
Navigating Force Majeure in Offshore Wind Energy Projects: Drawn from the CISG, the Taiwanese Law, and the Principle of Contractual Freedom

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The development of offshore wind energy plays a pivotal role in Taiwan's transition to a low-carbon economy. To secure the profits of substantial investments in offshore wind energy, long-term contracts are essential. However, supervening incidents could halt, damage, or destroy offshore wind projects. Force majeure clauses serve as a preventive mechanism to address these unforeseen risks. Despite their significance, contract drafters often overlook the importance of force majeure clauses. This article contends that offshore wind developers and the Taiwanese government should collaborate as partners to carefully draft force majeure clauses in offshore wind contracts, ensuring proper allocation of unforeseen risks. By examining the concept of force majeure under the CISG and Taiwanese law, this article proposes fundamental elements and a model clause for force majeure in offshore wind contracts.

Keywords

Force Majeure, Offshore Wind Energy, CISG, Principle of Contractual Freedom, Taiwanese Law

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I. Introduction

In April 2017, the Executive Yuan of Taiwan approved and promulgated the revised “Guidelines on Energy Development”¹ (The Guidelines) in response to global energy transitions, climate change and issues related to nuclear disasters and nuclear waste disposal. The Guidelines serve as the predominant guidance for energy development policies at all levels, including policies, programs, plans, projects and action plans. It encompasses four primary objectives: energy security, green economy, environmental sustainability and social equity.² The focus is to establish a friendly environment for the development of green and renewable energy by constructing robust regulations, providing economic incentives, assisting in land acquisitions, and fostering a supportive financing mechanism.³

The development of offshore wind energy plays the key role in complying with the Guidelines and transitioning to a low-carbon economy. The development of offshore wind energy has gone through three stages: Demonstration Programs; Exploration of Zones of Potential; and Zonal Developments. In 2012, Demonstration Projects were selected and are now on the track. In 2018, the Bureau of Energy in Taiwan held two auctions for offshore wind farms through the Selection Procedure and the Auction Procedure. To date, a total of 5.5GW in the pipeline has been allocated to seven offshore wind power developers, with completion expected by 2026. The anticipated economic benefits are a total investment of NT\$962.5 billion (around USD31 billion) and the creation of 20,000 job opportunities. In 2021, the Bureau of Energy of Taiwan launched the third stage, Zonal Development. The first phase of the Zonal Development is scheduled for completion in 2027 with an installed capacity of 3GW, and the second phase is expected to be completed in 2029 with an installed capacity of 2.7GW.⁴

The profits and benefits of the significant investment mentioned above should be secured through long-term contracts signed by the Taiwanese government and the offshore wind developers. However, “long-term” is accompanied with the unknown or the unexpected. Supervening events may halt, damage or destroy offshore wind

1 The Guidelines was promulgated on the basis of Article 1 of Energy Administration Act. *See* Energy Administration Act art. 1, <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=J0130002>.

2 Taiwanese Bureau of Energy, Guidelines on Energy Development (2017), at 2, https://www.moeaea.gov.tw/ECW/english/content/ContentDesc.aspx?menu_id=2042.

3 *Id.* at 5.

4 *A guide to energy law in Taiwan*, ASIA. BUS. L. J. (Mar. 26, 2025), <https://law.asia/energy-law-guide-taiwan>.

projects, causing the supposedly guaranteed profits and returns to vanish suddenly. *Force majeure* clauses function as a preventive mechanism against these unexpected risks and excuse the non-performance of a party's obligations in the contract when extraordinary circumstances render performance impossible.

Despite their importance, *force majeure* clauses often do not receive adequate attention from contract drafters. Drafters may omit these clauses intentionally or unintentionally or simply insert template clauses without tailoring them to the specific contract. This may potentially lead to serious disputes between parties later on. Against this backdrop, this research argues that offshore wind developers and the Taiwanese government should collaborate as partners to carefully draft *force majeure* clauses in their offshore wind contracts to allocate future unexpected risks. This is crucial given that substantial financial investment, the lengthy contract period and the scale of offshore wind farms are unprecedented in Taiwan. By comparing the concept of *force majeure* under the UN Convention on Contracts for the International Sale of Goods (CISG) and the Taiwanese law, this research proposes fundamental elements and a model clause of *force majeure* in offshore wind contracts.

This article consists of five parts including Introduction and Conclusion. Part two explores the development of offshore wind energy in Taiwan, with an emphasis on the four-year plan and the three stages of offshore wind power development. Part three delves into the offshore wind contract in Taiwan, with a focus on Article 12, which addresses the *force majeure* clause. Part four examines the concept of *force majeure* under both the CISG and the Taiwanese law. The CISG represents a blend of civil and common law systems, making it valuable to compare its *force majeure* provisions with those under the Taiwanese law. Furthermore, Part four proposes six fundamental elements of *force majeure* for contract drafters. Part V concludes this article by using Taiwan's offshore wind contract as an example and presenting a revised and improved version of the *force majeure* clause.

II. Development of Offshore Wind Energy in Taiwan

A. Offshore Wind Energy Demonstration Program

The development of wind energy in Taiwan dates back to the year 2000. That year, the Taiwanese government promulgated the Regulations Governing Subsidies for Wind Power Demonstration Systems to promote clean energy and increase the wind

energy supply.⁵ Three onshore wind farms, owned by Formosa Petrochemical Corp., TaiPower Co., and Cheng Loong Corp. respectively, were selected and received subsidies.⁶ Later, these demonstration systems were fully installed in 2000, 2001 and 2004, with a total installed capacity of 8.54MW. These systems successfully encouraged more companies to invest in and build onshore wind farms.⁷ As of May 2024, four hundred twenty wind turbines had been established with a total installed capacity of 915 MW.⁸

Offshore wind energy was not developed in Taiwan until 2012. Taiwan has a dense population of 23,577,488 with an area of 35,883 square kilometers, two-thirds of whose territory is covered by mountains.⁹ Meanwhile, since the development of onshore wind farms in 2000, most regions with better wind energy have already been planned or exploited.¹⁰ After the Renewable Energy Development Act was enacted in 2009, the Offshore Wind Power Demonstration Incentive Program (Demonstration Program), was proposed and implemented in 2012 according to Paragraph 2 of Article 11.¹¹ The wind energy development policy has since shifted from onshore to offshore.

