

# Amendments to Align COVID-19 (Temporary Measures) Act and Building and Construction Industry Security of Payment Act

As the construction industry continues to grapple with the effects of the COVID-19 pandemic, contractors may find some respite in the latest round of amendments to the COVID-19 (Temporary Measures) Act (“COTMA”) passed by Parliament on 4 September 2020. Significantly, the COVID-19 (Temporary Measures) (Amendment No. 2) Bill (“Bill”)<sup>1</sup> will align the operation of the COTMA with adjudication, the dispute resolution mechanism set up under the Building and Construction Industry Security of Payment Act (“SOP Act”) and commonly used in the construction industry.<sup>2</sup>

In June 2020, amendments to the COTMA were proposed to provide relief from performance or breaches of construction or supply related contracts due to COVID 19 events.<sup>3</sup> For instance, a tenant who is unable to move in because of the landlord’s inability to renovate or retrofit would be entitled to seek reliefs under the COTMA. As at the date of this update, the details of such reliefs are still being finalised.

This update sets out the salient features of the Bill where they relate to the construction industry, and briefly explains how they align with the SOP Act. For ease of reference, Sections of the COTMA highlighted in this update refer to Sections of the amended COTMA, as those new Sections introduced by the Bill will come into force in due course. We will, for illustrative purposes, also provide examples involving a hypothetical scenario concerning two parties to a construction or supply contract, where Party A is the party who is unable to perform an obligation due materially to a COVID-19 event, and Party B is the counterparty to the contract.

## Mitigating Risk of Parallel Proceedings under COTMA and SOP Act

Section 37A of the COTMA governs how proceedings and determination under the COTMA will interact with other legal proceedings under, among others, the SOP Act, by triggering a temporary moratorium on the commencement of those other proceedings to mitigate and reduce the risk of parallel proceedings.

<sup>1</sup> Singapore Statutes Online, *COVID-19 (Temporary Measures) (Amendment No. 2) Bill*, <https://sso.agc.gov.sg/Bills-Supp/34-2020/Published/20200903?DocDate=20200903>.

<sup>2</sup> See Ministry of Law, *Second Reading Speech by Second Minister for Law, Mr Edwin Tong, on COVID-19 (Temporary measures) (Amendment No.2) Bill*, <https://www.mlaw.gov.sg/news/parliamentary-speeches/second-reading-speech-by-second-minister-for-law-mr-edwin-tong-on-the-covid-19-temporary-measures-amendment-no-2-bill>; Singapore Statutes Online, *COVID-19 (Temporary Measures) (Amendment) Act 2020*, <https://sso.agc.gov.sg/Acts-Supp/29-2020/Published/20200618?DocDate=20200618>.

<sup>3</sup> WongPartnership LegisWatch update on 11 June 2020, *New Bill Passed Broadens Application of COVID-19 (Temporary Measures) Act 2020 to Parties Affected by Stoppage of Construction Works* <https://www.wongpartnership.com/insights/detail/new-bill-passed-broadens-application-of-covid-19-temporary-measures-act-2020-to-parties-affected-by-stoppage-of-construction-works>.

### *Example*

Party A has applied for a determination by an assessor under the COTMA. Party B may not take any action to apply or continue an adjudication application under the SOP Act. The moratorium will apply until the COTMA application is rejected or withdrawn, or until a determination has been issued.

Section 37(1A) of the COTMA further provides that a party cannot apply for relief under the COTMA if, in relation to the subject of the intended application:

- (a) Proceedings before a court have commenced against the party;
- (b) Arbitral proceedings have commenced against the party;
- (c) An adjudication application has been made under the SOP Act for a claim against the party; or
- (d) A judgment, arbitral award, or an adjudication determination under the SOP Act has been given or made.

### **Effect of COTMA Determination on Operation of SOP Act**

Section 38B of the COTMA provides that, where a determination has been made under the COTMA, then the contract so adjusted will be considered the contract for the purpose of taking any action, including the action of determining an adjudication application or an adjudication review application under the SOP Act.<sup>4</sup> An adjudication application or adjudication review application made in such a case must be accompanied by a copy of the COTMA determination.

