

MEASURES TO MITIGATE TERMINATION OF CONSTRUCTION CONTRACTS IN SRI LANKA

S. Laxsana¹, S. Abiramy² and A.F. Fayasa³

ABSTRACT

Termination of construction contracts has significant impact on the construction industry. But none of the past literature has addressed on how termination can be managed effectively specific to Sri Lankan context given the unique cultural, economic, and legal contexts of Sri Lanka. Therefore, this research aims to investigate and provide practical strategies for managing the termination of construction contracts. Initially, the literature review provided an understanding of contract termination. Subsequently, this study used qualitative approach involving case study and expert opinion. Under the case study, the documentary review was conducted that focus on fifteen terminated building projects in Sri Lanka over the past five years to understand the termination phenomenon in Sri Lankan context. Finally, an expert opinion was obtained to gain deeper understanding of the findings. The collected data was structured through manual content analysis and descriptive analysis. The study found that Western and Northern provinces of Sri Lanka have higher termination rates due to urbanisation, and economic development. Complex approval processes, and bureaucratic inefficiencies are the common reasons for contract termination in commercial and residential building projects. Public projects are more vulnerable to termination due to political considerations. Employers are more likely to terminate contracts than contractors, possibly due to financial instability and higher quality expectations. Finally, combination of mitigation strategies should be customised to minimise the risk of termination. These strategies can be implemented with modifications to fit the local context, but challenges such as lack of awareness, bureaucracy, and resistance to change may arise.

Keywords: Contract termination; Measures; Mitigation; Sri Lanka.

1. INTRODUCTION

The construction sector is crucial for the country's economy (Manoharan et al., 2022). However, due to the complexity of construction projects, they involve substantial risks (Hinze, 2012). Contractors face the challenging task of delivering blameless outcomes within the employer's requirements and a limited budget (Abeynayake & Kumara, 2013).

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To achieve successful outcomes, coordination among individuals with different skills and interests is necessary (Flanagan & Norman, 1993).

Construction projects are usually regulated by extensively detailed contractual documents and conditions that establish and regulate the parties' respective rights and obligations (Siang, 2011). A construction contract is legally enforceable, and the parties agree on specific terms to allocate the risks, obligations, responsibilities, and liabilities (Bakey, 2018). Failure to comply with these terms is a breach of the contract, and the other party is entitled to claim the remedy under the contract (McKendrick, 2022). Abu-Eed (2012) noted that contract termination is a natural phenomenon in the construction industry when a project is no longer necessary or feasible. Termination is guided by specific clauses in the contract (Ade-Ojo et al., 2017). It discharges the parties from further obligations (Siang, 2011).

The COVID-19 pandemic has caused a standstill in businesses worldwide, including Sri Lanka's construction industry (Kawmudi et al., 2020). In Sri Lanka, the economy is in a poor state due to long-term structural issues and recent policy missteps, which have also affected the construction industry (Wijeratne, 2022). The industry is expected to be immediately impacted by new laws and regulations implemented by the government, as it is engaged with multiple stakeholders and the environment (Soyza, 2022). It may lead to the termination of projects in the long run (McLoughlin, 2022). Construction contracts are naturally considered as risky. Risks should be actively managed, decreased, transferred to another party, or accepted as part of a decision-making process, but ignoring risks is not a viable option (Lam et al., 2007). Hence, as a developing country, it is essential to investigate the practical measures to avoid or mitigate terminations in Sri Lankan construction projects for the betterment of the employers, contractors and the nation's development.

2. TERMINATION OF CONSTRUCTION CONTRACTS

A contract is terminated at a moment when a legally binding contract period is ended before it has been fulfilled by performance as a result of one or both parties' actions. Once a contract has been terminated, none of the parties involved is obligated to perform the duties mentioned in the contract (Bakey, 2018). However, even after termination, the parties may still be eligible for damages and the extent and nature of these damages depend on the termination policies outlined in the construction contract (Wittbrodt & Eaton, 2009).

