
- Various factors into consideration, among which “deep pocket” phenomenon
- Recourse claim of carrier against other parties based on contract (manufacturer, sale contract) or tort law, or recourse claim manufacturer/others against carrier...
- Assessment of civil liability made by Judge
- Share of liability, decided by Judge



ADMISSIBILITY OF GOVERNMENT INVESTIGATIONS AND CRIMINAL PROCEEDINGS

BEA – “Bureau d’Enquêtes et d’Analyses”

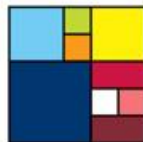
- **The French “BEA” in a nutshell:**
 - Founded in 1946
 - Depends on French Ministry of Transports
 - Approx. 100 investigations opened per year
 - Participation to approx. 300 investigations opened abroad
 - Per 1.1.2018: 96 members among which around 50 investigators
 - Preliminary report within 30 to 45 days, final report once investigations terminated.
 - Final report is made public <https://www.bea.aero/>



ADMISSIBILTIY OF GOVERNMENT INVESTIGATIONS AND CRIMINAL PROCEEDINGS

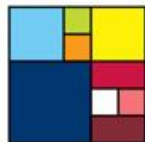
- **Regulations applicable**

- Article 26 of the Chicago Convention, annex 13
- EU Regulation 996/2010
- EU directive 94/56/CE
- L 1321-3 and following of Code of Transports and decree n° 2001-1043 from 8.11.2001



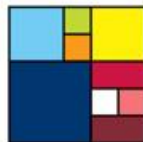
ADMISSIBILITY OF GOVERNMENT INVESTIGATIONS AND CRIMINAL PROCEEDINGS

- **Recommendation regarding security for the aviation community**
 - July 2000: BEA recommends suspension of all flights of CONCORDE in the world following crash of Concorde on July 25, 2000.
 - Takes preventive and immediate measures
 - Since 2014 better cooperation between BEA and criminal investigations conducted under supervision of investigating Judge (“*Juge d’instruction*”)



ADMISSIBILITY OF GOVERNMENT INVESTIGATIONS AND CRIMINAL PROCEEDINGS

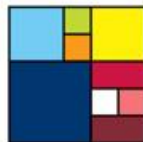
- **Recommendation regarding security for the aviation community**
 - Final report of BEA document of proof in criminal and/or civil proceedings
 - Problematic if contradictions between BEA and Court Experts designated by investigation Judge or Civil Judge
 - Experts of BEA can provide testimonials before criminal courts (but rather rare)



ADMISSIBILITY OF GOVERNMENT INVESTIGATIONS AND CRIMINAL PROCEEDINGS

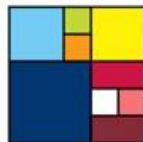
Criminal Investigations

- **Investigating Judge** (“*Juge d’instruction*”) conducts criminal investigations in France
- “The most powerful man in France” (Napoleon I)
- Balzac in “*Splendeurs et misères des courtisanes* » :
« No human power, no king, no Ministry of Justice, no Prime Minister may reduce the power of an Investigating Judge, nothing is an obstacle to him, nobody commands him. He is a sovereign only responding to his consciousness and the law” (1847)



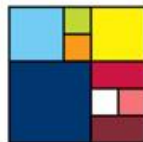
ADMISSIBILITY OF GOVERNMENT INVESTIGATIONS AND CRIMINAL PROCEEDINGS

- Single independent Judge – turnover – problematic if investigations are long
- Leads all investigations in criminal matters
- Determines if sufficient evidence to open a criminal trial
- But law from 13.12.2011, combined with decree 2014-1634 from 26.12.2014
- New provisions in the Code of Criminal Proceedings (article 706-176 and following)
- Creation of dedicated **investigating jurisdiction** with increased means to deal with **collective accidents** with “multiple victims and of great complexity” not specific to aviation accidents



ADMISSIBILITY OF GOVERNMENT INVESTIGATIONS AND CRIMINAL PROCEEDINGS

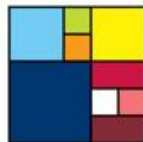
- Two courts in France: PARIS and MARSEILLE
- Possibility by Investigation Judge or Special Attorney (« *Procureur de la République* ») to ask for designation of « assistants » to share burden of work load:
 - Specific requirements of education and professional practice
 - Assist ordinary Judges
 - Elaborate documents under supervision and control of ordinary Judges
 - Research, draft documents
 - No delegation of signature, no power to rule



ADMISSIBILITY OF GOVERNMENT INVESTIGATIONS AND CRIMINAL PROCEEDINGS

Disclosure of French government investigations and French criminal proceedings in FRENCH CIVIL TRIALS

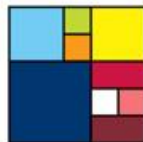
- Final report of BEA is public, document of proof as any other
- Victim/estate become part to the criminal trial
- Full access to all elements of the criminal file via Lawyer.
- Documents are confidential, no authorization to transfer copy to third party, except technical survey (fine if this is not respected)
- Once criminal trial terminated, authorization given by Judge to disclose documents from criminal trial in civil proceedings (usually granted).



