Journal of Construction in Developing Countries, 30(2), 247–267, 2025

Mediation Procedural Rules and Their Application in the Malaysian Construction Industry: A Doctrinal Legal Research

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First submission: 14 March 2025 | **Accepted:** 7 August 2025 | **Published:** 30 November 2025

To cite this article: Ahmad Arzlee Hassan, Mohd Suhaimi Mohd-Danuri, Umi Kalsum Zolkafli, Muhammad Hadi Mustafa and Sharifah Nur Aina Syed Alwee (2025). Mediation procedural rules and their application in the Malaysian construction industry: A doctrinal legal research. *Journal of Construction in Developing Countries*, 30(2): 247–267. https://doi.org/10.21315/jcdc.2025.30.2.10

To link to this article: https://doi.org/10.21315/jcdc.2025.30.2.10

Abstract: Mediation has emerged as an alternative dispute resolution (ADR) method that promotes confidentiality, cooperation and open communication by encouraging parties to reach mutually agreeable outcomes without the rigid structure of litigation or arbitration. Although the non-adversarial nature of mediation is observed to have attracted younger professionals and millennials, construction practitioners appear to be unaware of what mediation entails. Moreover, inconsistencies in procedural rules and the perception that mediation lacks finality have hindered its adoption in the construction industry. This highlights the gaps in the awareness and practical engagement of mediation as a viable dispute resolution method. The current study addressed these gaps by conducting a comprehensive legal analysis with a specific focus on the legislation, procedural rules and the forms used in construction-related contracts. Employing a doctrinal legal research methodology, the study systematically dissected relevant legal documents, statutory provisions, policy guidelines and applicable case law. Through this approach, the study aimed to identify an established legal principle (i.e., the black letter law) surrounding mediation in the construction industry. The research revealed three principal findings: (1) many procedural rules have been clearly established and legally coherent, (2) certain procedural rules were ambiguous due to the inconsistencies in legal drafting or interpretation and (3) some areas of mediation law were underdeveloped and required further legal articulation. This article contributes to the understanding of mediation within the Malaysian construction industry by examining existing legal principles, identifying areas of uncertainty and clarifying ambiguities within the procedural rules. It underscores the need for increased awareness and promotion and clarification on some of the ambiguities through robust legal backing to support the growth and acceptance of mediation as a mainstream dispute resolution tool for the construction industry.

Keywords: Alternative dispute resolution, Construction dispute, Doctrinal research, Mediation, Procedural rules

INTRODUCTION

The dynamics within the construction industry, which is known to be rough and challenging, have contributed much to triggering eventual disputes within the industry. Yap, Chow and Shavarebi (2019) listed 23 common and 5 most

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critical problems associated with the global construction industry. According to Yap, Chow and Shavarebi (2019), the five critical problems, namely: (1) design changes during construction, (2) cost overruns, (3) late completion, (4) competitive tendering procedures and (5) late payment, can eventually lead to disputes and conflict. Disputes in the construction industry can negatively affect project parties and bind stakeholders to additional costs (Matarneh, 2024). Well-structured project management arrangements generally serve as preventive measures against disputes. However, as each stakeholder pursues different expectations within the project, clashes in objectives, sudden creativity and interests, disputes become an inevitable aspect of contractual engagements.

The dispute resolution industry is highly related to the environment of the construction law. Therefore, a study on the subject is imperative. The number of existing dispute resolution methods, the hybrids of methods and the imminent new methods have prompted research and endless debates among the players. Litigation was considered the main dispute resolution method until arbitration was introduced. Litigation has severe disadvantages, which include damage to relationships, high costs and time consumption. Although arbitration is an established form of alternative dispute resolution (ADR), it is increasingly resembling litigation (Saeb et al., 2021). When the quantity of cases referred to in court and arbitration proceedings grows overwhelming, faster and less expensive alternatives in settling disputes are required, and mediation becomes one of the solutions.

Ismail et al. (2010), Agapiou and Clark (2012), Mohamed (2013) and Danuri (2020) defined mediation as a voluntary, non-prejudiced and highly confidential dispute resolution process in which a third party assists disputing parties in reaching an amicable settlement through a structured form of assisted negotiation. Mediation promotes the idealism of a proceeding with high-level confidentiality and conformity. It believes in compromise, negotiation and speaking openly, politely and appropriately under negotiation-based discussions (Shah et al., 2019) to achieve settlements that can be agreed upon by both parties.

