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Contract Data Models: A Modern Framework for Digitization

Contracts as Data Models: A Modern Framework for Digitization

A Step-by-Step Guide to Turn Contracts into Data Points to Drive Your Enterprise

Innovation fever is gripping the law department and virtually everything is up for modernization, including the tried-and-true: contract. Contracts are an ideal target for innovation for good reason: the business is pressing legal to increase the visibility and accessibility of contract data to manage risk and drive value. The specific asks of legal departments include:

1. Rapid access to information about signed contracts (e.g., does our contract with Vendor Y include a price adjustment mechanism? Do all our customer contracts contain a limitation of liability clause? How many of our leases are coming up for renewal next year?)

2. Proactive responses to company-wide challenges (e.g., a change in regulation like the introduction of The California Consumer Privacy Act or General Data Protection Regulation compliance or a destabilizing event like COVID-19 or strategic M&A transaction1.)

3. Data-driven decision making (e.g., enterprise determinations of commercial risk and value through metrics and reporting on contracting results or to prevent value-leakage.)

4. Automation to increase efficiency (e.g., outsource low-value tasks to free up legal bandwidth to focus on high value initiatives and support business strategy.)

Legal departments are turning largely to technology to evolve their contracting practices, especially to Contract Lifecyle Management (CLM) systems. Although there are plenty of great CLMs to choose from, World Commerce and Contracting (WorldCC), the leading association dedicated to raising capabilities in contracting practices, suggests that only roughly 60% of CLM deployments meet the original expectations and fully deploy as intended[2]. A survey by Onit's Contract Works group found that 77% of customers had "experienced a failed technology implementation."[3] Even when successful, anyone that has gone through a CLM "go-live" event can attest to the high time and cost commitments associated with getting it right.[4]

As vital as CLMs are, they're not quick on/off switches to automatically produce contracting improvements and unlock data-driven results. First, you must step back and complete the necessary groundwork to evolve foundational contracting practices that ultimately make contracts "ready" for digitization.

Whether using a CLM or not, our industry must depart from outdated approaches to contracting that have prevented Legal's full-blown entrance to the digital world that we now live in.

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Current State of Contracting: Static Word Documents Full of Legalese

Contracting practices have not kept pace with digital adoption. We still think of contracts as highly formatted text in Microsoft Word or PDF documents. We use agreement templates of unknown origin that are amalgamations of numerous lawyers smashing together clauses from disparate sources to solve issues in isolation. Contracts are full of legalese, repetition, bloated and unclear language. Conflated issues lead to drafting errors and interpretation challenges. Deciphering contracts drafted from these templates is nearly impossible for anyone (human or artificial intelligence) except a highly experienced lawyer.

Things aren't much better when it comes to contract negotiations. After a draft contract is shared with a counterparty, they first need to decode the document to fully understand its provisions. This means comparing and assessing it against their own criteria, which requires highly trained or specialist resources and wastes time and aggravates attorney relationships. Lawyers end up taking harsh negotiation positions and adopting "old school" negotiation methods to debate issues that largely don't even result in disputes and don't drive value for either company.

Once finalized, contract data is static, unstructured, and stored in paper form or on local desktops. Bulky contract language doesn't quickly or easily translate to meaningful data. As a result, the information contained in contracts is not easily disseminated across the enterprise. Without data visibility and mobility, organizations struggle to measure all the risk and value held within their contracts.

Rethinking Contracts as Data

We no longer need to accept the limitations of treating contracts as complex words in a document. Instead, we can shift the paradigm and open myriad possibilities to propel the business by thinking of contracts as a collection of data points or a data model.
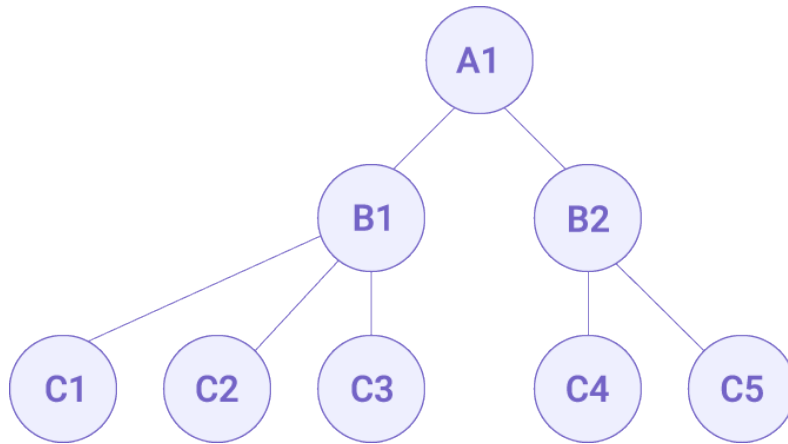
A data model is a map or a blueprint that facilitates a deeper understanding of what it depicts. Data models come in different forms but ultimately share a common ability to connect and show relationships among the data they contain. [5] They provide a consistent, predictable way to define and manage data resources across an organization or between multiple parties.

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[1] Poor contracting can take the form of ambiguous and incompleteness contract terms, needless and ineffective negotiation, and unclear remedies. poor contracts reportedly costing most companies more than 12% of their revenue, according to data from World Commerce & Contracting (WorldCC).

[2] IACCM Benchmark Report 2019

[3] See: https://www.artificiallawyer.com/2022/05/23/77-of-inhouse-lawyers-experience-failed-legal-tech-projects/

[4] See: https://www.worldcc.com/Resources/Content-Hub/View/ArticleId/11008/Why-do-contract-management-tools-fail

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A depiction of a hierarchical data model that represents one-to-many relationships in a family tree-like format. In this type of data model, each record has a single root — or parent — that map to one or more child

Creating a data model for contracts means defining the core issues and concepts that surface in a contract to understand what the contract says at a structured data level (instead of just words on a page). For example, there might be countless ways to draft a limitation of liability provision that caps damages at two times fees paid in the last year. From a data model perspective, you can map all of them back to the same value (e.g., "Limitation of Liability = 2x Fees (Annual)").

Thinking of contracts as data models has multiple benefits, including:

- A reference point for someone to decipher and interpret words and turn them into data Insurance

- A path to align language included with the value it represents

- A framework to latch on to when reviewing and negotiating a third-party draft

- An objective way for companies to think about whether a contract aligns with their negotiating positions and risk tolerances

Once a final agreement has been reached, this approach to contracts allows for easy translation of the contracts into structured data that you can plug into the rest of the enterprise to enable business. You can combine contract data with other enterprise data to uncover insight previously impossible to surface.

