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Brexit or not Brexit

Handling Contractual Relationships Between the UK and France

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With about 25 years experience, **Emmanuel Gougé** is a renowned counsel and litigator in IP law and technology transfer for Pinsent Masons, with a strong focus on patents and technology. With his dual qualification in England and Wales and in France, and his professional background in Germany, Emmanuel has been involved in a range of multi-jurisdictional matters, including licensing and broader contractual matters. Emmanuel has been a partner with Pinsent Masons since the opening of the Paris office in 2012, where he is heading the IP group. He started his career with CMS, followed by Bird & Bird, where he worked in London, Brussels and Paris.



After a few years in the Press industry, **Eric Amar** joined Bolloré more than 25 years ago. After various occupations as an international lawyer specialised in transport law as well as in contract negotiation and Mergers & Acquisitions, he took over Bolloré Transport & Logistics Legal Department, and hence added up some further topics in relation to Africa, Projects Management and Port and railways operations. Eric regularly travels worldwide to either conduct or close transactions, as well as to manage a population of more than 100 lawyers.



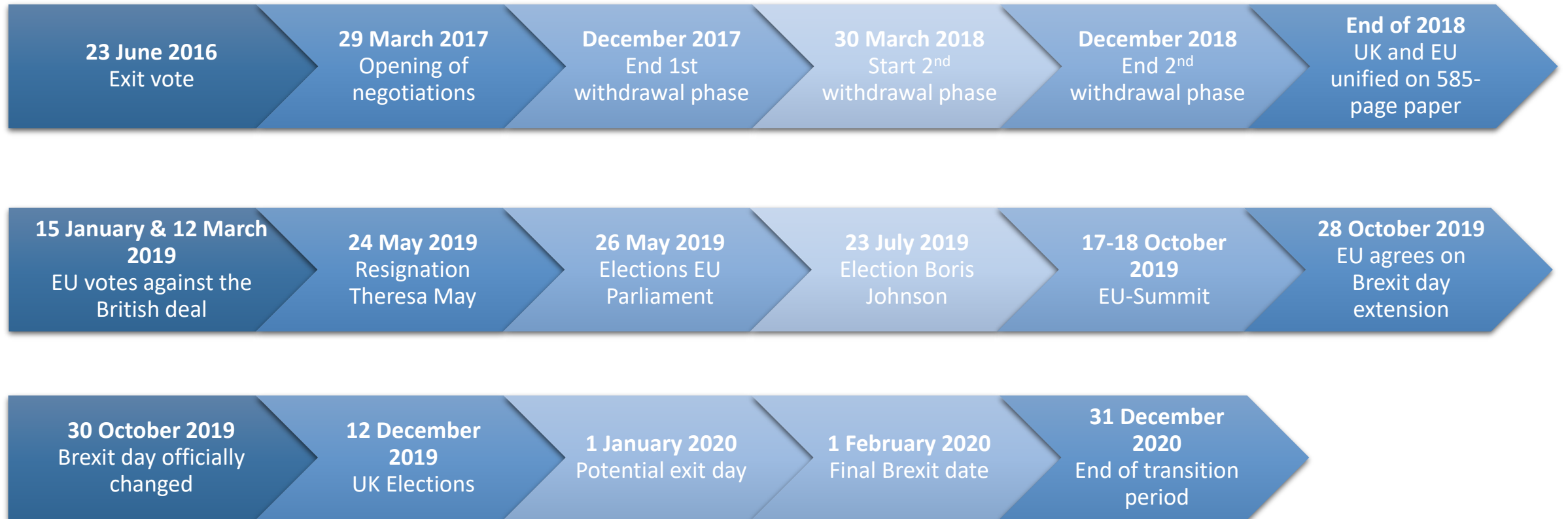
Doug Johnston is Head of Legal for Alstom UK & Ireland, leading the a legal and contract management team on a broad range of work, including tender and project support, litigation management, M&A and regulatory compliance. Director of two principal Alstom UK subsidiaries and member of UK&I Senior Management Team. Joined Alstom in 2017 from the London office of Dentons, working across the transport, infrastructure and defence sectors, in the UK as well as Africa and the Middle East. Previously seconded to UK Government, Netherlands and Russia.

Political update

Where do we stand?

01

Context



Political update - the Brexit election

Result	Brexit impact
Tory win	Withdrawal agreement passes Canada Plus negotiations begin
Lab/coalition win	New withdrawal agreement? "Softer" Brexit proposed Second referendum
Hung Parliament, Minority Tory govt	Withdrawal agreement pushed through Potential for Canada Plus Plus?



Future trade agreement – Canada Plus?

