

# The covid-19 paradox

*A liberated mindset for intelligent contract management has been unleashed, says **Jenny Hotchin***



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**T**he impact of the covid-19 pandemic has been felt across the entire business landscape. For many organisations, one of the hallmarks of these turbulent times has been significant contract disruption.

According to the International Association for Contract and Commercial Management (IACCM), from 9 March to 9 April 2020 the percentage of organisations reporting moderate to severe impact on contract performance rose from 37 per cent to a whopping 78 per cent.

Therefore, it's not surprising 81 per cent of organisations plan to implement or replace their contract management automation technology. The IACCM identified clause analysis and portfolio analysis as two areas where current systems fall short, even as the pandemic has highlighted the importance of these capabilities.

Artificial intelligence (AI) has a key role to play in enabling many types of organisations, including law firms and the businesses they represent, to better analyse their contract estate and gain an accurate understanding of the risks and opportunities across all their contracts. AI can do this in ways that would be nearly impossible to achieve if attempted manually.

Taking this step towards intelligent contract management enables organisations to make better informed decisions as they respond to the contract disruption the pandemic has unleashed.

## MORE THAN FORCE MAJEURE

So, what clauses and data points will organisations need to unearth as they adjust to the rapidly changing business landscape? This is not simply a matter of force majeure.

Reviewing contracts to establish whether force majeure clauses are present in those documents may not be useful in and of itself. More nuanced information is required – like whether or not the contract can be terminated for force majeure; or whether notice needs to be served to rely on force majeure relief. And if the latter, how and when notice should be served.

One quickly realises that there are a slew of clauses and data points that organisations will need to look at if they hope to understand the various positions in a contract; and then

make sound business decisions as a result of that intelligence.

## THE FULL PICTURE

A few real-world business scenarios are helpful here to show just how many factors might feed into a business decision.

On buy-side contracts, if an entity has lost a huge part of its business the first thing its leaders might want to do is look at how they can stop money going out the door. That might mean changing payment terms or – as a last resort – terminating the contract, depending on what clauses are present.

However, given the tangled nature of supply chains, making a business decision in this area might not be as straightforward as it seems.

For example, suppose your client organisation has 10 suppliers in its supply chain and needs those 10 different components to make a finished product. Even if just one supplier defaults, the organisation won't have a finished product – which means it won't have the cash-flow coming in to pay the nine other suppliers.

Such is the intertwined nature of the supply ecosystem.

Organisations seeking to diversify their suppliers to reduce their overall risk will find that this business decision isn't as simple as it first appears either. It requires a close look at clauses around exclusivity and intellectual property (IP) rights which might otherwise prevent that diversification.

For example, company X will likely have intellectual property rights, trade secrets and confidentiality provisions specific to its strategic supply chain. This is because company X and its suppliers want to limit the sharing of this intellectual property and information.

In the wake of covid-19, however, company X might decide it's a good idea to diversify its supply chain to protect against future contract disruption. Bringing in additional suppliers will require all of the new and existing suppliers to open up their IP, trade secrets and confidential information to one another, in order to successfully collaborate on the final product.

None of these moves can be undertaken without a full understanding of what IP, trade secrets and confidentiality provisions are already in place across contracts. Company X will also need to assess whether there are any



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exclusivity provisions that may restrict such diversification in the first place.

Subcontracting raises similar complexities for any organisation seeking to diversify its supply chain, requiring a careful examination of clauses in this area. Since there are typically restrictions on how organisations can subcontract, more flexibility – or creativity – might be required from all parties regarding who's allowed to perform work in the supply chain should any one supplier be unable to continue to deliver.

Insourcing can be seen as another piece of the supply chain diversification puzzle. If your client doesn't trust external sources to provide what's needed, should insourcing be considered? Is insourcing a cheaper option?

The answer will largely depend on the industry; but if the business wants to insource, a host of other questions will need to be addressed first. Can the organisation terminate its existing contract with external providers? What are the consequences of that termination – for example, is the business required to pay anything? Does it have rights around exit management?

If an organisation is insourcing in the UK, do the Transfer of Undertakings (Protection of Employment) Regulations (TUPE) kick in, requiring the business to take onboard a large number of employees?

As these real-world business scenarios illustrate, a rich understanding of the different clauses and data points in the contract portfolio are necessary for any organisation wanting to make informed business decisions that will help it successfully adjust to the various curveballs the pandemic has thrown the global economy.

### NEED FOR SPEED

Time is of the essence here. Organisations have difficult decisions to make and they need to ensure they're making as well-informed decisions as possible. Confidence in decision-making comes from having a factual understanding of the positions in your (or your client's) documents and contracts.

Given the pressing need for speed in making adjustments to contracts, trying to gain this breadth of knowledge manually through individual lawyer review or by throwing throngs of professionals at the problem just isn't feasible.

On the other hand, AI is ideally suited to the rapid review of mountains of documents and extracting the key clauses and data points that matter most.

Crucially, AI doesn't just help with clause analysis but also with portfolio analysis.



Clause analysis involves reviewing a contract for a particular clause or data point (such as an exclusivity provision, to take our earlier supply chain example); and this action can be completed on one or many contracts.

Portfolio analysis involves taking all the data points collected across each contract to give an aggregate view of that contract portfolio – allowing you to take a 30,000 feet view over thousands of contracts in a fraction of the time.

This portfolio analysis can be used to assess risk in a particular customer segment, supply chain or market. Having an understanding of the overall risk exposure across the portfolio is critical when making serious business decisions like: can it keep its doors open? Can operations continue?

When an organisation is making a decision that will impact hundreds – or maybe hundreds of thousands – of people's jobs or well-being, decision-making can't be taken lightly. The people driving that organisation need to understand the business implications of the decisions. AI enables them to leverage data to quickly and to confidently make important decisions about the direction of the organisation.

### NOW'S THE TIME

As the business landscape continues to adjust to the changes that covid-19 has brought about, AI stands at the ready as an enabling technology. On both the buy-side and the sell-side, it can help organisations with all aspects of their contract management, guiding them towards pragmatic solutions and smarter business decisions that will help them successfully navigate this uncharted territory. <sup>SJ</sup>



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