

# MEDIATION AS AN ALTERNATIVE DISPUTE RESOLUTION METHOD IN SRI LANKAN CONSTRUCTION INDUSTRY

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## ABSTRACT

*Litigation is a traditional mode of dispute resolution; disadvantages of litigation have paved the way for the development of 'Alternative Dispute Resolution' (ADR) methods for settlement of construction disputes. Mediation can be identified as commonly practicing ADR method in international construction industry. However, the current experience of mediation method in the Sri Lankan construction industry is not that much popular with compared to the other ADR methods. Hence, it is essential to review the suitability of mediation method for resolving disputes in the Sri Lankan construction industry. Literature review was done together with the preliminary survey for the collection of information. Research problem was approached through interviews of experts in the construction dispute resolution. Findings of the research identified the mediation process, advantages, disadvantages, barriers for the implementation of mediation method and best ways of establishment by overcoming the barriers. Results of the research indicate the process, practice and establishment of construction mediation is suitable for the Sri Lankan context. Further, this research is limited to the evaluating the suitability of mediation only in resolving construction disputes in Sri Lanka. Data and information collection were limited to the experienced ADR practitioners who having analytical knowledge in mediation practice. It further revealed that the mediation method for the dispute resolution in the construction industry is suitable. The research further makes recommendations in order to make mediation method more effective and efficient in the Sri Lankan construction industry.*

**Keywords:** ADR Methods; Construction Industry; Dispute Resolution; Mediation.

## 1. INTRODUCTION

Construction industry is a creator of a multitude of disputes due to its various inherent characteristics. Disputes have the potential to rise at any stage of the construction process. There is a growing trend across the globe to attempt resolving such disputes by Alternative Dispute Resolution (ADR) methods. Similarly, there is increasing involvement of construction professionals from engineering, architecture, quantity surveying and other disciplines in construction dispute resolution practice. The need therefore arises among other things to maintain greater consistency in the dispute resolution methods.

Alternative Dispute Resolution (ADR) is a general term encompassing various techniques for resolving disputes outside of courts of law using a neutral third party (Atlas *et al.*, 2000). There are varied means of ADR methods in used in the construction industry. There are four ADR methods: Negotiation, Mediation, Adjudication and Arbitration, commonly practicing ADR methods in the construction industry (Omar, 2007; Uff, 2005). Among them mediation method is rarely practicing in Sri Lankan construction industry (De Silva, 2011). Mediation method has unique characteristics such as confidentiality, preservation of business relationship, cost and time saving, flexibility, voluntariness, generation of creative agreement, neutrality, fairness and higher levels of satisfaction (Yiu and Cheung, 2005) which could be directly or indirectly overcome drawbacks and conflicting spheres in other ADR methods.

## 2. MEDIATION METHOD AS AN ADR METHOD

Mediation is a structured and facilitated settlement method which involves a neutral professional facilitator called "mediator" who helps impartially and independently the parties to try to reach a settlement (Chau,

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2007; Frame and Reynolds, 2010). Mediator conducts the proceedings by taking particular account of the general circumstances of the case, the business relationship of the parties, parties' wishes and the need for a speedy and economical settlement.

### 3. MEDIATION PRACTICE IN SRI LANKA

There is no specified legislation which governs the construction mediation in Sri Lanka. Moreover, there is no any provision which focuses the disputant parties refer to mediation in a matter of construction disputes in the Standard Bidding Document (SBD) for conditions of contracts of Institute for Construction Training and Development (ICTAD). There is a provision that the disputant parties to be required to go for amicable settlement in conditions of contract of International Federation of Consulting Engineers (FIDIC) however FIDIC is not commonly used in local construction industry.