Two offshore wind power demonstration proposals from private companies were selected under the Offshore Wind Power Demonstration Incentive Program: the Fuhai Demonstration Project by Fuhai Wind Farm Corp. and the Formosa Demonstration Project by Formosa Wind Power Co., Ltd.¹² Later, TaiPower Company, a state-owned enterprise, was also awarded the third offshore wind power demonstration project through special project review.¹³ The Demonstration Program requires each selected private company to install two offshore wind turbines in order to install a total capacity of more than 6MW before 2016.¹⁴ The Taiwanese government would provide subsidies for fifty percent of the installation expenditures.¹⁵

The Formosa Demonstration Project and the TaiPower Demonstration Project progressed smoothly, but the Fuhai Demonstration Project was terminated. Formosa

5 Taiwanese Bureau of Energy, Onshore Wind Power: Background, <https://www.twtpo.org.tw/eng/onshore>.

6 *Id.*

7 *Id.*

8 Taiwanese Bureau of Energy, Onshore Wind Power: Current Status, <https://www.twtpo.org.tw/eng/onshore/status.aspx>.

9 Department of Household Registration, M.O.I., Statistics, <https://www.ris.gov.tw/app/en/3910>.

10 Taiwanese Bureau of Energy, Offshore Wind Power: Background, <https://www.twtpo.org.tw/eng/offshore>.

11 *Id.*

12 Taiwanese Bureau of Energy, Offshore Wind Power: Demonstration Incentives, <http://www.twtpo.org.tw/eng/offshore/demonstration.aspx>.

13 *Id.*

14 *Id.*

15 *Id.*

Wind Power Company installed two 4MW wind turbines in November 2016, in adherence to the requirement of the Demonstration Program.¹⁶ The Company then progressed into the second phase, which allowed it to place another twenty wind turbines with a total capacity of 120MW by 2020.¹⁷ TaiPower Company has installed twenty-one wind turbines with a capacity of 110MW by 2021.¹⁸

B. The Four-Year Plan and the Three-Stage Strategy for Offshore Wind Power

Under the framework of the old version of the Guidelines on Energy Development, the Ministry of Economic Affairs initiated the Four-Year Plan of Promotion for Wind Power (Four-Year Plan) in June 2016 when the new Taiwanese government took office.¹⁹ The final version of the Four-Year Plan was approved in August 2017 by the Executive Yuan and aligned with the new Taiwanese government's goal of a nuclear-free homeland by 2025.²⁰ The Four-Year Plan builds on past projects and adopts a three-stage strategy to boost the development of offshore wind energy: "Demonstration first, then Exploration of Zones of Potential, and finally Zonal Development."²¹ The target is to install offshore wind turbines with an aggregate capacity of 520 MW by 2020 and 3 GW by 2025.²²

Three years after the implementation of the Demonstration Program, the development of offshore wind energy entered the second stage, Exploration of Zones of Potential. In July 2015, the Bureau of Energy enacted the Directions of the Application for Offshore Wind Potential Zones (Directions of Application).²³ The Bureau of Energy announced thirty-six potential zones open for application by domestic and international developers in October 2015 and set the deadline for December 31, 2017.²⁴ All developers were required to file relevant documents in accordance with Article 7 of the Directions of Application, such as application forms,

16 Power Technology, Formosa 1 Offshore Wind Farm (May 1, 2020), <https://www.power-technology.com/projects/formosa-1-offshore-wind-farm>.

17 *Id.*

18 4C Offshore, Changhua-Taipower Offshore Wind Farm, <https://www.4coffshore.com/windfarms/changhua---taipower-taiwan-tw24.html>.

19 Taiwanese Bureau of Energy, Four-Year Plan of Promotion for Wind Power (2017), at 2, https://www.moeaea.gov.tw/ecw/English/content/ContentDesc.aspx?menu_id=5495.

20 *Id.* at 1.

21 *Id.* at 3.

22 *Id.*

23 *Id.* at 6.

24 *Id.*

certificates of financial proof, wind farm locations, and so on, and to obtain approval of the environmental impact assessment according to Article 12.

Following the Directions of Application, the Bureau of Energy promulgated the Directions for Allocating Installed Capacity of Offshore Wind Potential Zones (Directions of Allocation) in January 2018 authorized by Article 4²⁵ and 9²⁶ of the Renewable Energy Development Act, Article 24²⁷ of the Electricity Act, and Article 5 of the Regulations for Installation and Management of Renewable Energy Generation Equipment. The Directions of Allocation outlines two methods to allocate the capacity to be connected: Selection Procedure²⁸ and Auction Procedure.²⁹ The plan is to allocate eleven wind farms with a total capacity of 5.5GW by 2026.³⁰

Several factors explain why the Selection Procedure and the Auction Procedure in the Potential Zone Development stage attracted the world's key players. First, according to the research report by 4C Offshore consulting firm, the wind speed in the Taiwan Strait is among the highest in the world, and western waters of Taiwan are rated as one of the world's best resources for offshore wind farms.³¹ Second, the Taiwanese government promised to offer twenty-year power purchase agreements with Feed-in Tariffs to the winners of the Selection Procedure. The Feed-in-Tariff rate for offshore wind energy announced in January 2018 was fixed at NT\$ 5.8498 per kWh, providing strong incentives for developers.³² It was expected that Feed-in Tariffs would gradually decrease due to advancements in offshore wind technology, the scale-up of wind farms, and lower costs in supply chains. Third, the world's top offshore wind developers saw Taiwan as a gateway for the wider Asian markets, such as Japan and South Korea, where the offshore wind energy was expected to play a crucial role in their energy mix.³³

To build on the achievements of the first two phases of offshore wind power

25 Renewable Energy Development Act art. 4, <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=J0130032>.

26 *Id.* art. 9.

