

COVID-19 (Temporary Measures) Act 2020 – Ten Key Considerations for the Construction Industry

Introduction

The COVID-19 pandemic is first and foremost a human tragedy. It has also caused worldwide economic carnage. Singapore has not been spared – the Minister for Law has described the pandemic as “*the most serious crisis [the] country has faced since independence*”.¹

It was against this exceptional backdrop that the COVID-19 (Temporary Measures) Bill was introduced in Parliament on 7 April 2020, and enacted as the COVID-19 (Temporary Measures) Act 2020 (“**COTMA**”) that very day.

COTMA is an exceptional piece of legislation that provides extraordinary relief for parties to specific contracts that are unable to perform their obligations due to COVID-19.² It also has retroactive effect – it applies to specific contracts entered into or renewed before 25 March 2020 or automatically renewed on or after 25 March 2020, and covers contractual obligations in those contracts that are to be performed on or after 1 February 2020.³

This, however, should not be mistaken as a sea-change in Singapore’s deep-rooted adherence to the cardinal principle of “*sanctity of contract*”. The relief under COTMA is *temporary* – it applies for six months in the first instance (“**prescribed period**”) and while the Minister for Law may extend or shorten the prescribed period, COTMA states that it must not exceed one year.⁴ In short, COTMA allows parties to seek “breathing space” or a “time out” to deal with the impact of COVID-19.

Parties in the construction industry – like other industries heavily reliant on supply chains and labour – desperately need this “breathing space” or a “time out”. They will therefore welcome that COTMA provides relief for the performance of construction and supply contracts – and in fact, provides *additional* reliefs for these contracts over and above the specified general reliefs.

The provisions in COTMA providing this temporary relief (i.e. Part 2 of COTMA) came into operation on 20 April 2020 and will last at least for the six-month period ending on 19 October 2020, subject to any further extension(s). This update therefore sets out ten considerations you should bear in mind about COTMA if you are a party to a construction or a supply contract.

¹ Second Reading of the COVID-19 (Temporary Measures) Bill on 7 April 2020.

² See Part 2 of COTMA.

³ See Sections 4(1) and 5(1)(a) of COTMA.

⁴ See Sections 1(2) and 3 of COTMA.

1) How will I know whether my contract falls within the definition of a “construction contract” or “supply contract” under COTMA?

The terms “construction contract” and “supply contract” are stated in COTMA as having the meanings given by Section 2 of the Building and Construction Industry Security of Payment Act (“**SOP Act**”).⁵

Parties will therefore be familiar with these terms, and their breadth – they generally cover most contracts in the construction industry.

Parties should also note that, consonant with the SOP Act, COTMA does not apply to a construction contract or supply contract to the extent that it contains provisions under which a party undertakes to carry out construction work or supply goods and services, as an *employee* of the party for whom the construction work is to be carried out or the goods or services are to be supplied.⁶

Parties should further note that temporary relief under COTMA is *not* available for contracts entered into or renewed (other than automatically) on or after 25 March 2020.⁷ Hence, parties consciously electing to enter into new contracts *on or after* 25 March 2020 should be mindful of the challenges posed by COVID-19: for instance, they may wish to give more thought to the definition of *force majeure* in their contracts (given that, as things stand, COVID-19 related claims *are* arguably foreseeable events or risks at the time of contracting).

2) Can any party to a construction contract or a supply contract seek relief under COTMA?

Yes. COTMA allows *any* party to a construction contract or a supply contract that falls within its ambit to seek temporary relief from its inability to perform an obligation in that contract, provided that such obligation is to be performed on or after 1 February 2020 and such inability is to a material extent caused by a COVID-19 event (see Questions 4 and 5).⁸

Hence, while the expectation is that parties will seek relief from their upstream obligations, the converse may also happen – for example, an employer may seek relief for its inability to perform a contractual obligation owed to a main contractor.

3) The completion date in my construction contract or in my supply contract was 31 January 2020, but I cannot meet this date. Am I entitled to relief under COTMA?

COTMA states that temporary relief for inability to perform a contract only applies to an obligation in the contract “*that is to be performed on or after 1 February 2020*”.⁹ This date has been identified as the approximate date when the impact of COVID-19 started to be significantly felt in Singapore’s economy.¹⁰

⁵ See Section 2 of COTMA.