2.1 TYPES OF TERMINATION

Depending on the viewpoint of various professionals, two main types of termination can be generally characterised as termination by convenience and termination for default (Brumback, 2012).

Convenience is appropriate or agreeable to the needs or purpose (Cohen & Wojak, 2011). When the government exercises its power to stop all or any of the work being performed under a contract before the contract expires "when it is in the Government's interest," this is referred to as termination for convenience (Manuel et al., 2015). The contractor does not have the authority to terminate or suspend the agreement for convenience; only the owner does (Brumback, 2012). One of the contract's parties "defaulted," which results in termination for default (Benarroche, 2019). Moreover, the author stated that what this

means is that they failed to perform something they were required to do. Both the contractor and the employer can terminate the agreement under the termination for breach (Dilts & Pence, 2006).

2.2 REASONS FOR TERMINATION OF CONSTRUCTION CONTRACTS

Contract termination in the construction industry can be caused by various factors that are applicable globally and locally, even though specific reasons may differ depending on the context. It can be broadly categorised as location-related factors, project-related factors, employer-related factors, and time-related factors that influence project termination in the construction industry. On the other hand, Table 1 provides a detailed overview of the main factors based on the party involved in the creation of the termination phenomenon considering the construction industry.

Table 1: Factors of termination of construction contracts

Code	Factors
Q	Contractor Related Factors
Q1	Lack of experience in the line of work (Enshassi et al., 2006)
Q2	Frauds (Enshassi et al., 2006)
Q3	Failure to achieve the rate of progress as scheduled (Hamdia, 2008)
Q4	Lack of team spirit in the project team (Chan et al., 2001)
Q5	The low margin of profit due to competition (Enshassi et al., 2006)
Q6	Contractors bankrupting or insolvent (El Karriri et al., 2011)
Q7	Average number of full-time employees (shortage of employees) (Dilts & Pence, 2006)
Q8	Ability to manage cost and time organisation (cash flow and schedule) (Chan et al., 2001)
R	Employer Related Factors
R1	Lack of capital (Enshassi et al., 2006)
R2	Change in the funding source (Dilts & Pence, 2006)
R3	Change in the type of work (Enshassi et al., 2006)
R4	Difference of local currency exchange with contract currency (Enshassi et al., 2006)
R5	Employer delay in the contractor's interim payments (El Karriri et al., 2011)
R6	Bankruptcy of employer (Abeynayake & Kumara, 2013)
S	Both Parties Related Factors
S1	Lack of clear expectations (Anderson, 2010)
S2	Neglect (Enshassi et al., 2006)
S3	Poor communication / coordination between involved parties (Abu-Mousa, 2005)
S4	Difficulty to get permits (Abu-Mousa, 2005)
T	External Factors
T1	Internal political troubles; such as rebellion, civil war, or disorder (El Karriri et al., 2011)
T2	Change in regulatory problems (Dilts & Pence, 2006)
T3	Increment in material prices (El Karriri et al., 2011)
T4	Inflation in world (Kartam & Kartam, 2001)
T5	Legal restrictions and injunctions (Abeynayake & Kumara, 2013)
T6	Acts of God (Natural disaster) (Kartam & Kartam, 2001)

2.3 STRATEGIES TO MITIGATE OR AVOID TERMINATION

Termination of construction contracts can be a costly and disruptive event for all parties involved. Therefore, it is essential to have strategies in place to mitigate or avoid termination. To avoid costly and disruptive termination of construction contracts, parties can implement several strategies. These include drafting clear and comprehensive contracts, maintaining effective communication (Allen, 2017), conducting regular site inspections, incorporating alternative dispute resolution mechanisms, and including termination clauses that allow for negotiation and dispute resolution. By implementing these strategies, parties can better manage risks and conflicts that may arise during construction projects, thereby reducing the likelihood of termination and minimising the associated costs and disruptions.