	Expect	Don't expect	“plus”?
Goods	98-99% of tariffs removed, mutual recognition of standards	Removal of tariffs on all agricultural produce	Continued protection for <u>all</u> geographical indications
Services	Mutual recognition of qualifications	Frictionless trade for all services	Financial services and passporting
IPR/Data	IPR protection	GDPR one-stop shop	Data protection – mutual adequacy agreement
Borders	Advanced electronic checking	Frictionless border	Northern Irish exception
Procurement	Reciprocal access to procurements, initial alignment of rules	Alignment of rules to continue (eg local content)	Alignment of process
Disputes	Independent arbitral panel	EU court jurisdiction	Deeper joint committee

Supply chain and tendering

Brexit risk allocation

02

Alstom in the UK

Business profile

- Primarily service-based (not manufacturing)
- High-profile contracts (WCML, London Underground)
- Public sector tendering – HS2
- Parts supply – local supply chain with limited import
- Heavy focus on suppliers and preparedness



Basic model – French/EU supplier to UK public or private customer...

Contractual risk allocation with customers – trend analysis

State contracts where authority is prepared to accept Brexit risk to achieve vfm and level playing field for tenders

“The Authority therefore requests that Tenderers make the following assumptions when pricing their Tender:

- a. The terms of the UK’s relationship with the European Union and other states remain those that are in place as at 1 January 2019; and*
- b. according, Brexit will not lead to any changes which will affect the costs and risks associate with the delivery of the Project.”*

With subsequent negotiation...

Private sector seeking to push risk onto suppliers in competitive tenders – competitive market sees expectation that tenderers will swallow some (but not all) risk

“If, as a result of the United Kingdom ceasing to be a Member State of the European Union after the date of this Agreement, the Supplier incurs higher costs in relation to the supply of the Services as a result of the increase in and/or imposition of new custom duties or tariffs applicable to goods imported or exported from outside the United Kingdom to facilitate the provision of the Services, the Variation Procedure shall apply.”

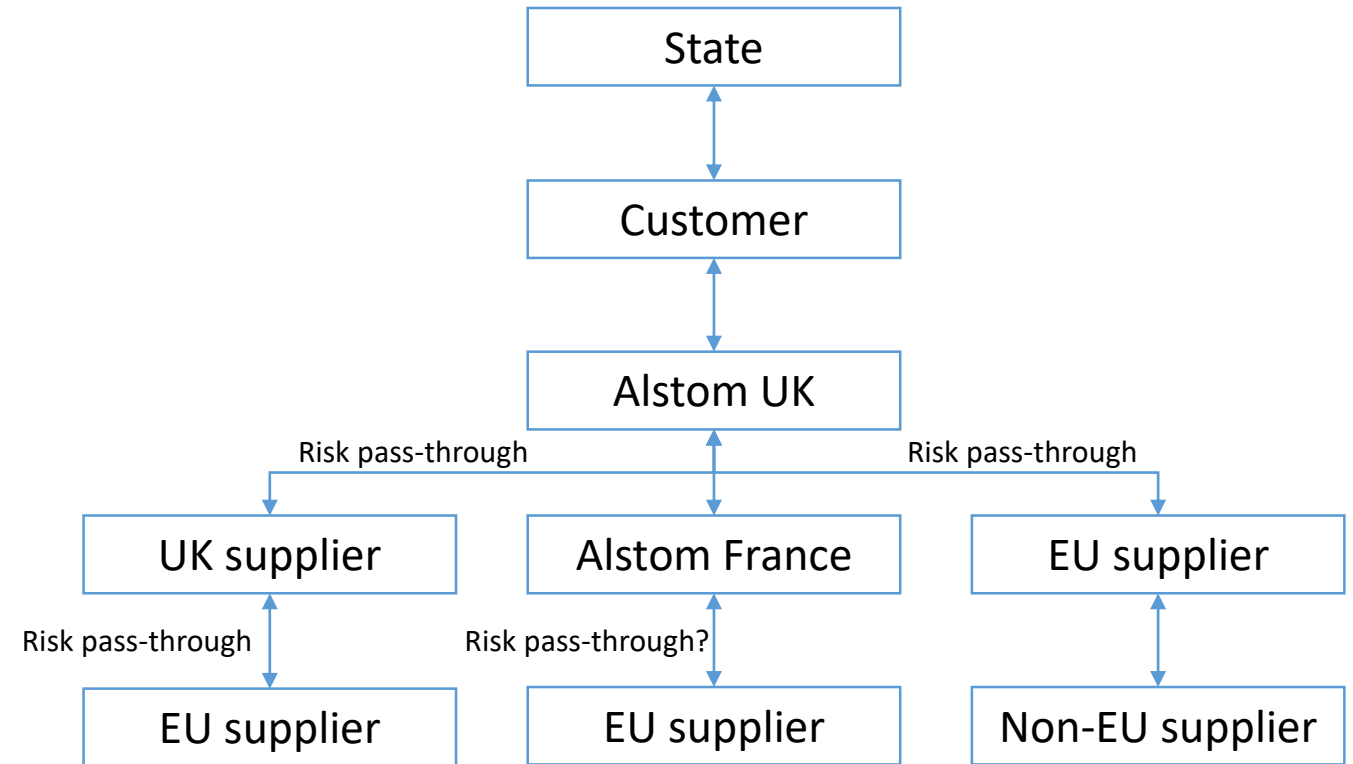
“Foreseeable Change in Law includes...

