

CONTRACTUAL IMPLICATIONS RELATED TO THE CONSTRUCTION INDUSTRY IN PANDEMIC SITUATIONS: A REVIEW OF CASE LAWS

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ABSTRACT

COVID-19 catastrophe has created various complications related to the construction industry. Conflicts arise between parties to the contract and among the majority of stakeholders. A successful contractual implication can manage the contractual challenges arising within construction job sites. The most common contractual provisions for the situation are Force Majeure and Changes in Legislation clauses in standard conditions of contracts. Sufficiency of the available remedies under the provisions applicable to COVID-19 or any other pandemics is a current talking point in the construction industry. Following questions are addressed to manage these unprecedented situation-related contractual conflicts: 'what are the contractual challenges faced by the construction industry?', 'what are the most applicable contractual provisions to a pandemic situation?', 'what are the pandemic-related guidelines applicable to the construction industry?', and 'what are the available legal cases to use in a pandemic situation?' The questions were discussed by carefully analysing existing literature referring to Case Laws. Future researchers are encouraged to suggest appropriate strategies for contractual challenges to facilitate the construction stakeholders to prepare them for future pandemics.

Keywords: Case Law; Contractual Challenges; Contractual Provisions; Construction Industry; Pandemic.

1. INTRODUCTION

The world has been affected by crises such as Spanish Flu in 1918, Asian Flu in 1957, and Hong Kong Flu in 1968 during the last century, and Severe Acute Respiratory Syndrome - SARS in 2002, Swine flu in 2009, and Ebola in 2014 during near past (Vithana et al., 2020). COVID-19 is the prevailing crisis, announced as a pandemic by the World Health Organisation (WHO) and expeditious diffusion worldwide (Husien, et al., 2021). Kiraz and Ustun (2020) stated that the world had faced a critical situation where none could foresee its impact. The prevailing COVID-19 pandemic has been a massive threat to the contractual performance in many industries, including the construction sector (Niraula, et al., 2008). Apart from the high risk of infection through droplet contamination and exposure to the virus, workers and professionals in the construction industry are currently facing a job risk with the novel Coronavirus pandemic

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(Zheng, et al., 2021). COVID-19 outbreak reminds the researchers about the need for creative responses to contractual challenges arising with pandemics (Pedamon and Assileva, 2021). The construction organisations have been daunted with COVID-19 due to the uncertainties and less awareness on contractual challenges resolution (Andres, et al., 2020). Furthermore, Bailey et al. (2020) expressed that events such as the COVID-19 pandemic generally engage contractual provisions concerning the consequences of unforeseen events. Evidently, the construction industry was always embroiled with protracted and costly dispute resolution procedures (Construction Leadership Council [CLC], 2020). In addition, Sierra (2021) stated that the terms time and money are related to disputes in construction projects, and the most common conflicts are finance-related and time-related failures.

Moreover, the author disclosed that the prevailing pandemic situation had aggravated both these problems. The pandemic originated by COVID-19 adverts the necessity of pre-preparation to overcome unforeseen risks and have contingency plans for managing projects in the construction sector (Ogunnusi, et al., 2020). Therefore, it is prudent to address the pandemic's impact at the beginning and end of the crisis to prepare for any future potential and learn lessons for future preparations of the construction industry (Iqbal, et al., 2021).

This paper aims to review available most common contractual provisions related to cases within the construction industry, globally and locally, to determine whether these available cases can implement when parties to the contract claim their entitlements for pandemic-related challenges. The paper is structured as follows. First, a brief introduction to the study, followed by the research method adopted, a compressed literature synthesis, an insight of the research methodology adopted for the study, and a discussion of findings. Finally, the conclusion is formed based on the key research findings of the study.

2. RESEARCH METHOD

A researcher can review existing researches using several methods (Grant and Booth 2009). To achieve the aim of this research study, a comprehensive review of case laws was conducted. Available cases in counties like United State (US), France, England and Wales, Ghana, Singapore and China were incorporated to come up with a good review.

