



THE COVID-19 (TEMPORARY MEASURES) ACT 2020

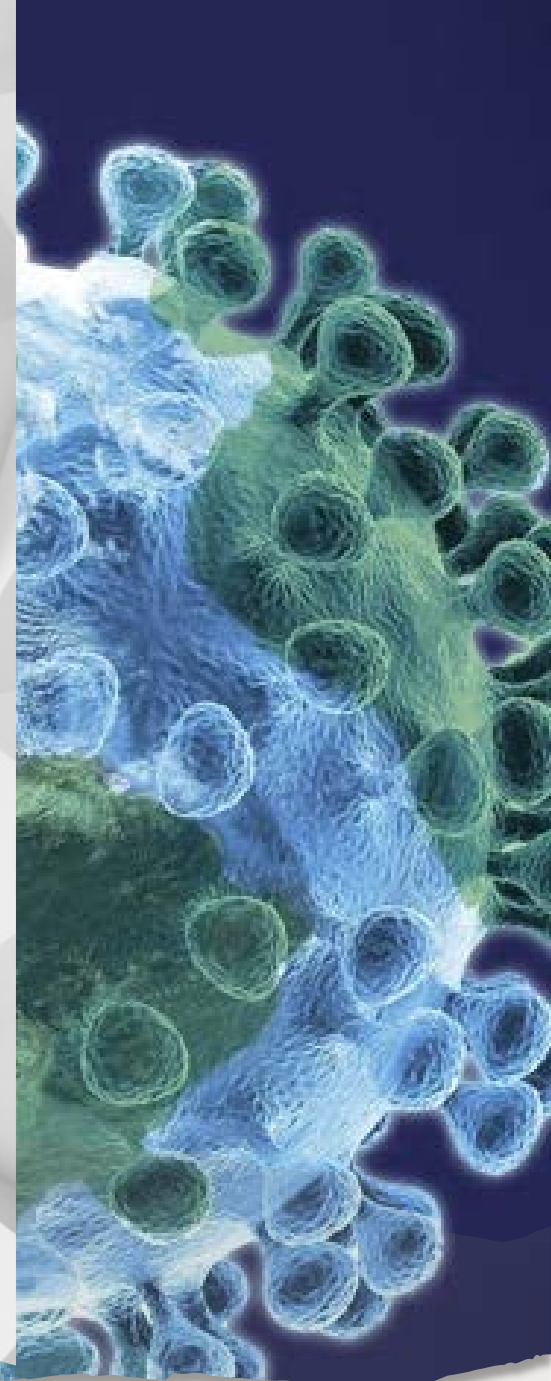
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ROADMAP

- I. Scope and application of the COTMA

- I. Reliefs and claims under the COTMA
 - I. Protection against legal proceedings and claims for breach (Part 2 of the COTMA)
 - II. Time and costs relief (Parts 8A, 8B, 10A of the COTMA)

COVID-19 (TEMPORARY MEASURES) ACT 2020 (“COTMA”)

- Passed into law on 7 April 2020
- Provides temporary and targeted protection for qualifying individuals and businesses who are unable to fulfill their contractual obligations due to the COVID-19 pandemic.

Part 2 : Temporary Reliefs for inability to perform contracts

Temporary relief and protection ends **30 September 2021**

- Provides time and costs reliefs

Part 8A: Extension of time for construction contracts

Part 8B : Temporary measures for costs-sharing in construction contracts

Part 10A: Reliefs for contracts affected by increase in foreign manpower salary costs

COTMA – SCHEDULED CONTRACTS



Leases and licenses
of non-residential
property



Construction and
supply contracts



Performance
Bonds
(Construction
/supply contract)



Event and
tourism-related
contracts



Secured loan
agreements to SMEs



Hire-purchase and
conditional sales
agreements



Options to purchase,
sale & purchase/lease
agreement for
residential property



Lease of plant,
machinery,
commercial
vehicle

A CONSTRUCTION OR SUPPLY CONTRACT FOR THE PURPOSES OF THE COTMA?

- Must be a construction or supply contract as defined under Section 2 of the Building and Construction Industry Security of Payment Act (SOP Act)
- **Excludes** such contracts where a party carries out construction work or supplies goods or services as an employee

