

Chapter 10

The Role of Incentivization to Mitigate the Negative Impact of COVID-Related Disputes



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Abstract Project delays caused by the COVID outbreak are unprecedented. The associated loss and expenses are supposed to be equitably shared between the client and the contractor. Nonetheless, Standard Forms of Building Contracts in many countries do not consider delay caused by COVID-19 lockdown as a qualifying event for any time and monetary claim. Disagreements and disputes have arisen as a result. In this aspect, incentivization has been advocated as an effective measure to fill the equity gap. But how incentivization can be introduced into construction contracts, and how this may help reduce disputes arising from the COVID-19-associated delay has not yet been explored in prior studies. This chapter presents a study investigating how the claims for COVID-related project delays were managed. Sixteen semi-structured interviews with the contract administration experts were conducted in Melbourne, Australia—a city that experienced the world’s most prolonged COVID lockdown in 2020–21. Measures taken to mitigate the consequences of the COVID-related delay were identified. The effect of incentivisation on rebalancing the risk between the client and the contractor was also investigated. The findings reveal that although the existing Standard Forms of Building Contracts cannot be applied flawlessly in managing COVID-related time and monetary claims, interviewees were hesitant to introduce any radical change to the contract provisions. While incentivisation can instigate more active actions towards resolving COVID-related disputes, interviewees preferred the incentive schemes to be developed outside the construction contract regime. Views regarding how incentivisation can be implemented to avoid COVID-related disputes in future projects were sought. The study reported in this chapter illustrates how incentivisation may foster equitable risk sharing between the contracting parties in future contracts.

Keywords COVID-19 · Lockdown · Risks · Equity

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1 Introduction

Construction contracts often enable the project completion date to be extended under the following three conditions:

Condition 1: The delay event should be non-culpable. The contractor should justify that the delay event is not caused by its faults. Delay caused by the client or its agents (such as issuing design change instructions or work suspension orders); and delay caused by factors that are beyond the control of neither contracting party (such as exceptionally adverse weather, strikes, civil commotion, and force majeure); are typical non-culpable events.

Condition 2: Regardless of the nature of the delay, the contractor had used its best endeavour to mitigate the associated negative impact on the project.

Condition 3: The delay event should have disrupted the critical path of the up-to-date program.

During the extended period, the client's right to charge the contractor liquidated damages (LD hereafter) is forfeited. Furthermore, if the client (or its agents) caused the delay, it is liable for the contractor's loss and expenses (L&E hereafter), the amount would be equivalent to the number of extended days multiply by the pre-agreed daily rate specified in the contract.

Nonetheless, the above principles can be changed by amending the contract terms. Typical examples of the amendment include deleting 'exceptionally adverse weather' as a reason for claiming Extension of Time (EOT hereafter). Even though the delay caused by the adverse weather is beyond neither contracting party's control, clients genuinely believe that they had given chance to the contractors to 'price on the risk of delay' in their tenders. Contractors can first estimate the additional cost incurred by analysing the historical meteorological records, then reflect such additional cost on the tender price. The allowance is expected to be equal to the estimated delay period, multiply by the daily LD rate.

As such, risks of delay do not necessarily be equally shared between the contracting parties. Clients can offload their responsibilities for project delays to the contractors by amending the contract terms. They usually see this as 'equitable' for the contractors should have acknowledged the amended terms through their tender prices. Findings from previous studies reveal that such an arrangement shows no impediment to the contract execution, until the COVID-19 outbreak (Chirieac, 2020; Sun & Xu, 2021).

Clients generally accepted force majeure as a reason for the COVID-19 lockdown-related claims lodged by contractors (Chirieac, 2020; Sun & Xu, 2021). In these cases, force majeure was often interpreted as a 'neutral event'—a delay event that 'prevents performance of a contract, lie outside any of the affected party's control, and cannot be avoided or stopped' (Denison, 2021, p. 89). Under this logic, the contractor is entitled to an EOT. However, the contractor would not be compensated for any L/E associated with the extended work. Furthermore, clients generally do not see other

COVID-19-associated delays, including the disruption of the supply chain, as the 'neutral events'. Under this logic, many EOT and L&E claims were rejected.

