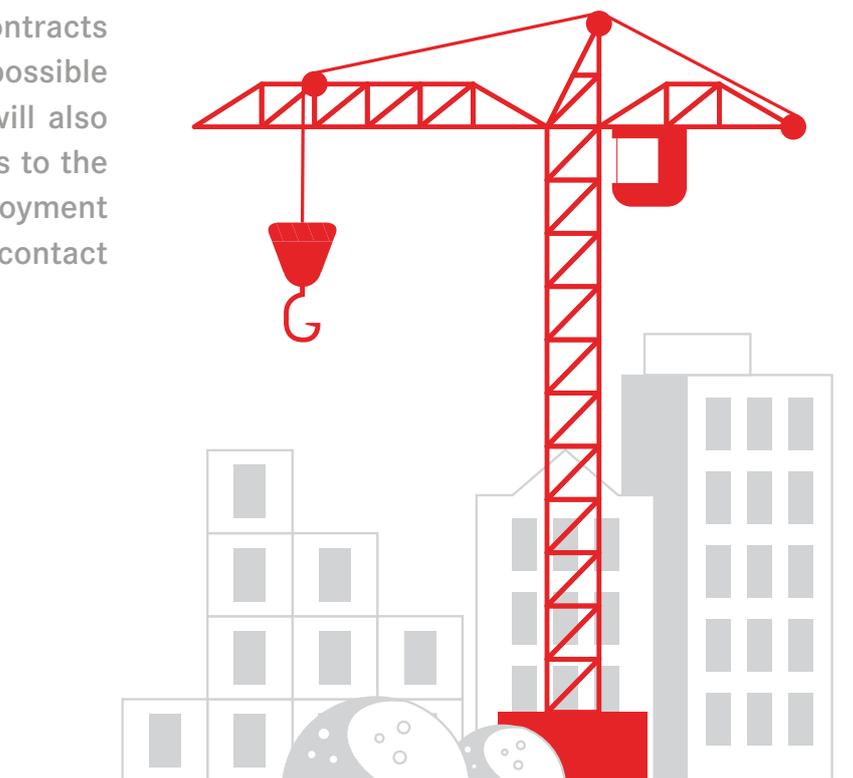


## CONSTRUCTION / INFRASTRUCTURE UPDATE

### Introduction

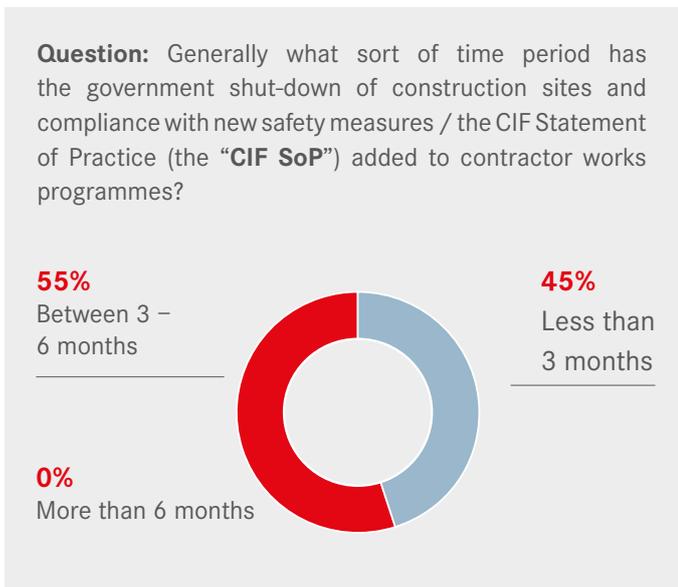
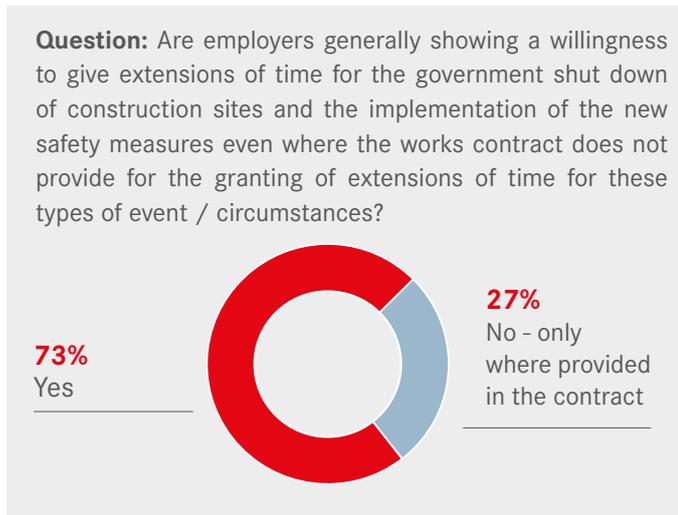
In this update, we will share with you our experience of the attitude of the construction sector with respect to current / existing COVID-19 claims together with some thoughts on future proofing construction contracts for both the current pandemic and possible further waves of the pandemic. We will also highlight for you some recent changes to the planning regime and Sectoral Employment Orders. For more information, please contact a member of our team listed below.