27 Electricity Act art. 24, <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=J0030011>.

28 Directions for Allocating Installed Capacity of Offshore Wind Potential Zones, ch. 2, arts. 5-19, <https://law.moea.gov.tw/EngLawContent.aspx?lan=E&id=10322>.

29 *Id.* ch. 3, arts. 20-26.

30 Adrijana Buljan, *Taiwanese Gov't Awards Offshore Wind Capacity to 7 Projects*, OFFSHORE WIND.BIZ (Dec. 30, 2022), <https://www.offshorewind.biz/2022/12/30/taiwanese-govt-awards-offshore-wind-capacity-to-7-projects>.

31 4C Offshore, Global Offshore Wind Speeds Rankings, <https://www.4coffshore.com/windfarms/windspeeds.aspx>.

32 Taiwanese Energy Administration, The 2018 Rates of Feed-in Tariff (FIT) for Renewable Energy, https://www.moea.gov.tw/ECW/english/news/wHandNews_File.ashx?file_id=12609.

33 *From 0 to 15GW by 2030: Four Reasons Why Taiwan is the Offshore Wind Market in Asia*, CCTNE (Jan. 20, 2020), <https://climatechange-theneweconomy.com/from-0-to-15gw-by-2030-four-reasons-why-taiwan-is-the-offshore-wind-market-in-asia>.

development and continue to drive the growth of domestic offshore wind power, the Ministry of Economic Affairs announced the Operation Directions of Application for Offshore Wind Zonal Development and the Directions for Allocating Installed Capacity of Offshore Wind Zonal Development on July 23 and August 19, 2021, respectively. On December 6, 2021, the Offshore Wind Zonal Development Industrial Relevance Program was published, officially marking the start of the Zonal Development.³⁴

This phase aims to streamline resources for wind farms through large-scale zonal development led by the Ministry of Economic Affairs, along with strategic environmental assessments. By doing so, it seeks to reduce the development time, lower development costs, and expedite the growth of offshore wind power.³⁵ Unlike the Exploration of Zones of Potential phase, this phase does not have the Selection Procedure or the Auction Procedure; instead, it adopts a review-first,³⁶ auction-later³⁷ approach and incorporates a joint review mechanism, simplifying the administrative procedures for developers during the application process.³⁸

The Zonal Development is divided into two phases. The first phase involves the deployment of wind farms along the coasts of Miaoli, Taichung, and Changhua.³⁹ In addition to domestic companies, developers from Denmark, the United Kingdom, and Germany are participating in wind farm development.⁴⁰ The construction and grid connection of the wind farms is expected to be completed between 2026 and 2027, with an installed capacity of 3GW.⁴¹ The second phase focuses on the allocation of wind farms along the coasts of Taichung and Changhua.⁴² Developers plan to complete the construction of the wind farms and grid connections successively in

34 Energy Omni, The Ministry of Economic Affairs (MOEA) officially announced the “Industrial Relevance Plan for Offshore Wind Zonal Development” (Dec. 17, 2023), <https://www.energy-omni.com/en/news/article/810ZYB6HT3Zn1hm2?page=33>.

35 Wen-Yan Chia, *The Development of Offshore Wind Farms in Taiwan: A Marine Policy Perspective* [從海洋政策觀點論臺灣離岸風場之發展], 18 (2) J. NAT'L DEV. STUD. [國家發展研究期刊] 71 (2019).

36 Directions for Allocating Installed Capacity of Offshore Wind Zonal Development, ch. 2, arts. 5-10.

37 *Id.* ch. 3, arts. 11-16.

38 Hsing-An Chen, *A Brief Comment on the Legal Issues in Relation to the Promotion of Offshore Wind Power Generation in Taiwan* [簡評我國離岸風力發電推廣法制問題], 2 PUB. L. [公法研究] 167-9 (2022).

39 Chen-Yin Ling, *The Offshore Wind Zonal Development Phase 1 Selection Capacity Allocation Results Announced* [離岸風電區塊開發第一期選商容量分配結果出爐], WIND TAIWAN (Dec. 30, 2022), <https://www.windtaiwan.com/ArticleView.aspx?ID=ART01026>.

40 *Id.*

41 *Id.*

42 An-Yu Huang, *The Offshore Wind Phase 3-2 Capacity Allocation Results Announced! Synera Renewable Energy's Formosa 6 Emerges as the Biggest Winner* [離岸風電 3-2 期容量分配結果出爐! 風睿能源海廣風場成最大贏家], WIND TAIWAN (Aug. 8, 2024), <https://www.windtaiwan.com/ArticleView.aspx?ID=ART01801>.

2028 and 2029, with a total installed capacity of 2.7GW.⁴³

The development of offshore wind energy has been the focus of the Taiwanese government since the government sees great benefits from that development. The development can boost economic growth when local supply chains of offshore wind farms and industrial clusters of offshore wind technology are established. It is estimated that the total investment will be up to NT\$962.5 billion (around USD31 billion) once all offshore wind farms with a total of 5.5GW connected capacity in the stage of the Potential Zone Development have come online.⁴⁴ Also, the government that twenty thousand job opportunities will be created.⁴⁵ The generation of clean electricity will reduce emissions of carbon dioxide by 10.47 million tons/year.⁴⁶ If all the works of the Exploration of Zones of Potential go well in a coordinated and effectively manner, energy security can be ensured in tandem with economic development, social equity and environmental protection.