### *Example*

Party A has obtained a determination pursuant to the COTMA which discharges it from the obligation to pay damages for breach of contract as the breach was, to a material extent, caused by a COVID-19 event. If Party B subsequently lodges an adjudication application against Party A, the adjudicator will disregard Party B's entitlement to claim such damages from Party A. The same will apply for an adjudication review application.

### **Effect on Supply Contracts**

In relation to supply contracts, Section 38B(5) of the COTMA provides that, where a claimant has served a payment claim before a COTMA determination has been rendered, and subsequently lodges an adjudication application in relation to that payment claim, the question of whether the payment claim was made and served in accordance with the provisions of SOP Act is to be determined by reference to the contract *before* it was adjusted by the COTMA determination.<sup>5</sup> Further, the due date of the claimed amount under Section 12(3)(a) of SOP Act will be the due date under the original contract, even if the due date had been adjusted by the COTMA determination.<sup>6</sup> It should be noted that the timelines under the original

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<sup>4</sup> Sections 38(1) to 38(4) of COTMA.

<sup>5</sup> Sections 38B(5) to 38B(7) of COTMA.

<sup>6</sup> Section 38B(5) of COTMA.

contract (that is, *before* any adjustment by a COTMA determination) apply for the purposes of determining whether an objection may be included in an adjudication response.<sup>7</sup>

### *Example*

Party B serves a payment claim on Party A under a supply contract. Party A then applies for a determination under the COTMA and the determination adjusts the due date for payment. Party B may lodge its adjudication application against Party A in accordance with the timelines under the contract, even if such timelines were amended by the COTMA determination. Party A is also obliged to provide its payment response and adjudication response in line with the original timelines under the contract, before it was adjusted by the COTMA determination.

## **Adjudicators under SOP Act Clothed with Same Powers as Assessors under the COTMA**

Section 38C of the COTMA provides that an adjudicator or review adjudicator under the SOP Act may exercise the powers afforded to an assessor under the COTMA in order to reach a just and equitable outcome under the adjudication proceedings.<sup>8</sup> This applies so long as parties have not previously gone through a COTMA determination. In other words, a party may not, after having obtained an unfavourable outcome from COTMA proceedings, then seek a second bite of the cherry by pursuing adjudication of the same claims under the SOP Act.

In respect of the nature of relief that a party is able to obtain, an assessor under the COTMA or an adjudicator exercising his powers under the COTMA may adjust the contract by determining that any prescribed obligation be performed in a manner other than in accordance with the contractual terms. The assessor can also vary, or release or discharge any party from, certain prescribed terms in the contract. We understand that subsidiary legislation will be enacted at a later date to prescribe the terms and conditions of a contract that an assessor can adjust.

## **Effect of COTMA Determination on Court or Arbitral Proceedings**

Lastly, Section 38D of the COTMA provides that when a COTMA determination has been made, a court or arbitral tribunal may make orders having regard to the COTMA determination and any action taken by a party in good faith and in reliance on the COTMA determination.<sup>9</sup>

## **Concluding Remarks**

The latest set of amendments to the COTMA is, against the backdrop of the COVID-19 pandemic, a positive step to facilitate the implementation and delivery of reliefs under two major pieces of legislation which affect the construction industry.

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<sup>7</sup> Section 38B(6) of COTMA.

<sup>8</sup> Section 38C of COTMA.

<sup>9</sup> Section 38D of COTMA.

It is important for parties to understand that the reliefs prescribed under the COTMA are not automatically comported into adjudication proceedings. For instance, while the adjudicator is now empowered to exercise the powers of a COTMA assessor, the respondent remains obliged to provide its objections in the payment response. If the respondent does not do so, it is prohibited from including such objections in the adjudication response.<sup>10</sup> Further, in relation to a supply contract, it should be noted that the original contractual timelines for the respondent to make payment (before any adjustment pursuant to a COTMA determination) continue to apply.<sup>11</sup>

This update is accurate as of 25 September 2020.

If you would like information 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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<sup>10</sup> Section 15(3) of SOP Act.

<sup>11</sup> Sections 38B(5) to 38B(7) of COTMA.

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