ADMISSIBILITY OF GOVERNMENT INVESTIGATIONS AND CRIMINAL PROCEEDINGS

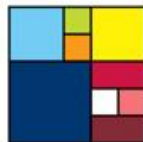
Disclosure of French government investigations and French criminal proceedings ABROAD

- France bound by the Hague Convention from 1970 on the taking of evidence abroad in civil or commercial matters.
- Bilateral treaties signed with various States regarding mutual assistance in criminal matters (F-USA: 10.12.1998 but applicable only since 12.5.2010)
- Treaties signed by EU with non-member states (EU-USA: 25.6.2003 treaty regarding mutual cooperation in criminal matters and extradition).
 - facilitates exchange of information
 - facilitates access to documents of proof

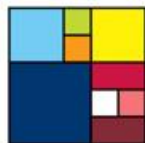
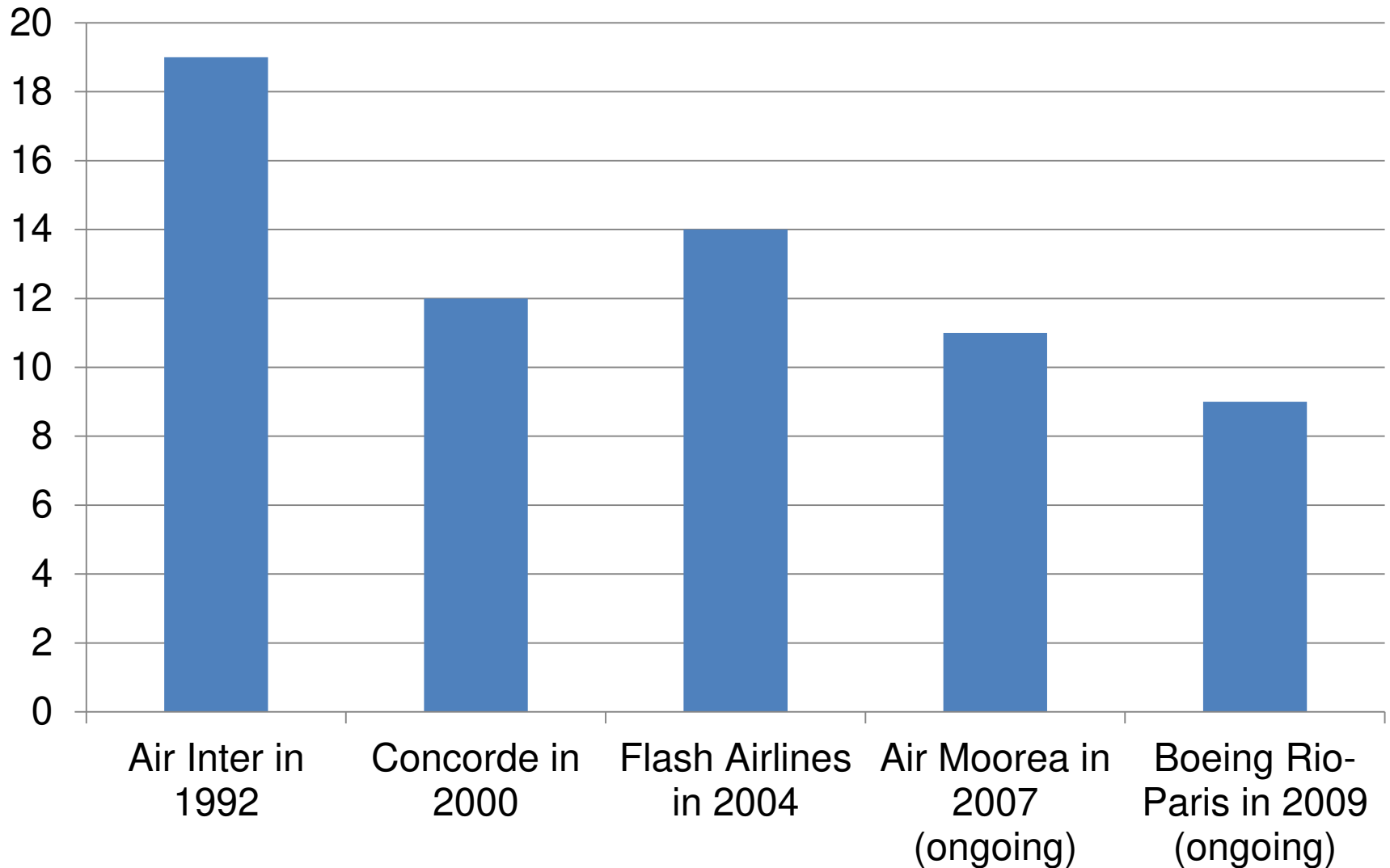