The above practice stems from the premise that it is the contractors' own business decision if they didn't make sufficient allowance for undertaking the risk offloaded by the clients. Nonetheless, clients generally ignored the fact that the delays caused by the COVID outbreak are not the regular neutral events that the contractors can predict like inclement weather. Furthermore, long before the pandemic, scholars had already pinpointed the existence of a power relationship between the client and the contractor (Perez et al., 2017; West, 2014). The competitive tendering arrangement, as well as the tender interviews, pressurize the contractors not to reflect their risk-taking on their tender prices.

Findings from recent studies indicate that the clients generally lack compassion for the traumatic loss the contractors suffered from the COVID-19 lockdown (Mosey, 2021). Some contractors went into liquidation as their clients reject to share the risk of COVID-related delays equitably (Mosey, 2021; Larasati et al., 2021). The above reveals that the contracting parties may not easily compromise in settling claims caused by the COVID-19 outbreak. These also triggered debates about the need to review (and update) the standard form of contracts to fill the equity gap between the client and the contractor in a construction contract (Larasati et al., 2021). Equity gap, in this study, refers to the disparities in contract rights and responsibilities between the contracting parties (Zhu & Cheung, 2022).

In this aspect, incentivization has been advocated as an effective measure to fill the equity gap (Zhu & Cheung, 2021). Nonetheless, to the best of our knowledge, no study has explored how incentivization can be introduced into construction contracts. More specifically, how incentivization may help reduce disputes arising from the COVID-19-associated delay has yet to be studied.

In this chapter, we draw on the findings of a qualitative study to explore the role of incentivization to mitigate the negative impact of COVID-related disputes. First, how the construction contract terms were applied to assess the EOT and L&E claims arising from the COVID-related delay are studied. The enforceability of the relevant contract clauses is discussed. Second, measures that were taken to mitigate the consequences of the COVID-related delay are identified. Whether these measures were crucial proof for EOT and L&E claims is studied. Third, the effect of incentivization on rebalancing the risk between the client and the contractor is investigated.

This study is significant because managing construction disputes is not government-driven but a sector-wide practice. The success of dispute resolution usually relies on collaboration among the contracting parties. This study is significant because it examines the effectiveness of collaboration at the corporate level when parties face extraordinary situations like the COVID-19 lockdown. The findings will provide insight into how the existing construction contract paradigm may change through incentivization.

2 Research Methodology

This study adopts a constructivist/interpretivist approach. It analyses the subjective views of the participants in the real-world context (Talabi et al., 2021; Wong et al., 2019). Semi-structured interviews were conducted to investigate how COVID-related delays and claims are managed and how incentivization may help rebalance the risk between the contracting parties. Semi-structured interviews were chosen as this method enables the participants to demonstrate their unique angle on a matter (Madill, 2011). This method helps capture different perspectives of the contracting parties through a set of objective questions (Holdsworth et al., 2019). The interviews were structured in two stages (namely Stage I and Stage II thereafter). At Stage I, interviewees were asked to provide some background information about themselves and their projects. At Stage II, interviewees were requested to base on the background information they provided to respond to the following questions:

1. *Can you explain the rationale behind the decision-making in the relevant EOT and L&E applications in your project?*
2. *What do you think about the current Standard Form of Construction Contract/ or any bespoke contract being used in your project in avoiding disputes arising from the COVID-19-driven delay events?*
3. *What is the role of incentivization in rebalancing the COVID-19-driven delay risk allocation between the client and the contractor?*
4. *Is there a need for amendments to contract provisions in future projects to formalise the incentivization? Why and how?*

Semi-structured interviews were undertaken after approval was obtained from the local Human Research Ethics Committee. The interviews were conducted face to face, digitally audio recorded, and transcribed. Given the exploratory nature of the research, thematic analysis was deemed a suitable method to analyse the collected data. An inductive approach was taken to identify themes from the data (Guest et al., 2006). This was firstly done by the researcher familiarizing himself with the data by reading the transcripts a number of times to develop potential codes along the way. Codes were then used to develop the emergent themes that display the interesting features of answering the four questions asked at Stage II of the interviews. The inductive approach allowed notable themes and patterns to emerge from the transcript themselves (Pablo et al., 2021). Once key themes were identified, data was checked again by the researcher to ensure the reliability of the transcripts.