## COVID-19 Construction Contract Claims: the now and the future

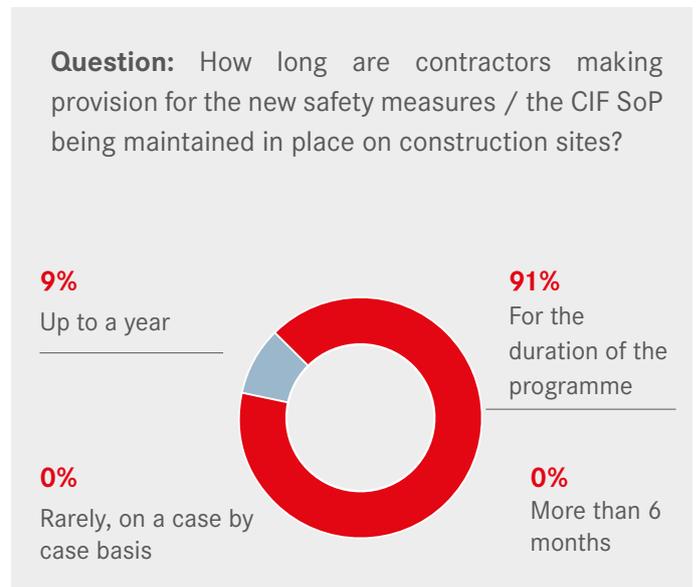
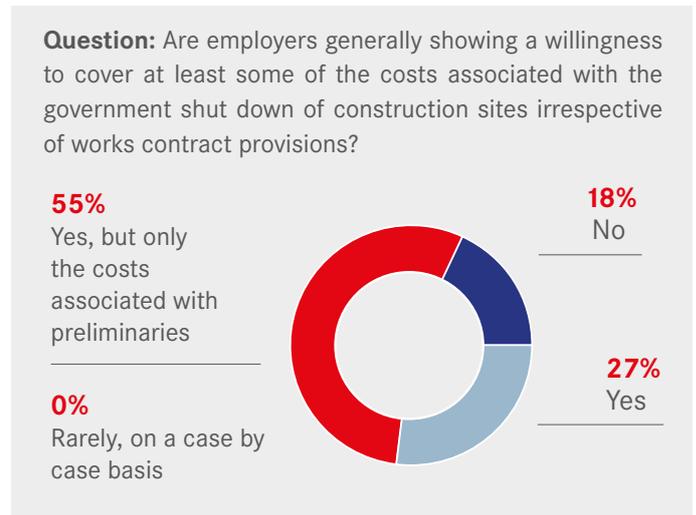
### The now

Matheson's construction / infrastructure specialists have taken the temperature of the construction sector with respect to existing / ongoing COVID-19 claims in the industry with some very interesting and consistent results. We asked key stakeholders in the industry a



The answers to these questions witness for us that notwithstanding the fact that extensions of time for the government shut down of construction sites and the implementation of the new safety measures are generally not extension of time (or loss and expense) triggers / events in construction contracts now, over three quarters of poll participants confirmed that employers are willing to grant extensions of time and over half of employers are open to making payments associated with preliminaries. In addition, over half of the contractors polled agreed

number of questions in relation to the willingness of employers to give extensions of time / costs on foot of the government shut down of construction sites, together with some other related questions, with results as follows:



that the government shut-down of construction sites and compliance with new safety measures / the CIF SoP would add between 3-6 months to the contractor's programme.