According to Benston and Farkas (2018), the millennials prefer mediation more than a highly litigious and adjudicative process with a rigid deadline and oppressive top-down formalism (Benston and Farkas, 2018). Moreover, in prior research, small and medium-sized enterprises (SMEs) are found to prefer negotiation-based settlements over adversarial forms of ADR. Negotiation, particularly mediation, has gained traction as a preferable method for conflict resolution within the construction sector due to its flexibility, speed, cost-effectiveness and ability to maintain ongoing relationships among the parties involved. These attributes make mediation particularly suitable for SMEs, which often rely on collaboration and goodwill to sustain their business operations

and reputations (Artan et al., 2016; Lin, Li and Cheung, 2023). Therefore, the inherent complexity of the construction industry and the fragmented nature of its operations have led to frequent disputes among various stakeholders, necessitating effective dispute resolution strategies that foster collaboration rather than confrontation (Yap et al., 2021; Artan et al., 2016).

However, despite endorsing the suitability of mediation in the construction industry, Rahmat and Abdul Rahim (2020) criticised that it lacked finality, where parties might attempt to dispute the settlement agreement and still end up filing suit in court regarding the legitimacy of the settlement agreement. Ahnuar et al. (2023) observed that the practice of mediation was still very low in Malaysia, as construction practitioners were unsure, missinformed or perhaps had no idea what mediation is or how it works. The lack of available research also indicates that limited literature, research and information have been gathered on the mediation process, procedure and its development in Malaysia, suggesting that inadequate examination was carried out and thus calls for more research to ensure more information can be relayed to the construction players and also the public.

The current study aimed to scrutinise Malaysian mediation legislation and procedural rules used together with the forms of construction contracts in Malaysia. The objective was to analyse the mediation procedural rules available in the construction industry to understand how mediation should be implemented and made beneficial for construction firms in Malaysia.

LITERATURE REVIEW

The Development of Mediation in the Malaysian Construction Industry

The dispute resolution methods recognised and widely used in Malaysia include litigation, arbitration, adjudication, expert determination and mediation. This recognition was based on their common use, including in many standard forms of construction contracts that consist of specific provisions and are governed by relevant laws, acts and standards. For example, statutory adjudication in Malaysia gained prominence following the enactment of the Construction Industry Payment and Adjudication Act 2012 (CIPAA). Despite its advantages, such as enforceability, a solid legal framework, faster decision-making, accessibility and cost-effectiveness compared to traditional litigation or arbitration, adjudication faced several criticisms (Ryan, 2024; Trash, 2023; Amir et al., 2024). The method is advantageous for small firms with limited resources and cash flow constraints. However, adjudication can be complex and burdened with bureaucratic procedures that often require specialised

consultancy. These challenges become more pronounced in complex disputes, especially under the pressure of adhering to strict adjudication timelines, which can be discouraging for the SMEs.

Mediation as a form of assisted negotiation is increasingly viewed as a more suitable and beneficial approach for SME firms. The first mediation model operating in the construction industry officially began when it was included as a provision under the building contract Persatuan Arkitek Malaysia (PAM) 2018 and the Construction Industry Development Board (CIDB) Standard Form of Contract 2000. For instance, Clause 47.2 of the CIDB Standard Form of Contract 2000 (CIDB, 2000) provides the procedures to refer disputes to mediation. The clause mandates parties to resolve disputes first by mediation and as a condition precedent to arbitration. Since then, other forms of contract have started acknowledging the benefits and potential of including mediation by producing procedural rules for its use within the contract.

Generally, Ahnuar et al. (2023) found that the lack of initiatives in promoting and implementing mediation has had an impact on its low adoption. It can be observed that the drawbacks existed due to the lack of understanding, failure to comprehend its objectives, loose ends within the implementation of the system, equivocal procedures and the general attitude and perception towards them. In addition, Rahmat et al. (2022) highlighted that mediation practice in Malaysia lacked a standard national system or law that standardises the qualification and accreditation of a mediator. As a result, governing institutes have to develop their standards and criteria for a mediator. Considering the varying standards and criteria, it is imminent that the government allocates resources to promote a uniform standard by providing a legislative framework to help regulate and implement a national standard of mediation practices in Malaysia (Lau and Mohamed, 2020).

