

## Report on Supply Chain Compliance Volume 3, Number 8. April 16, 2020

### Should artificial intelligence be your force majeure clause detector?

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Currently, every country is in an unprecedented period of time. Every day brings news of more shutdowns, shelter-in-place orders and increased COVID-19 figures. Companies have switched to a work-from-home environment where possible, and some have even furloughed employees until the pandemic is over. But one concern for many companies—especially the supply chain, compliance and legal teams—is upholding contractual obligations amid a time of increasing uncertainty. Many companies may be unable to fulfill their obligations, leading them to ask whether a force majeure clause provides an “out.” These companies will then have to determine what contracts contain force majeure clauses—which can be simplified by leveraging artificial intelligence (AI).

Force majeure clauses are typical in most contracts.<sup>[1]</sup> However, the issue for supply chain teams lies in the interpretation of the clause. Every court will interpret force majeure clauses differently based on case precedent within the state or country.<sup>[2]</sup> For example, in New York, the courts will only excuse performance based on the specifically listed events when a force majeure clause contains a catch-all provision. Also, New York courts will require the invoking party to show that it used a reasonable effort to try to perform and that the event was unforeseeable. California and Texas treat force majeure clauses similarly, but Texas does not require the invoking party to show a reasonable effort. A clear-cut way for companies to ensure protection during this time is if the force majeure clause contains language about “pandemics” or “epidemics.” But this leaves a mighty task for companies to determine which contracts contain force majeure language, the words pandemic or epidemic, and any other necessary provisions.

While no specifics currently exist about how courts will handle breach of contract cases due to COVID-19, supply chain teams can take steps to be prepared and handle a potential breach of contract as soon as possible.

First, the company should review every contract to understand what force majeure clauses exist. After a company identifies the important language in the contract, it should review what notice and response requirements it has agreed to regarding a force majeure event. If the company needs to move forward under a force majeure event, it should obtain as much information about the event and document all the relevant information so that it is prepared in court. However, before a force majeure event occurs, every company should build a contingency plan to understand how COVID-19 may affect every contract.

Besides identifying the contract-specific restrictions, companies should be aware of local regulatory actions and restrictions from the Centers for Disease Control and Prevention and local public health organizations to determine whether restrictions will interfere with contract performance.

Lastly, a company should consider how a force majeure declaration may affect other contracts. For example, financial agreements may include representations about material events that could result in litigation—like a

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force majeure event. These steps will ensure companies are prepared during this uncertain time. However, this process can be daunting and take hours, days or weeks to accomplish while the company remains at risk. AI can help companies streamline this process and avoid any further breaches or risks.

## **How can AI help with force majeure issues?**

The first task for businesses will be to determine which contracts contain force majeure clauses and the specific language in the clauses. As mentioned, AI can streamline this process to quickly provide results all while saving the company money.

An AI contract management system, like Evisort, can help companies easily identify force majeure language.<sup>[3]</sup> Some contract management systems even work with existing SharePoint platforms where companies are currently housing contracts. This means a company can easily load its contracts into the platform, and the AI can begin to do its job. AI can search through thousands of documents to pull out specific clauses related to force majeure.

Additionally, some platforms' technology allows searches for specific words within specific clauses to find the relevant provisions across all signed contracts. For example, a company can search for force majeure clauses with the word "pandemic" with a governing law clause in California. These features allow the company to separate contracts by state and by whether or not it includes a force majeure clause. Given that individual states and countries treat force majeure clauses differently, a company needs to know which state's governing law applies to which contract. Also, it is equally important for companies to identify which contracts do not have force majeure clauses, and AI can easily provide that information. Contract-management AI capabilities save exponential amounts of time and money.

Furthermore, contracts often contain notice of time frame provisions if a force majeure event is going to occur. Companies can use AI to search for the notice provisions so they can be compliant with any requirements. Without AI functionality, this process would be lengthy, and companies could potentially miss a notice requirement, causing further breach of contract.