The results of this Matheson poll are very telling and in our view, a solid representation of the wider industry approach.

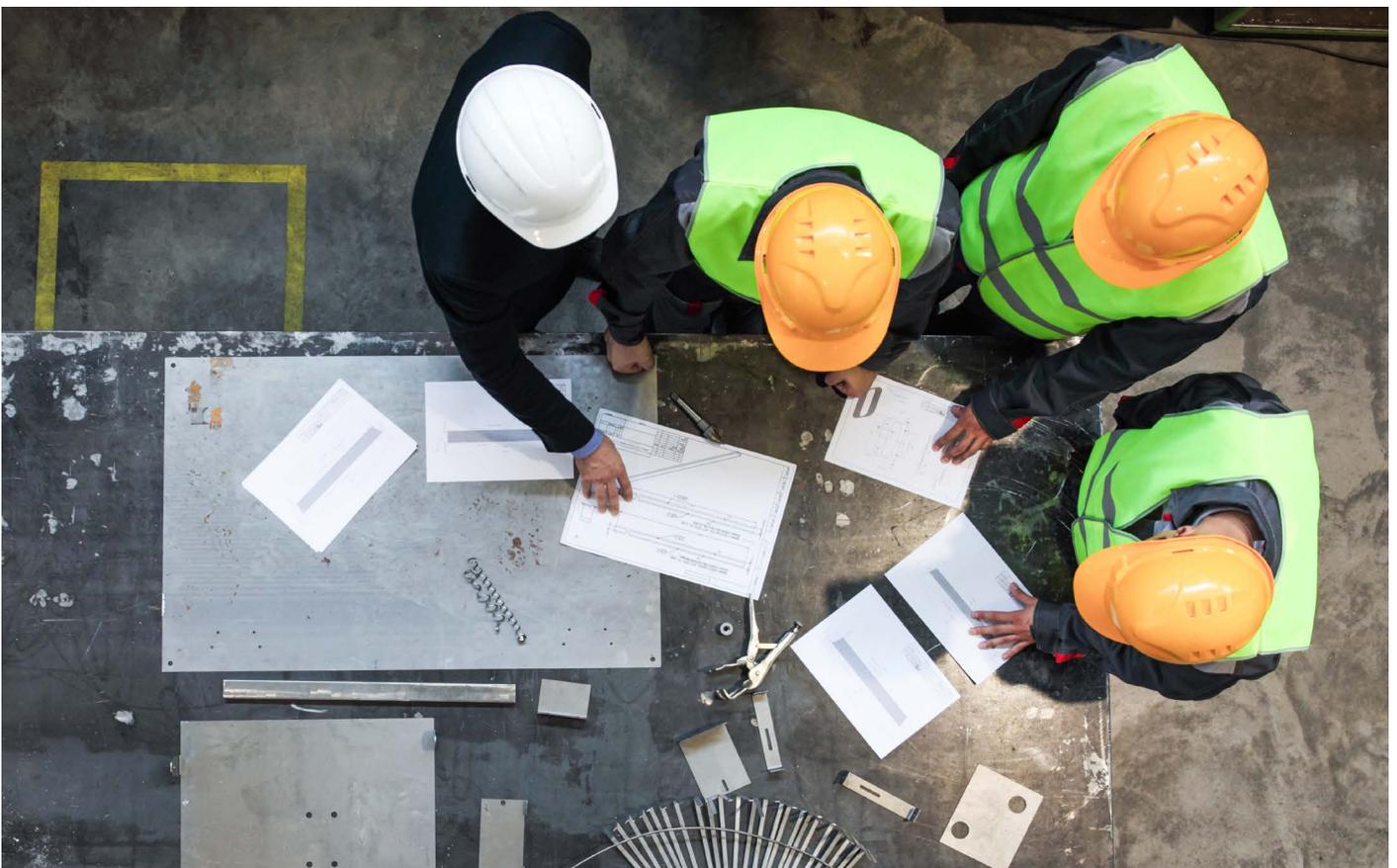
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## The future

So what of the treatment of COVID-19 claims in the context of new developments? We know that a force majeure event is something which is not foreseeable, is beyond a party's control and the impact of which is unavoidable and not just more expensive. The concept of force majeure is then difficult to reconcile with the COVID-19 world that we now live in and in the context of construction, the CIF SoP. The CIF SoP is available and contains detailed guidance on how to deal with the pandemic on a construction site and how to control activities on site such that the social distancing rules can be adhered to.