Mediation may have been practised in accordance with several procedural frameworks in the Malaysian construction industry. These include the CIDB Mediation Rules and the PAM Mediation Handbook. Beyond the construction-specific context, other general mediation frameworks are also applicable, such as the Malaysian International Mediation Centre (MIMC) Mediation Rules and Code of Ethics (2024), the Borneo International Centre for Arbitration and Mediation (BICAM) Mediation Rules and the Asian International Arbitration Centre (AIAC) Mediation Rules (2023). Furthermore, mediation practices in Malaysia are governed by the Mediation Act 2012 (Act 749). The act provides a statutory foundation for the process. In light of the coexistence of multiple mediation frameworks, each with distinct provisions and scopes, it is therefore imperative to identify and critically examine any legal and procedural gaps that may affect the consistency and effectiveness of mediation practices within the construction sector.

Mediation Procedural Rules and Their Application

There are three routes through which parties can refer their dispute to mediation. First, parties who wish to engage in ad hoc mediation can obtain the procedural rules from the Mediation Act 2012, MIMC Mediation Rules or BICAM Mediation Rules. However, for parties bound by the construction contract, depending on the type of contract, they must follow the provisions under the forms of contract in regard to mediation and the specific procedural rules. For instance, if the contract uses the PAM Contracts, the parties must abide by the provision of mediation under the contract and should simultaneously use the PAM Mediation Handbook. This similarly applies to CIDB Contracts and AIAC Forms of Contracts. Conversely, in litigation, court-annexed mediation is an option offered to the parties, which, in the opinion of the court, could better benefit the parties rather than going through litigation. Court-annexed mediation falls under an entirely different mediation system. It can be observed that mediation has many entry points, numerous governing rules and directives, few operating structures, several different approaches and styles, and several questionable inconsistencies.

Despite the various routes through which parties can refer their dispute to mediation and the respective procedural rules, Agapiou (2018) observed that the failure of its implementation in the United Kingdom was due to the non-existence of a general agreement on the mediation process. Agapiou (2018) explained that multiple mediation methods have been practised internationally within entirely different legal and cultural environments by mediators with different types and levels of training and experience. This eventually led to inconsistency and explained the cause for the wide disparity between the success rates of mediation within different states or nations (Ooi, 2017), which is unfortunate, as the methods have significant benefits and potential.

Dahlan, Said and Rajamanickam (2021) noted that mediation explores the possibilities for settlement, focusing mainly on the future, amicable resolutions and the relationship between the parties. Benston and Farkas (2018) pointed out that, as mediation possesses a financial risk-averse nature, a party-controlled dispute resolution mechanism that allows control over the parties' own money and emphasises compromise, millennials would have preferred mediation over litigation. This is a clear assertion that mediation could be the preferred dispute resolution method of the future. However, the issues of inconsistencies, ambiguities and general lack of understanding need to be addressed through the clarification of procedural rules.

Mediations in Malaysia were performed based on procedural rules that depend on (1) the type of dispute, (2) the type of contract that binds parties and (3) the governing bodies. In-depth scrutiny of the legislation and procedural rules

will highlight the discrepancies, inconsistencies, and ambiguities. Only then can the established, indisputable rules be extracted and the overall practice comprehended.

METHODOLOGY

The research methodology applied in this research was doctrinal legal research. Doctrinal research is concerned with the formulation of legal doctrines through the analysis of legal rules (Chynoweth, 2008a). Additionally, from the epistemological perspective, the doctrinal research is concerned with the discovery and development of legal doctrines for publication in textbooks or journal articles. Concerning its research questions, they take the form of asking 'what is the law?' in particular contexts and the black letter law, which refers to the basic, well-established legal rules and principles that are widely accepted and easily found in legal texts such as statutes, regulations and case law (Chynoweth, 2008b; Pradeep, 2019).