III. Taiwan's Offshore Wind Contract and the Force Majeure Clause

A. Taiwan's Offshore Wind Contract

According to Article 27 of the Directions of Allocation, the Ministry of Economic Affairs issued the offshore wind contract (Official Contract) on March 22, 2018. Once the selected offshore wind developers signed the Official Contract, they received permits for offshore wind power system installation. They are required to complete grid connection between 2021 and 2026.⁴⁷

The Official Contract consists of 19 articles, with provisions allowing contracting parties to add supplementary clauses by mutual consent. Articles 1, 2, 17 and 19 of the Official Contract are general clauses, stipulating details such as the documents, definitions and interpretations of terminology, addresses for service, and the number of contract copies. Article 3 outlines the subject of the Official Contract, installation

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Directions for Allocating Installed Capacity of Offshore Wind Potential Zones, art. 29.

capacities, wind farm locations, and wind farm areas. Article 18 establishes that the governing law shall be the law of Taiwan. In cases where the Official Contract does not address specific issues, the parties shall refer to the Directions of Allocation, the Electricity Act, the Renewable Energy Development Act, the National Property Act, and the Administrative Procedure Act.

Articles 5 to 8 of the Official Contract describe the obligations that selected offshore wind developers must fulfill. These include obtaining an electric industry establishment permit, securing a work permit, and completing the grid connection within a specified timeframe. During the construction phase, developers are required to report their progress and ensure worker safety. Additionally, they must implement an Industrial Relevance Program, adopt measures to avoid and mitigate environmental impacts, and contribute to a power development fund to minimize negative effects.⁴⁸

Articles 9 and 10 of the Official Contract specify that the selected offshore wind developers are required to deposit a performance bond in the event of a breach of the Official Contract. Articles 14 to 16 address dispute resolution procedures, requiring both parties to resolve disputes primarily in accordance with the Administrative Procedure Act. To maintain the validity of the Official Contract and ensure compliance, the contract must remain enforceable and in force unless it has been fully terminated.

B. The Force Majeure Clause

Article 12 of the Official Contract outlines the *force majeure* clause. Pursuant to Article 12.1, if the selected offshore wind developer (Party B) is unable to meet its obligations and commitments due to *force majeure* events, it may request an extension of the contract. The specific conditions that qualify as *force majeure* events, as claimed by the offshore wind developer, are detailed in Articles 12.2.1 to 12.2.6.

In addition to *force majeure* events set out in Articles 12.2.1 to 12.2.6, Article 12.2.7 stipulates that other reasons recognized by the Ministry of Economic Affairs (Party A) as *force majeure* events or reasons not attributable to the selected offshore wind developers may qualify an application for an extension. In order to minimize disputes, however, Article 12.3 disqualify three specific circumstances as *force majeure* events. According to Article 12.4, after considering the selected offshore wind developers' application, the Ministry of Economic Affairs may choose to agree to the extension of the performance period and/or change the content of the contract. The *Force Majeure*

48 Owen Chio & Lillian Chen, *Laws and regulations shaping offshore wind development in Taiwan*, EUROVIEW (Nov. 8, 2021), <https://euroview.ecct.com.tw/category-inside.php?id=829>.

and Non-attributable Cause (Article 12) of the Official Contract is as follows:

1. If Party B is unable to fulfill the obligations and commitments set forth in Articles 5 to 8 of this contract due to *force majeure* or other justified reasons not attributable to Party B, Party B may, within 90 days before the expiration of the term, apply to Party A for an extension and obtain Party A's consent. Each extension period shall not exceed six months.
2. *Force majeure* or other reasons not attributable to Party B are limited to:
 - ① War (whether declared or not), invasion, acts of foreign enemies, rebellion, revolution, unrest, civil war, and terrorist activities.
 - ② Radiation or radioactive contamination caused by the burning or explosion of nuclear fuel or waste.
 - ③ Tsunamis caused by aircraft or other flying objects traveling at or above the speed of sound.
 - ④ Natural disasters, including but not limited to typhoons, volcanic eruptions, tsunamis, earthquakes, floods, lightning strikes, or any natural forces that are beyond the reasonable control of both parties or cannot be prevented, avoided, or eliminated with reasonable care.
 - ⑤ The discovery of legally protected monuments or sites during the construction process, which affects the progress of the project.
 - ⑥ Geographical, geological, ecological protection, or other natural environmental factors that affect the progress or implementation of the project.
 - ⑦ Other reasons recognized by Party A as *force majeure* or reasons not attributable to Party B.
3. *Force majeure* or other reasons not attributable to Party B do not include:
 - ① Public protests. However, this exclusion does not apply to protests not caused by Party B, unrelated to Party B's wind farm development, or the protest not targeted at Party B, or other protests recognized by Party A as unrelated to Party B.
 - ② Disputes over fishery rights compensation. However, this exclusion does not apply to disputes not caused by Party B, unrelated to Party B's wind farm development, or other disputes recognized by Party A as unrelated to Party B.
 - ③ Failure to obtain necessary documents required by law or regulations for obtaining an electricity generation license or fulfilling the obligations under this contract, including but not limited to documents under the Underwater Cultural Heritage Preservation Act, the Coastal Management Act, the Renewable Energy Development Act, the Electricity Act, and the Electricity Registration Rules.
4. If Party B applies for an extension according to Clause 1, Party A may, based on the circumstances, agree in writing to extend the performance period or change the contract term. No performance bond will be deducted during the extension period.