Future proofing construction contracts / developments / projects to deal with both the current pandemic and possible resurgences is a reality. It is also an unenviable task / exercise in a construction environment which is challenged by increased costs and extended programming, sub-contractor / supply chain concerns, sites currently working at a reduced capacity and COVID-19 claim payments being agreed / discussed.

Any kind of future proofing exercise will need to include a forensic review of the contract programme / the contract sum in order to analyse and assess the impact that compliance with the CIF SoP will have on developments. So, for example, the question as to whether the whole programme and all the activities within it will be affected by social distancing rules must be asked and answered. Whilst force majeure may be relevant as a concept in the context of possible resurgences of the pandemic, for construction contracts today, dealing with the current pandemic is a reality and must be managed.



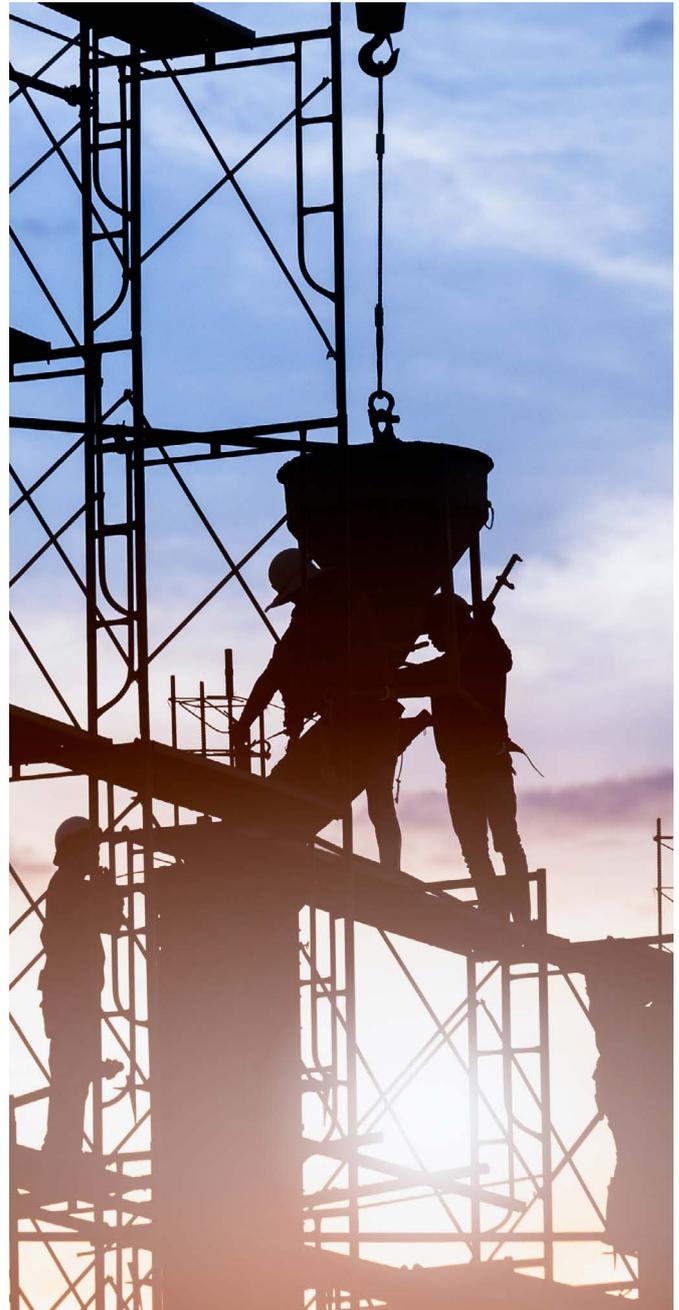
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## Sectoral Employment Orders U-turn

Sectoral Employment Orders (SEOs) are orders which regulate rates of pay, sick pay and pensions within a specific sector of the economy. SEOs are issued by the Minister for Business, Enterprise and Innovation on foot of a recommendation of the Labour Court pursuant to the Industrial Relations (Amendment) Act 2015 (the “Act”). They replace the old Employment Regulations Orders and Registered Employment Agreements which were found to be unconstitutional in 2011 and 2013 respectively.