3. COVID-19 AND THE CONSTRUCTION INDUSTRY

Aviantara (2020) brought up the 'pandemic' as a critical risk factor that ought to discuss within the construction industry. The construction industry is always linked with the other industries directly or indirectly (Tripathi and Jha, 2018). As summarised by Iqbal, et al. (2021), the construction industry in most countries investigates the applicable approaches to overcome the negative impacts which may arise due to pandemics, such as the novel Coronavirus; this is a fundamental need to obstruct an economic downturn (Zamani, et al., 2021). Therefore, construction stakeholders should be able to answer the following questions: *what are the absolute recommended practices to make secure the construction industry against a pandemic situation?* and *what are the unprecedented impacts and consequences of the COVID-19 on the construction industry?* (Porter, 2020). Husien, et al. (2021) explained that some of the impacts by cause of COVID-19 were more wrathful and pathetic for all construction practitioners in the construction industry. Porter (2020)

reported that multiple questions remain within the construction industry and the pandemic situations, which have not been answered yet.

3.1 CONTRACTUAL CHALLENGES IN CONSTRUCTION JOB SITES

The most prominent impacts of COVID-19 are the suspension of projects, labour impact and job loss, time overrun, cost overrun, and financial implications (Gamil and Alhagar, 2020). Husien, et al. (2021) reported that the pandemic raised many challenges at the level of the workforce including low or halting productivity, production time and costs, as well as disputes in contractual formulas for construction projects.

3.1.1 General Challenges with a Pandemic in Construction Job Sites

Through the existing literature, Pamidimukkala and Kermanshachi (2021) have identified general challenges faced by the construction industry and classified them into five categories: organisational, economic, psychological, individual, and moderating factors.

Table 1 shows the challenges under each category.

Table 1: General challenges related to COVID-19 in construction job sites

Category	Challenges
Organizational Factors	<ul style="list-style-type: none"> • Lack of safe working environment • Challenges due to work from-home practices • Managing a heavier workload • Management team’s lack of leadership knowledge and skills
Economic Factors	<ul style="list-style-type: none"> • Reduced accessibility to updated tools and equipment needed to accomplish the tasks • Uncertainty regarding future of workplace • Supply chain disruptions • Cash flow delays
Psychological Factors	<ul style="list-style-type: none"> • Social isolation due to teleworking • Stress and burnout
Individual Factors	<ul style="list-style-type: none"> • Responsibility for personal and family needs when working • Learn communication tools and overcome technical difficulties • Feelings of not contributing enough to work • Adjusting to new work schedules
Moderating Factors	<ul style="list-style-type: none"> • Effect of COVID-19 on vulnerable groups • Gender-based impacts • Impacts on migrant workforce

Delays in permits or license, Escalations in prices, High demand of suppliers and manufacturers, Increase of claims and disputes, Lack of funding, Less productivity in site works, Payment delays, Project abandonment, and Suspensions or terminations of projects are the other issues summarised by Alsharef, et al. (2021), American Society of Civil Engineers [ASCE] (2020), and Osuizugb (2020), in addition to the general challenges identified by Pamidimukkala and Kermanshachi (2021). On the other hand, Zamani, et al. (2021) mentioned project duration, construction material, and human resources are the three main factors related to project operations. According to the

authors, project operations were delayed because COVID-19 smashed these three factors. Although parties to the contracts needed to restart project activities, the inherent labour-intensive nature of the construction project caused additional challenges due to the onsite necessity of construction task delivery and the constraints on the feasibility of social distancing on an active job site (Zheng, et al., 2021). The most common reasons for delays in projects are that the daily working period has been shortened and the absence of employees to the assigned work on time (Alenezi, 2020). Construction parties should always be aware of uncertainties, incompleteness, and unforeseeable circumstances affecting construction costs (Elhag, et al., 2005).