A purposive sampling strategy was applied. Project managers and contract administrators were the targeted respondents for this study. Potential respondents were identified from two major sources. Firstly, the registered contractors' list, maintained by the Masters Builders Association of Victoria, was utilized. Master Builders is a major building and construction industry association in Australia, and its members represent 95% of all sectors of the Australian building industry. Secondly, potential respondents were searched from general browsing on the official webpages of professional institutes including the Australian Institute of Builders, Australian Institute of

Architects, and Engineers Australia. Interviewees were randomly selected from the above pools of potential respondents.

Researchers in qualitative studies emphasised that there should not be strict guidelines of minimum sample size for the semi-structured interviews (Patton, 2020; Hansen et al., 2020). More importantly, semi-structured interviews should continue until ‘the depth of data to reach theoretical saturation—the point at which no new data emerges to provide additional insights into the research question’ (Watkins et al., 2017, pp. 3). Following this approach, sixteen semi-structured interviews were conducted in Melbourne, Australia. Melbourne is considered the best place to conduct this research study because, since March 2020, this city has spent the world most prolonged period (262 days) under COVID-lockdown as any place globally. During this period, the progress of the construction projects was impacted by different levels of site closure and social distancing orders.

3 Interviewee Profile

The demographics are presented in Table 1. Interviewees were assigned reference codes (from A to P). Nine out of the sixteen interviewees of the interviewees are working for the developers and contract administration consultant firms. The rest are from the contractor firms. This sample mix balances contracting parties’ views (Saunders et al., 2016; Talabi et al., 2021). All interviewees have more than five years of experience in construction contract administration. Adding strength to the responses, one-third of the interviewees have more than 15 years of contract administration experience. The creditability of the interviewees is indicative of their service to the industry; thus, their responses are believed to be reflective of the industry’s views.

Interviewees were first asked whether they had been involved in a construction project in which progress had been affected by the COVID-19 lockdown. All answered ‘Yes’; thus, they were invited to continue with the interviews. They were then asked to respond to the interview questions based on their contract administration experience of that specific project. Information including the project nature, contract sum, project duration and the forms of contract being used were collected and presented in Table 2.

Such background information is crucial because this affects how the interviewees respond to the research questions. It’s worth noting that the Australian Standard Form of Contract (AS) or amended Australian Standard Form of Contract is being used in the interviewees’ projects. Three out of the sixteen projects used AS2124—a standard form for operating lump fixed-price contracts. Four projects used AS4902 or AS4300, which are intended for design and build projects. The rest of the projects used AS4000, which is suitable for novated design and build projects.

Table 1 Interviewees' profiles

Interviewee	Firm	Role	Experience in contract administration (Years)
A	Developer	Senior contract administrator	6–10
B	Developer's consultant	Senior contract administrator	6–10
C	Developer's consultant	Director	16–20
D	Developer	Senior contract administrator	6–10
E	Contractor	Senior contract administrator	6–10
F	Contractor	Project Manager	16–20
G	Contractor	Contract administrator	11–15
H	Contractor	Contract administrator	6–10
I	Developer	Associate Director	6–10
J	Contractor	Senior cost planner/contract administrator	11–15
K	Contractor	Contract administrator	11–15
L	Developer	Director	30 +
M	Contractor	Senior contract administrator	11–15
N	Developer	Contract administrator	6–10
O	Developer	Director	30 +
P	Developer's consultant	Senior contract administrator	16–20

4 Findings and Discussions

Key findings of the thematic analysis of the elicitation study are presented in this section. From the interviewees' responses, firstly, the rationale behind the decision-making in EOT and L&E claims is introduced. Secondly, the effectiveness of the current Standard Form of Construction Contract/ or any bespoke contract terms in avoiding COVID-19 related disputes is presented. Then, the role of incentivization as understood by interviewees in rebalancing the allocation COVID-19-driven delay risk is articulated. Finally, the need for amendments to contract provisions in future projects to formalise the incentivization is evaluated.