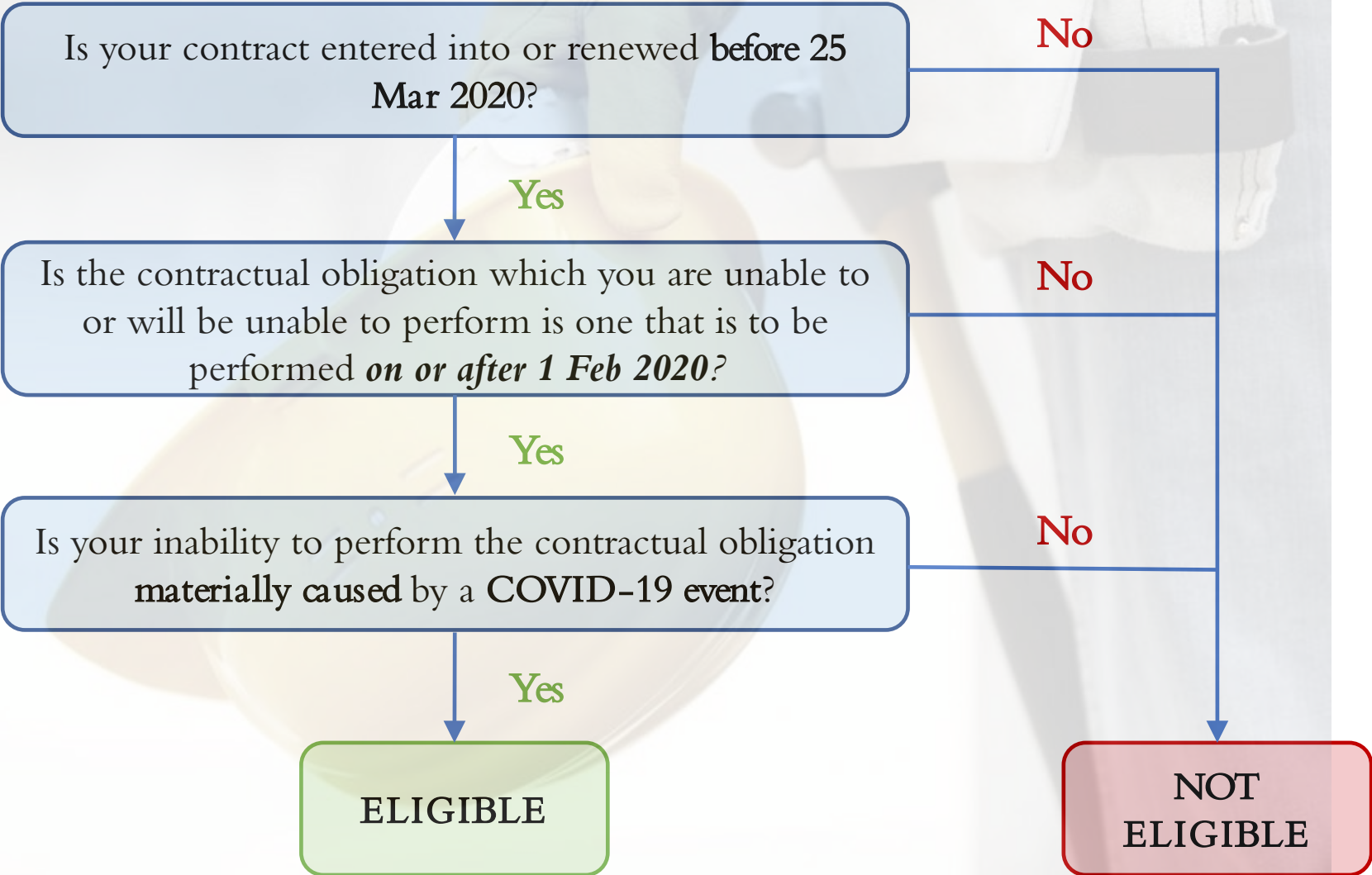
Construction Contract (S 2 SOPA)

An agreement under which a party undertakes to:

- (a) Carry out construction work, including the supply of goods or services or otherwise, for one or more other parties; or
- (b) Supply services to one or more other parties

“*Services*” means: conduct of feasibility studies, planning services, submission of applications to the authorities, site supervision services, professional engineering services, architectural design, surveying or quantity surveying services, project management services, building, engineering, exterior or interior decoration or landscape advisory services, provision of labour in relation to construction work

PART 2 – TEMPORARY RELIEF



“TO A MATERIAL EXTENT CAUSED BY A COVID-19 EVENT”

Definition of “COVID-19 event” (Section 2)

- (a) The COVID-19 epidemic or pandemic; or
- (b) The operation of or compliance with any law, order, or direction made in relation to COVID-19 (whether by a government, statutory body, or public authority of Singapore or of another country/territory)

Meaning of “material extent”

- A COVID-19 event must have meaningfully caused the inability to perform
 - *Does not have to be the dominant cause, but cannot be an insignificant cause*
- Even where there are multiple reasons for your inability to perform the contractual obligation, it would suffice that the COVID-19 event is a material reason

