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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.^[1] 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.^[2] 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.

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