Table 2 Project profiles

Interviewee	Project nature	Project duration (month)	Project sum (\$M)	Construction contract used in the project
A	Private—hotel and commercial complex	25	50	Australian Standard Form of Contract (AS) 4902—amended
B	Private—residential	18	60	AS4000—amended
C	Private—residential and commercial complex	24	200	AS4000—amended
D	Public—hospital	18	120	AS4000—amended
E	Private—residential and commercial complex	30	10	AS4000—amended
F	Private—residential and commercial complex	36	190	AS4300
G	Private—residential	18	80	AS4000
H	Private—commercial	17	30	AS4000—amended
I	Public—utilities (civil)	8	17	AS2124
J	Public—hospital	30	480	AS2124
K	Private—clinic	8	13	AS4000
L	Private—residential	16	22	AS4000
M	Private—commercial	18	30	AS4902—amended
N	Public—infrastructure	18	20	AS2124
O	Private—residential	9	10	AS4000—amended
P	Private—residential and commercial complex	24	140	AS4300—amended

4.1 Rationale Behind the Decision-Making in EOT and L&E Claims

The first theme identified under this question is ‘*government-enforced lockdown was understood as force majeure*’. Standard forms of construction contracts usually have a ‘Force majeure’ clause that enables the contractor to claim EOT for any qualifying event. However, standard forms of construction contracts rarely articulate what event is qualified as force majeure. Force majeure within the construction field is understood as Acts of God, including natural disasters such as floods, bush fire, tropical cyclones, and earthquakes. Recent case law further extends the applicability of force majeure to manmade effects, including strikes, riots, terrorism, war and cyber-attacks (Denison, 2021). The use of the force majeure clause in managing delay claims associated with the COVID-19 lockdown is a new concept. When the force majeure clause is applied to manage COVID-19 lockdown-related claims, contracting parties may pose different views (Vickery, 2020).

Interviewee A, who is working for the developer in a commercial and hotel complex project responded.

'We had 4 weeks of state-wide lockdown where no labor is allowed to work on-site. The contractor put in time extensions for that. Obviously, we granted that (EOT) because it was beyond their (the contractor's) control.... But contractually there is nothing there for them (the contractor) to claim loss and expenses. And, without any prejudice, we will entertain something and help you guys (the contractor) out. Most clients are open to hearing and understanding if the contractors are really struggling. People just want to work together to come for the better of the project. it's just good faith, I think.' (Interviewee A, Developer).

The above view is consistent with the published work of Chiriac (2020) and Sun and Xu (2021) who reported that the construction practitioners often define government-enforced lockdown as force majeure to legitimatise their decisions in granting EOT to the contractor under the existing contract framework. However, the 'good faith' Interviewee A mentioned about might not be shown by all the developers, as the second theme of this question was identified as *'delays unrelated to the government mandated lockdown was not compensated.'*

Interviewee F, who is the senior contract administrator of a first-tier contractor firm says *'Even without the lockdown, the government put in place social distancing measures that limited the number of laborers and reduced the productivity on site... Also, there are lots of additional cost for the disruption of the imported materials supply, sanitization, temperature checking and reporting. All were regarding as the loss and expenses that cannot be predicted during tender submitted. But our client denied our loss and expenses claims.... this is unfair.'* (Interviewee F, Contractor).

Views from the clients can be very different, *'I went back and forward a couple of times and a fair bit of review went into the contract itself. I also sought additional legal advice given the nature of claims lodged by the contractor. Under the contract, the contractor should maintain the risk of any changes to OH&S (Occupational Health and Safety) and safety changes to legislation. And it wasn't provided to them any ground to claim any loss and expenses for complying with the new OH&S requirements.'* (Interviewee L, Developer).