PART 2 - TEMPORARY RELIEF

- Moratorium on court and arbitration proceedings (Sections 5(3)(a),(b))
 - Prohibition does not cover arbitration proceedings under the International Arbitration Act
 - Limitation period extended by period of relief
- Prohibition against enforcement of judgment, award and adjudication determination (Section 5(3)(n))
- Prohibition against enforcement of security over immovable and movable property used for trade, business and profession (Sections 5(3)(c),(d))
- Moratorium on insolvency proceedings, bankruptcy and debt restructuring proceedings (Sections 5(3)(e),(f),(g),(h),(i))
- Other reliefs prescribed with effect from Oct 2020: Cannot increase charges or interest rates unless specified in the contract or agreed to, cannot impose new charges (Section 53(o))

ADDITIONAL RELIEF FOR INABILITY TO PERFORM CONSTRUCTION OR SUPPLY CONTRACT (Section 6)

1. Prohibition on call on performance bonds (Section 6(2))

- Does not prohibit the call entirely, the bond can still be called in the last 7 days before the expiry of the bond.
- To postpone call on bond, non-performing party can apply for extension of the bond under Section 6(3)

2. Relief from damages arising from delay in performance(Section 6(5))

Section 6(5):

“Despite anything in the contract, for the purposes of calculating the liquidated damages payable under the contract or assessing other damages in respect of the subject inability, where the subject inability occurs on or after 1 February 2020 but before the expiry of the prescribed period, any period for which the subject inability subsists and falling within the period is to be disregarded in determining the period of delay in performance by A.”

- Delay must be materially caused by a COVID-19 event
- Inability to perform occurs on on or after 1 February 2020 and before 30 September 2021

ADDITIONAL RELIEF FOR INABILITY TO PERFORM CONSTRUCTION OR SUPPLY CONTRACT (Section 6)

3. Defence to a claim for a breach of contract (Section 6(6))

Section 6(6):

“Despite anything in the contract, where the subject inability is the inability to supply goods or services in accordance with the terms of the contract and such inability occurs on or after 1 February 2020 but before the expiry of the prescribed period, the fact that the inability to perform the obligation in the contract was a material extent caused by a COVID-19 event is a defence to a claim for a breach of contract in respect of the subject inability”

Section 6(7):

- Any contractual right or obligation that accrues before 1 Feb 2020 and after 30 Sept 2021 **will not be affected**
- Any judgment, arbitral award, adjudication determinations, compromise or settlement given or made before notification for relief is served **will not be affected**



PART 2- NOTIFICATION FOR RELIEF (NFR)

- Prescribed period : 20 April 2020 to 30 September 2021
- Submission of prescribed form (Form 1) *via* the electronic system on Min Law's website
- Service on the other party to the contract, surety or guarantor of the subject obligation and issuer of the performance bond (if applicable)
- **Upon receipt of a notification for relief**, the temporary relief (under **Section 5**) will only last until (whichever is earlier):
 - a) The expiry of the prescribed period under the Act;
 - b) The withdrawal of the non-performing party's notification for relief;
 - c) Where the matter is referred by either party for assessment, upon the assessor's determination that the non-performing party does not qualify for relief.

APPLICATION FOR ASSESSOR'S DETERMINATION (PART 2- NFR)

The Assessor decides whether the case in question is one to which Section 5 applies:

- (a) Whether the party to the construction or supply contract is unable to perform an obligation; and
- (b) Whether the inability is to a material extent caused by COVID-19

Application (Form 6) must be made **by 30 Nov 2021**

Section 13(2): When making a determination, the Assessor:

- (a) may take into account the **ability and financial capacity of the party** concerned to perform the obligation that is the subject of the application, and other prescribed factors; and
 - (b) Must seek to achieve an outcome that is **just and equitable** in the circumstances of the case
- The Assessor's determination is binding on all parties to the application and all parties claiming under or through them. (Section 13(9))
 - There is **no appeal** from an assessor's determination (Section 13(10))

PART 8A –
EXTENSION OF
TIME FOR
CONSTRUCTION
CONTRACTS
(SECTIONS 39A,
39B)

Eligible contracts:

- Construction contract entered into before 25 March 2020 and remains in force on 2 November 2020
- As at 7 April 2020, any construction works to be performed under the construction contract have not been certified in accordance with the construction contract as completed

BCA Part 8A and Part 8B Guide (updated on 19 April 2021)

PART 8A - EXTENSION OF TIME TO COMPLETE THE WORKS (SECTION 39B)

- Extension of completion date for construction works by 122 days – No EOT application required, automatic.
Does not apply to contracts for the supply of construction-related goods or services.
- 122 days to be reduced by the number of days EOT granted under the construction contract or otherwise agreed by parties in the period between 7 April 2020 to 6 August 2020
- 122 days **not** applicable if:
 - (a) **any of the construction works were performed any time between 20 April 2020 and 30 June 2020** (both days inclusive); or
 - (b) Court or arbitration proceedings have, before 2 November 2020, commenced in relation to the failure to comply with the completion date
 - (c) Any judgment, arbitral award, or compromise or settlement entered into in the course of result of proceedings, has been given or made before 2 November 2020

