

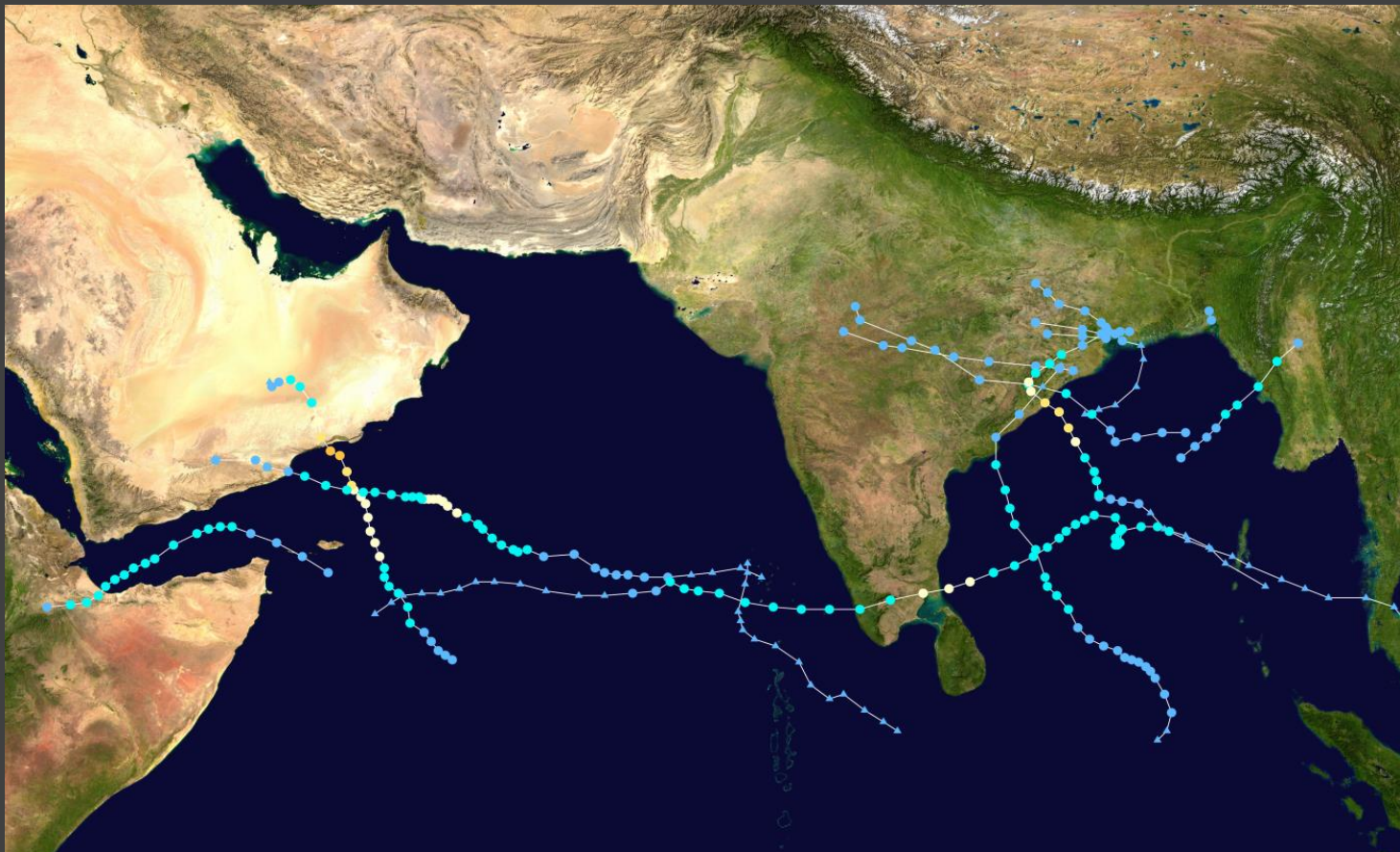


Cyclone Mekunu Force Majeure in Tumultuous Times?