Clients' argument looks sharp and clear. It is the Australian Work, Health, and Safety Act that requires contractors to provide a safe workplace for their employees. With or without the COVID outbreak, the contractors should provide a safe workplace in accordance with the Australian law.

'But the Law never says we got to employ additional resources to keep those temperature checks and everything in order... the client's denial of sharing the additional expenses is not helping anyone'. Interviewee E, who is working in the contractor's firm reminded us to consider this matter in another perspective.

As a general principle, it is preferable for the contracting party who has control over an event to assume the delay risk arising from its occurrence. For example, a delay caused by the contractor's suppliers will typically be borne by the contractor. Even though it is not within the contractor's direct control, the contractor should manage the risk through practical steps such as careful selection and monitoring of its suppliers and contingency planning should its preferred source of supply become

unavailable. However, there has been no mention of whether the additional cost should be shared.

'Instead of shipping the materials, we got them air-freighted which was 10 to 15 more expensive than estimated... Unfortunately, it was still considered more economical than compensating liquidated damages.' (Interviewee G, Contractor).

Under this logic, clients have every right to reject any EOT and L&E claim caused by COVID-related delay. In the client's perspective, defining government-enforced lockdown as force majeure may have already been a favour they gave to the contractor. Such views may disappoint many governments as they have been encouraging fairer and more responsible contractual arrangements to support the viability of the construction contracts during COVID (United Kingdom Cabinet Office, 2020; Ministry of Law Singapore, 2020).

4.2 Effectiveness of the Existing Contract Terms in Avoiding COVID-19 Related Disputes

Theme 1: Time-related claims under the contract are still possible.

Interviewees who are working for the developers generally perceived that the negotiation of EOT claims under the contract is straightforward:

'..... 'Force majeure' and 'Delays caused by the public/statutory authorities' are valid grounds for EOT claims under the contract. By far I don't aware of any dispute raised by the contractor.... Delay claims caused by COVID lockdown can be settled under the current contract terms. They are just usual EOT claims. Thus, the contractor should justify how the lockdown has affected critical path activities.... It [the contractor] should show its effort in mitigating the delay and check their actual revised critical path.... I need to see its behaviour, not just grant the period it asked for' (Interviewee C, Developer's consultant).

However, interviewees from the contractor firms are generally disappointed as they are accepting the clients' judgments grudgingly:

'Contractor loses most of its flow in the program after the government made it clear that the lockdown would last long enough to make the work impossible to operate in full swing... While the developer pledged to support...., it emailed us saying that any time claim other than the government announced lockdown is not qualified to claim EOT.... You're not getting the same outcome when you are asking your builder to take on more risk. The contractor simply doesn't have the funds to deliver what you may have expected. You can have every mechanism to make every claim impossible, but that might lead you to a court case, not to a good project outcome so.' (Interviewee H, Contractor).

'...clients have not been very receptive to any exclusions or clarifications about the impacts of COVID. All through last year, we are following the contract terms to manage time claims in a way that the client considered as correct. We reluctantly define COVID as Force majeure, Delays caused by the public/statutory authorities

and whatever they like to qualify for EOT claims. But none of them (the conditions) is 100% fit for the nature of COVID-related delay.... And now new contracts kick in, and we will ensure that they will provide a clear definition of COVID delay ... I can see the improvement in avoiding disputes through reading the terms more cautiously' (Interviewee J, Contractor).

The above findings show that disputes caused by COVID-related time-related claims can be effectively eliminated without reforming the construction contract mechanism. Interviewees mainly sought clarification or articulation of the existing contract provisions, and rarely thought of any radical change in the contract administration practice.

Theme 2: Loss and expenses claims are only negotiable outside the contract framework.