Even though mediation method is practiced for the settlement of commercial disputes in Sri Lanka. The Commercial Mediation Centre of Sri Lanka Act No. 44 of 2000 enacts to promote mediation and to resolve of commercial disputes. At present, concept of Mediation has been institutionalised through the Commercial Mediation Centre of Sri Lanka (CMCSL) and it is statutorily mandated to promote the wider acceptance of mediation for the resolution and settlement of commercial disputes. Also community mediation in Sri Lanka is based on the Mediation Boards Act No. 72 of 1988 and its recent amendments.

### 4. ADVANTAGES AND DISADVANTAGES OF MEDIATION METHOD

Chau, (1992); Brown and Marriott, (1999); Cheung, (1999); Kheng, (2003) have identified the effectiveness and reliability of mediation method by identifying advantages and disadvantages. The research is decided to represent the advantages and disadvantages of mediation method while comparing with the arbitration method as the basis. Those advantages and disadvantages are summarised in Table 1.

Table 1: Advantages and Disadvantages of Mediation Method

Advantages of Mediation	Disadvantages of Mediation
<ul style="list-style-type: none"> <li>• Time effective</li> </ul>	<ul style="list-style-type: none"> <li>• No final and non-binding decision</li> </ul>
<ul style="list-style-type: none"> <li>• Cost effective</li> </ul>	<ul style="list-style-type: none"> <li>• Non enforceability of the decision</li> </ul>
<ul style="list-style-type: none"> <li>• Preservation of business relationship</li> </ul>	<ul style="list-style-type: none"> <li>• Less chance of honour outcome</li> </ul>
<ul style="list-style-type: none"> <li>• Protect privacy and confidentiality of the process</li> </ul>	
<ul style="list-style-type: none"> <li>• Flexibility in the process</li> </ul>	
<ul style="list-style-type: none"> <li>• Party autonomy</li> </ul>	
<ul style="list-style-type: none"> <li>• Non-involvement of lawyers</li> </ul>	
<ul style="list-style-type: none"> <li>• Expertise involvement</li> </ul>	
<ul style="list-style-type: none"> <li>• Non adversarial method and practice</li> </ul>	

### 5. RESEARCH METHODOLOGY

Comprehensive literature survey was carried out based on journals, law texts, conference proceedings, government publications and previous research investigations. Due to the difficulties of gaining much awareness relating to the Sri Lankan construction industry, pilot survey was undertaken with the purpose of identify the level of mediation practice in Sri Lankan construction industry. Due to the limitations in existence of experienced ADR practitioners, who having an analytical knowledge in the construction mediation and other ADR methods, the number of expert interviews were limited to three. The framework of evaluating the suitability of mediation practicing in construction dispute resolution was developed through literature survey. Content analysis method was used to determine the presence of key concepts. Themes of findings in order to validate the literature findings and to identify the other findings which were necessary to further develop the frame work, within the data gathered through interviews. Cognitive mapping technique was used due to its suitability in displaying the relationships of views and concepts that identified from the research findings. Finally, according to the evaluation, recommendations were derived for the suitability and applicability of mediation as an ADR method in Sri Lankan construction industry.

## **6. LITERATURE REVIEW ON MEDIATION PROCESS**

Gould *et al.* (2010) has revealed three main phases to mediation process and it was backed by Flake and Perin (2003) and Madden (2001). Those phases are, Pre mediation phase, the mediation phase and the post mediation phase. Therefore, it can discuss the mediation process under Said three phases.

### **6.1. PRE MEDIATION PHASE**

Both the empirical findings and literature findings disclosed that, before the commencement of mediation, parties may submit and exchange the summaries of dispute between each parties and the mediator with the supporting documents in this stage. Further, literature findings disclosed some more activities which are done in this pre mediation stage. It was said that, a contract to mediate is used in this stage in order to agree the terms and the ground rules for the mediation where a mediation agreement includes details of items such as cost, confidentiality, without prejudice nature of the mediation, authority to settlement and time framework etc. Moreover, in this pre mediation stage, mediator will be also identified and parties may become to the mediation agreement.