3. RESEARCH METHODOLOGY

This study employed qualitative research methodology utilising case study and expert opinion. A method for meaningful individuals or groups to investigate and comprehend the contributing components to social or human difficulties is qualitative research (Creswell, 2009). According to Myers (2013), qualitative researchers contend that qualitative research is the best method for understanding people's motives, reasons for their behaviours, and the context of their beliefs and actions. The qualitative method was selected for this study for conducting an in-depth analysis of the termination phenomenon in the Sri Lankan context, aiming to identify the authentic causes and effective preventive measures. Qualitative approaches enable a comprehensive exploration of the complexities surrounding the termination of construction contracts.

The termination of construction contracts is a complex issue that requires an in-depth investigation of the various factors that can influence contract termination. A case study methodology is appropriate for this because it allows for a detailed investigation of specific cases and can provide insights into the contextual factors that contribute to contract termination (Dainty et al., 2001). As per Yin (2009) multiple case study design was chosen to identify commonalities and differences in how the termination of construction contracts is managed.

Since all the selected projects have already been terminated, observation is not an appropriate method. Moreover, interviews take a lot of time. So, professionals may not be willing to give interviews. Therefore, the documentary review was carried out as the primary data collection method under the case study. This method provides access to historical records related to termination, which can be used to learn from past mistakes and develop effective strategies for future projects. Additionally, expert opinion was sought as focus group interview to validate the accuracy of the documentary review results. Further, the manual content analysis and descriptive analysis approaches were used to ensure a more thorough and nuanced analysis of the collected data.

For this study, information was gathered from well-reputed firms and construction practitioners. Hence, according to Kothari (2004) the judgemental sampling under the non-probability sampling technique was chosen for this research. To reduce the time constraints and practical inconvenience of data collecting, the sample size was determined by considering the effectiveness of the study.

Relevant documents and archival records were referred to grasp information on cases regarding the termination. These documents were collected from Construction Industry Development Authority (CIDA) registered firms of contractors and consultants. CIDA registered organisations are selected to avoid anomalies and maintain uniformity. Moreover, documents were collected for 15 terminated building projects in Sri Lanka over the past 5 years to identify the trend and nature of the termination phenomenon in Sri Lankan construction industry. The expert opinion was conducted as focus group interview with a Contract Administration Manager and two Senior Quantity Surveyors and they have over 15 years of experience in the field. This suggests that the experts have significant knowledge and expertise in the area of contract administration, which is directly relevant to the research topic. In addition, the experts have previous experience in project termination, which is likely to have provided them with valuable insights into the reasons and consequences of project terminations.

4. RESEARCH FINDINGS

4.1 DESCRIPTIONS OF PROJECTS

This research aimed to investigate the mitigation measures for the termination of construction contracts in Sri Lanka. Establishing the representative nature of a sample consisting of 15 projects in the Sri Lankan construction industry presents challenges due to the absence of a statistical body that collects data on all terminated projects in the country. As a result, accessing the necessary information requires individually contacting each company involved. However, due to time constraints, difficulties in accessing information, and confidentiality concerns, it was only possible to gather a sample of 15 projects. Despite the small sample size, the findings were still useful for gaining insights into the termination of construction contracts in the Sri Lankan context. The characteristics of the 15 building projects are provided in table 2 and table 3. Furthermore, factors that were not previously mentioned in the literature are highlighted in different colour to distinguish them from other factors.