3.1.2 Contractual Challenges with a Pandemic in Construction Job Sites

The contractual challenges, stakeholders' obligations, and contractual provisions may differ from the general situation in pandemics like COVID-19 (Andres, et al., 2020). Kabiru and Yahaya (2020) addressed the impact of COVID-19. They discovered that professionals face legal challenges in the construction industry - e.g., contractual issues raised to assist contractors in claiming loss and expenses and extension of time (King, et al., 2021). Proper contract administration is one of the main challenges the construction stakeholders face with this crisis (Niraula, et al., 2008). Legal provisions in several contractual documents related to construction contracts may vary among countries and from project to project (Ogunnusi et al., 2020).

The government, as the client, should revise the contract to aid the contractor to claim losses for projects delayed due to lockdown, and the government should grant an Extension of Time (EOT) to cover the period of projects stopping (King, et al., 2021). Figure 1 presents the contractual challenges related to a pandemic situation in the construction industry identified by Jayathilaka and Waidyasekara (2022) through a systematic literature review.

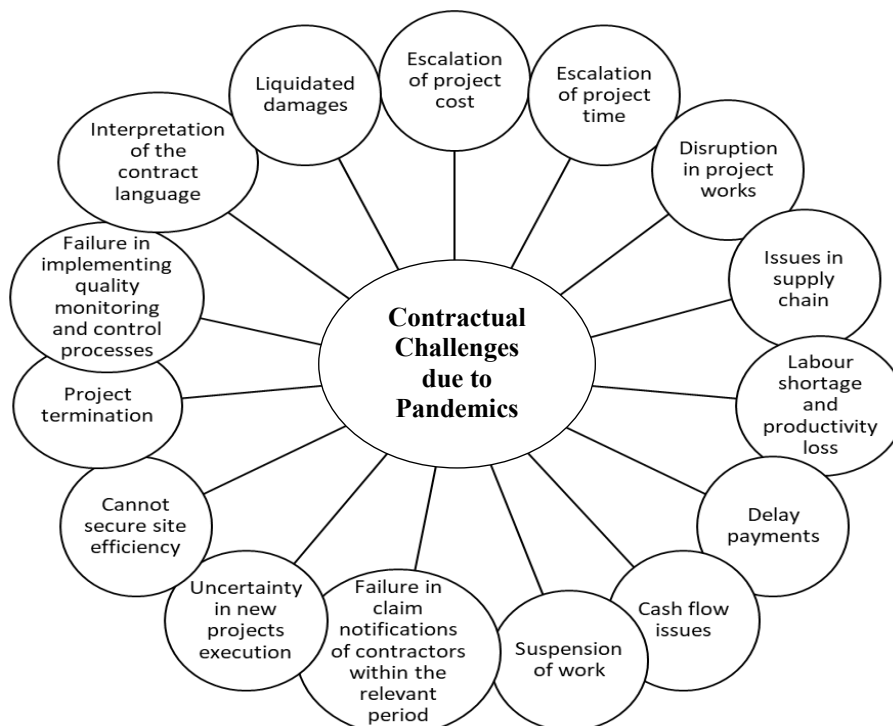


Figure 1: Contractual challenges due to a pandemic situation in construction industry

3.2 CONTRACTUAL PROVISIONS RELATED TO A PANDEMIC SITUATION IN CONSTRUCTION INDUSTRY

There was much confusion and uncertainty about dealing with a pandemic on construction job sites due to the absence of definite construction-related guidelines and best practices (Budds, 2020). Although the government and health organisations have issued guidelines to prevent the spread of the virus on job sites, there have not been many specific guidelines for construction industry workers (Afkhamiaghda and Elwakil, 2020).