IV. Force Majeure Clauses: The CISG, the Taiwanese Law, and Six Key Elements

The concept of *force majeure* may be presented in various ways in different legal systems. In general, the *force majeure* doctrine is applied in civil law systems, while the concept of *force majeure* is not clearly applicable in common law systems. For example, explicit terms of *force majeure* are articulated in the Civil Code in Taiwan and its source and the Civil Code in Germany. Article 79 of the CISG addresses “impediment” issues, which is arguably similar to *force majeure*. However, the term “frustration” in the English legal system and the “commercial impracticability” in the US legal system are of similar meaning and somewhat different from *force majeure*.

A. The Force Majeure Clause in the CISG

The CISG in force since 1988 is a unified law that contains the terms of obligation, risk allocation, and liability exemption of contract parties.⁴⁹ The CISG aims to provide certainty on international transactions of goods. The CISG is applicable for any contract of international sale of goods concluded between parties with a place of business in Contracting States, when the rules of private international law make the law of a Contracting State applicable, or when the CISG is chosen as the applicable law.⁵⁰ It provides that the boilerplate and agreeable terms for the parties to choose from when drafting a contract.

Notably, Article 79 in the exemption part of the CISG can be arguably described as the “*force majeure* clause,” which has been adopted by the tribunal in many significant cases.⁵¹ If one party fails to perform the obligation, it is liable for the damage to the other party unless it can assert Article 79 of the CISG.⁵² To invoke Article 79 of the CISG, the party should satisfy four elements: (a) an impediment happened; (b) the failure to perform was “due to” an impediment; (c) an impediment must be beyond the party’s control; (d) the party could not reasonably be expected to have considered the impediment at the time of the conclusion of the contract or to have avoided or

49 John Honnold, *The Sales Convention: Background, Status, Application*, 8 J. L. & COM. 1 (1998).

50 CISG art. 1.

51 Harry Flechtner, *The Exemption Provisions of the Sales Convention, Including Comments on “Hardship” Doctrine and the 19 June 2009 Decision of the Belgian Cassation Court*, 26:2 BELGRADE L. REV. 85 (2011).

52 Jennifer Bund, *Note and Comment: Force Majeure Clauses: Drafting Advice for the CISG Practitioner*, 17 J. L. & COM. 384 (1998).

overcome it, or its consequences.⁵³ Namely, the non-performance must have cause-effect relation with an impediment which is unreasonable to predict, out of the party's control and unavoidable when concluding a contract.⁵⁴ Article 79(2) of the CISG also mentions that the party's obligation can be excused if the non-performance is caused by the failure of third party who has participated in whole or in part of the contract and would be so exempt if the provisions of Article 79(1) were applied to the party.

Article 79 of the CISG allows the party who cannot perform the obligation to exempt from its liability. And the scope of exemption is limited to the damage of non-performance since 79(5) emphasizes that a party who invokes Article 79 of the CISG may not prevent the other party from exercising any right except claiming damages under the CISG. Moreover, the exemption period is in existence until the termination of an impediment. Furthermore, to claim for exemption, the non-performing party must fulfill the obligation of notification under Article 79(4) of the CISG, and ensure that the other party receives the notification. Otherwise, the party who seek for the exemption is liable for the damage resulting from the non-receipt.

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The majority of the scholarly opinions agree that Article 79 of the CISG is similar to a *force majeure* clause⁵⁸ and that Article 79 of the CISG is gap-filling in nature when interpreting *force majeure* clauses of a contract.⁵⁹ In fact, some scholars think that Article 79 of the CISG is equivalent to *force majeure* since the drafters of the CISG intended to avoid using specific words, such as *force majeure* or frustration, in different

53 *Id.* at 386.

54 JOHN HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 473 (1999).

55 *Id.* See also CISG art. 79:5. It reads "nothing in this article prevents either party from exercising any right other than to claim damages under this Convention."

56 CISG art. 79(3).

57 *Id.* art. 79(4).

58 Bund, *supra* note 52, at 387. See also Ingeborg Schwenzer, *Force Majeure and Hardship in International Sales Contracts*, 39:4 VUW L. REV. 715 (2009).

59 Bund, *supra* note 52, at 387.

legal systems.⁶⁰ In practice, there are not so many disputations between Article 79 of the CISG and *force majeure* because Article 79 of the CISG can be the standard when drafting *force majeure* clauses, or can be used to assist the interpretation of ambiguous clause.⁶¹

Article 79 of the CISG is also debatable. For example, it does not clearly mention the “impediment” encompassing “impossibility” and “difficulty.”⁶² No doubt is that the word “impediment” implies impossibility. Some scholarly opinions, however, contend that Article 79 of the CISG also includes the concept of hardship, which means the contract becomes extremely difficult to fulfill.⁶³ Other scholarly perspectives point out that the scope of impediment is between “great difficulty” and “absolute impossibility,” and a courts’ opinion is needed to fill the gap.⁶⁴ Therefore, it is rather controversial that Article 79 of the CISG should exclude or include the content of hardship, and to what extent.

B. Force Majeure Clauses in the Taiwanese Law

The term and the concept of *force majeure* have been widely mentioned, directly or indirectly, in provisions in the Civil Code of Taiwan. However, general provisions of *force majeure* are oddly absent. As the Freedom of Contract is a fundamental principle in the Civil Code of Taiwan, it becomes highly complex to discern the elements and applicability of *force majeure* when a contract inserts *force majeure* clauses with ambiguity.⁶⁵ Disputes have been raised on what specific events constitute *force majeure* or what the legal effects would be under such circumstances.