By definition, doctrinal legal research is a doctrinal method that focuses on the systematic examination and exposition of legal principles, rules and concepts within a specific legal field or institution (Smits, 2017). The doctrinal research involves a thorough dissection of each legal document, policy, procedural rule, guideline and other directive to establish the black letter law for the construction industry. McConville and Chui (2017) explained that the process includes the gathering of legal documents and analysing them to demonstrate the operation and efficacy of a particular law. However, the doctrinal research does not consider the social, economic or political factors. It concentrates solely on the laws and their technical mechanics and helps address legal issues efficiently, supports the development of law through in-depth analysis and encourages the formulation of new legal theories or propositions based on the existing doctrines (Roy, 2023). Chynoweth (2008a), Smits (2017), Roy (2023), Majeed, Hilal and Khan (2023) and Bhaghamma (2023) unanimously summarised that the process of doctrinal legal should involve:

1. Defining research questions through preliminary literature review to articulate the specific legal question or issue on the relevant legal area and context of the research.
2. Using literature review to review existing legal development and to identify gaps in the literature.
3. Identifying and gathering relevant legal materials such as statutes, regulations, court cases, legal commentaries and academic discussions to be examined, analysed and interpreted.

4. Conducting textual analysis to interpret the language of laws and cases by examining their meanings and to understand the context in which they were created, including assessing how the principles are applied and interpreted in practice, as well as identifying any ambiguities or gaps.
5. Analysing the relationships to clarify how existing legal frameworks address specific issues and how they might change in the light of new developments or societal needs.
6. Organising and systemising legal concepts from the findings to create and clarify relationships and coherent legal principles, rules and concepts between various legal rules and to establish how they would fit within the broader legal system.

In this research, a comparative table was used to outline the major content based on the issues raised during the literature review. This would highlight the contradictions, inconsistencies and ambiguities found in the practice of mediation in reference to the available legal doctrines and cases. The findings would help to formulate arguments and apply logical reasoning to advocate for a particular interpretation or understanding of the law based on the research question.

The analysis helped to develop coherent legal arguments that addressed the research problem (Pradeep, 2019). The study analysis was divided into two parts to obtain a better flow of comprehension on the law and practice, namely: (1) legal document analysis and (2) case law analysis (as shown in Figure 1). There were three main goals from the analysis of legal documents, namely:

1. To identify the applicable legal rules governing a particular issue and to understand the legal rules and norms applicable to specific situations, to establish legal rules and concepts, to delineate legal duties, rights and responsibilities (Chynoweth, 2008a; Smits, 2017; Bhaghamma, 2023; Majeed, Hilal and Khan, 2023).
2. To extract the issues and conflicts by understanding the normative legal framework and to uncover the contradictions or ambiguities in the legal texts and doctrines (Pradeep, 2019; Majeed, Hilal and Khan, 2023).
3. To clarify the ambiguities through the analysis of the language and structure of these documents to understand the legislative intent, interpretations, scope, applicability, gaps or uncertainties within the law (Smits, 2017; Majeed, Hilal and Khan, 2023).