Table 2: Brief introduction to the selected projects

Project	Type of building	Location (Province)	Duration (Months)	Contract Sum (Mn)	Commencement	Termination	Type of Termination
P1	Residential	Western	30	1,723	2020	2021	Termination by Employer
P2	Commercial	Northern	12	139	2018	2021	Termination by Contractor
P3	Commercial	Northern	12	250	2018	2021	Termination by Contractor
P4	Commercial	Western	12	300	2018	2022	Termination by Employer
P5	Residential	North central	6	88	2021	2022	Termination by Employer
P6	Educational	Northern	7	20	2019	2022	Termination by Contractor
P7	Residential	Sabaragamuwa	48	1,600	2017	2021	Termination by Employer
P8	Residential	Sabaragamuwa	6	11.5	2016	2018	Termination by Employer
P9	Commercial	Western	12	231	2017	2022	Termination by Employer
P10	Residential	Sabaragamuwa	6	7.5	2017	2019	Termination by Employer

Project	Type of building	Location (Province)	Duration (Months)	Contract Sum (Mn)	Commencement	Termination	Type of Termination
P11	Commercial	Western	12	56	2018	2022	Termination by Employer
P12	Commercial	Uva	15	277	2018	2022	Termination by Contractor
P13	Residential	Northern	6	12	2019	2022	Termination by Contractor
P14	Commercial	Northern	12	25	2018	2021	Termination by Contractor
P15	Commercial	Western	12	299	2017	2022	Termination by Employer

Table 3: Major courses of termination of selected projects

Project	Contract or	Employer	Main reasons for termination
P1	Private	Public	Failure to achieve the rate of progress as scheduled (Q3) Lack of experience in the line of work (Q1) Average number of full-time employees (shortage of employees) (Q7) Lack of team spirit in the project team (Q4)
P2	Private	Public	Employer delay in the contractor's interim payments (R5) Government change (T7)
P3	Private	Public	Employer delay in the contractor's interim payments (R5) Government change (T7)
P4	Private	Public	Failure to achieve the rate of progress as scheduled (Q3) Contractor's bankrupting (Q6)
P5	Private	Public	Failure to achieve the rate of progress as scheduled (Q3)
P6	Private	Public	Employer delay in the contractor's interim payments (R5) Government change (T7)
P7	Private	Private	Bankruptcy of employer (R6)
P8	Public	Public	Bankruptcy of contractor (Q6) Failure to achieve the rate of progress as scheduled (Q3)
P9	Private	Public	Failure to achieve the rate of progress as scheduled (Q3) Ability to manage cost and time organisation (cash flow and schedule) (Q8)
P10	Public	Public	Bankruptcy of contractor (Q6) Failure to achieve the rate of progress as scheduled (Q3)
P11	Private	Public	Failure to achieve the rate of progress as scheduled (Q3)
P12	Private	Public	The employer failed to hand over the site and give instructions for the right to access the site to commence the works (R7)
P13	Private	Public	Employer delay in the contractor's interim payments (R5) Government change (T7)
P14	Private	Public	Employer delay in the contractor's interim payments (R5) Government change (T7)
P15	Public	Public	Failure to achieve the rate of progress as scheduled (Q3) Contractor's bankrupting (Q6)

4.2 TERMINATION BEHAVIOUR BASED ON VARIOUS PARAMETERS

The termination behaviour of the projects was analysed based on various parameters such as location, time, type of employer, and type of project as per literature (Section 2.2).

4.2.1 Based on Location and Type of Project

The research was carried out in Sri Lanka. Data could only be collected from five provinces due to time and access limitations. According to Figure 1, among which 15 projects, most of the terminations have occurred in the Western and Northern provinces. Moreover, the majority of commercial and residential building projects were terminated in Sri Lanka over the past five years.