### **6.2. MEDIATION PHASE**

Gould *et al.* (2010) described this stage as heart of the mediation process. According to the literature findings, the mediator establishes the ground rules and motivates each party to make an opening statement during the first joint meeting. Once the parties have made their opening statements, the mediator may decide to discuss some issues in the joint meeting or in a private meeting called ‘caucus’ between the mediator and one of the parties. It was further stated that, the mediator will caucus with the parties in order to explore in confidence the issues in the dispute and options for settlement. The mediator may also use further joint meetings in order to narrow the issues and allow expert to meet the final settlement. Moreover, empirical findings revealed the purpose of having private meetings as to allow the mediator to gather the confidential information which is necessary to facilitate the mediation process to achieve a settlement from each party separately.

Further, literature findings revealed that the mediation phase is conducted on neutral territory rather than at the office of one of the parties to avoid the power imbalances. However, empirical findings revealed that the real mediation should be done within three separate rooms which served for each parties and the mediator. Further it was stated that at the beginning, all two parties and mediator may discuss about the matter together in joint a joint meeting. Then the mediator may conduct private meetings with each party separately in above mentioned separate rooms. And then again the joint meetings are conducted with the participation of all parties. However, this procedure is called as “Shuttle Diplomacy” as accordance with the empirical findings.

### **6.3. POST MEDIATION PHASE**

As per the empirical findings, after the above mentioned procedure, parties may come to a settlement. Literature findings revealed that post mediation phase involves either executing the settlement agreement or if no agreement or only a partial agreement is reached, continuing with arbitration or litigation.

## **7. RESEARCH FINDINGS**

### **7.1. SUITABILITY OF THE MEDIATION PROCESS**

Suitability of mediation was evaluated in terms of mediation process, its practice and the establishment of mediation in the Sri Lankan construction industry.

According to the framework of evaluating the suitability of mediation as an ADR method in the Sri Lankan construction industry, suitability of the process was evaluated based on the advantages of the mediation process which are revealed by literature review.