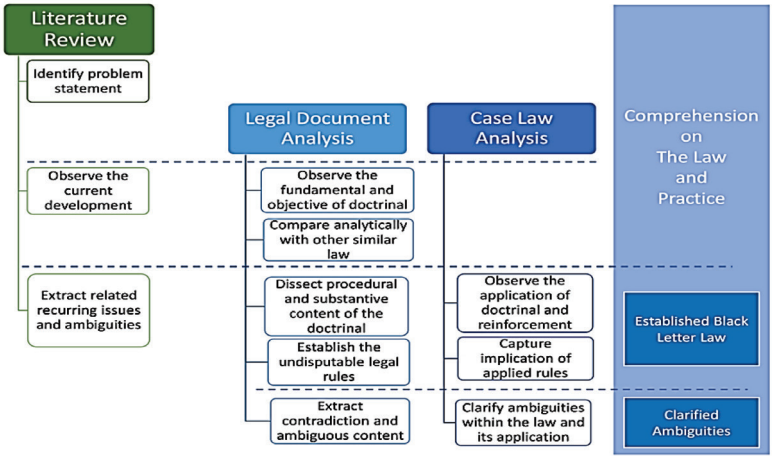

Figure 1. Doctrinal legal analysis

On the other hand, case law analysis was employed to gather the precedential values of specific legal principles through judicial decisions, examining how courts interpreted statutes and resolved legal disputes. This process identified patterns and prevailing doctrines, aiding in the clarification and refinement of legal principles. It also provided multi-jurisdictional perspectives on the interpretation and application of analogous legal principles, facilitated an understanding of the argumentation and reasoning underpinning judgements, and allowed for the observation of their application to factual scenarios. (Chynoweth, 2008b; Bhaghamma, 2023). Case law analysis is also critical when there are conflicting doctrines or interpretations. For this research, online databases, which were Lexis Advance Malaysia Search and CLJ Prime, were utilised. Figure 2 displays the search trails and keywords used for the search (Smits, 2017) while Table 1 illustrates the 12 identified cases that were used for the case law analysis.

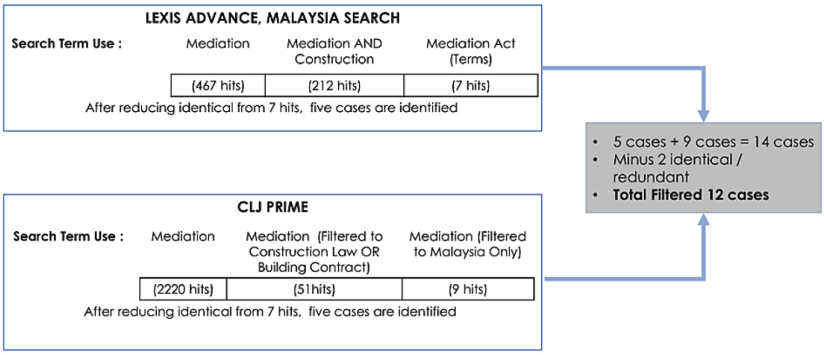

Figure 2. Case law search trails and filtering process

Table 1. Case laws related to mediation

Case ID	Case Name
[1]	*Sabah Forest Industries Sdn. Bhd. vs. Mazlan bin Ali, [2012] 5 MLJ*
[2]	*Alex Nandaseri De Silva vs. Sarath Wickrama Surendre, [2016] 7 MLJevi 52*
[3]	*IOI Properties Bhd. and Anor vs. Paramanathan a/l Muniandy and Anor, [2016] MLJU 1400*
[4]	*PM Securities Sdn. Bhd. vs. Securities Industry Dispute Resolution Centre, Securities Commission and another application, [2016] 12 MLJ 536*
[5]	*Wasilah Engineering Sdn. Bhd. vs. Kolej Universiti Insaniah Sdn. Bhd. and Ors, [2017] MLJU 2128*
[6]	*Terranova Builders Sdn. Bhd. (previously known as NisaConsolidated Sdn. Bhd.) vs. Repc Services Sdn. Bhd. (previously known as Ranhill Engineers and Constructors Sdn. Bhd.) and Anor, [2018] MLJU 1995*
[7]	*Prestij Mega Construction Sdn. Bhd. vs. Keller (M) Sdn. Bhd. and another appeal, [2019] MLJU 1231*
[8]	*Yap Yin Hing (trading under the name and style of Sunlite Electrical Engineering) vs. Hexatech Energy International Sdn. Bhd. and another case, [2020] MLJU 1935*
[9]	*Gogung Fusion Restaurant (KLCC) Sdn. Bhd. and Ors vs. Suria KLCC Sdn. Bhd., [2021] MLJU 2345*
[10]	*Summit Streams Sdn. Bhd. vs. Yayasan Selangor (Sap Ulu Yam Sdn. Bhd., [2021] MLJU 2611)*
[11]	*Panzana Enterprise Sdn. Bhd. vs. Turnpike Synergy Sdn. Bhd., [2022] MLJU 01000*
[12]	*Ong Kong Beng and Anor vs. Ong Kong Leong and Ors, [2022] 3 MLJ*

Both analyses were essential to complete the doctrinal legal analysis. The legal instruments provided an understanding of laws, rules, and practices. However, legal documents lacked clarity and consistency. Case law was used to provide the explanation and to iron out the discrepancies and inconsistencies. The established sets of law supported by legal documents and case laws are called the black letter law, which this study wishes to establish.