The concept of *force majeure* in the Civil Code of Taiwan has its origins in German Civil Code. Fifteen provisions in the Civil Code of Taiwan expressly use the term of *force majeure* - ten provisions in the Part II Obligations of Taiwan’s Civil Code (Article 231, Article 457, Article 458, Article 508, Article 525, Article 526, Article 606, Article 634, Article 645 and Article 654) and five provisions in the Part III Rights in Rem (Articles 837, 850-4, 891, 920-921). *Force majeure* is also expressly mentioned in particular acts, such as the Maritime Act (Article 66), the Negotiable Instruments Act (Article 92), and

60 Catherine Kessedjian, *Competing Approaches to Force Majeure and Hardship*, 25:3 INT’L REV. L. & ECON. 416 (2005).

61 Bund, *supra* note 52, at 409.

62 HONNOLD, *supra* note 54, at 483.

63 Schwenger, *supra* note 58, at 713.

64 Joern Rimke, *Force Majeure and Hardship: Application in International Trade Practice with Specific Regard to the CISG and the UNIDROIT Principles of International Commercial Contracts*, in PACE REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 225 (1999-2000).

65 John Chen, *Force Majeure Clause in Construction Contracts-Taiwan (Part I)* [論工程契約之不可抗力條款(上)], 76 FT L. REV. [萬國法律雜誌] 48 (1994).

the Land Act (Articles 115 and 132). By and large, those acts typically state, “by reason of or due to *force majeure*,” and then describe the legal effects respectively.

The *force majeure* events must be exceptional events. The prerequisite of the *force majeure* claim is that the non-performing party is without the default or negligence. Generally speaking, special events under *force majeure* include but are not limited to Acts of God, natural disasters, and events which are irresistible.⁶⁶ In practice, courts agree that *force majeure* events should be unforeseeable, unpreventable, caused by external factors, and beyond reasonable control.⁶⁷ However, it is difficult to tell if an emergency event reaches the degree of *force majeure*.

C. The Concept and Legal Effects of Force Majeure in the Civil Code of Taiwan

The Taiwanese law is usually chosen as the applicable law in transnational contracts with one Taiwanese party. However, some transnational transactions may choose the CISG or the law in another country as the governing law. The CISG is considered to be an eclectic result between the civil law system and the common law system. It is worthwhile to compare the concept of *force majeure* between the CISG and the Taiwanese law in order to depict the concept of *force majeure* in Taiwan.

Article 79 of the CISG prescribes the exemption from non-performance. Although this provision does not mention “*force majeure*” explicitly, most of the drafters of international sales of goods contracts adopt Article 79 of the CISG as a model of *force majeure* clauses.⁶⁸ The Taiwanese law extensively indicates the concept of *force majeure* either directly or indirectly in the Civil Code. Different from Article 79 of the CISG, however, there are no provisions which exempt a party’s liability when the party fails to perform the contract due to his intention or negligence. Moreover, under Article 79 of the CISG, a non-performing party can invoke the provision because of the failure of the third party;⁶⁹ while, in Taiwan, a party cannot be excused owing to the third party’s intervention. Also, according to Article 79 of the CISG, a party who fails to perform should notify the other party and the exemption will be terminated when an impediment ends.⁷⁰ Both notification and termination mechanisms have not been laid out in the Taiwanese law yet.

When courts in Taiwan determine an event of *force majeure* by examining the

⁶⁶ *Id.* at 47

⁶⁷ *Id.*

⁶⁸ Bund, *supra* note 52, at 384.

⁶⁹ CISG art. 79(2).

⁷⁰ *Id.* art. 79(3) & (5).

elements of the event. The event has to be unforeseeable, unpreventable, caused by external factors, and beyond reasonable control.⁷¹ However, it is debatable and difficult to determine to what extent the events are unforeseeable, unpreventable, and beyond reasonable control.

Next, the Taiwanese courts will consider the legal effects of *force majeure* when the event satisfies all elements mentioned in the preceding paragraph. Other than the legal effects expressly articulated in the Section 8 Hire of Work of Chapter II Particular Kinds Of Obligations,⁷² the main legal effects of *force majeure* can be divided into three types, namely, exemption from performance, delayed performance, and exemption from the damages of non-performance. The effects of exception from performance can be found in Articles 225 and 266 of the Civil Code of Taiwan. Article 225(1) provides: “The debtor will be released from his obligation to perform if the performance becomes impossible by reason of a circumstance to which he is not imputed.” Article 266(1) of the Civil Code in Taiwan stipulates: “If neither of the parties is imputed to the impossibility of one party’s performance, the other party shall be released from his obligation to perform the counter-prestation. If the impossibility is only partial, the counter-prestation shall be reduced proportionately.” In sum, when the events of *force majeure* obstruct performance, the obligation to perform can be waived.

Delayed performance means that when *force majeure* circumstances hinder performance, the obligation to perform may be suspended until the end of the *force majeure* event. Generally speaking, no provisions in the Civil Code of Taiwan expressly provide this type of legal effects. In practice, however, the performance period may be extended or shortened by courts.⁷³ Third, the exemption from the damages means a party who cannot perform the obligation due to *force majeure* events may be discharged from liability for damages.⁷⁴ Article 226(1) of the Civil Code of Taiwan provides: “If the performance becomes impossible by reason of a circumstance to which the debtor is imputed, the creditor may claim compensation for any injury arising therefrom.” This article then can be read as: The debtor is excused from liability for damages if he is not imputed.

71 The Supreme Court Civil Judgment No. 2 of the Year 106 [最高法院 106 年度台上字第 2 號民事判決], <https://judgment.judicial.gov.tw/FJUD/data.aspx?ty=JD&id=TPSV,106%2c%e5%8f%b0%e4%b8%8a%2c2%2c20170222>.