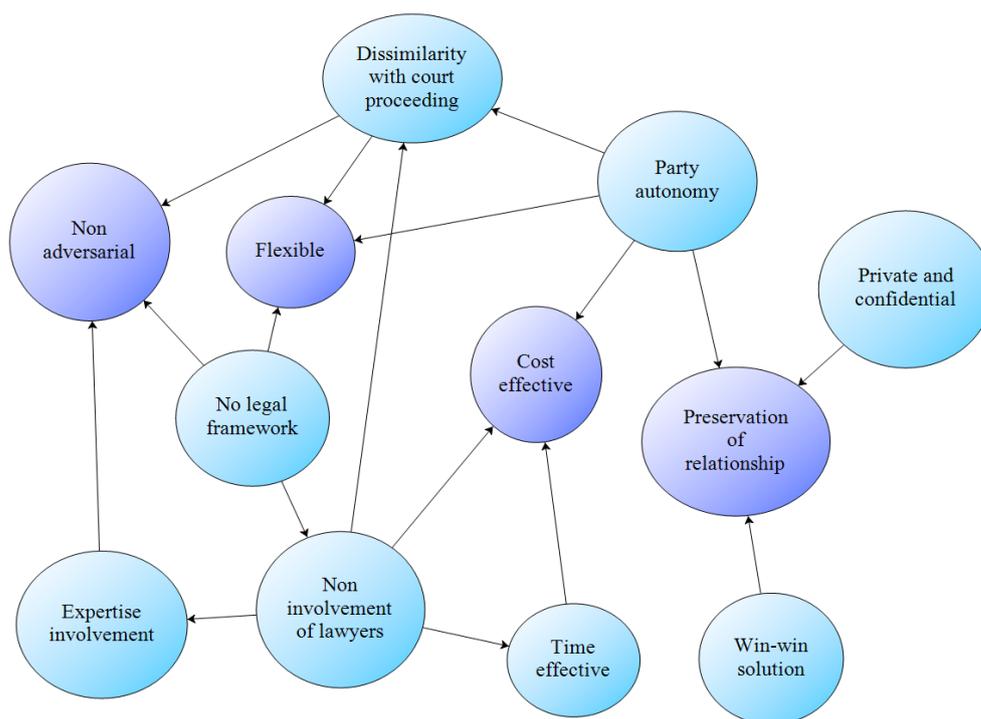


Figure 1: Cognitive Map of Advantages of Mediation

Above cognitive map (refer Figure 1), all the advantages of mediation process are presented with the additional key features of the mediation process as identified through the research findings. According to these relationships, it can be identified that preservation of relationships, cost effectiveness, non-adversarial and the flexibility are the key advantages of mediation process. As the main basis for creating several advantages of mediation, it can be identified as the party autonomy nature of mediation. Party autonomy directly leads to three key advantages: preservation of relationships, cost effectiveness and flexibility. Further, party autonomy indirectly leads to the other key advantage: non-adversarial as well. Hence, it can be apparent that the party autonomy is the most important feature of the mediation process.

As described by Madden (2001), an unnecessary long and expensive dispute resolution process will imperil existing business relationships and will add an unnecessary cost to carrying on business. Further, as per Cheung and Suen (1999), ADR methods are a collective term describing dispute resolution strategies which are having flexibility in the issues and non-adversarial approach not like in litigation. Hence, it is apparent that the cost, relationship, flexibility and the non-adversarial approach are the required characteristics through ADR methods in construction industry. Since, mediation gives all those characteristics as its advantages, this process is best suitable for resolving construction disputes in Sri Lanka, as required by the construction industry.

## 7.2. SUITABILITY OF THE MEDIATION PRACTICE

As per the framework of evaluating the suitability of mediation as an ADR method in Sri Lankan construction industry, suitability of the mediation practice was evaluated based on the disadvantages of the mediation and the suggested ways for the better practicing the mediation in order to minimise the disadvantages. Empirical data revealed that if the construction mediation is practiced in a proper way and if the parties are ready to accept the outcome of mediation, there won't be any shortcoming in mediation over arbitration practice.

According to cognitive map (refer Figure 2), it can be clearly identified that there are mainly three disadvantages in mediation and all these disadvantages lead to mediation to the failure. Furthermore, it can be identified that the main disadvantage of mediation is the not final and non-binding nature. This nature of not final and non-binding is the main reason of occur the other disadvantages of mediation. Therefore, it can be concluded that failing of mediation is the final outcome of the disadvantages of mediation and the main reason which lead to the mediation fail is the not final and non-binding nature of mediation. Hence, it is evidenced that the success of mediation should be achieved from the suggested ways of better practice

of mediation. The main objective of those suggestions should be made the mediation final and binding in order to make mediation success. Hence it is necessary to analyse the suggestions for better practice of mediation, in order to evaluate the suitability of mediation practice.