⁶ See Reg 3 of the COVID-19 (Temporary Measures) (Temporary Relief For Inability to Perform Contracts) Regulations 2020 (“**COTMA Regulations**”).

⁷ See Section 4(1) of COTMA.

⁸ See Section 5(1) of COTMA.

⁹ See Section 5(1)(a) of COTMA.

¹⁰ See <https://www.mlaw.gov.sg/news/press-releases/temporary-relief-for-inability-to-perform-contractual-obligations-due-to-coronavirus-disease-2019-covid-19-situation>.

In the scenario posed, while the position is not entirely clear, an argument may be made that you can seek relief on the basis that your obligation to complete the works is a continuing one, such that it remains an obligation *“to be performed on or after 1 February 2020”*.

What if you had applied for an extension of time seeking to extend the date of completion to on or after 1 February 2020, but this application was rejected or was still under consideration? In theory, you could – in addition to the ground articulated in the paragraph above – seek relief on the ground that the completion date should be extended such that your obligation to complete is *“to be performed on or after 1 February 2020”*. If your counter-party disputes this, it may make an application for an assessor’s determination that you are not entitled to temporary relief under COTMA (see Question 9 below).¹¹

As for the other conditions you have to fulfil to seek relief under COTMA, see Question 4 below.

4) The completion date in my construction contract or in my supply contract is 1 June 2020, but I cannot meet this date. Am I entitled to relief under COTMA?

Yes, you may be entitled to relief under COTMA, if the contract falls within its ambit.

COTMA permits a party to such a contract to seek temporary relief if the following three requirements are met:

- (a) it is unable to perform an obligation in a construction contract or supply contract (that is entered into before 25 March 2020, or renewed automatically on or after 25 March 2020), being an obligation that is to be performed on or after 1 February 2020;
- (b) the inability is to a material extent caused by a COVID-19 event (which is referred to as the **“subject inability”** in COTMA); and
- (c) it has served a notification for relief in accordance with Section 9(1) of COTMA on (i) the other party or parties to the contract, (ii) any guarantor or surety for its obligation in the contract, and (iii) such other person as may be prescribed.¹²

You have to serve the notification for relief on the other party or parties to the contract before the end of the prescribed period (i.e. by 19 October 2020). You also have to serve the notification for relief on the surety or guarantor for the subject obligation and the issuer of a related performance bond (if applicable) – no later than one working day after the date of the service of the notification on the other party or parties to the contract.¹³

5) What does the phrase *“to a material extent caused by a COVID-19 event”* mean?

The phrase “COVID-19 event” has been defined broadly in COTMA to mean:

- (a) the COVID-19 epidemic or pandemic; or

¹¹ See Section 9(2) of COTMA.

¹² See Section 5(1) of COTMA. For the procedure on submitting a notification for relief, see Reg 9 of the COTMA Regulations, and this link: <https://www.mlaw.gov.sg/covid19-relief/notification-for-relief>.¹²

¹³ See Reg 9(3) of the COTMA Regulations.

- (b) the operation of or compliance with any law of Singapore or another country or territory, or an order or direction of the Government or any statutory body, or of the government or other public authority of another country or territory, being any law, order or direction that is made by reason of or in connection with COVID-19.¹⁴

As a safeguard against abuse, COTMA provides that a party's inability to perform an obligation in a contract must be shown to have been caused by a COVID-19 event "*to a material extent*".¹⁵

This is naturally a fact-specific inquiry. The Minister for Law explained in Parliament that COTMA covers situations where a COVID-19 event has "*meaningfully caused the inability to perform*", and it "*need not be a dominant cause*", but "*cannot be a remote/insignificant cause either*". The Minister further explained that it can cover situations where there are multiple reasons causing the inability to perform the contractual obligation, as long as a COVID-19 event is a material reason.¹⁶

For instance, consider a case where a contractor's completion date under a construction contract is 1 June 2020, and it was on track to meet that deadline – until the "circuit breaker" and "extended circuit breaker" measures that were introduced on 3 April 2020 and 21 April 2020 respectively resulted in a suspension of its works till at least 1 June 2020. This contractor will likely have good grounds to establish that its inability to fulfil the completion date was to a material extent caused by a COVID-19 event.