...Any provisions relating to the imposition of border controls in respect of the import and export of goods through the United Kingdom's borders following the termination by the United Kingdom of its membership of the European Union”

Contractual risk allocation with suppliers – trend analysis

- Working assumption is that suppliers will continue to supply
- Recognition of head contract provisions – we will of course look to avoid mismatch that leaves risk with Alstom
- Number of companies in our position have accepted Brexit provisions where appropriate on case-by-case basis – not one-size fits all

“Where the Supplier incurs an increased cost directly in connection with the supply of Materials under this Agreement as a result of a Brexit Event, the Service Provider shall have the right to increase its prices for the Materials for the remaining Term to enable its recovery of such increased costs on a pass-through basis, and which shall be documented via the Variation Procedure.”



Ethics and compliance in a post-Brexit world

- No change
 - Bribery Act 2010
 - Modern Slavery Act
 - FS Regulations
 - Criminal Finance Act
 - PLUS extra-territorial (Sapin II, FCPA)
- Potential for change
 - Competition law
 - Data Protection
 - Industry-specific (eg healthcare/pharma)



Customs formalities and transport

03

Brexit

In case of a no-deal:

The UK would become a third country in relation to the EU.

Movements of goods would thus require customs formalities on both sides of the Channel.

→ Bolloré Logistics is working on all forms of customs clearance schemes to identify the most reliable and efficient solutions and ensure border crossings run smoothly.

COMMON TRANSIT PROCEDURE

In the current climate, Bolloré Logistics strongly discourages its customers from carrying out their customs clearance formalities at the borders.

We recommend using the common transit procedure as a priority for departures from both France and the UK.

"SMART BORDER"

Bolloré Logistics is playing an active part, alongside French customs, in testing the "smart border", an innovative concept based on the anticipation of the French customs formalities for imports and exports, the identification of the means of transport and the automation of all electronic messages.

Air Transport – a solution to think about

As airport infrastructure and staff are already thoroughly used to working with goods travelling from or to countries outside the European Union, Bolloré Logistics is working to organise alternative air transport solutions (multimodal solutions, charters etc).

To-do list (1/3)

 **OBTAIN your EORI number** (unique EU customs identification number)

Your company must have a valid EORI number in the European Union and/or in the UK, depending on the location where customs clearance formalities are performed on your behalf.

To-do list (2/3)



DETERMINE:

INCOTERMS®

Tariff classification

Customs origin

Customs value

To-do list (3/3)



PUT TOGETHER:

Commercial or pro forma invoice, packing list, transport documents (AWB, B/L, CMR etc.), import or export licences, customs authorisations, insurance documents

Your company must quickly obtain and/or update all import and export licences as well as any other customs authorisations required for the customs formalities.

Customs viewpoint...

- End of the free movement of goods
- End of the customs union with the UK
- Restoration of restrictions and prohibitions
- Administrative costs
 - In-house customs clearance
 - Outsourced customs clearance

... and more broadly for business

- Contracts
- Indirect tax
- Intellectual Property (IP)
- Freight transport

Contracts

Changes and adaption of contractual provisions

04

Preliminary actions

- What economic ties does my company have with the UK?
- List all of the contracts that may be influenced by Brexit
 - What do they provide?
 - Are there maybe already specific clauses which regulate the Brexit event?
 - Can your counterparty still meet its contractual obligations in case of a Brexit? Can you?
 - Does your counterparty want to continue your contractual relation? Do you?

→ **Make the test:** <https://www.votrediagnosticbrexit.fr/#/bienvenue>

Brexit – a contractual definition?