(BCA) EOT- PUBLIC SECTOR CONSTRUCTION CONTRACTS

(Beyond COTMA)

BCA Circular 27 April 2021 (Simplified Claim process for EOT)

- Common ex-gratia EOT for loss of productivity between 7 Aug 2020 to 31 Dec 2020 – Total 49 days

Aug	Sep	Oct	Nov	Dec
14 days	14 days	9 days	6 days	6 days

Based on an estimated loss of productivity based on year-on-year comparison with Industry-Level Certified Progress Payment

Eligible contracts:

- Tender closed on or before 1 June 2020
- Not terminated on or before 7 Aug 2020
- Not certified substantially completed on or before 7 Aug 2020

PART 8B - COST-
SHARING IN
CONSTRUCTION
CONTRACTS
(SECTIONS 39C
TO 39F)

Eligible contracts:

- Construction contract entered into before 25 March 2020 and remains in force on 2 November 2020
- As at 7 April 2020, any construction works to be performed under the construction contract have not been certified in accordance with the construction contract as completed
- **Preconditions:**
 1. “**unable** to complete any of those construction works by the completion date”
 2. “inability is to a **material extent** caused by a COVID-19 event”
 3. “**incurred or incurs** any qualifying cost” in connection with the performance of the construction works



PART 8B- COST SHARING

- Prescribed period for costs-sharing may be claimed: 7 April 2020 to 30 Sept 2021 (> 17 months)
- Types of qualifying costs include: rent or hire-purchase instalment for plant or equipment, costs to maintain the site (eg. vector and pest control, utilities), costs to extend insurance or bond, rental for storage. It **excludes**: SMM costs, **manpower costs**, acceleration costs and costs supported by other schemes - Section 39D(9)

Quantum:

- 50% of qualifying costs incurred
- Capped at 0.2% of contract sum per calendar month, maximum total amount must not exceed 1.8% of contract sum

PART 8B - COST SHARING

- Claim for cost sharing “must” be claimed in a payment claim – Section 39D(6)
- The amount may be claimed as a “debt due” in arbitration or court proceedings.
- Disputes on cost-sharing may be submitted to adjudication under the SOP Act
 - The adjudication application must provide all information and documents relevant to the claim, including extract of the supporting contract relating to the qualifying costs, invoices and receipts showing amount of costs and date the costs were incurred, and information and documents showing the amount of relief that the contractor may have received from other reliefs.
- The adjudicator must determine (a) whether Part 8B of the COMTA applies; and (b) the amount under the respondent is liable to pay
 - Overrides Section 17(2A) of the SOPA preventing claims for loss or expense

BCA circular dated 27 April 2021 (Circular on simplified claim process for prolongation costs in public sector contracts)- eligible contracts up to \$100 million- GPEs will co-share 0.1% of contract sum for every month of delay rising from COVID-19 events

PART 10A -
INCREASE IN
MANPOWER
COST
(SECTIONS 79A
TO 79K)

Commenced on 6 Aug 2021

- Framework to adjust contract sum to address the increase in foreign manpower salary

Applicable contracts

- construction contracts as defined under the SOPA

Preconditions:

- Contract entered into before 1 October 2020;
- Works not certified completed by 10 May 2021;
- Not terminated before 10 May 2021 or no notice of termination given before 10 May 2021

PART 10A - CLAIM FOR INCREASE IN MANPOWER COSTS

- Application to Part 10A Assessor for adjustment in contract sum to take into account increase in the amount of **foreign manpower salary** costs at any time between **1 October 2020 and 30 September 2021** because of a COVID-19 event.
 - Time to make application: by **14 October 2021**
 - Claim for foreign manpower salary can include bonuses, allowances and overtime payments
- **Pre-condition:** Applicant must have made a reasonable attempt to negotiate with the Respondent for the adjustment - Evidence to be included in the application
- The Assessor will have to determine:
 - (a) whether there has been an increase in the amount of foreign manpower salary costs between 1 Oct 2020 to 30 Sept 2021;
 - (b) whether it is **just and equitable** in the circumstances to adjust the contract sum to take into account such increase, and (if so) the adjusted amount.

PART 10A DETERMINATION

- May be enforced in the same manner as a judgment or an order of court
- No appeal from a determination
- Binding on all parties to the construction contract and all parties claiming under or through them

Approach for Public Sector Contracts

BCA Circular dated 18 August 2021

- (a) 1 Oct 2020 – 30 April 2021: 1.3% of monthly progress payment
- (b) 1 May 2021 – 30 Sept 2021: no payment, because of \$160 foreign worker levy rebate already given

Any contractor who has incurred more foreign manpower salary increase can still put up their proposed adjustment.

Thank you



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