72 Taiwan’s Civil Code art. 508(2). It reads: “The undertaker is not responsible for loss or destruction by force majeure of materials provided by the proprietor.” <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=B0000001>.

73 Taiwan High Court Civil Judgment No. 381 of the Year 107 [臺灣高等法院 107 年度上字第 381 號民事判決], <https://judgment.judicial.gov.tw/FJUD/data.aspx?ty=JD&id=TPHV,107%2c%e4%b8%8a%2c381%2c20180917%2c1>.

74 Chen, *supra* note 65, at 46.

D. Six Key Elements in Force Majeure Clauses

The concept of *force majeure* is presented differently in various legal systems, whose meaning, however, may vary slightly. While the Civil Code and specific acts of Taiwan may directly or indirectly use the term or the concept of *force majeure*, the Taiwanese legal system does not provide a clear definition of *force majeure*. This creates difficulties in identifying the constitutive elements and evaluating the legal effects. Therefore, based on the previous sections A, B, and C that explore relevant provisions in the CISG and the Taiwanese law, the author proposes six key elements in *force majeure* clauses as follows in accordance with the Freedom of Contract principle. This tries to reduce the aforementioned difficulties in identifying constitutive elements and legal effects and serve as a basis for improving offshore wind contracts in Taiwan.

1. Definition

To define the exceptional events that amount to *force majeure* circumstances to offshore wind contracts in Taiwan, drafters are advised to adopt not only broad lists, but also the general and all-inclusive approach.⁷⁵ The broad list approach can add events that only arise in a specific contract type. However, the parties will be exposed to the risk of not being able to claim for *force majeure* when events are not provided in the list. In contrast, in the all-inclusive approach, the language may be too ambiguous for courts to apply *force majeure* clauses.⁷⁶ Thus, board lists of *force majeure* should consider future impediments to construction, operation and maintenance.⁷⁷ The all-inclusive language of *force majeure* should put emphasis on the scope of *force majeure*, and avoid the use of indistinct words.⁷⁸

2. Procedural Requirement

It is quite often to find procedural provisions in *force majeure* clauses.⁷⁹ The most common and useful procedural condition is the requirement of notification, which is related to the timeline of invoking the exemption provision.⁸⁰ To draft the notification provision, the drafter must notice four elements: (1) when the non-performing party has a duty to give the notice; (2) the limitation of notice period; (3) the forms

75 Joni Paulus & Dirk Meeuwig, *Article: Force Majeure-Beyond Boilerplate*, 37:2 ALTA L. REV. 304 (1999).

76 *Id.* at 306.

77 KOLLIATSAS ET AL., OFFSHORE RENEWABLE ENERGY-ACCELERATING THE DEPLOYMENT OF OFFSHORE WIND, TIDAL, AND WAVE TECHNOLOGIES 73-81 (2011).

78 *Id.* at 307.

79 P. Declercq, *Modern Analysis of the Legal Effect of Force Majeure Clauses in Situations of Commercial Impracticability*, 15 J. L. & COM. 244-5 (1995-96).

80 Bund, *supra* note 52.

of notification - in writing or in oral form; and (4) the legal effect of breaching the notification clause.⁸¹

3. Mitigation

The duty of mitigation to reduce the losses from *force majeure* events does not appear very often in *force majeure* clauses.⁸² Nonetheless, it is essential for drafters of offshore wind contracts to consider this duty of mitigation. Offshore wind contracts usually last for a long period of time and involve extensive rights and obligations. Also, the investment and the benefits of offshore wind projects will have a significant impact on the society, economy and the environment. It is important for the invoking party to make best efforts to mitigate the consequence of *force majeure* events.

4. Exemption from Liability or Obligations

In most legal systems, exemption from liability due to *force majeure* is a common term and can be found in clauses. Legislation may contain the duration of claiming exemption. For example, liability can only be exempted during the period of the *force majeure* event.⁸³ *Force majeure* provisions may mention the scope of liability or obligations that can be exempted, including liquidated damages, liability for the delay and obligations to perform.⁸⁴ To avoid confusion, it is better to explicitly define the extent to which the liability or obligations can be exempted.

5. Termination and Renegotiation of Offshore Wind Contracts

Provisions concerning the termination of contracts are set out in different ways,⁸⁵ so it is necessary to stipulate when and who can claim for termination of contracts in *force majeure* clauses. To terminate a contract is usually considered an exceptional approach and the last resort when one party is unable to fulfill the original contractual obligations.⁸⁶ Also, the obligation to begin a renegotiation before terminating the contracts would maintain relationship between contract parties and reduce losses caused by *force majeure*.⁸⁷ Therefore, termination and renegotiation provisions may be contained in *force majeure* clauses.

81 *Id.* See also Declercq, *supra* note 79, at 245.

82 Paulus & Meeuwig, *supra* note 75, at 301.

83 CISG art. 79(3).

84 Schwenzler, *supra* note 58, at 719; Taiwan's Civil Code arts. 225 & 230.

85 See, e.g., Taiwan's Civil Code arts. 511 & 512(1).

86 Theo Rauh, *Capital Market: Legal Consequences of Force Majeure under German, Swiss, English and United States' Law*, 25:1 DENV. J. INT'L L. & POL'Y 164 (1996).

87 *Id.*

6. Risk Allocation

It is essential to clarify the risk allocation in *force majeure* clauses of offshore wind contracts. Article 508 of the Civil Code of Taiwan is relevant to the construction contract which expressly provides that the risk of loss or destruction by *force majeure* events is borne by the undertaker.⁸⁸ By the same token, parties may formulate the allocation of risk in *force majeure* clauses in accordance with the principle of Freedom of Contract.