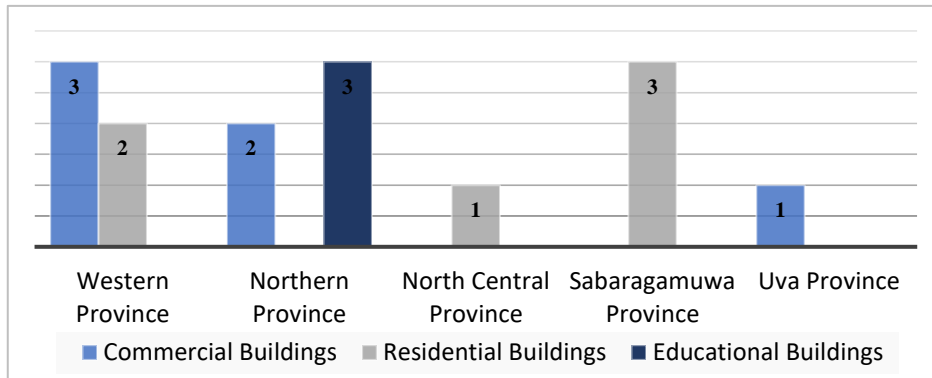


Figure 1: Research location and type of building

As per expert opinion, the Western and Northern provinces have more construction projects than other provinces due to various factors such as population growth, urbanisation, and economic development. With more projects happening, there is a greater chance of issues arising that can lead to project terminations. Commercial and residential building projects were mostly terminated in Sri Lanka due to lack of adequate funding and resources for these types of projects, as they tend to be larger in scale and require more financial investment. Additionally, commercial and residential projects often involve a more complex and lengthy approval process, which can lead to delays and increased costs. This can be especially challenging in Sri Lanka, where bureaucratic processes can be slow and inefficient.

4.2.2 Termination Year of the Projects

The documentary review was carried out for the last five years. In 2020-2022, Sri Lanka has faced the worst situation due to the economic crisis and COVID-19. When considering the commencement date of the project, duration of the project, and reasons for the termination in accordance with Tables 2 and 3, the above termination was not occurred by this economic crisis and COVID-19 situation. Hence, Figure 2 shows the construction projects that have been terminated in Sri Lanka in the last five years.

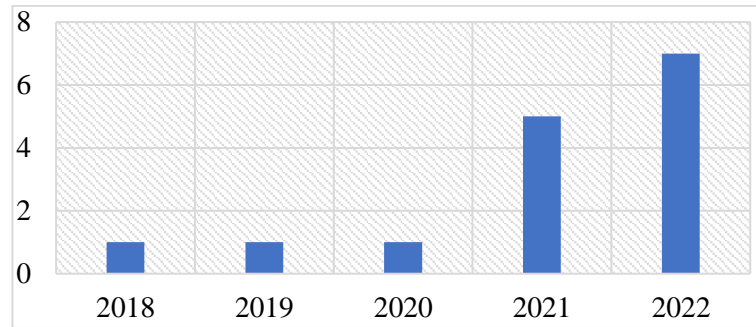


Figure 2: Year of termination

As a result, the majority of the projects were terminated in 2022 due to failure to achieve the rate of progress as scheduled, contractors bankrupting, employer delay in the contractor’s interim payments, and Government change.

4.2.3 Employer of the Projects

Figure 3 illustrates whether the employer of the project was public or private. Ultimately, it is evident from the above depiction that in the Sri Lankan construction industry, 93% of government building projects are terminated over the last 5 years.