Three SEOs have been issued for the construction sector. The first applied to general construction operatives which came into force in 2017 and was replaced in October 2019. The second applied to the mechanical engineering building services sector from 2018. The third applied to the electrical contracting sector from September 2019. SEOs have been quite controversial in their application as they can significantly increase the cost of construction for the employer or the contractor depending on how changes in law are dealt with under the related works contract.

However, on 23 June 2020, the High Court ruled that the underlying legislation giving the Minister the power to issue the SEOs is unconstitutional. The case considered the validity of the electrical contracting sector SEO. The basis of the Court’s decision to invalidate this SEO was primarily on the basis that the Minister did not exercise its power properly in making the order as he did not scrutinise the necessary report from the Labour Court to satisfy himself that the mandatory processes and procedures set out in the legislation were properly followed. The High Court however went further to consider the constitutional validity of the Act. In striking down the legislation, the Court found that the Act did not contain sufficient principles and policies to guide the broad discretion delegated to the Minister. Although the electrical sector SEO is the only SEO that has been specifically set aside, the other SEO’s will be unenforceable.



Any workers currently employed on the terms consistent with the SEOs are under contract with their employer and the provisions of those contracts will not be affected by this ruling ie, those contractual terms will continue to apply.

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## COVID-19 : Changes to Planning Regime

In response to the COVID-19 emergency, the government introduced **legislation** to disregard the period from 29 March 2020 to 23 May 2020 (inclusive) when calculating timelines under the planning legislation. As a consequence, time periods for decisions, submissions, applications for judicial review, etc were extended by that period (56 days). Planning permissions that do not have a specified duration, and are therefore subject to the default 5 year duration, will also be extended by an additional 56 days. The strategic housing development regime is likely to also now extend beyond the original 31 December 2021 cut-off date to 25 February 2022 by virtue of the excluded period (though the legislation governing that regime precludes any extension beyond 31 December 2021).

The COVID-19 emergency has also led to “virtual” planning judicial reviews. In May, Matheson acted for the developer in one of the first “virtual” hearings of a challenge to a proposed strategic housing development. The Courts are also keen to avoid delays and are hearing cases remotely, particularly planning judicial review (with an emphasis on those concerning strategic infrastructure / housing).

The planning authorities are also conducting remote pre-application consultations, and amended **Planning Regulations** on 22 May 2020, now require all planning application documentation to be made available on-line within five working days of receipt of the application, save for some exceptional circumstances.

Other legislative changes and guidance on the planning regime in light of COVID-19 specific to the construction

industry in the “new normal” working environment include **derogations to extend working hours of construction sites to be agreed**. The Department of Housing, Planning and Local Government has issued a **circular** requesting that planning authorities determine and agree a reasonable extent of discretion in respect of the working hours of construction sites in excess of those hours specified by planning conditions for all or some of the period to 9 November 2020. Any derogation is to be an exceptional time-limited arrangement applied on a case-by-case basis by planning authorities, having regard to individual local circumstances including factors such as the nature, scale, extent and location of the construction site.

Further information on the resumption of planning timelines is available from the Department of Housing, Planning and Local Government’s FAQs [here](#). COVID-19 related information is also available on An Bord Pleanála’s website [here](#).

Matheson are fortunate that since 13 March it has been business as usual for us as our IT infrastructure facilitated an immediate switch from office to exclusive remote working. We are acutely aware of the challenges so many of you have faced with the restrictions and continue to face so please do reach out to us if we can assist or if you just want to chat through any of the issues dealt with in this update. We would be happy to hear from you.

In the meantime stay safe.



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