If applied more broadly across companies and industries, this new paradigm to contract development and management can create a world where two companies' systems and lawyers can speak to each other in equivalent terms and align on the business terms that really matter. It would be a world where reduced negotiation improves the experience for both parties and starts a relationship on the best possible footing.

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[5] For a more holistic overview of data modeling, see here: https://www.ibm.com/cloud/learn/data-modeling

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How to Create a Data Model for Your Contracts

Transforming your contracts into Data Models can be accomplished with the following five-step process:

1. Define concepts and sub-concepts

2. List objective positions for each sub-concept

3. Assign owners

4. Choose preferences for each position

5. Draft contract language for each position

A more detailed look at each step follows:
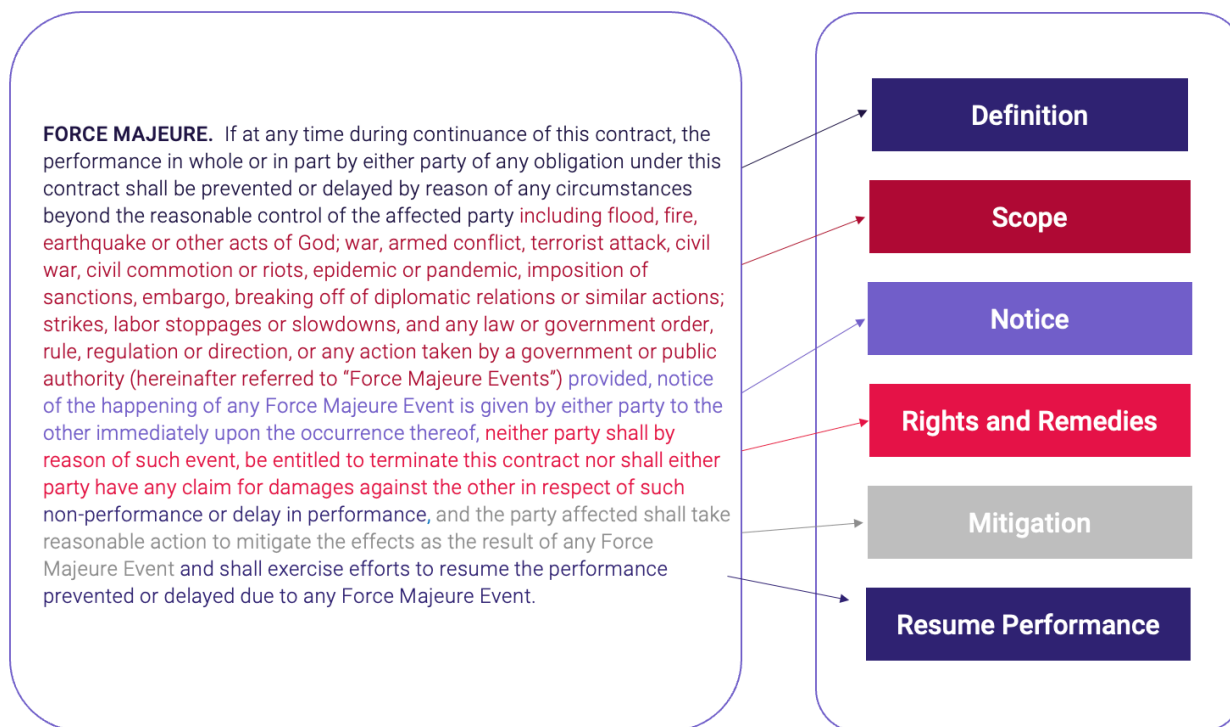
Step 1: Define Concepts and Sub-Concepts

The good news is that your agreement templates already contain the core information necessary to construct a data model. The process simply requires transforming existing provisions and language into a new format. If you haven't yet put together templates for your agreements, you can use a sampling of recent contracts that you have entered into across your enterprise. Whichever the case, the first step is to isolate the high-level Concepts that you find. If agreements are already organized with headings to articles and sections, this will make it easy to start to identify the Concepts. Below is an example of what a list might look like for a simple services agreement:

- Definitions
- Term
- Termination
- Payment

- Performance
- Acceptance
- Warranty
- Confidentiality

- Intellectual Property
- Indemnification
- Insurance
- Limitation of Liability

- Audit
- Force Majeure
- Governing Law
- Assignments

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The goal at this stage is not to identify improvements to a template. Instead, you are deconstructing your contracts into their component parts, isolating the Concepts that form the building blocks of your contracts.

Create Sub-Concepts

After you turn a specific agreement type into a list of Concepts, the next step is to further deconstruct the language and identify Sub-Concepts that relate to each of the Concepts. The following graphic illustrates that deconstruction process for a typical force majeure clause.

FORCE MAJEURE. If at any time during continuance of this contract, the performance in whole or in part by either party of any obligation under this contract shall be prevented or delayed by reason of any circumstances beyond the reasonable control of the affected party including flood, fire, earthquake or other acts of God; war, armed conflict, terrorist attack, civil war, civil commotion or riots, epidemic or pandemic, imposition of sanctions, embargo, breaking off of diplomatic relations or similar actions; strikes, labor stoppages or slowdowns, and any law or government order, rule, regulation or direction, or any action taken by a government or public authority (hereinafter referred to "Force Majeure Events") provided, notice of the happening of any Force Majeure Event is given by either party to the other immediately upon the occurrence thereof, neither party shall by reason of such event, be entitled to terminate this contract nor shall either party have any claim for damages against the other in respect of such non-performance or delay in performance, and the party affected shall take reasonable action to mitigate the effects as the result of any Force Majeure Event and shall exercise efforts to resume the performance prevented or delayed due to any Force Majeure Event.

- Definition
- Scope
- Notice
- Rights and Remedies
- Mitigation
- Resume Performance

The graphic uses color-coding to highlight how blocks or chunks of contract language, even if organized by a heading (Force Majeure in this instance), ultimately consist of separate components or Sub-Concepts within a broader Concept.

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The resulting list of Sub-Concepts could look something like the below table:

Concept	Sub-Concept
Force Majeure	Definition
Force Majeure	Scope
Force Majeure	Notice
Force Majeure	Rights and Remedies
Force Majeure	Mitigation
Force Majeure	Resume Performance

Looking Across Agreements

Concepts and Sub-Concepts represent the substance of your agreement, as opposed to the form of the agreement or the ordering of provisions. The fact that the same Concept appears at different locations across two different agreement types doesn't change the fact that it is the same Concept in both. For example, one agreement template might have some Sub-Concepts related to Force Majeure that are buried in a defined term section explaining what a Force Majeure is. Or, it can appear in a termination section explaining how a party can terminate the agreement in the event of a Force Majeure. Another agreement type may have all the Sub-Concepts related to force majeure included in a single section.