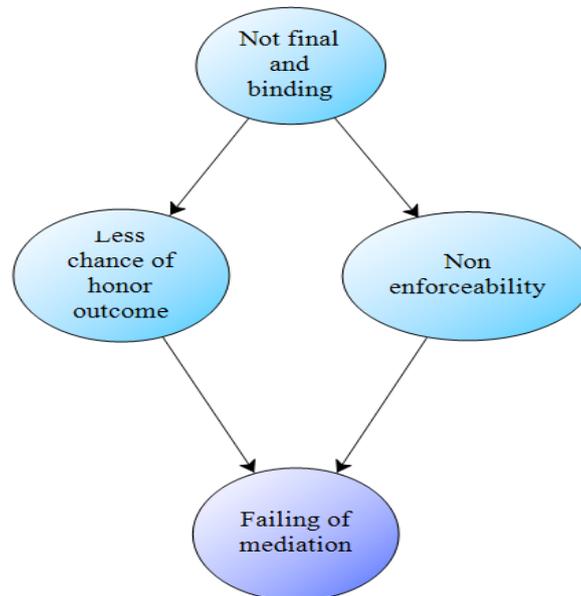


Figure 2: Cognitive Map of Disadvantages of Mediation

According to the above discussion on disadvantages of mediation practice, it was identified that the main disadvantage which leads to the other disadvantages of mediation is the not final and non-binding nature. Thereby this not final and non-binding nature is the main cause which leads the mediation fail which is identified as the final outcome of disadvantages. Hence, it is obvious that the Suggestions for better practice of mediation in order to minimise the disadvantages of mediation should mainly focus on the not final and non-binding nature of mediation.

As per cognitive map of Figure 3, it can be identified the main three suggestions lead to make the mediation final and binding. Then, the parties honour the outcome and thereby it minimises the failure of mediation as the final outcome of suggestions. Hence, it is evidenced that it highly overcomes the disadvantages of mediation practice through the suggested ways. Therefore, it is apparent that the practice of mediation is suitable in Sri Lankan construction industry.

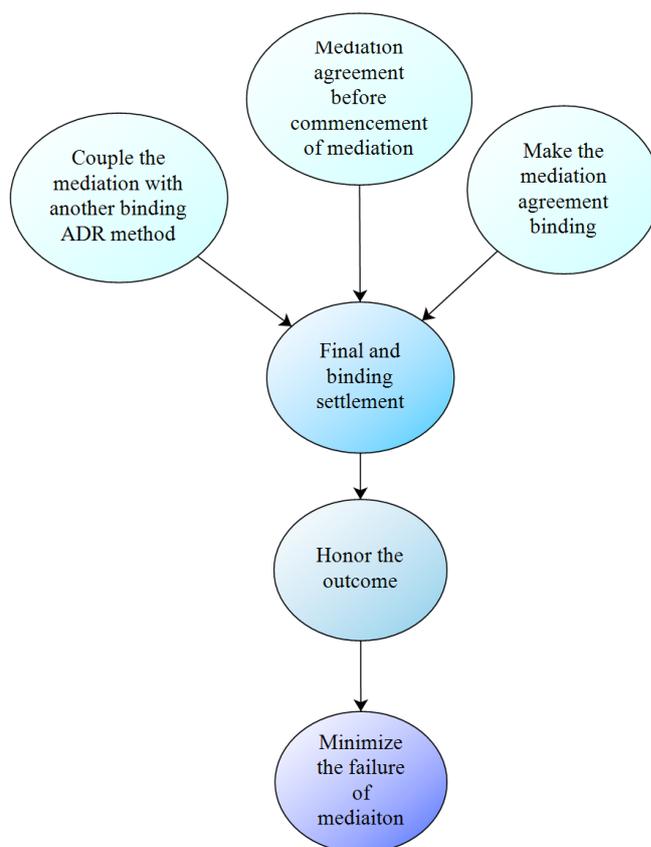


Figure 3: Cognitive Map of Suggestions to Overcome Disadvantages

Nevertheless, empirical findings specially stated that all the suggestions which have been stated to minimise the disadvantages of mediation practice should have to be established or practiced without changing the conceptual principal of mediation.

### 7.3. *SUITABILITY OF THE ESTABLISHMENT OF MEDIATION*

According to the framework, suitability of the establishment was evaluated based on the barriers for the establishment of mediation practice in Sri Lankan construction industry and the suggestions to overcome those barriers.

It can be identified that the main reasons for the barrier to widespread of mediation method are the disrepute of mediation, unawareness of method by stakeholders and general public and the absence of governing recognition for construction mediation in the Sri Lanka. Therefore, it can be identified that above barriers are as the key barriers for the establishment of mediation.