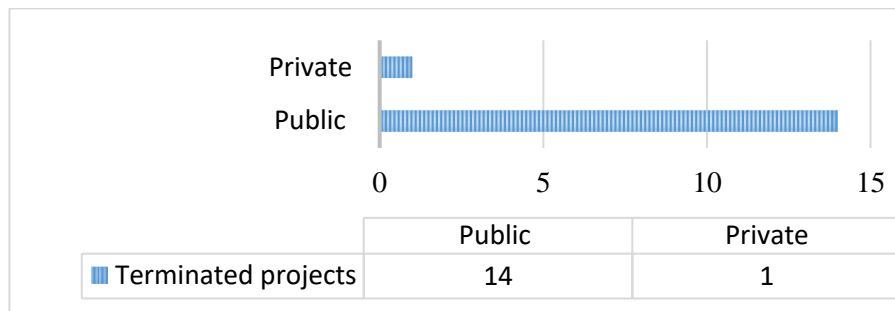


Figure 3: Employer of the projects

Experts mentioned that in terms of public projects versus private projects in Sri Lanka's construction industry, it is possible that there are differences in the termination rates between the two sectors. Public projects are typically funded and overseen by the government. These projects are often undertaken for the benefit of the general public and may be subject to political considerations. On the other hand, private projects are typically funded and overseen by private companies. These projects are often undertaken for profit and are subject to market conditions and competition. If most of the terminations are occurring in public projects rather than private projects, it is possible that political considerations may be a factor in these terminations. Public projects may be subject to changes in government policies or funding priorities, which can lead to delays or terminations of projects. Additionally, political considerations may lead to changes in the leadership of government agencies overseeing these projects, which can lead to disruptions and delays.

4.2.4 Type of Termination

A construction contract can be terminated by either contractor or employer. Figure 4 demonstrates that most of the projects (65%) were terminated by the employer and 35% of projects were terminated by the contractor.

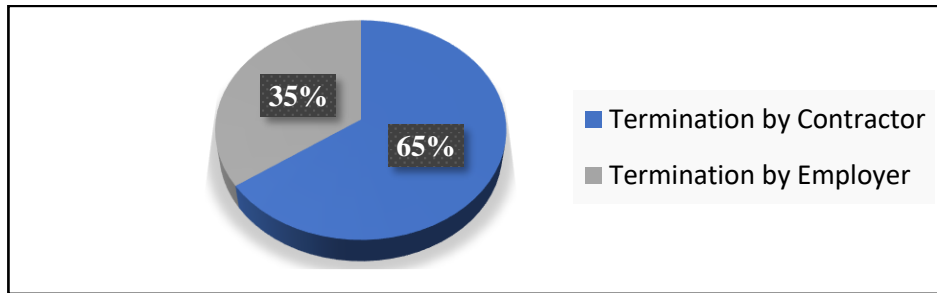


Figure 4: Type of termination

Most of the projects were terminated by the employer rather than by the contractor because of employers are more likely to have greater financial resources and can be able to afford to terminate a contract if they are not satisfied with the work. On the other hand, contractors cannot have the same level of financial stability and cannot be able to afford to terminate a contract even if they feel that it is necessary. Moreover, employers have higher expectations for the quality of work and adherence to timelines. If a contractor is not able to meet these expectations, the employer may feel justified in terminating the contract. These justifications have been mentioned by the experts.

4.3 MAIN REASONS FOR THE TERMINATION

Figure 5 explains the factors that were affecting the termination of the construction contract.