As you complete your process across all your agreement templates, you'll probably notice that there are lots of overlapping Concepts from one agreement template to the next (e.g., many of your agreement templates may have a Warranty Concept and a Remedies Concept). You might also notice that these Concepts are not always written the same way. For example, the definition of Force Majeure in one agreement template may be lengthy with lots of specific items included or excluded, and it might be defined more generally in another (e.g., anything outside your control). That is expected. Don't worry about which version is better. Instead focus on creating a list of the Concepts and Sub-Concepts that need to be included in your data model.

You will also notice Concepts and Sub-Concepts that are unique to specific agreements and don't span your agreement templates. For example, if you have an IT Services Agreement Template it likely covers how security related updates and patches are applied or service level agreements around downtime. These wouldn't be part of the Service Agreement Template you use with your marketing agency. Or, your Supply Agreement might include supply chain continuity provisions, (e.g., maintenance of safety stocks and backup manufacturing facilities) which wouldn't' be part of any of your Service Agreement Templates.

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Step 2: List Objective Positions for Each Sub-Concept

The next step in the process is to identify and define "Positions" for each Sub-Concept. Think of Positions as different contracting stances you can take for a Sub-Concept. The exercise of defining Positions requires distilling language down to very basic and objective results, regardless of the dense or relatively complex language in the contract. For example, let's stick with the Concept of Force Majeure and its Sub-Concept of Notice, that has two basic Positions: (i) required and (ii) not required. This is black or white. You either must give notice to receive the benefit (in this case excusing performance for a Force Majeure) or you don't have to. A more holistic list of Positions might instead be: (i) Notice required – immediate, (ii) Notice required – promptly, (iii) Notice required – within 1 day, (iv) notice required – within five days and (iii) Notice not required.

Positions can extend exponentially if you define every possible permutation, which of course is not the goal. The focus should be on practicality. You want to define Positions that actually (and commonly) arise. Applying the Pareto principle, as opposed to attempting to document every conceivable Position that might be encountered. Here is what that would look like continuing on the Force Majeure example:

Concept	Sub-Concept	Position ⬅
Force Majeure	Definition	Event beyond the reasonable control of Affected Party
Force Majeure	Definition	Unforeseeable cause
Force Majeure	Definition	Could not have been prevented by reasonable precautions
Force Majeure	Scope	Act of God
Force Majeure	Scope	War
Force Majeure	Scope	Epidemic
Force Majeure	Scope	Pandemic
Force Majeure	Notice	Not Required
Force Majeure	Notice	Prompt or Immediate Required
Force Majeure	Rights and Remedies	Termination Allowed
Force Majeure	Rights and Remedies	Termination Not Allowed
Force Majeure	Rights and Remedies	Claim for Damages Allowed
Force Majeure	Rights and Remedies	Claim for Damages Not Allowed
Force Majeure	Mitigation	Not Required
Force Majeure	Mitigation	Reasonable Mitigation Required
Force Majeure	Resume Performance	As Soon as Reasonably Practicable
Force Majeure	Resume Performance	When Mutually Agree is Possible

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If you have experience negotiating the agreement type you are building a data model for, you can recollect how you have altered text and negotiated things over the years, making sure to cover those Positions you most frequently see. However, it's important to note that at this point we are not focused on the development of preferred Positions, alternative Positions and no-go areas, but instead defining the potential Positions that a party could take with respect to a Sub-Concept. A simple test to see how you have done is to pick up a sampling of negotiated agreements to see if you can fit the final Positions in each finalized agreement into your new data model.

Positions Will Vary by Agreement Types

You may find that some Positions are specific to a given agreement type or agreements in a specific geographical location. These should also be included as Positions across the Concepts and Sub-Concepts in the data model. For example, there might be a Position that makes sense if you are acquiring simple goods but wouldn't make sense if you are purchasing IT services (e.g., a software license agreement often includes a Warranty that the software is free from third party intellectual property and that it won't cause a system vulnerability, but these warranties would not be common in an agreement to purchase widgets.

Step 3: Assign Owners

The data model creates a framework to assess and assign ownership by breaking contract language down to granular and objective data elements. At the Concept level, ownership can be assigned to the stakeholder that will take responsibility for the strategic approach for how that Concept will be managed by the company. Owners could be tasked with things like selecting a Company's preferences for each Position (i.e., whether the Company would accept a Position during a negotiation), assessing risk for different Positions, stepping in as an approver for any deviations to the Company's preferences, ensuring compliance with contracting terms within the Position or tracking over time how the Company's approach might change based on any learnings from course of performance under contracts with respect to the Concept or external changes in market dynamics that affect the Concept.

Ownership will vary from one company to the next. Many companies look to legal as the "owner" of contracting overall, and may tend to assign ownership to legal for things that go well beyond any legal issue or even any risk issues, even to Concepts that really are more commercial in nature. Other companies think of legal as the controller of legal risks, assigning ownership for other, "non-legal" Concepts to other groups within the Company other than legal, such as functions and departments that have better knowledge of the subject matter at hand, and are able to balance risks identified by Legal against potential rewards and other strategic benefits to the company.

For example, the owner of the Concepts for Pricing and Price Adjustment would be owned directly by the business unit, Concepts for payment and invoicing would be owned by Finance, Supplier Management and Supplier Continuity owned by Procurement, Insurance and Non-Legal Risk Owned by Risk Management. For these companies, you might see only a handful of Concepts owned by Legal, maybe even limited to Limited of Liability and Indemnification. Legal may also be tasked with helping these other functions think through other Concepts, draft preferred language for contracts, identify when different Concepts are present, and drive contract drafting and negotiations toward reaching the Company's goals. In either case, most will usually identify several Concepts that are better left to specialists, like Tax, Data Privacy and Security, IT, Finance and Procurement.

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Sub-Concept and Positions provide more flexibility to vary ownership within a Concept. For example, confidentiality as a Concept might be owned by Legal, but a Sub-Concept that covers data destruction might be owned by Data Privacy and Security. Or a data destruction Position that requires a written certificate might be owned by the business unit, which would be tasked with ensuring the destruction has occurred and the certification provided.