V. Conclusion: Suggestions for Offshore Wind Contract in Taiwan as an Example

Offshore wind energy is a long-term project. As parties may face *force majeure* events during the contract period, it is imperative to stipulate provisions addressing these *force majeure* events. In the offshore wind contract (Official Contract) in Taiwan, the *force majeure* clause contains a simple list of *force majeure* events and some legal effects under the contract extension clause. However, the definitions, additional obligations, extensions, and legal effects of these *force majeure* events are evidently insufficient.

The definition plays a crucial role in determining whether an event falls into the scope of *force majeure*. Three key points could be revised in Article 12 of the Official Contract. First, the provision needs a general clause to define what types of events can qualify as *force majeure* to avoid ambiguity when courts apply or review the clause. In addition, the detailed list could be broadened to include situations, such as infectious diseases, explosions or court decisions that affect offshore wind operations. Third, Article 12.2.7 appears unfair to the selected offshore wind developers and could be modified to ensure contract fairness. Suggested clauses are as follows:

1. Definition of Force Majeure

1.1 “*Force majeure*” means any event that could not reasonably have been anticipated before entering into the Contract, is beyond the affected Party’s reasonable control, without the fault or negligence of the non-performing party, and not substantially attributable to the Party seeking to have its wholly or partial performance obligation excused. It shall include but not limit to:

⁸⁸ Taiwan’s Civil Code art. 508

- (a) Acts of God, including earthquakes and extreme weather (e.g., heavy winds, heat, lightning, tsunamis, and typhoons);
- (b) Fire and explosion;
- (c) Illegal strikes and other labor disputes not caused by employees of the party or the third party contractors.
- (d) Civil disobedience or disturbances, wars, acts of sabotage, blockades, insurrections, rebellions, civil wars, terrorism, revolutions, riots or epidemics;
- (e) Contamination by radioactivity from any nuclear fuel;
- (f) Changes of orders, legislation, rulings or any government acts post-contract that restrain a party;
- (g) Unanticipated maintenance or outages affecting the facility and resulting directly from or scheduled as a consequence of *force majeure*;
- (h) Failure of operation or construction of the facility due to environmental protection; and
- (i) Discovery of historical sites or cultural heritage protected by law during construction and resulting disruption of the project progress.

1.2 A Party shall not invoke *force majeure* to discharge its contractual obligations if the Party itself is involved in causing the *force majeure* events.

The additional obligations including notification, mitigation, and renegotiation should be incorporated into the Official Contract because these provisions can minimize the losses or damages incurred by the parties during *force majeure* events. The invoking party should notify the other party within the required period when a *force majeure* event occurs. The party suffering *force majeure* events should mitigate potential losses or damages once it becomes aware of the *force majeure* events. Furthermore, renegotiation provisions are important for continuing the Official Contract, given its long-term nature, the large number of stakeholders involved and the broad impacts on the economy, society, and third parties. Suggested clauses are as follows:

2. Notice

2.1 A Party failing to perform contractual obligations due to *force majeure* must notify the other Party in writing/in the oral form no later than ____ days of an event constituting *force majeure* or when the Party recognizes the *force majeure* event.

2.2 The invoking Party should not be exempted from the liability if notification is not provided within the required timeframe.

2.3 After the end of the *force majeure* event, the invoking Party shall give a prompt written notice to the other Party within ____ days.

3. Mitigation

3.1 The invoking Party shall mitigate potential losses due to *force majeure* during the event.

3.2 The invoking Party shall provide evidences to the other Party proving its best efforts to mitigate losses.

3.3. The invoking Party bears the burden of proof in mitigation obligation when disputes arise.

Regarding the extension provision, there is currently only one provision related to the extension during *force majeure* events in the Official Contract, which is not comprehensive enough for contract parties. It is necessary to formulate more detailed provisions, including the written notice for extension, the number of extensions and the length of extension periods. The invoking party can submit the application for extensions and issue written notices to the other party within the required timeframe. The details of the re-extension should be more specific in the Official Contract, including the length of extension periods and the number of extensions. Additionally, it is important to consider the remaining term until the original Commercial Operation date. Suggested clauses are as follows:

4. Extension

4.1 A contract Party may apply for an extension by issuing a written notice and providing relevant materials if it fails to perform obligations due to *force majeure*.

4.2 The invoking Party should provide documents within ____ days of the commencement of the *force majeure* event. Upon acceptance of the other Party, the invoking Party may extend the Contract for ____ days/months.

4.3 If the *force majeure* event continues, the invoking Party may re-extend the Contract within ____ days before the expiry date. The number of re-extensions shall not exceed _____. If the *force majeure* event persists till the original Commercial Operation date, the extension application might not be accepted.

The legal effect of *force majeure* plays an important role in the Official Contract by managing risks and reducing disputes in the future. In the Official Contract, the provision concerning the legal effect of *force majeure* includes only a contractual extension. However, it may be difficult to maintain the Official Contract in force for the invoking Party to fulfill its obligations or this may cause more damage to both parties. It might be unfair for the invoking Party to assume all responsibility for the damage caused by *force majeure* events. To mitigate damage and solve problems effectively, the Official Contract should add provisions specifying which obligations can be exempted and who has the right to terminate the Official Contract, and under what circumstances the Official Contract can be terminated. Suggested clauses are as follows:

5. Legal Effect of *Force Majeure*

5.1 A Party shall be excused and relieved from the contractual obligations and not liable for liabilities, damages, losses, payments, costs or expenses to the other Party due to *force majeure*.

5.2 The invoking Party shall renegotiate the Contract with the other Party in good faith within ____days after the written notice.

5.3 After renegotiating, both Parties have right to terminate the Contract by mutual consent due to *force majeure*.

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