MAC

Force
majeure

Frustration

Illegality

Termination

Example of a classical force-majeure-clause

"Neither party shall be in breach of this agreement nor liable for delay in performing, or failure to perform, any of its obligations under this agreement if such delay or failure result from events, circumstances or causes beyond its reasonable control, including but not limited to: ...any law or any action taken by a government or public authority"

(Source: Article Bird & Bird "Does Brexit constitute a force majeure event in supply chain contracts?" - <https://www.twobirds.com/en/news/articles/2019/uk/does-brexit-constitute-a-force-majeure-event-in-supply-chain-contracts>)

Canary Wharf (BP4) T1 Limited and others v. European Medicines Agency (2019)

- The EMA had to move to Amsterdam because of Brexit.
- It argued that their 500 million pound lease in Canary Wharf was frustrated.

→ **The British Court**

- acknowledged that Brexit would have financial consequences on EMA,
- but it also stated that EMA is capable of coping with the situation.
- *According to the Court, the relocation was not a necessity.*

Clauses that may be affected by Brexit

Territory

- What is the territorial scope of the contract
- Is the EU mentioned as a territory?

Prices and costs

- VAT
- Customs & borders

Data

- GDPR
- Data transfer

Liability

- Performance
- Delays in delivery

IP

- Patents and copyright vs.
- Trade marks and designs

Law and jurisdiction

- Governing law: Rome I and II?
- Jurisdiction: Brussels regime?

Data transfer: Standard Contractual Clauses

- The EU Commission proposes Standard Contractual Clauses for data transfer:
 - EU controller to non-EU or EEA controller:
Decision 2001/497/EC and Decision 2004/915/EC
 - EU controller to non-EU or EEA processor:
Decision 2010/87/EU

→ Access them here:

https://ec.europa.eu/info/law/law-topic/data-protection/international-dimension-data-protection/standard-contractual-clauses-scc_en

Brexit Clauses

If the United Kingdom, or any other Major Market which is currently a member state of the EU, withdraws from the EU and such withdrawal is likely to have a material adverse effect on the activities contemplated under this Agreement or the rights or obligations of either Party hereunder, the Parties shall negotiate in good faith an adjustment or amendment to the terms hereof if necessary to preserve each Party's rights hereunder as such rights were reasonably contemplated by the Parties as of the Effective Date. For clarity, a withdrawal from the EU by the United Kingdom, or any other Major Market which is currently a member state thereof, shall not constitute a Force Majeure.

In the event of Brexit, if either Party considers that the consequences of Brexit materially increase the costs of it performing its obligations under this Agreement and/or reduces its income under this Agreement and/or otherwise adversely affects the benefit it derives from this Agreement, such Party may give notice to the other of the same, and shall promptly supply such details and evidence of such consequences as may reasonably be required by the other Party). Within fourteen (14) days of the other Party receiving such notice, the Parties shall discuss in good faith and agree whether any amendments are required to this Agreement as a result of Brexit, such that the provisions of this Agreement maintain the same overall balance of obligations, benefits, liabilities and risk between the Parties as applied at the date of this Agreement. The Parties agree that the imposition of tariffs and other trade barriers relating to the subject matter of this Agreement and not in existence at the date of the Agreement shall be considered a change in the overall balance.

(Sources:

Left: Lawinsider, <https://www.lawinsider.com/clause/Brexit>

Right: Ward Hadaway, <https://www.wardhadaway.com/updates/brexit-clause/>)

Your personal checklist

- ✓ Who is the counterparty? Are there sub-contractors/other suppliers?
- ✓ Where is the contract being performed?
- ✓ Does the contract contain any of the following: MAC clause, force majeure clause, Brexit clause?
- ✓ How long is the term and what termination rights does each party have? What is the role of Brexit?
- ✓ Are any EU standards listed as the standard to which the services/products must be supplied?
- ✓ Try to include intra-group rights to provide flexibility.
- ✓ What is the territorial scope of the contract?
- ✓ Is there an exchange rate risk? Which party bears said risk?
- ✓ Are the products delivered overseas and if so, has any customs/tariff change been considered (time and cost)?
- ✓ Does the contract involve processing data? Where is it being processed?
- ✓ Which party bears the risk in respect of any change in law?
- ✓ What is the applicable law? Is it appropriate?
- ✓ Is there a choice of jurisdiction? Is it appropriate? What about alternative dispute resolutions?
- ✓ Remember to check definitions and interpretation provisions (especially if there is a change in law).
- ✓ Is there an IP clause? Does it refer to EU rights?

Some useful links

- <https://www.ashurst.com/en/news-and-insights/legal-updates/deal-out-consequences-of-the-brexit-contract-for-the-financial-sector/>
- <https://www.votrediagnosticbrexit.fr/#/bienvenue>
- https://ec.europa.eu/info/law/law-topic/data-protection/international-dimension-data-protection/standard-contractual-clauses-scc_en
- <https://www.pinsentmasons.com/thinking/special-reports/brexit>

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