Regardless of who owns what, it's necessary that ownership is delegated so that Concepts, Sub-Concepts and Positions aren't neglected or managed by somebody without intimate knowledge of that subject matter, risks and company objectives. How things are broken down will ultimately depend on how your company organizes enterprise functions. The data model doesn't decide for you, but it does give you a clear framework for completing the task. See the below graphic showing an example of Ownership information added to your Data Model.

Concept ➡	Subject-Matter Owner
Limitation of Liability	Legal
Indemnification	Legal
Price	Procurement
Payment	Finance
Software Audit	IT
Data Privacy	Privacy
Governing Law	Legal

In this simple example, concepts are owned by various internal subject-matter experts. Besides the overall owner, other stakeholders can be assigned that have an interest in a given Concept, Sub-Concept or Position, perhaps they are consulted or informed when it comes to any changes to an approach to managing the Concept. For example, Information Security might need to know about specific restrictions regarding access to or storage of sensitive client information. Various operations functions might be informed or notified that a specific Position in a specific contract is tied to a deliverable they are responsible for completing.

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Step 4: Choose Preferences for Each Position

As a next step, you can add your company's contracting preferences for each Position in the Data Model. This can be accomplished by classifying each Position for each Sub-Concept with one of the following:

A. **Most Desired**: This is your preferred Position, and in a perfect world what you hope your contracts say for each Sub-Concept. Of course, negotiations don't always end with you getting everything exactly as you want, so defining and deciding your preferences among potential alternative Positions is necessary.

B. **Fallback or Stepdown**: Your Fallback or Stepdown Positions represent your negotiation back-up plans. For a given Sub-Concept, you can define a single Fallback or several options. You may even have some Sub-Concepts that have no Fallbacks (e.g., you are required to include a specific Position under applicable law.

C. **Last Resort**: As the name suggests, this represents the furthest you're willing to extend from your Most Desired Position. In practice, it's not a position you should agree to easily or often, but effective guardrails are appropriate to concede to it under limited and preferably pre-identi fied circumstances. In the rare circumstances where you do end up agreeing to these Positions, you want to make sure that it happens under strict, limited circumstances where the appropriate stakeholders have been fully informed and approve knowing all the facts.

D. **Not Acceptable**: If you're unwilling or unable to agree to a certain Position, then identifying it as Not Acceptable helps avoid mistakenly signing up to it. This is an important distinction from not including the Position in your data model at all, because it acknowledges that you know the Position that someone can take for the Sub-Concept so identifying it in your Data Model means someone has an easy place to map new or unfamiliar language back to, as opposed to struggling to understand your company's position.

The below graphic represents how these positions fit into the Data Model.

Concept	Sub-Concept	Position ⬅	Company Preferences
Force Majeure	Definition	Event beyond the reasonable control of Affected Party	Most Desired
Force Majeure	Definition	Unforeseeable cause	Stepdown
Force Majeure	Definition	Could not have been prevented by reasonable precautions	Stepdown
Force Majeure	Scope	Act of God	Most Desired
Force Majeure	Scope	War	Most Desired
Force Majeure	Scope	Epidemic	Most Desired
Force Majeure	Scope	Pandemic	Most Desired
Force Majeure	Notice	Not Required	Unacceptable
Force Majeure	Notice	Prompt or Immediate Required	Most Desired
Force Majeure	Rights and Remedies	Termination Allowed	Unacceptable
Force Majeure	Rights and Remedies	Termination Not Allowed	Most Desired
Force Majeure	Rights and Remedies	Claim for Damages Allowed	Unacceptable
Force Majeure	Rights and Remedies	Claim for Damages Not Allowed	Most Desired
Force Majeure	Mitigation	Not Required	Most Desired
Force Majeure	Mitigation	Reasonable Mitigation Required	Stepdown
Force Majeure	Resume Performance	As Soon as Reasonably Practicable	Most Desired
Force Majeure	Resume Performance	When Mutually Agree is Possible	Stepdown

As another example, your Data Model likely will include a Concept for Payment and Invoicing, and a specific Concept around Timing of Payment. You might have a Most Desired Position of 30 days for your Customer Contracts, with Fallbacks for 45 and 60 days, a Last Resort of 90 days and anything more than 90 days as Not Acceptable.

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What to Consider When Defining Your Positions

When deciding on your preferences also remember that nothing makes a Position innately right or wrong except as it positively contributes to your company's desired contracting outcomes. Each organization's specific preferences for Positions will vary since evaluating what Positions are best for your company requires weighing how important speed of execution is to your Company versus the risk that can be avoided and value that can be created by adhering to Positions that are preferable to your Company. Some things to consider when completing this analysis:

- **Some Concepts are riskier than others.** Agreeing to uncapped liability in your customer agreements or relaxing your indemnification protection in your vendor contracts will increase riskfor your company. On the other hand, negotiations around procedural mechanics of how you raise and escalate claims don't have the same i pact. The analysis will vary depending on things like the industry you are, the products or services you are selling or buying.

- **Risk will vary across your contracting landscape.** Thinking about risk and reward will also vary based on the specific types of agreements you are entering into, and the Concepts included in them. For example, risk inherent to a software contract with data externally hosted will differ from risk in a contract for widgets. As a result, your preferences may vary from one agreement type to the next.

- **Creating value with your Positions.** As vital as it is to craft Positions with risk mitigation in mind, equally important is to recognize the role that Positions play in value creation. Positions that create value tend to be more preferred than those that do not. Some examples of Concepts that directly contribute to value creation include pricing and pricing caps, payment terms, unilateral rights to extend favorable terms or opt-out of unfavorable terms, reduced costs through limited audit provisions, termination rights on assignment attempts to limit service degradation.

- **How well do your Positions conform to your standards?** Your company policies and standard operating procedures should be reflected in Positions in your Data Model and considered when setting your preferences. As policies and standards change, your Positions and Preferences should be revisited. For example, if your company creates an Information Security Policy that requires external users of your data follow certain technical and administrative protocols, then all supply chain engagements where vendors will have access to company data should include those obligations as part of the contract underlying that transaction.

- **Risk and Value is specific to your company.** There are times when competing priorities might force you to weigh trading off a less desirable Position for one Concept against a more desirable Position for another Concept. The party you are negotiating against may very well have different priorities and preferences than yours. This means that instead of driving every Position to your most preferred, you may be able relax Starting Positions and additional Fallbacks for those Concepts that you know will be important to your counterparty, while adding less flexibility for those Concepts that you know are the most critical to your company.