Different countries and organisations have developed guidelines and suggestions for infection prevention (Zheng, et al., 2021), as below:

- COVID-19 - Temporary Measures Act (Singapore)
- Health and Safety Guidelines for Sri Lankan Construction Sites to be adopted during COVID-19 outbreak (Construction Industry Development Authority - CIDA, Sri Lanka)
- Quarantine and Prevention of Disease Act - 1897 (Health and Safety Guidelines for Sri Lankan Construction Sites to be adopted during COVID-19 outbreak, Sri Lanka)
- Quarantine and Prevention of Diseases Ordinance - 2020 (Sri Lanka)
- FIDIC COVID-19 Guidance Memorandum (To users of FIDIC standard forms of works contract)
- Phase I COVID-19 construction guidelines for the safety of returning construction workers (Washington)
- Gazette Extraordinary No. 2167/18 (COVID-19 announced as a quarantinable disease for the existing Quarantine Regulations passed under the Ordinance in 1925 and 1960 - Sri Lanka)
- Gazette Extraordinary No. 2168/6 (Defining the proper authority and a diseased locality - Sri Lanka)
- Gazette Extraordinary No. 2197/25 (Restriction of movement and guidelines to be followed in public places - Sri Lanka)

Ogunnusi, et al. (2020) mentioned that the construction industry had been substantially affected by COVID-19, and construction stakeholders have given full attention to the standard forms of contracts to seek appropriate entitlements. Despite the contractual challenges experienced by the construction industry due to the prevailing crisis, numerous parties still incite construction stakeholders to rely upon the available uncertain circumstances related to legal provisions in contractual documents (Alsharif, et al., 2021).

In line with Bailey, et al. (2020), these provisions commonly fall into two broad categories, 'force majeure', and 'changes in law', which is relevant and may yield a different legal effect. Chivilo, et al. (2020) declared that, since the conditions covered through a force majeure or excusable delay provision may vary, it should not be presumed that any contractual language addressing excusable delays applies automatically to the COVID-19 outbreak. Moreover, the authors reported that a careful review of the language of any force majeure provision should be undertaken to determine whether impacts resulting from the COVID-19 outbreak are covered as an excusable delay.

By contrast with force majeure, change in law provisions in construction and engineering contracts may confer a right to both an extension of time for the contractor and

compensation for the unavoidable costs incurred due to the change in the law (FIDIC, 2017).

Figure 2 compares “force majeure” and “changes in law” clauses in standard forms of contracts.

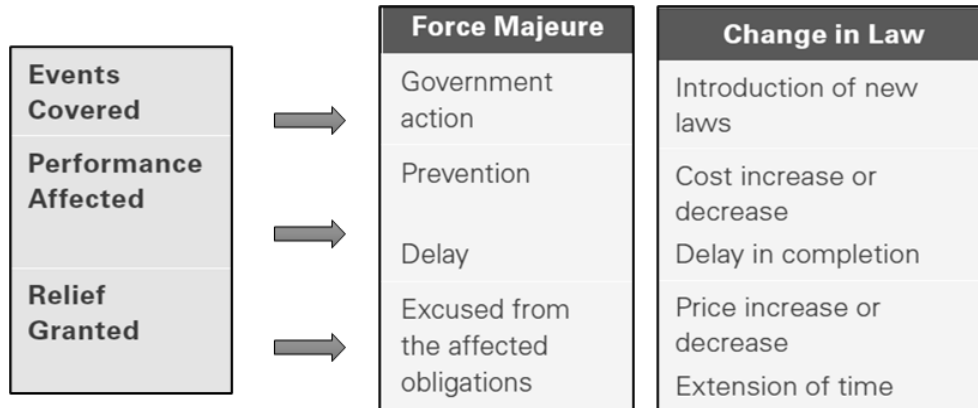


Figure 2: Force majeure clause vs changes in law clause in standard forms of contracts

Source: Ford and Bloch (2020)

Under many forms of contract, including the FIDIC forms, a force majeure event would typically entitle a contractor to an EOT for critical delay caused by the event, but not to compensation for costs incurred during the period of delay, except in agreed-upon circumstances (FIDIC, 1999).