TIME TO TRIAL AND COST

- **Free determination of lawyers' fees**, no legal obligation to limit or cap the amount of fees
- **Contingency fees in France:** In France, and contrary to certain Anglo-Saxon countries, the so-called « *pacta de quota litis* » is prohibited, only combined
- **Legal aid (“aide juridictionnelle”):** available to legally residents in France, for most types of legal disputes, whether criminal or civil.
- **Generally no full refund of lawyers' fees, French Courts rule on equity, not very generous**

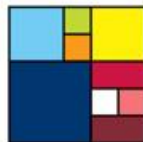


Years of criminal investigations (as of 2018)



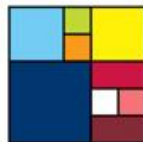
Crash on Mont Sainte Odile/ Airbus A320 Flight Air Inter

- January 20th 1992, the Air Inter Flight from Lyon to Strasbourg crashed
- May 2006, the trial opened after 14 years of criminal investigations
- November 7th, 2006, civil action was brought before the French Court of first instance
- September 2009, the French Supreme Court confirmed the ruling of the Court of Appeal allocating remedies to the direct victims and their families



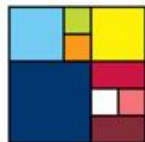
Crash of the Concorde – Air France Flight 4590

- July 20th 2000, the Concorde Flight from Paris to New York crashed
- Experts concluded that the crash was caused by a titanium strip that fell from a Continental Airlines DC-10
- March 10th 2005, French authorities initiated criminal investigations against Continental Airlines
- March 12th 2008, French prosecutor filed manslaughter charges against Continental Airlines
- December 6th 2010, Criminal Court of First instance held Continental Airlines liable for the crash
- November 6th 2012, Court of Appeal discharged Continental Airlines



Crash of the Airbus A330 – Air France

- June 1st 2009, the Flight AF447 from Rio de Janeiro to Paris crashed
- June 6th 2009, French authorities initiated criminal investigations against Airbus, Air France and Thales Avionics
- July 5th 2012, BEA issued its report
- September 24th 2018, criminal investigations hold primarily the pilots (Air France) and secondly Airbus and Thales Avionics responsible for crash
- 10 years after the crash, the criminal trial is still not open

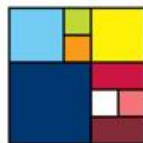


TRIAL, STRATEGY AND VERDICT – JUDGE VS. JURY

Criminal trial – Jurisdiction in France

- Articles 113-4 and 113-11 Criminal Code (“Code Pénal”)
 - Offenses/crimes committed on board of French airplanes
 - Offenses/crimes committed against French airplanes or its passengers
 - Offenses/crimes committed on board/against French airplanes not registered in France if:
 - By/against French national
 - If plane had France as place of destination
 - If the plane was chartered to without crew to a French national of French company

NO JURY – 3 PROFESSIONAL JUDGES



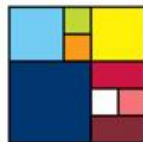
TRIAL, STRATEGY AND VERDICT – JUDGE VS. JURY

Civil trial

- Official Guide for Victims/members of estate following aviation accident
 - By French Ministry of Justice
 - From November 2017

“in case of major aviation accidents, it is common practice that the Attorneys chosen by the insurer of the carrier offer a settlement to the victims/members of estate.

The negotiation of such settlement takes into consideration the law and case law of the most favorable forum offered to the plaintiff by international conventions and the individual situation of each plaintiff (...).”



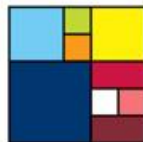
PRACTICE IN FRANCE

Preserve time bar:

- Introduction of civil proceedings within 2 years (time bar) to avoid any risk.
- Mere negotiations/discussions or a letter of claim does not interrupt time bar in France.
- RIO-PARIS: AIRBUS introduced proceedings against AIR FRANCE to preserve time bar under Montreal Convention
- But possibility to negotiate a time bar extension with insurers/carrier. But only binding upon party that agreed to it

Translation:

- Burden to translate all documents into French
- But more and more liberal



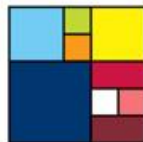
PRACTICE IN FRANCE

Distinction passenger claims and claims of crew members

- Specific court for crew members and their estate
- Complex and long proceedings
- “Inexcusable fault” of the carrier needs to be proven
- Less damages than passengers, but compliant with French Constitution.

Civil litigation on merits or summary proceedings

- Possibility to obtain rapidly summary judgment or down payment up to 100.000 SDR (113.100 SDR) under Montreal Convention
- Stay of proceedings until end of criminal trial



THANK YOU FOR YOUR ATTENTION

SELARL BOURAYNE & PREISSEL

Avocats

12, rue Jacques Bingen

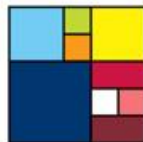
F-75017 Paris

Tel. : +33 (0)1.83.79.98.20

Fax : +33 (0)1.83.79.98.25

contact@bourayne-preissl.com

www.bourayne-preissl.com



Bourayne & Preissl
Selarl d'Avocats