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- **Valuing the relationship with your suppliers and clients.** In some cases, negotiations feel like a zero-sum game, where if one side wins the other side loses. This might be true for some Concepts in your agreements. In many cases taking more nuanced Positions that protect your company's interests while addressing a counterparty concern creates cumulative value for both sides Defining your Positions in a more reasonable way also cultivates good will with a counterparty and shows a sign of collaboration, starting of your relationship on the right foot of collaboration, starting off your relationship on the right foot.

- **Speed of execution and shorter cycle times.** Lengthy negotiations of one-sided terms have economic consequences. Delays getting sales agreements in place affect revenue recognition and deal velocity, while delays with vendor agreements prevent needed goods and services from entering the supply chain. When performance begins before the delayed contract is put in place, risk exposure increases. If a dispute arises there is no alignment on terms governing the relationship.

- **Alignment with Industry Standards.** Using Positions that align to what is generally accepted within an industry provides an easy way to quickly reach agreement. Unfortunately, while some industries have clearly defined their standards, most have not. [6] World Commerce & Contracting has developed a set of contracting principles that is a good reference point to start. It covers common Concepts from commercial contracts. . You can also form impressions of industry standards by looking for publicly available examples of contracts that have been put in place by others in your industry, reviewing a sampling of your existing negotiated contracts or discussing Positions with other professionals that have worked on contracts in your area (e.g., peers at other companies or your legal advisors).

As you continue to build out your Data Model or look to cover more variety of negotiations and expanded uses, you may add other columns of data for each Position that specify:

1. An order of preference between your Fallbacks (e.g., use this Fallback first, before moving to that Fallback).

2. Conditionality on when a particular Fallback is appropriate to use, versus when another one makes more sense (e.g., use only when the contract includes a Termination for Convenience provision, use only if the counterparty is not a single-source supplier or use only if the contract value/spend exceeds a threshold).

3. The functions or levels of employees that are authorized to use the Fallback (e.g., for self-service agreements that are directly negotiated by your business a limited subset and a full list for the ultimate owner of the Concept or legal team).

4. Any approvals or escalations that need to be obtained prior to using the Fallback.

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[6] One area of contracting with a heavy use of standards representing best practices is the construction and engineering industries. In addition to contracting and commercial standards, they often utilize templates without changing or negotiating the core terms and conditions. Organizations such as the Joint Contracts Tribunal, the International Federation of Consulting Engineers and the Institution of Civil Engineers are recognized institutions entrusted by their industries to make beneficial revisions to their contracting standards.

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Regardless of the form your preferences take in your Data Model, you have created a structured way to neatly store and index your Positions. Any easy way to align across your enterprise on what Positions are acceptable and what Positions are not acceptable.

Numerous arbitrary variations of terms spread across company agreement templates

Deconstructing agreements into a Data Model allows for comparison and drafting to produce best positions

Defined Positions allows for highly-tailored, risk-appropriate contract language tied to preferred Positions
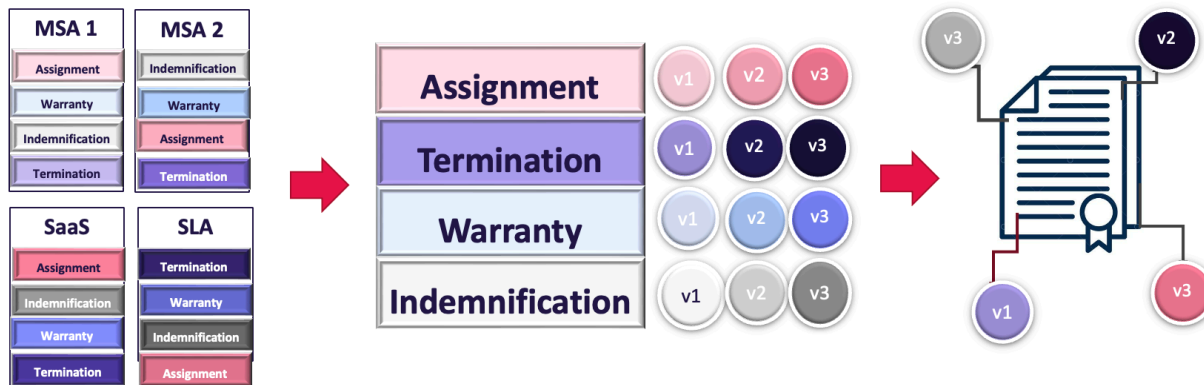
Step 5: Draft Contract Language for Each Position

The last step in creating your Data Model is to create a one-to-one mapping between each Position that you have defined in your Data Model and well drafted language. This ensures when your teams are using Positions in agreements, they don't have to spend time drafting language, but can instead swap in corresponding language that they know reflects that Position. This means when your team is trying to understand language in a counterparty agreement to respond to, or to structure a signed agreement into data points, it will have an example of a well drafted version of language that reflects the Position to compare against. Some key modern drafting principles and best-practices that you can use when drafting your new contract language include:

- **Isolate Concept and Sub-Concepts.** Avoid drafting language that covers multiple Concepts or Sub-Concepts together. This ensures that things are only said once in a contract and there is no overlap or confusion between language. It also makes it much easier to swap in and replace language during a negotiation (i.e., replacing language that reflects a Preferred Positions with language reflecting Fallback Positions) and to maintain and update template language over time as your preferences for a given Position or Sub-Position change without having to worry about how it might affect other Positions or Sub-Concepts.

- **Embrace Structured Lists.** By relying on structured lists instead of long, descriptive text and run-on sentences, contract language is more readable and understandable. It is easier to identify the Concepts covered and the Positions taken. In the example below, existing provisions in two separate templates for the same company were consolidated into one company-wide provision. Note how difficult it is to see the differences between the provisions and what is covered in the original format.

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Previous Templates

Services. Vendor will provide Company with the services and deliverables that will be agreed to in separate statements of work (such services collectively, the "Services", and each such SOW, a "SOW"). On each occasion when Company desires to obtain Services from Vendor, either Company or Vendor shall prepare a SOW which shall reference this Agreement and include: (i) a detailed description of the Services to be provided by Vendor; and (ii) the fees and payment schedule for the Services. Vendor shall deliver to Company any items noted in each SOW, together with any other results, data, work product and/or deliverables generated by Vendor pursuant to the Services (collectively, the "Deliverables"). Once each SOW is signed by both Parties, it shall become part of this Agreement. If there is a conflict between this Agreement and any SOW, or any other terms within any document generated under this Agreement, the terms of this Agreement will govern and control. A sample SOW is attached hereto as Exhibit A.