As illustrated by the map (refer Figure 4), lack of qualified mediators and the parties' mentality are the common reasons for the disrepute of mediation and failure of mediation. Moreover, unawareness of method leads to create the parties mentality in order to have a negative impact. Further, unawareness of method is the negative consequence of absence of prevailing law, lack of institutional framework and the non-practicing construction mediation in Sri Lanka. Moreover, absence of governing recognition is the negative consequences of absence of prevailing law and lack of institutional framework.

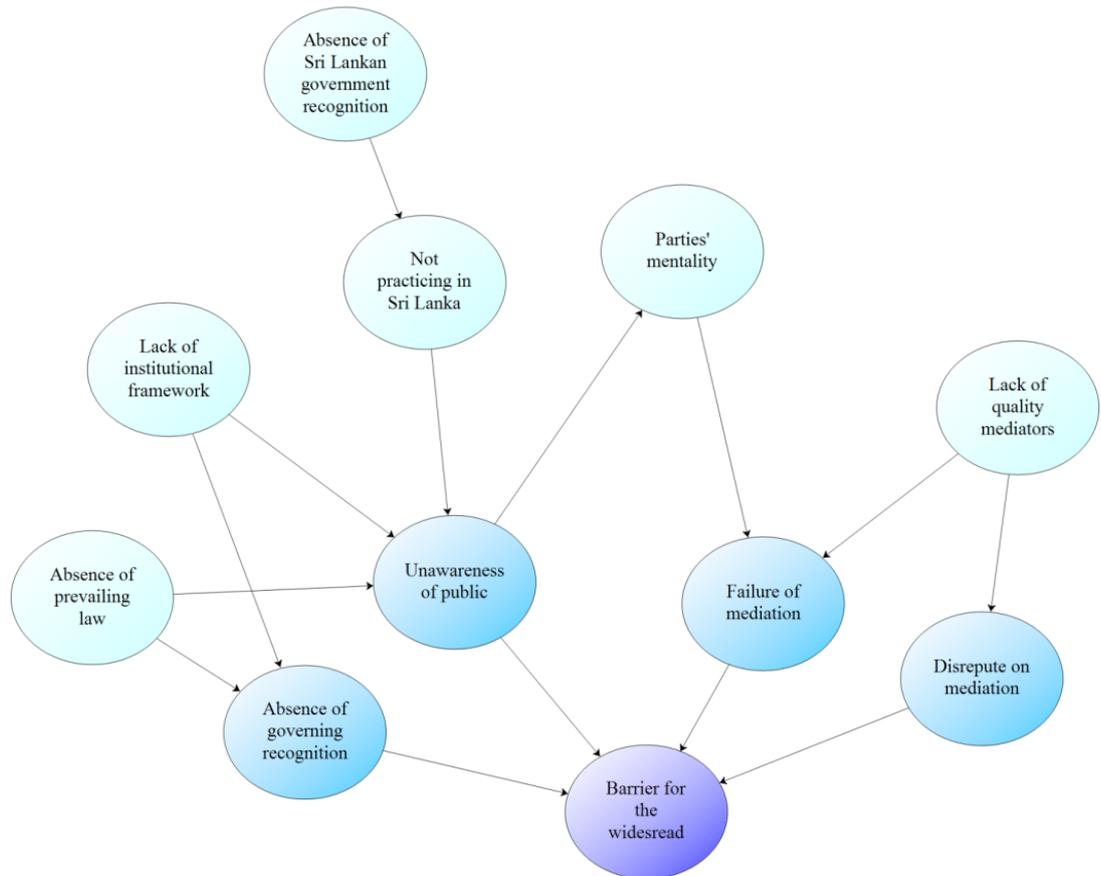


Figure 4: Cognitive Map of Barriers for the Establishment of Mediation Practice in Sri Lankan Construction Industry

Hence, it is obvious that through the suggestions, it should be created construction mediators who are suit as required in the mediation process and should be changed the parties' mentality. Further, background for the establishment of mediation should be well prepared in order to achieve a successful implementation with widespread.