If, however, the contractor – instead of being on track to meet the deadline – was already in inordinate or inexcusable delay such that it had not even completed a fifth of the works as of 3 April 2020 and had not been progressing the works, its employer may be able to dispute the contractor's entitlement to seek relief under COTMA, on the ground that the contractor was already not performing and therefore the COVID-19 event did not affect the contractor's ability to perform to a material extent.

6) I have been served with a notification for relief under COTMA by my counter-party in a construction contract or supply contract. Does this affect my entitlement to commence or continue actions against that party?

Yes. Unless and until the notification is withdrawn by your counter-party or an assessor appointed under COTMA determines otherwise, you are precluded from taking a number of specified actions *in relation to the subject inability* until the expiry of the prescribed period.¹⁷ These actions include:

- (a) the commencement or continuation of an action in a court against that party;
- (b) the commencement or continuation of arbitral proceedings under the Arbitration Act against that party;
- (c) an application to wind-up that party;
- (d) the commencement or levying of any execution, distress or other legal process against any property of that party, except with the leave of the court and subject to such terms as the court imposes; and

¹⁴ See Section 2 of COTMA.

¹⁵ See Section 5(1)(b) of COTMA.

¹⁶ Second Reading of the COVID-19 (Temporary Measures) Bill on 7 April 2020.

¹⁷ See Sections 5(2) and 5(3) of COTMA.

- (e) the enforcement against that party of a judgment of a court, an award made by an arbitral tribunal in arbitral proceedings conducted under the Arbitration Act or a determination by an adjudicator under the SOP Act.¹⁸

The prohibition on the taking of these specified actions – *in relation to the subject inability* – seeks to give the party claiming relief “breathing space” or a “time out” to deal with the impact of COVID-19.

The phrase “*in relation to the subject inability*” is an important filter: the prohibition is not intended to allow a party to avoid its liability for contractual obligations unaffected by COVID-19; rather, the prohibition only covers actions that relate to a party’s inability to perform its contractual obligations that is to a material extent caused by a COVID-19 event. It is anticipated that this phrase could be a source of potential contention and/or be exploited for tactical reasons (for example, to forestall or stay proceedings that in reality are entirely unrelated to the subject inability).

It also bears highlighting that proceedings under the International Arbitration Act (“IAA”) do not fall under the scope of the prohibited actions. Hence, if your arbitration clause states that the IAA applies, or the IAA otherwise applies to your contract, it appears that you remain entitled to commence or continue arbitral proceedings notwithstanding any subject inability. Nevertheless, if the governing law of your contract is Singapore law, you should still be mindful of the impact COTMA may have on your claims, for e.g. for liquidated damages or breaches of contract.¹⁹

You should also note that COTMA extends any period of limitation prescribed by any law or in any contract for the taking of an action in relation to the subject inability by a period equal to the period beginning on the date of service of the notification for relief on you, and ending on the expiry of the prescribed period (or earlier – if the notification is withdrawn by the party seeking relief, or if an assessor determines that the party is not entitled to the relief sought under COTMA).²⁰

7) I have been served with a notification for relief under COTMA by my counter-party in a construction contract or supply contract. Does this affect my entitlement to call on a performance bond?

Yes. Unless and until the notification for relief is withdrawn by the party seeking relief or an assessor appointed under COTMA determines otherwise, COTMA temporarily restrains your entitlement to make a call on the performance bond in relation to the subject inability.²¹

For instance, consider a case where a main contractor’s contractual completion date is 1 June 2020, and under the contract, the main contractor procured a bank to issue a performance bond in the employer’s favour. The main contractor is then unable to fulfil the completion date of 1 June 2020 because of a COVID-19 event, and serves a notification for relief under COTMA on the employer.

Once served with the notification for relief, the employer may not make a call on the performance bond in relation to the subject inability – i.e. in relation to the main contractor’s inability to meet the completion date

¹⁸ See Section 5(3) of COTMA.

¹⁹ See Sections 6(5) and 6(6) of COTMA .

²⁰ See Section 5(7) of COTMA.