For companies with only hard-copy contracts and no online repository, the task of finding force majeure provisions can be even lengthier. However, AI can help here as well. Some contract management platforms use optical character recognition to turn a scanned document into a Word document that is easily searchable. Rather than searching through each contract manually, a company can scan and upload all the documents and easily search through them all at the same time. Without AI, this situation is a logistical nightmare for companies, and unfortunately, many companies often do not house their contracts in any specific location—making this nightmare a reality.

Ultimately, AI can significantly reduce the length of time and the cost behind finding important provisions to determine the best next steps for a company. Also, because the AI is set up through a contract management platform, it makes the contracts and search capabilities accessible from anywhere, which is even more important when many employees are locked out of the office.

## **How does AI apply to the current situation?**

Every industry has been hurt by the COVID-19 pandemic, and many companies, concerned about how to keep day-to-day operations running, may need to use force majeure clauses to help mitigate breach of contract concerns. Internal supply chain teams are currently facing a multitude of issues related to payment, late shipments, shipments not arriving at all and vendors breaching contracts. Force majeure provisions can address many of these concerns. It is essential for companies to quickly find the right information so the companies can

move toward solutions or secondary plans to continue doing business as normal as possible.

Two industries that have been hit particularly hard by the pandemic are the restaurant and retail industry. Many of these businesses are currently determining whether they can pay rent in the coming months and, if not, what options exist with their rent obligations.

For example, one of our customers, a North American chain restaurant, is using AI to quickly search through all its lease agreements and find force majeure clauses and any other rights within the contract to temporarily halt rent payments. Additionally, this chain restaurant is also using the platform to identify contracts where others may owe them money and then determine whether those companies may not receive rent payments from lessees due to the COVID-19 outbreak. AI streamlined this process so the company can focus on other concerns during the pandemic.

A global retailing company is also using AI to help with a few different concerns resulting from the pandemic. The company is performing similar functions as the restaurant mentioned above to identify force majeure clauses to renegotiate leases. They are also using the platform to find leases with malls that have cotenancy clauses that could allow them to lower rent during the crisis. Both companies are using this technology to determine termination rights within the contract, which often lead back to force majeure clause concerns.

## **What can't AI do during this time?**

AI can provide the necessary information with the force majeure clause language and the governing law clause, but from there, companies must make the hard decisions—to stop rent payments, cease shipments and essentially breach contracts—relying on the force majeure clauses to cover the breach.

AI helps companies move off the starting line. AI provides contract-specific information, and then the legal team must research case law to determine whether those provisions are enough.

Lastly, AI cannot help an organization's business relationships with its vendors, landlord tenants and others that may be adversely affected by these decisions. AI cannot determine how the other party will respond, but that is where human consideration and communication will always come in to connect the work AI can do.

## **What comes next?**

Unfortunately, the current pandemic is an extreme scenario, and the next few weeks and months will determine how far force majeure can stretch. Without a clear-cut rule from the courts, companies must make the best decisions for themselves at the present time, and AI can make this process more efficient, releasing some of the burden. Without AI, companies will have to spend valuable time and money simply finding the force majeure language, governing law and any other applicable clauses. With AI, however, organizations can shift to focusing on what happens next and make the best decisions possible. AI is becoming more predominant across all industries, and it is becoming crucial to helping businesses thrive amid a pandemic-stricken world.

## **Takeaways**

- Currently, companies face the hard task of determining what contracts contain force majeure clauses and other language to help with breach of contract concerns during the COVID-19 pandemic, but artificial intelligence (AI) can alleviate the pain points of this task.
- An AI-powered contract management system is more important than ever for supply chain companies to efficiently handle concerns during the pandemic.

- 1 “Force Majeure Sample Clauses,” Law Insider, last accessed April 10, 2020, <https://bit.ly/3a3H6A9>.
- 2 Jennifer Ancona Semko et al., “US: When Is Force Majeure Really Force Majeure?” Baker McKenzie, March 5, 2020, <https://bit.ly/34q4Ygc>.
- 3 Jerry Ting, “Using AI-enabled Contract Management for Force Majeure During Pandemic,” Legal tech Daily, March 24, 2020, <https://bit.ly/2Ve7hPq>.

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