Interviewees from the developers and consultant firms conceded that existing contract forms lack relevant contract provisions to deal with COVID-related loss and expenses claims. This made dispute settlement within the existing contractual framework difficult:

'We made our professional judgment on loss and expenses claims, and the contractor has the ability under the contract to dispute the judgment that has been made. That dispute then falls between the developer and the contractor before it gets into further mediation etc. And then they can take it all the way further if the disputes can't be resolved.... I don't see why the client should have to pay loss and expense for the government shutting down their sites, and they're getting nothing out of it in terms of construction and the contract provisions' (Interviewee B, Developer's consultant).

'I think that can become quite difficult dealing with things (COVID-related loss and expenses claims) through the contract, particularly when there isn't any clause there to deal with ... it becomes a matter of interpretation, and those disagreements can escalate. But I think it is quite dangerous to set a precedent to misinterpret or over-interpret the contract term to enable claims within the mechanism too' (Interviewee D, Developer).

Interviewees from the contractor firms shared similar views that the respective loss and expense claims can only be resolved outside the contract framework. The direct loss and expense incurred by COVID outbreak include the additional cost of sanitization of the workplace and machines, the additional government-imposed social distancing measures, late delivery of materials, and the extra labour costs for accelerating the work through night shifts.

'It was difficult to put a valid loss and expenses claim under the contract because catching back the loss of productivity is very difficult to measure. We can genuinely argue that the loss of productivity is caused by the lockdown measures, but clients will ask us for evidence supporting that the direct loss is really caused by the COVID outbreak, not our mismanagement. They knew it is impossible to provide evidence like this before they asked. The messages they conveyed have been very clear. Approving loss and expense claims of this kind under the contract is a no-go zone that the contractors shouldn't reach' (Interviewee K, Contractor).

'A massive part of our disagreements is, actually, the cost we spent on mitigating the COVID-related delay..., and the disparity is that under the contract it is not clear who should have the responsibility on such additional cost... COVID is unprecedented. And it is quite obvious that if we only follow the contract provisions, the disputes can never be resolved' (Interviewee M, Contractor).

Interestingly, if the responsibility for the loss and expense was discussed outside the contract framework, claims become negotiable:

It is understandable that clients don't wanna tarnish the controls or mechanisms or like of the existing contract... but it doesn't mean that we don't wanna help the contractors. At some point, we may suffer more loss if they collapse. We can form a separate agreement, dealing with such claims outside the existing contract mechanism (Interviewee I, Developer).

4.3 The Role of Incentivization in Rebalancing Risk Allocation

Most interviewees believed that incentivization can mitigate some negative impacts of COVID-related disputes.

'Clients are not always trying to offload risk to the contractors. But it is ironic that they have been quite successful in doing that mainly because they assume the contractors would behave genuinely in tender pricing.....If clients can't expect self-regulation from the contractor, they can incentivize the resolution of COVID-related disputes. The concept is like introducing a contingency or provisional sum in the Bills of Quantities. Clients put upfront the ceiling of their undertakings of the loss and expense caused by the COVID-related delays. As an equal amount of incentive is allowed in tenders for the contractors' to avoid disputes, this enables fairer tender comparison' (Interviewee P, Developer's consultant).

The major concern should be whether equitable risk allocation can be achieved under the existing procurement and contract mechanism. COVID outbreak reaffirms that the answer is, unfortunately, No. But the industry should admit that the core problem is whether there is COVID that caused delay disputes. The point is that the contractors have long been taking overly aggressive commercial positions, trying to win work and thus taking more risk, reducing their margins, and accepting contract conditions they shouldn't accept. Who's gonna shoot first is the colloquial way of saying it, so some of them do take on more risk to win work and that becomes the status quo and that was. Incentivization, to some extent, relieves such brutal rivalry (Interviewee O, Developer).

Responses from the interviewees with contractor backgrounds focused on the feasibility of incentivizing dispute settlement.