²¹ See Sections 6(1) to 6(4) of COTMA .

that is to a material extent caused by a COVID-19 event – at any time earlier than seven days before the expiry date of the bond.²²

Further, if the main contractor makes an application to the bank not less than seven days before the expiry of the performance bond to extend the term of the performance bond, and serves a notice of the application on the employer at the same time, then the term of the performance bond is deemed to be extended to a date that is seven days after the end of the prescribed period, or such other date as may be agreed between the main contractor, the employer and the bank, and that date or other date (as the case may be) is treated as the date of expiry of the performance bond or equivalent.²³

8) Does COTMA affect my entitlement to liquidated damages or general damages in a construction contract or supply contract?

Yes, it may.

Consider the following scenario: a contractor's completion date under a construction contract is 1 June 2020, and it was on track to meet that deadline – until the “circuit breaker” and “extended circuit breaker” measures that were introduced on 3 April 2020 and 21 April 2020 respectively resulted in a suspension of its works till at least 1 June 2020. As such, it could no longer meet the completion date of 1 June 2020.

Under COTMA, for the purposes of calculating liquidated damages payable under the contract or assessing other damages in respect of the subject inability, any period for which the subject inability subsists is to be disregarded in determining the period of delay in the contractor's performance.²⁴

This effectively affords the contractor a (partial) statutory defence to the imposition of liquidated damages for a portion of the delay that eventuated in the late completion. This statutory defence is also in *addition* to any other rights available to the contractor under the relevant construction contract or supply contract to apply for an extension of time to complete the same.

Further, the fact that the inability to perform the obligation in the contract was to a material extent caused by a COVID-19 event provides the contractor with a defence to a claim for breach of contract in respect of the subject inability.²⁵

A related question is whether these reliefs – which are in Section 6 of COTMA – are predicated on the service of a notification for relief under Section 9(1) of COTMA. In this regard, Section 9(1) of COTMA states that a party that “*intends to seek relief under section 5 or 7*” must serve a notification for relief. Hence, it is not explicitly stated that a party seeking relief under Section 6 of COTMA has to serve a notification for relief.

Nevertheless, Section 6(1) of COTMA states that Section 6 applies “*to a case mentioned in section 5...and does not limit the operation of that section*”. And Section 5 of COTMA in turn states that it applies to a case where, among other things, “*a notification for relief in accordance with section 9(1)*” has been served.” Hence, on this reading, the reliefs in Section 6 of COTMA are predicated on the service of a notification for relief under Section 9(1) of COTMA. Further, the Minister for Law also explained in Parliament that a

²² See Section 6(2) of COTMA .

²³ See Section 6(3) of COTMA .

²⁴ See Sections 6(5) of COTMA.

²⁵ See Sections 6(6) of COTMA.

notification for relief has to be served if a contractor wishes to seek relief under Section 6 of the Act (although this was specifically in response to a query regarding relief from calls on a performance bond in Sections 6(2) to 6(4) of COTMA, rather than the relief relating to liquidated damages and breaches of contract in Sections 6(5) and 6(6) of COTMA).²⁶

All things considered, a prudent contractor that intends to seek the additional reliefs in Section 6 of COTMA *should* serve a notification for relief under Section 9(1) of COTMA. This also accords with common sense – if no notification for relief is required, the employer or the contractor administrator may not be aware that there is a subject inability, and of the period for which this subject inability subsists.

9) I have been served with a notification for relief under COTMA by my counter-party in a construction contract or supply contract. My view is that my counter-party is not entitled to relief under COTMA. What are my options?

You may, after having been served with the notification for relief, within no later than two months after the end of the prescribed period, apply to the Registrar of assessors to appoint an assessor to make a determination on whether the case is one in which the requirements for temporary relief are satisfied.²⁷

The assessors appear to have a broad mandate and considerable discretion in making determinations on cases referred to them. In making their determination, they *may* take into account the ability and financial capacity of the party concerned to perform the obligation that is the subject of the application.²⁸ More importantly, they *must* seek to achieve an outcome that is just and equitable in the circumstances of the case.²⁹

In fact, prior to the release of the COTMA Regulations, an assessor's power to make *further* determinations (over and above determining that the case is one in which the requirements for temporary relief are satisfied) – including the power to require “*a party to the contract to do anything or pay any sum of money to discharge any obligation under the contract*” – gave rise to some concerns in the construction industry.³⁰

It is therefore welcome that the COTMA Regulations have curtailed this power in the context of construction and supply contracts, or a performance bond or equivalent that is granted pursuant to a construction contract or supply contract.³¹ In other words, for such contracts, an assessor is limited to determining whether the case in question is one to which the requirements for temporary relief are satisfied.