DISCUSSION

This study found 10 mediation issues that required examination based on legal document analysis. The issues were the most constructive for further examination. Table 2 summarises the findings of the first part of the research, which was legal document analysis. The analysis involved the comparison of the content between the Mediation Act 2012 and the mediation procedural rules of the organisations (PAM, CIDB and AIAC) on the highlighted issues,

here labelled as Theme 1 to Theme 10. The themes were "Validity of mediation agreements" (Theme 1), "Allowance for concurrent proceedings" (Theme 2), "Need for refundable deposits, advance payment and security 'bonds'" (Theme 3), "Immunity of the mediator" (Theme 4), "Confidentiality of the proceedings" (Theme 5), "Authority of the settlement agreement" (Theme 6), "Termination of mediation due to inconclusive outcomes" (Theme 7), "Finality of mediation settlement agreements" (Theme 8), "Proceeding timeframe" (Theme 9) and "Admissibility of documents for arbitration and litigation" (Theme 10).

This study, through legal document analysis, discovered that consistency in legislation and procedural rules affirmed the rules and established the accepted principles or black letter law within the full procedural framework. This was observed in the rules of Themes 4, 5, 6 and 7. However, some rules were inconsistent, with major differences and impact. These included Themes 2 and 10. Other differences included provisions that might exist in one document but were lacking or absent in others, such as Themes 1, 8 and 9.

In short, the analysis revealed that the existing inconsistencies and ambiguities should be addressed. Case law analyses were carried out to eliminate any ambiguities and ensure that these regulations were admissible in practice. The examples were reviewed using Themes 1 to 10, with the issues from each instance extracted and grouped into the predetermined topic. Table 3 highlights the findings from the case law analysis.

Table 2. Summary of legal document analysis

Themes		Procedural Rules based on Mediation Act 2012	Procedural Rules based on Construction Contract and Respective Procedural Rules	
1	Mediation agreement	Must be in written form, signed and obtain together with the invitation to mediation before the start of mediation (Sections 6[1] to 6[3])	1. Written and signed before mediator appointment.	PAM
			2. Written and signed after mediator appointment.	CIDB
			3. No mention on when agreement should be signed.	AIAC
2	Allowance to concurrent proceedings	Allow for concurrent proceeding with the court proceeding (Section 4[2])	1. Concurrent proceeding is not allowed.	PAM
			2. Concurrent proceedings are not allowed, but they may opt for Dispute Review Board instead of mediation.	CIDB
			3. Arbitration is allowed to start concurrently with mediation.	AIAC
3	Refundable deposits, advance payment and security "bond"	Not specified	1. Deposits required for mediation expenses.	PAM
			2. Required and stated under CIDB's schedule of deposits.	CIDB
			3. Strict provisional advance payment rules.	AIAC
4	Immunity of mediator	Not liable for act and omission (Section 19)	1. Not liable for act and omissions, in the absence of fraud or wilful misconduct.	PAM
			2. Mediators are release, discharge and indemnify of all liability.	CIDB
			3. Not liable for act or omission in relation to or arising out of the mediation.	AIAC

(Continued on next page)

Table 2 *Continued*

Themes		Procedural Rules based on Mediation Act 2012	Procedural Rules based on Construction Contract and Respective Procedural Rules	
5	Confidentiality of proceedings	No disclosure of communication without consent by the parties, use for proceeding under written law or for the purpose of implementation and enforcement of settlement agreement (Sections 15 and 16)	1. Mediation recordings and transcripts are to not be disclosed, publicly, in arbitration or judicial proceedings.	PAM
			2. Instructing for the destruction of all records and transcripts of mediation, to safeguard the confidentiality and exclusivity of mediation.	CIDB
			3. All information relating to the mediation shall be kept confidential by those involved in the mediation, except for the settlement agreement to be used as evident and to seek relief	AIAC
6	Authority of settlement agreement	Upon agreement, the settlement agreement shall be in writing and signed by the parties and shall have binding effect (Section 14[1])	1. Settlement agreements shall have full contractual force and effect and shall be legally binding upon the parties.	PAM
			2. No settlement reached in the mediation will be binding until it has been reduced to writing and signed by or on behalf of the parties.	CIDB
			3. Settlement agreements will be binding and can be used as evidence and relied upon for seeking relief under the applicable law.	AIAC
7	Termination of mediation due to no conclusive outcome	Can be made by the mediator if the mediators feel further effort will not contribute to outcome or by request of the parties (Section 11[3])	1. The mediator shall terminate the mediation proceedings at any time if, in his opinion, further efforts at mediation will not achieve a settlement of the dispute.	PAM