According to the cognitive map (refer Figure 5), it can be identified there are four number of objectives are achieved through the suggested ways proposed in order to overcome the barriers. Those objectives are, increase the practice of construction mediation in the country, increase the awareness of mediation, establish a formal recognition and increase the skills and professional ethics of mediators. Thereby, it is expected to achieve the growth of mediation in Sri Lankan construction industry. Further, it can be identified that the development of the practice and the awareness are achieved through both the general public and the sources of establishments. Establishment of formal recognitions is expected to achieve through the sources. Finally, development of mediators' skills and professional ethics are expected to achieve through the development of mediators.

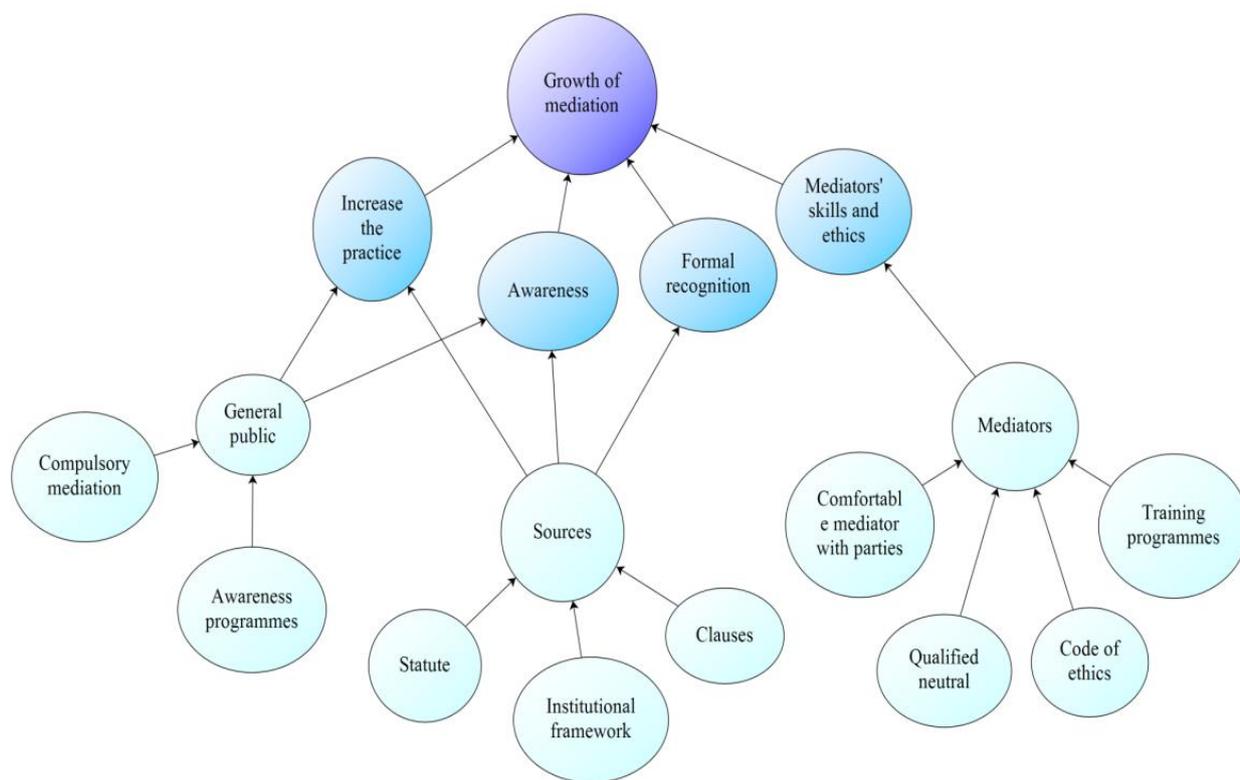


Figure 5: Cognitive Map of Suggestions to Overcome Barriers of the Establishment Mediation Practice in Sri Lankan Construction Industry