34th Marine Forum

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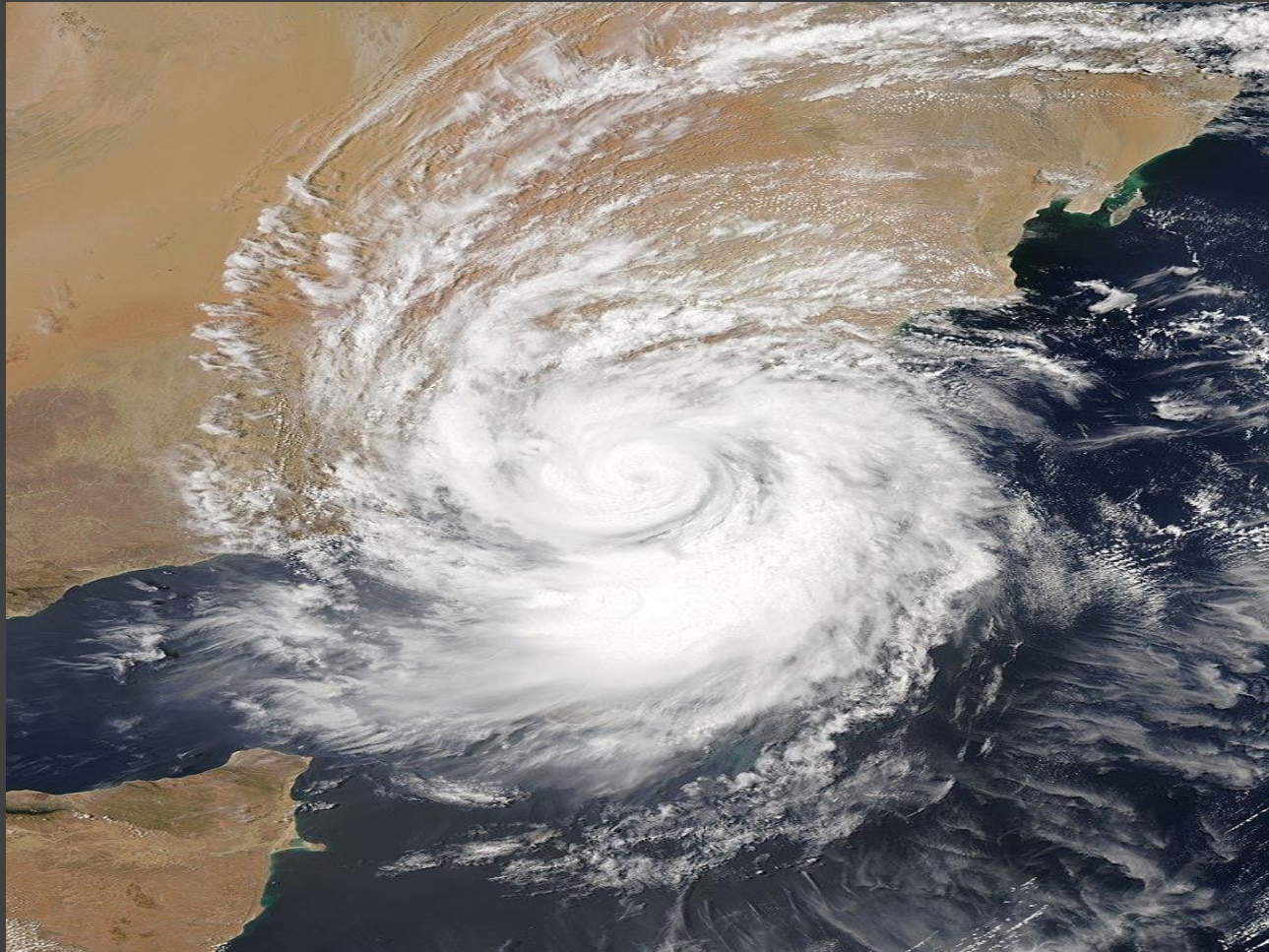
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Seasonal statistics

Depressions	14
Deep depressions	9
Cyclonic storms	7
Severe cyclonic storms	5
Very severe cyclonic storms	3
Super cyclonic storms	0
Total fatalities	343 total
Total damage	\$4.325 billion

Cyclone Mekunu



Formed May 21, 2018

Dissipated May 27, 2018

- Fatalities 31
- Total Damage \$1.5 billion (2018 USD)
- Areas affected Yemen, Oman, Saudi Arabia

“This year, Port of Salalah was subject to two cyclones which were really unprecedented in the history of the port – or in Salalah. . . .”

“Based on events over the last two years, these storms are becoming more frequent and I think this is a concern that ports around the world, . . . , definitely need to spend more (looking at storm-related threats).”

Oman Daily Observer, 28.10.2018



Port of Salalah to work closely with the Omani government to explore the possibility of rerouting wadis that unleashed a 2.2 metre-high deluge of floodwater into the port during Cyclone Mekunu.

“From the commercial standpoint, we should also be looking at contracts and force majeure clauses – it is one of those things you think you will never have to exercise.”

Oman Daily Observer, 28.10.2018

France:

Art. 1218 French Civil Code

“Force Majeure in contractual relations applies to an event beyond the control of the debtor, which upon conclusion of the contract was reasonably impossible to predict and the consequences of which could not have been prevented by appropriate measures, thus hindering the fulfillment of the contractual obligation”.