Updated Template

2   Performance

2.1   SOW/s

2.1.1   Vendor must provide the Services in the SOW to Company.

2.1.2   Each SOW will be substantially in the form of the SOW template in Exhibit A.

2.1.3   Vendor must not provide the Services until the parties have signed the SOW.

2.1.4   Unless otherwise provided in the SOW, each SOW ends upon completion of the Services and acceptance by Customer of all Services.

2.1.5   Change orders must be agreed in writing.

- **Forgo Generic Phrases and Standards.** Generic phrases or standards add unnecessary length and complexity to contracts. For example, concepts like "best efforts" or "time is of the essence" among others can seem to add a higher standard of care to contracts and make a party feel more protected in a transaction, but in most jurisdictions these "higher standards" are not enforceable. Parties are likely to act reasonably in accordance with their interests regardless of what's in a contract, and courts are unlikely to force a party to act unreasonably against their interests on the basis of a generic standard in a contract. If a higher standard of care is required for a specific obligation, the requirements need to be specific with a specific remedy that applies if the specific standard is not met. Otherwise, negotiations are burdened with a generic standard that holds no value to the transaction.

- **Blacklist the Descriptive List.** Negotiation time can be shortened and contract drafting and interpretation can be streamlined by removing descriptive lists and relying on standards that are reasonable to the contracted parties. An example of a "Confidential Information" definition versus the typical defined term that can run on and on with descriptive examples:

  > **"Confidential Information"** of a party means all information disclosed by a party in any form, and either:
  > i.   marked as confidential (or similar); or
  > ii.   which a reasonable person would consider confidential."

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- **Steer Clear of Legalese.** Avoiding legal jargon can also improve a contract's clarity. Words, especially arcane combinations like "hereby," "hereinafter," "herewith," and "hereto" can be better expressed in plain language. Consider which of these phrases seems more straightforward and comprehensible:

  "Each party hereby represents, covenants, and warrants that …"
  Or:
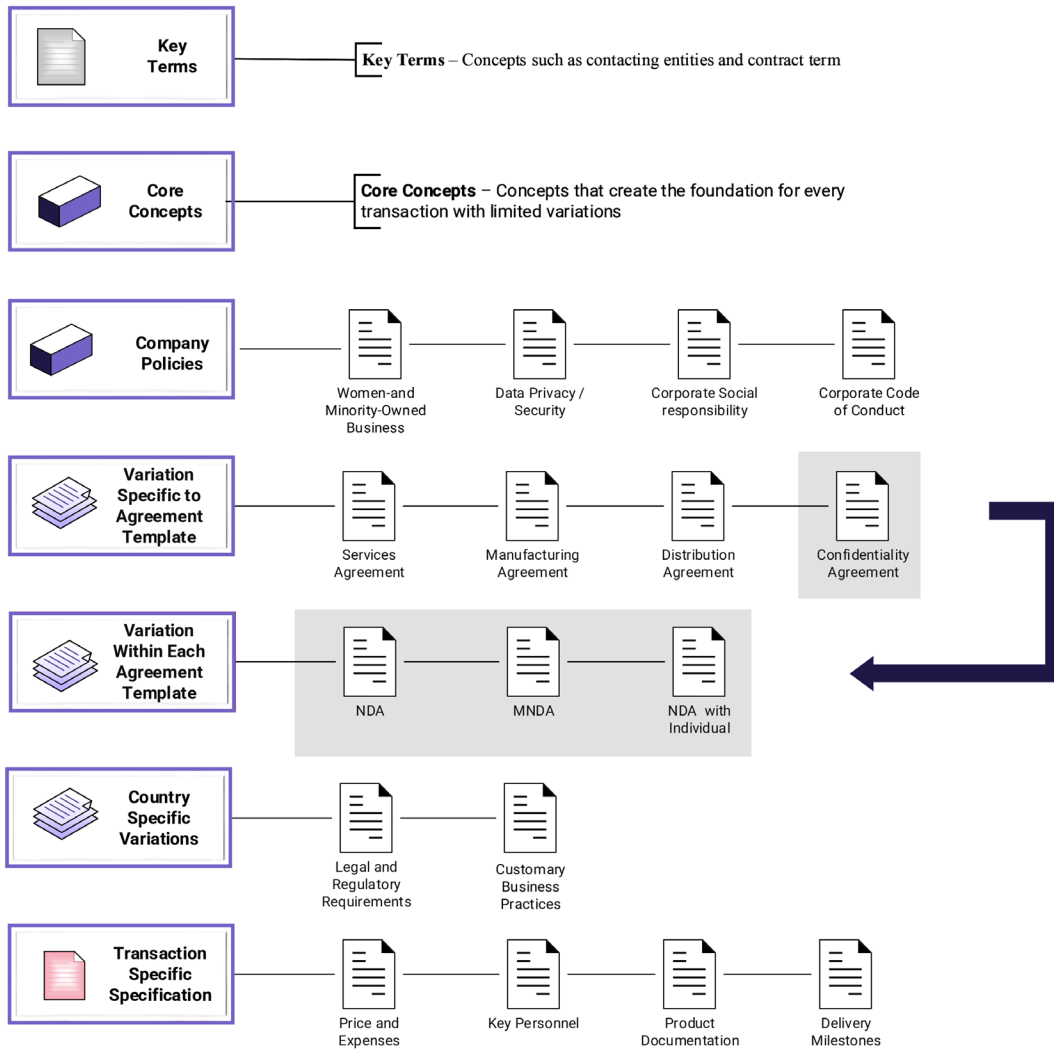 "Each party states that …"

  Certain legal terms of art are not only overused, but they can create confusion and cause unnecessarily difficult negotiations if used inappropriately. In the example above, the phrase "represents, covenants, and warrants" seems to be protecting remedies for the involved parties; in reality, the same remedies would be available if the phrase was expressed more clearly as "represents" or "states." If a Concept has a remedy under warranty, then the remedy should be clearly stated. Merely including the word "warranty" does not create a warranty on its own, especially if legal warranties are disclaimed elsewhere in the contract.

- **Stop Using "Shall."** The word "shall" is pervasive in contract drafting and can create misunderstandings. Drafters often use "shall" to convey an obligation on a party, or to express conditions or a step in a sequence of events. But "shall" is a modal verb that must be used with another verb to have context. Eliminating "shall" in contracts can make them more easily understandable. To express an obligation, a better word is "must." To express an option, a clearer word is "may." To express a sequence of events, "will" is more succinct.