However, as identified in the cognitive map for barriers (refer Figure 4), main causes of barrier for the widespread of mediation are the skills of mediators, recognition by parties and formal recognition for the establishment. Hence, it can be concluded through this cognitive map (refer Figure 5) illustration for suggestions, all three main causes of barriers are concerned in order to increase the mediation practice, awareness, formal recognition and the skills and ethics of mediators. Hence, it can be said that the establishment of mediation practice also would be suitable. Nevertheless, the empirical findings revealed that through all these suggestions, the consensual nature of the mediation should be preserved and it should not be an imposed method and should not spoil the spirit of the mediation.

Finally general ideas of the interviewees' concerning qualities of mediation method can be stated as follows;

- Swift and fast decision making method
- Deliver impartial and decisive conclusions
- Cheaper and less costly method
- Less damage to the reputation and relationship of parties

The findings of this research indicate that the construction professionals have maximum level of satisfaction on the mediation practice. Therefore, much attention must be paid for the mediation method to settlement of disputes.

## 8. CONCLUSIONS

The ADR methods were introduced to minimise the drawbacks of litigation process. Mediation is rarely practicing ADR method in the Sri Lankan construction industry. Nevertheless, mediation has unique characteristics such as confidentiality, preservation of relationships, cost and time saving, flexibility, non-adversarial which could be directly or indirectly overcome drawbacks in other ADR methods. Suitability of mediation method was evaluated in terms of mediation process, its practice and the establishment of mediation in the Sri Lankan construction industry. Suitability of the process was proved through the key

advantages of the mediation. Those key advantages are, cost effective, preservation of relationships, non-adversarial and flexible. Hence, the process of mediation is suitable to practice in resolving construction disputes in Sri Lankan construction industry.

Suitability of the mediation practice was proved from the disadvantages of mediation and the suggestions identified to overcome disadvantages when practicing in Sri Lanka. The main disadvantage which leads the decision is 'not final and non-binding'. The final outcome of the practicing of mediation in suggested ways is the 'minimise the failure of mediation'. Further the suggestions identified lead to make the mediation final and binding. Hence, when practicing the mediation as suggested ways, the practice of mediation is also suitable in resolving construction dispute in Sri Lankan construction industry.

Suitability of the establishment of mediation was proved from the identified barriers for the establishment of mediation practice in Sri Lanka. Four numbers of objectives are achieved through the suggested ways as, increase the mediation practice in the country, increase the awareness of mediation, establishing formal recognition and increase the skills and professional ethics of mediators. Therefore, the establishment of mediation is suitable in resolving construction dispute in Sri Lankan construction industry.

## 9. RECOMMENDATIONS

The followings are recommended to enhance the standard of mediation in the Sri Lankan construction industry.

- Require immediate review of existing standard conditions of contracts practiced in the construction industry and introduce construction mediation to the conditions of contracts.
- Implement proper construction mediation centres for small and medium level construction stakeholders.
- Maintain qualified panel of mediators by a regulating body of the construction industry.
- Construction mediation requires statutory recognition. Hence, there is a requirement of legislation which control and recognise construction mediation as an ADR method in Sri Lanka.
- Educational institutes have to experiment and take initiative to introduce mediation method and make the industry aware of the advantages of such method. Then there will be an incentive to industry professionals to adopt them into their practice. In addition they can organise CPD events which may allow experts to share their knowledge with others.
- Introduce speedy mediation method in order to minimise the time spent on the process.

Based on these evaluations it can be concluded that the construction mediation is suitable to practice for resolving disputes in Sri Lankan construction industry. Accordingly, the research found that though mediation has positive advantages over other ADR methods, however, it is not practice appropriately in the Sri Lankan construction industry. Therefore a further research can be done focussing on establishing a sound mediation practice in Sri Lankan construction industry.

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