Nevertheless, parties in the construction industry should note that reference to an assessor is intended to be a summary process at which parties are not allowed to be represented by lawyers, and from which there is no right of appeal.³² Hence, save for corrections of clerical mistakes, or errors arising from an accidental slip or omission, the only substantive recourse against an assessor's determination may lie in a judicial review application.

²⁶ Second Reading of the COVID-19 (Temporary Measures) Bill on 7 April 2020.

²⁷ See Section 9(2) of COTMA. Also see Reg 14 of the COTMA Regulations on the application and procedure for an assessor's determination, and this link: <https://www.mlaw.gov.sg/covid19-relief/application-for-assessor>.

²⁸ See Section 13(2)(a) of COTMA.

²⁹ See Section 13(2)(b) of COTMA.

³⁰ See Section 13(3)(a) of COTMA.

³¹ See Reg 22 of the COTMA Regulations.

³² See Sections 13(10) and 14 of COTMA.

Given the inherent uncertainty and risks in applying for a determination by an assessor, parties are encouraged to consider and assess – and if need be, take advice on – the manner in which any disputes can be resolved by alternative, amicable means.

10) How does COTMA affect the operation of the SOP Act? Can I still submit payment claims? Do I still need to serve payment responses?

Parties in the construction industry will be particularly anxious about the impact of COTMA on the operation of the SOP Act.

Significantly, adjudication proceedings under the SOP Act are *not* included under the suite of actions that a party is prohibited from taking in relation to a subject inability.³³ Whilst at first blush this may appear to have been an oversight by the drafters, this is unlikely to be so since it has been legislated that the *enforcement* of an adjudication determination under the SOP Act (which is done by filing an application in court) is one of the prohibited actions.³⁴ In fact, the Singapore Mediation Centre has issued Supplementary Rules for Electronic Adjudication Lodgment – these came into force on 15 April 2020 and provide for, among other things, the electronic lodgment and service of adjudication applications, adjudication responses etc., as well as the holding of adjudication conferences through electronic means of communication.

Therefore, while COTMA does not prohibit a claimant from commencing or continuing with adjudication proceedings under the SOP Act, a successful claimant's ability to *enforce* an adjudication determination – in relation to the subject inability – is constrained.

For instance, consider a case where a claimant serves a payment claim, and the respondent serves a notification for relief under COTMA as it is unable to pay the sums sought in the payment claim. The claimant then commences adjudication proceedings and obtains an adjudication determination in its favour. In such a case, the claimant cannot enforce the adjudication determination as a judgment until the expiry of the prescribed period (unless the respondent withdraws its notification for relief, or if an assessor appointed under COTMA determines that the respondent is not entitled to relief).

Nevertheless, as things stand, parties – and especially respondents – should have systems in place to monitor any payment claims that are submitted, and ensure that payment responses are served within the requisite deadlines (subject of course to compliance with the “circuit-breaker” measures first announced on 3 April 2020 and subsequently extended on 21 April 2020, and the related advisories issued by the Ministry of Trade and Industry as well as the Building and Construction Authority). After all, an opportunistic claimant may still elect to at least commence adjudication proceedings on account of default by a respondent (even if arising from a subject inability) since once it has an adjudication determination in its favour, it can simply wait out the temporary statutory restraint against enforcement before doing the same.

³³ See Section 5(3) of COTMA.

³⁴ See Section 5(3)(n) of COTMA.

Concluding words

COTMA provides a welcome fillip to the economy at large, and the construction industry in particular.

As with any new legislation, there may be teething troubles with COTMA, especially in its initial stages – but on the whole, it will likely give parties to construction and supply contracts the much needed “breathing space” or “time out” that they need to deal with and recover from the effects of COVID-19 on the construction industry.

If you would like information and/or assistance on the above or any other area of law, you may wish to contact the Partner at WongPartnership whom you normally work with or any of the following Partners:



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