- **Reference Industry Practices/Norms**. Getting comfortable with industry standards and norms (e.g., HIPAA, ISO, GDPR, SOC) means you can reference those as you draft language instead of attempting to redefine and list out all the requirements and obligations those industry standards and norms embody. Not only does that make drafting shorter and more succinct, it also means you won't have to continually update your contract and contract language as things change over time. Instead, a party's obligation to comply will automatically update as the industry standard does.

This is not meant to be an exhaustive list but instead is a sampling of some of the modern drafting principles and best-practices that can really make an impact as you construct language reflecting your Positions.

**Re-Create Templates from your Drafted Positions**

Now that you have created clearly drafted language tied to each Position and identified which Position is your Most Desired, you can recreate templates for usage in the different transactions and relationships your company enters. The equivalent of an Agreement Template. Where Positions for Concepts and Sub-Concepts are consistent from one Agreement Template to another, you will now know that the same drafted language will be used in both cases. Where Positions differ from one Agreement Template to the next or additional Concepts and Sub-Concepts are only relevant for some Agreement Templates or in some geographies, you will separate add those to the Agreement Template. The sample structure below provides a framework for thinking through this in more detail:

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Key Terms – Concepts such as contacting entities and contract term

Core Concepts – Concepts that create the foundation for every transaction with limited variations

Company Policies: Women-and Minority-Owned Business, Data Privacy / Security, Corporate Social responsibility, Corporate Code of Conduct

Variation Specific to Agreement Template: Services Agreement, Manufacturing Agreement, Distribution Agreement, Confidentiality Agreement

Variation Within Each Agreement Template: NDA, MNDA, NDA with Individual

Country Specific Variations: Legal and Regulatory Requirements, Customary Business Practices

Transaction Specific Specification: Price and Expenses, Key Personnel, Product Documentation, Delivery Milestones

- **Key Terms:** Important information that defines transaction and parties (e.g., the parties to the contract, the length of the contract and a description of the scope of the contract). They can be included at the beginning of the contract in a table so future reviewers can easily understand the context of the contract.

- **Core Concepts:** Terms and conditions that are generally consistent across various Agreement Templates. Concepts such as how to place orders pricing and payment, warranty, confidentiality, termination rights and remedies, and general/miscellaneous clauses.

- **Company Policies:** Organizational policies and procedures that apply across Agreement Templates. For example, anti-corruption, data privacy and security, or code of conduct.

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- **Variations Specific to Agreement Templates:** One aim of isolating Concepts is to find commonalities in Core Concepts used across Agreement Templates. There will also be additional Concepts and Sub-Concepts that are unique to a specific Agreement Template. For example, an established time period for goods warranties wouldn't be included in a service agreement. Similarly, a specific expense reimbursement policy might be unique to a particular transaction.

- **Country-Specific Variations:** When Core Concepts and Company Policies apply across legal jurisdictions, variations might be necessary to comply with local laws or mandatory legal codes. Consider data handling, which has become a significant concern for jurisdictions nationally and globally.

- **Transaction-Specific Specification:** Some terms are specific to underlying business transactions, as opposed to across all transactions of a similar type. Examples include location of delivery, prices or carriage terms. These Concepts can be isolated through forms used directly by the business, such as scope-of-work documentation, pricing schedules and change notices.

The Contract Data Model: What it Means Moving Forward
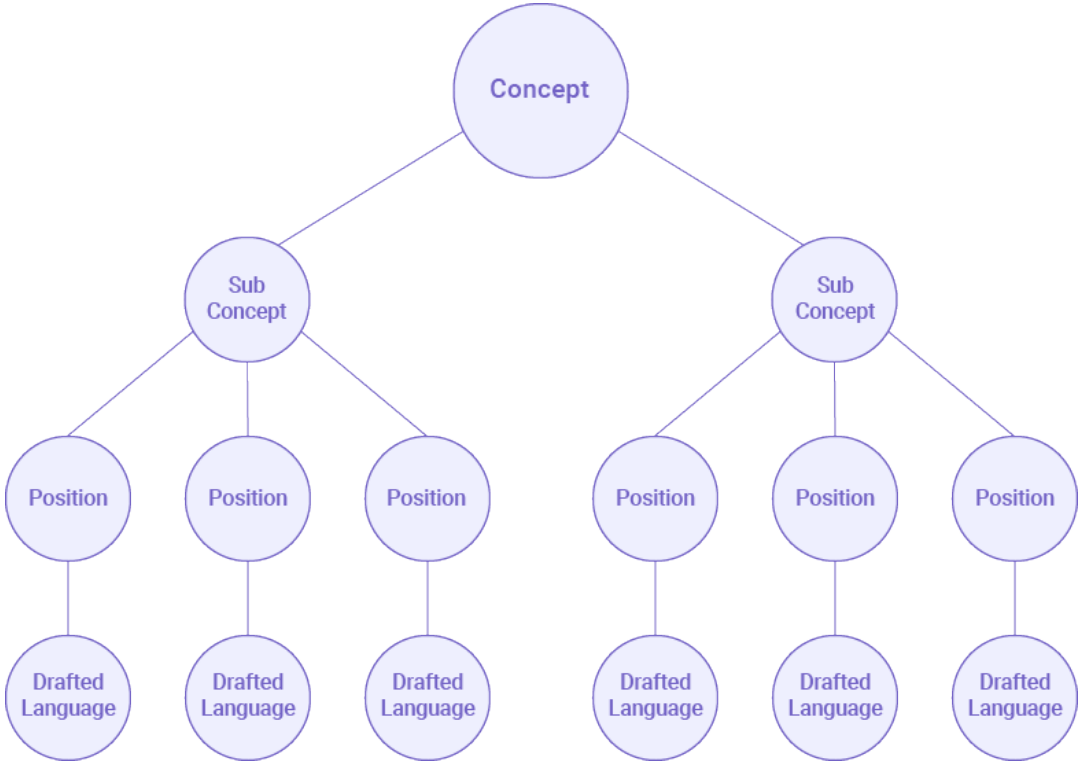
A visual depiction of the Data Model created following the steps above.