The disruption and the associated loss caused by the COVID-19 outbreak is unprecedented. We find it difficult to execute the existing terms to resolve claims associated with the COVID-19 outbreak anyway. Thinking this outside the box is a

good initiative.... Any form of incentivization should be welcomed. At least it shows that the client is willing to resolve this problem through collaboration, not endless finger-pointing.... (Interviewee F, Contractor).

Not only government-enforced lockdown is out of the contractor's direct control, but also the disruption of the global supply chain. Apparently, our client knows no one can address the unprecedented changes in international supply chains. We didn't have any chance to predict such loss during the tendering stage. To me, the incentivization is not merely for unprecedented situations caused by the COVID outbreak, but for any circumstance when risk cannot be reasonably estimated by the contractors. Incentivization is a sign from the clients that they acknowledge this issue(Interviewee K, Contractor).

Previous studies have highlighted that the incentivisation can shape cognitive and behavioural change of one party so as to meet the expectation of another (Dix, 2020). Similar findings were revealed in this study. Interviewees found incentivisation as a tool that drives the contractor's behavioural change in tender pricing.

4.4 The Need for Formalising Incentivization in Contracts

Interviewees' responses to the first three questions revealed that the current contract forms they used might have some deficiencies in managing the EOT and L/E claims triggered by the COVID-19 pandemic. It's logical to expect that the interviewees would support formalising incentivization in the contracts. Surprisingly, the findings show that most interviewees opposed it.

'We used to tailor our own set of amended clauses and add them to the Special Conditions of Contract anyway. Any incentive schemes can be enforced even without touching the current version of the Australian Standard (Form of Contract).' (Interviewee N, Developer).

'Everyone's been hurting, both the client and the contractor.... but you can foresee that our appetite to accept risk will change. With or without incentive embedded into the contract, we will pass the additional preliminary costs to the client, then ultimately the end customer. Incentivization, if it won't show how much the client would pay, can make future bidding more complicated. I don't think it's a good idea to show the cost (of incentivization) in the contract.' (Interviewee F, Contractor).

'There is a notable noise asking the developers to be more sympathetic to the contractors' situation. But it remains unclear how the developers can help. To me, incentivization can be operated like an advance payment scheme. If the contractor can justify its cash flow being affected by the pandemic, it can apply for this fund to keep its business afloat. The client will pay the premium of the advanced payment bond for the contractor. I don't think touching the contract terms can help. Touching them may hit the nerves of both parties which can create more disputes. If the intention of incentivization is genuine, let's simplify the procedures to motivate the contractor to get helped quickly.' (Interviewee C, Developer's consultant).

The results indicate that interviewees do recognize incentivization as a tool to mitigate the negative impact of COVID-related disputes. However, formalising incentivization should not involve any radical change to future contract clauses. The findings are in line with the McDonald et al. (2008) who advocated the need a surveillance mechanism to avoid any incentive scheme from creating tensions among the contracting parties.

5 Summary

COVID outbreak has traumatised contracting parties who used to assume time-related risks can be offloaded to the contractors through construction contract terms amendment. Ignoring the contractors' needs to recover the unanticipated losses caused by the COVID outbreak would not only lead to disputes but also contract frustration. COVID-19 exposes the weakness of the Standard Forms of Contract in managing related loss and expenses claims. While interviewees conceded that the contractors suffered an irrecoverable loss in time and cost during the lockdown period, their legal determination constrained their responses.

If the clients are genuinely open to hearing and understanding the contractors' needs, the conversation can start with developing and formalising new measures to avoid disputes arising from COVID-related claims. Interviewees of this study provide valuable suggestions to fair project risk allocation and disputes avoidance.

This study elucidates the role of incentivization in mitigating the negative impact of COVID-related disputes. Surprisingly, the findings of this study do not build a case for reforming the Standard Forms of Contract. Interviewees generally believed that incentivization is enforceable even without amending the existing contract terms. Incentivization helps articulate the client's undertakings of COVID-related delay risk. It rationalises risk assessments, thus promoting reasonable and responsible tender pricing. Incentivization also fosters collaboration in resolving the contractor's cashflow problem which is considered a key motive of claims and disputes.

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