Changes in the law/legislation clause would be more useful than the force majeure clause in the current COVID-19 situation, where the contract can still be performed, but there is delay and increased cost due to compliance with government regulations (Ford and Bloch, 2020). Parties to the contract should analyse the additional time and costs and contractual provisions under force majeure and legislation changes to be aware of risk allocation between parties (Baker, 2021).

Dealing with the force majeure clause is crucial when there is a pandemic situation, and carefully drafted contractual provisions would ensure that parties are not liable when the situation is out of the parties’ control (Benarroche, 2020). Furthermore, Bailey, et al. (2020) expressed, contractually, events such as the COVID 19 pandemic generally do engage contractual provisions concerning the consequences of unforeseen events. Moreover, when there are more case laws available to apply for unforeseen situations, it may help construction parties to unravel the contractual challenges quickly. Still, the issue is the unavailability of applicable case laws related to unforeseeable circumstances (Cartwright, et al., 2020).

Parties to the contract in construction projects should be aware of the construction industry-related case laws, which can apply to pandemic situations for the future use of potential contractual issues (McLennan, 2021). Therefore, this paper reviews available most common contractual provisions addressed in few cases related to the construction industry which can be applied to unravel contractual challenges in a pandemic situation.

Table 2 presents contractual provisions related to cases applicable to a pandemic situation by reviewing recent past literature.

Table 2: Contractual cases related to a pandemic situation

Country	Case
United States (US)	<ul style="list-style-type: none"> • JN Contemporary Art LLC vs Phillips Auctioneers • Rudolph vs United Airlines Holdings • R & B Falcon Corp. vs American Exploration • LLC vs Conoco Phillips • Am. Nat. Red Cross vs Vinton Roofing Co • SNB Farms, Inc. vs Swift & Co.
France	<ul style="list-style-type: none"> • Lebeauvin vs Richard Crispin & Co, 12 McCardie J • General Construction Co. Ltd vs Ibrahim Cassam & Co. Ltd
England and Wales	<ul style="list-style-type: none"> • Fibula Air Travel Srl vs Just-US Air Srl • Entertain Video Limited and Others vs Sony DADC Europe Limited and Others • McCardie J in Lebeauvin vs Crispin • Clifford Gardner vs Clydesdale Bank Limited • Thames Valley Power Ltd vs Total Gas & Power Ltd
Ghana	<ul style="list-style-type: none"> • Tennants (Lancashire) Ltd vs CS Wilson & Co Ltd • Seadrill Ghana Operations Ltd vs Tullow Ghana Ltd
Singapore	<ul style="list-style-type: none"> • Holcim Singapore Pte. Ltd vs Precise Development Pte Ltd
China	<ul style="list-style-type: none"> • Li Ching Wing vs Xuan Yu Xiong

United States (US)

New York courts use strict interpretation for legal issues. Cartwright et al. (2020) stated US courts rely on the express language, and only events specifically listed in the delay clause will excuse performance as well as determine that any construction delay caused by the COVID-19 pandemic is way beyond the “reasonable control of the parties,” and covered with force majeure clauses. Moreover, California requires the party invoking the clause to prove reasonable efforts to avoid the consequences of the force majeure event.

A decision given for *JN Contemporary Art LLC vs Phillips Auctioneers, LLC, No. 1:20-cv-04370-DLC* in the Southern District of New York has presented the COVID-19 pandemic as a ‘natural disaster’ that is beyond the parties’ ‘reasonable control’, and thus triggered the force majeure clause (McLennan, 2021). McLennan (2021) stated the case, *Rudolph vs United Airlines Holdings, Inc., 2021 WL 534669*, related to US District Court, provided that there must be some point where a force majeure event ends and a schedule change or irregular operation begins. The author further mentioned that the mere existence of a force majeure event was not sufficient, and demonstrating causation was essential. The defendant could not rely on the force majeure clause. Moore and Cornelius (2021) stated that Texas Supreme Court held that a force majeure event is not an excuse for non-performance when a prior material breach has occurred. Moreover, the author discussed that, in the construction industry context, a contractor seeking to claim a pandemic as an “Act of God” force majeure excuse for its failure to meet a specific turnover date would have to demonstrate that no concurrent delays existed. The following cases suggest pandemics may fall into a “catch-all” provision:

R & B Falcon Corp. vs American Exploration and LLC vs ConocoPhillips, in the context of pandemic-related government regulations, the more stringent state or local government stay-at-home orders that did not exempt construction activities could arguably be the type of regulation constituting an excusable event under an applicable force majeure provision (Moore and Cornelius, 2021). The case of ***Am. Nat. Red Cross vs Vinton Roofing Co., 629 F. Supp. 2d 5, 9 (DDC 2009)*** highlighted that an act of God, such as pandemic situations, cannot be avoided by parties before it happens or cannot be prevented (McLennan, 2021). Huie (2020) stated that ***SNB Farms, Inc. vs Swift & Co.*** case provides an important point when parties follow the process of seeking entitlements during a pandemic. The parties can have their remedies when a notice is given to the other party by mentioning the force majeure event.

Germany

The required standards are associated with the High Supreme Court Verdicts in Germany. Haas and Markovic (2021) mentioned that if the circumstances are related to ‘force majeure’ or ‘act of God’, when the claimant grants legal/contractual merit, entitled to get time extensions and can grant the additional cost suffered totally or some.

France

According to Haas and Markovic (2021), ***Lebeauvin vs Richard Crispin & Co, 12 McCardie J*** case referred that an epidemic could amount to an event of force majeure. The authors mentioned that in general, if the situation is relatively uncontroversial, whether an event of force majeure has actually arisen on a particular set of facts is a question of fact in every case. The case of ***General Construction Co. Ltd vs Ibrahim Cassam & Co. Ltd*** provides the following two characteristics to consider an event as a force majeure event under the Court of Civil Appeals:

- The event must have been unforeseeable/unpredictable at the time of the conclusion of the contract
- The event must be irresistible/Insurmountable (DLA-Piper, 2022)

DLA-Piper (2022) stated it is worth noting that epidemics outbreaks have not always been considered as force majeure events. In 2014, the epidemic of H1N1 Flu was officially announced and foreseen even before the implementation of health regulations but did not constitute an event of force majeure. In addition, the author mentioned that such reasoning could be applied perfectly to the current COVID-19 pandemic and outbreak that contains both a natural component, which is the virus itself, as well as governmental element (curfew) measures which make the execution of contracts even more difficult.

England and Wales

English courts have taken a cautious approach to the effect of the COVID-19 pandemic under force majeure provisions: for example, in the High Court decision in ***Fibula Air Travel Srl vs Just-US Air Srl (2020) EWHC 3048 (Comm)***, a party could not rely on the pandemic to invoke a force majeure clause to escape its obligations before government restrictions and ‘failure or delay in the performance of any obligations under the agreement’ would continue for a period (McLennan, 2021). In the absence of express language covering ‘pandemics’ or ‘infectious disease’, courts will be unlikely to accept arguments that the existence of COVID-19 is sufficient to invoke a force majeure clause (McLennan, 2021). Cheung (2020) stated even the government has failed to comply with public procurement law under the COVID-19 pandemic pressure, the High Court in

London has ruled that landlords are entitled to recover rent and service charges owed to them by tenants whose businesses were mandated to close by coronavirus restrictions.

Based on the case, *Entertain Video Limited and Others vs Sony DADC Europe Limited and Others*, the Technology and Construction Court has recently considered the meaning of a force majeure clause which could have implications for how these clauses are interpreted within construction contracts. Fenwick (2021) stated the clause, “Neither party shall be liable for its failure or delay, if such failure or delay is caused by circumstances beyond the reasonable control of the party affected including but not limited to riot, civil commotion, malicious damage, etc. as well as pandemics”. As per the mentioned clause, the current COVID-19 pandemic comes under the force majeure clause.