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A Data Model is not the end, but rather the starting point. It is a foundational framework intended to expand over time to include new data and structure to create additional sources of value across your legal department and to the enterprise. Some specific examples of those additional value sources and capabilities include:

- **Automate drafting of Contracts.** You can combine your new data model with any number of technologies and CLM systems to automate drafting. Your agreement templates become a collection of clause templates from your Data Model that are dynamically included or not included in a contract generated from the system based on rules you can define into your data model (e.g., when Geography = United States, include one Position. When Counterparty Type = Large Vendor, include Stepdown Position as opposed to Most Desired Position).

- **Create clause libraries.** Contract language tied to your Most Desired, Stepdown and Last Resort Positions are the foundation for your clause library. A clause library empowers your team to easily negotiate contracts without needing to track down any approvals or wait for any custom drafted language.

- **Control escalations and continually expanding self-service.** With owners assigned to Concepts in your Data model, you have provided a clear channel for contract negotiators to reach out to for approvals when they cannot complete a negotiation of a Concept based on the Stepdown Positions authorized in the Data. This creates another opportunity for continuous improvement as escalations can be tracked and periodically reviewed to identify where a new Stepdown Provisions should be authorized (i.e., the same Concept continues to be escalated). More Stepdown Provisions enables more self-service by the business without the need to spend time on approvals and escalations.

- **Quickly identify language in a markup of your template or a counterparty template.** Your data model provides a structure to easily map language you see in a draft markup to one of your templates or in a third-party template. If you are reviewing a provision in a draft you receive from your counterparty you can break it down into Concepts and Sub-Concepts to find the right place in your data model, then identify the Position taken in the draft and determine its acceptability based on Preferences you have defined. Your ability to rapidly assess acceptability of Positions means less time spent reviewing and producing overall reduction in contract negotiation cycle times.

- **Enable more professionals, and the business directly, to complete contract reviews and negotiations.** Because your data model gives you a structure to map language back to the specific Positions in your data model and includes simplified language to be used for each Position, it provides structure for a consistent review that can reliability be completed by a wider pool of professionals across your company or even directly by your business teams. You will no longer have to rely on only lawyers and highly trained contract professionals to complete relatively nuanced and subjective reviews of draft of contracts from your counterparty. With more structured and objective decisions, it means you can expect more consistent results across reviewers. If a reviewer cannot identify what Position is present in an agreement, they can escalate just the relevant Sub-Concept back for support from a more highly trained and experienced team.

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- **Automate parts of the contract review process with technology.** It will be easier for more professionals at your company to review contracts using your new data model and to set up and configure technology to help automate parts of reviews. For example, using search logic and artificial intelligence tools to identify Sub-Concepts and convert a draft from a counterparty into the structure of your Data Model and align it with your company's Preferences for Positions. Many systems are touting artificial intelligence that can be trained to identify the equivalent of Sub-Concepts in a contract, which can then be associated back to your Data Model to evaluate conformance to your Preferences.

- **Complete risk assessment of your contracts.** Whatever approach your company takes to assessing and grading risk (e.g., 1-10, A-F, 1-100%) your Data Model provides the framework for assigning levels of risk to each Position. One easy way to do this is to create a consistent mapping from your Preferences to a risk score. For example, a Preferred Position has a risk score of 0, whereas a Stepdown has a risk score of 3, a Last Resort a risk score of 6% and a Not Acceptable a risk score of 10. You can vary how you weigh different Concepts (i.e., a Limitation of Liability Concept is worth 5x as much as the Concept for Force Majeure). Ultimately, you may set different levels of risk to the same contracting position based on other, non-contract, risk elements (e.g., type of contract, attributes about the counterparty to the contract, or the goods/services being sold being sold or purchased).

- **Generate risk score across all your contracts.** You can score risks generated for individual agreements across pools of contracts, including geographies, business units, specific agreement types, or even the entire contract portfolio. With risk scoring, you can compare channels to drive insights and inform strategy to evolve how your company thinks about contract risk and how that risk feeds into broader enterprise risk.

- **Proactively manage obligations and rights.** With structured data about the Positions in your contracts, you can easily identify where specific obligations and rights exist and define additional data to help proactively manage those obligations and rights. Data containing the specific dates when things must be completed and the person or group that must complete them. Building automated reminders and notifications and setting up workflows within a system to track completion will translate into less disputes/losses as more obligations are completed on time. It means you can drive value by ensuring your company receives the benefit of its negotiated rights, on time and aligned with expectations.

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- **Automate workflows for contract actions.** The idea of creating "live contracts" that can be automated by pre-defining legal consequences through a decentralized workflow was all the buzz several years ago. However, outside of the rarest of examples, there are no "live contracts" in operation today. Perhaps these will never be a reality, but a Data Model taken to its logical extreme may breathe new life into this theoretical idea. For example, if a system knows at a data level that a given contract includes Position for Termination that requires a 0-day notice period and the email address where the notice must be sent, the formal formal termination of the agreement in question can be easily automated through a series of rules defined in the system (i.e.,10 days prior to the Termination Date, send notice to Email Address).

- **Integrate contract data into the broader data management framework and combine with other enterprise data.** Companies that use the data model framework to measure and track information held within their contracts and produce structured data capable of providing insights from those contracts will ultimately produce the greatest insights when they're able to integrate that data with other systems and combine it with other forms of data across the enterprise. Architecting the integration of systems across the enterprise to produce an ideal combination of data is largely the design of IT departments, but an example of systems that talk to each other would be the interconnection of CLM tools and enterprise resource planning or customer relationship management systems to combine contract data with other financial, accounting, or product-specific data to highlight systemic risk or other supply chain risk indicators.

Companies that turn their contracts to data models and transition to modern, data-driven contracting practices will realize significant benefits now and in the future as other companies and industries follow suit. When contracts are transformed into standardized data models, we'll be able to drive uniformity in a way that allows everyone's contract data, systems, and lawyers to speak to each other in equivalent terms and ultimately be able to focus on the business and legal terms that really matter to drive value. This future state will consist of improved mutual understanding across contract negotiations to speed up contract creation and produce improved contracts that more efficiently distribute goods and services around the globe.

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About UnitedLex

With more than 3,000 legal, engineering, and technology professionals globally, UnitedLex enables legal organizations to thrive in the Digital Age.

Over the past 15 years, we have successfully delivered eDiscovery, Source Code and Document Review, IP Monetization, and Contract Management Improvement services to over 25% of the Global 500, 30% of the Fortune 50, and 50% of the Am Law 100.

Contact UnitedLex to learn more about transforming your Corporate and Contracting Solutions, Intellectual Property, or Litigation and Investigations functions and our broader programs for Digital Legal Transformation.

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