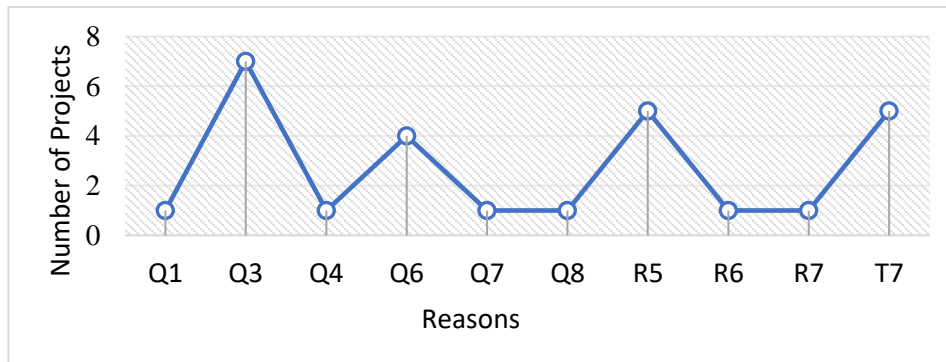


Figure 5: Reasons for the termination

It is evident that most of the projects were terminated because of contractor faults (Q). The majority of the projects were terminated due to the contractor’s failure to achieve the rate of progress as scheduled (Q3) and the next majority of the projects were terminated due to employer delay in the contractor’s interim payments (R5) and the government change (T7). Followed by a small percentage of the projects were terminated as a result of the lack of experience of the contractor in the line of work (Q1), lack of team spirit in the contractor’s project team (Q4), shortage of full-time employees in the contractor’s organisation (Q7), contractor’s ability to manage cost and time organisation (cash flow and schedule) (Q8), the bankruptcy of the employer (R6), and the employer failed to hand over the site and give instructions for the right to access to the site to commence the works (R7). Further, some projects were terminated due to the bankruptcy of the contractor (Q6). Addressing these issues requires careful planning and execution by all stakeholders involved in the project, including the contractor, employer, and government, to ensure successful project completion.

4.4 STRATEGIES TO MITIGATE TERMINATION

Construction projects are complex, and the failure of one factor can lead to project termination, causing significant losses for both the contractor and employer. To avoid this, various mechanisms can be implemented. However, it is important to note that no single mechanism can guarantee the success of a construction project, and therefore, it is necessary to implement a combination of these mechanisms and tailor them to fit the specific project requirements. In addition to the strategies mentioned in the literature, the following strategies provided by the experts. Parties can also consider implementing proactive risk management plans, which involve identifying potential risks and taking steps to prevent or mitigate them. This can include conducting thorough due diligence on contractors and subcontractors, setting clear expectations and milestones, and developing contingency plans for unforeseen events. Parties can also consider utilising project management tools and technologies to track progress and identify potential issues early on. Additionally, providing training and education to all stakeholders on the project can help ensure that everyone understands their roles and responsibilities and is better equipped to manage any issues that may arise. By taking a proactive approach to risk management and project planning, parties can minimise the likelihood of contract termination and ensure a smoother, more successful construction project.

4.5 SUMMARY OF THE FINDINGS

The summary of the research findings is presented in Figure 6 under:

- the factors for termination of construction contracts, and
- the strategies to mitigate or avoid termination of construction contracts.

Factors for termination of construction contracts	Strategies to mitigate or avoid termination of construction contracts
1. Contractor’s failure to achieve the rate of progress as scheduled	1. Conducting thorough due diligence on contractors and subcontractors
2. Employer delay in the contractor’s interim payments	2. Setting clear expectations and milestones
3. Government change	3. Developing contingency plans for unforeseen events
4. Bankruptcy of the contractor	4. Utilising project management tools and technologies to track progress
5. Lack of experience of the contractor in the line of work	5. Providing training and education to all stakeholders on the project
6. Lack of team spirit in the contractor’s project team	6. Drafting clear and comprehensive contracts
7. Shortage of full-time employees in the contractor’s organisation	7. Maintaining effective communication
8. Contractor’s ability to manage cost and time organisation (cash flow and schedule)	8. Conducting regular site inspections
9. Poor occupational health and safety in site management of the contractor	9. Incorporating alternative dispute resolution mechanisms
10. The bankruptcy of the employer	10. Including termination clauses that allow for negotiation and dispute resolution
11. The employer failed to hand over the site and give instructions for the right to access to the site to commence the works	

Figure 6: Summary of the findings

5. CONCLUSIONS

In conclusion, this research highlighted the importance of effective project management practices and minimising errors in the early stages of a project to avoid termination. The study focused on the termination of building projects in Sri Lanka over the last five years, with the majority of terminations occurring in the Western and Northern provinces, and most projects being commercial and residential buildings. The main reasons for termination were the contractor's faults, employer delay in interim payments, and government change, with the majority of terminated projects being government building projects. To prevent project termination, it is crucial to ensure proper communication and cooperation between all parties involved and to have a contingency plan in place in case of unexpected events. By implementing these strategies, project stakeholders can increase the likelihood of completing projects on time, within budget, and to the satisfaction of all parties involved.

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