Has the service to render only become impossible for a limited time, so that a suspension of the contractual obligation will be sufficient?

If so, no cancellation of the contractual obligation triggered.

Italy:

Art. 1218, 1463 Italian Civil Code

”Non performance by a party of its obligations hereunder is excused if such party was prevented from fulfilling its obligations by an event beyond that party’s control, that was not foreseen at the date hereof and that could not be reasonably avoided or overcome.”

Courts will determine on a case by case basis, if an event can be interpreted as a force majeure event.

English Law:

- No concept of Force Majeure at common law;
- Force Majeure has evolved by contract to fill the gap left by the uncertainties of frustration;
- It must therefore always be defined in common law contracts.













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Parties may exercise their right of freedom of contract.

BUT:

- Beyond dispute that an event meets a contract's definition of force majeure?
- Always refer to the relevant contract terms before making general assumptions.

1) Externality

The circumstances that lead to the non-performance of the obligation were beyond the control of the parties;

2) Unpredictability

The party must not be able to anticipate the occurrence of the event. If an event is foreseeable, the party must be prepared for it;

3) Irresistibility

The consequences of the event could not be avoided.

- Rests on the party wishing to be discharged from the contractual obligation(s).
- Three Test and legal definition of force majeure must be complied with.

Modification of application to give other party chance to:

- Reserve its rights;
- Try to reduce or mitigate losses.





- May 18, 2018 – **Cyclone Sagar**
Attained peak intensity in the Gulf of Aden, brushing Yemen's coast with damaging rainfall.
- May 25, 2018 – **Cyclone Mekunu**
Issued reports and warnings by the Oman National Multi - Hazard Early Warning Centre from 21 May 2018 to 26 May 2018.
- October 14, 2018 - **Cylcone Luban**
Upon making landfall, the storm dropped heavy rainfall in southern Oman that caused flash flooding. Salalah reported a 24 hour precipitation total of of 138 mm (5.43 in).

155 dams have been constructed as of 2018 for different purposes:

- flood protection (3 dams);
- recharge (46);
- surface storage (106).



Seadrill Ghana Operations Ltd v Tullow Ghana Ltd [2018] EWHC 1640 Comm) (03 July 2018) (“Seadrill Ghana”).

- Tullow Ghana contracted with Seadrill Ghana to hire an oil rig for the drilling and extraction of oil in two offshore petroleum concessions off the coast of Ghana.
- *Reasonable endeavours to “mitigate, avoid, circumvent or overcome the circumstances of the force majeure occurrence”.*
- After various circumstances prevented use of the rig, Tullow Ghana claimed force majeure and terminated the contract.

Hon. Justice Teare :

- Although the Government of Ghana's moratorium on drilling, which was the claimed force majeure event by Tullow Ghana, did prevent the rig from drilling in certain areas, the **effective** cause of the failure to perform was the Government's failure to approve Tullow Ghana's Greater Jubilee Plan (a drilling plan covering a wider area than that affected by the moratorium).

Held:

Tullow Ghana was not entitled to rely upon Force Majeure Clause. Termination of the contract was deemed invalid since the aims were not demonstrative on whether it was entitled to rely on the Force Majeure Clause.

Project Voldemort



Classic Maritime Inc. v Limbungan Makmur Sdn Bhd & Anor [2018] EWHC 2389 (Comm) (13 September 2018) (“Classic Maritime”)

Classic Maritime, a ship owner, entered into a long-term affreightment contract with Limbungan, the charterer, for the carriage of iron ore pellets from Brazil to Malaysia.

Burst of the Fundao dam in Brazil:

- Charterers claimed the burst was a force majeure event that prevented it from supplying five cargo shipments of iron ore pellets from Brazil to Malaysia.
- Charterers were unlikely to have performed even in the absence of the dam burst. Two shipments already missed due to a lack of demand in its factories in Asia.

Hon. Justice Teare :

Questions of causation are to be resolved by reference to common sense.

Disregard of previous authority:

If a force majeure event was proved to have prevented performance, the party relying on it did not have to show that it would have performed in the absence of that event.

Held:

The force majeure event had not caused Charterer's failure to perform and hence Charterers could not rely on it to avoid liability.

Competing causes for failure to perform, either by:

- Parties seeking compensation;
- Parties seeking to absolve themselves of liability.

Conduct of parties relying on a force majeure exclusion will be scrutinised.

Lack of authority on requirements of “reasonable endeavor”.

Consider the commercial interests of the other party?

Wording used by the parties is paramount and the courts' main aim is to determine the proper interpretation of the clause.

Failure to do so:

Litigation cost misery

Serious consequences in respect of whether or not who is liable under the contract.



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THANK YOU

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