The case *McCardie J in Lebeaupin vs Crispin (1920) 2 KB 714* was applied for many situations in England. It established that the events independently happening come under the force majeure category (Albertini, 2020). Further, *Clifford Gardner vs Clydesdale Bank Limited (2013)* provides that a flu pandemic belongs to the force majeure category. According to the case *Thames Valley Power Ltd vs Total Gas & Power Ltd (2006)*, no reported cases are testing the scope of the term “force majeure” in the context of some types of standard forms of contracts (Albertini, 2020).

Saudi Arabia

The Saudi Arabian Supreme Court issued decision No. M/45/M of 08/05/1442AH (the KSA Decision) 2020, and the decision sets out how contracts governed by Saudi law will be impacted by COVID-19. The Saudi Arabian Supreme Court has confirmed that COVID-19 is considered an ‘emergency event’ and will be deemed a force majeure if certain conditions are met (McLennan, 2021).

Ghana

Some standard forms of contracts do not have the word ‘prevent’, and on behalf of that, there may be another term (Lucy and Chambers, 2019). The case of *Tennants (Lancashire) Ltd vs CS Wilson & Co Ltd [1917] AC 495* provides the following requirement for parties to the contract, which should be present when seeking entitlements. “Parties shall put their full effort to minimise the impact, void, or overcome the circumstances of force majeure.” When dealing with a pandemic, *Seadrill Ghana Operations Ltd vs Tullow Ghana Ltd [2018] EWHC 1640* case is also important because it highlights the key importance in the context of a pandemic. In this case, the Court emphasised that “the force majeure event must be causative to the contractual breach and that reasonable steps to avoid the effects of force majeure event must be taken” (Lucy and Chambers, 2019).

Singapore

Holcim Singapore Pte. Ltd vs Precise Development Pte Ltd (2011) provides that “the force majeure event must be causative to the contractual breach and that reasonable steps to avoid the effects of force majeure event must be taken” (Lucy and Chambers, 2019).

China

Li Ching Wing vs Xuan Yu Xiong (2004) 1 HKLRD 754 case is related to SARS pandemic, and the Court held that even though that is an unforeseeable circumstance,

contractual parties should fulfil their duties and obligations accordingly to have the applicable entitlement (Hansen, 2020).

4. CONCLUSIONS

Since this is the first time most construction stakeholders face a pandemic situation like COVID-19, many disputes have occurred, are still occurring, and may occur in future regarding contractual provisions available in the construction industry. According to the findings, the most common contractual provisions which are applicable to contractual conflicts in pandemic situations available in the construction industry are 'Force Majeure' and 'Changes in Legislation' clauses. Accordingly, the Laws in terms of the Contracts have been changed in preventive measures of the COVID-19 pandemic. Parties to the contract should pay attention to whether they will depend on the available clauses and terminologies related to the pandemic or adjust available provisions concerning the crisis COVID-19. Since COVID-19 is a novel pandemic crisis, only a few cases are available within the construction industry. Most of the cases have mentioned 'pandemic' as an 'unforeseen situation beyond the reasonable control of the parties'. If more case laws are available to apply for unforeseen situations, it may help construction parties to unravel the contractual challenges easily; however, the issue is the unavailability of applicable case laws related to an unforeseeable circumstance. Due to the unavailability of particular contractual provision to 'pandemic' with in the standard forms of contracts, identified cases will be provided ground for applicable contractual implications to the contractual challenges faced by the construction industry in a pandemic situation. Further, parties to the contract must determine whether they should include new contractual provisions within the standard forms of contracts or use the existing provisions with minor changes. Finally, construction stakeholders should pay attention to available legal cases to implement when claiming their entitlements to be a success in coming contractual challenges related to pandemic situations.

5. ACKNOWLEDGEMENTS

The authors wish to acknowledge the support from the Senate Research Committee of the University of Moratuwa, Sri Lanka under the Grant SRC/ST/2021/01.

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