(Continued on next page)

Table 2 *Continued*

Themes		Procedural Rules based on Mediation Act 2012	Procedural Rules based on Construction Contract and Respective Procedural Rules	
			2. Can be terminated by the mediator (by request or if no conclusive outcome is foreseeable) or by any of the parties.	CIDB
			3. Allowed if the mediator finds that further efforts of mediation are unlikely to lead to the resolution of the dispute.	AIAC
8	Finality of mediation	Settlement agreement is binding on the parties (Sections 14[1] and [2])	1. Settlement agreement to have contractually binding legal effect on both parties.	PAM
			2. Lack of emphasis on the effect of settlement agreement being binding.	CIDB
			3. Lack of finality and closure, does not say it is final and binding on parties but can be used to seek relief.	AIAC
9	Proceeding timeframe	Not specified	1. 90 days.	PAM
			2. 42 days (extension up to 3 months allowed).	CIDB
			3. No specific timeline for many of the process.	AIAC
10	Admissibility of document for arbitration and litigation	The settlement agreement can only be disclosed for the purpose of judgement or consent judgement (Sections 14[2] and 15[2][c])	1. Prohibited from referring to or introduce as evidence, in any arbitration or judicial proceedings.	PAM
			2. Not be admissible as evidence or otherwise discoverable in any arbitration or litigation.	CIDB
			3. Can and will be used as evidence in seeking relief only under applicable law.	AIAC

Table 3. Summary of case law analysis

Themes		Lesson Learnt from Court Judgement	Case ID
1	Mediation agreement	1. Mediation must be agreed upon between parties. In this case, the parties did not enter into any agreement to have the dispute mediated.	[9]
		2. No mediation agreement was signed by the parties, indicating that no actual mediation took place albeit the reference to such a session as a "mediation session".	[1]
		3. Mediation must be agreed by both parties and is upon consensus; No mediation can proceed if it is only initialised by one party alone without the agreement of the other party.	[11]
2	Concurrent proceedings	1. The court has the discretion to allow mediation during arbitration, especially if settlement through mediation is foreseeable. Arbitration does not inherently preclude mediation.	[7]
		2. Proceedings explained clearly by parties can proceed upon agreement by both parties. In this case mediation prior to adjudication is allowed by the court, as it was well explained by the party conducting the proceeding.	[4]
3	Refundable deposits, advance payment and security "bond"	–	
4	Immunity of mediator	–	
5	Confidentiality of proceedings	1. Details and records of mediation are confidential.	[2]
		2. It was established that a strong expectation of confidentiality for discussions must occur during mediation sessions.	[8]
6	Authority of settlement agreement	1. Mediation was considered not successful, as no settlement agreement was signed by either of the parties. Any other letter has no validity, as it is produced by the party's representative and therefore dismissed as proof of a concluded mediation. In the absence of a settlement agreement, mediation cannot be considered concluded.	[2]
		2. Settlement agreements must be honoured once both parties have agreed on them.	[3]
		3. Agreed settlements reached during the mediation were valid and enforceable.	[12]

(Continued on next page)

Table 3 *Continued*

Themes		Lesson Learnt from Court Judgement	Case ID
		4. No valid or binding settlements were signed between the parties in the mediation. The plaintiff's alternative claim for refund of deposit pursuant to the alleged mediation settlement is also not sustainable. Matters not recorded and agreed during mediation, if not recorded in the settlement agreement and not signed, are invalid to be recognised as part of the settlement.	[10]
		5. Matter recorded in mediation meeting alone cannot be admissible and enforced.	[5]
		6. Mediation with no conclusive outcome or failed mediation does not amount to a valid settlement agreement.	[6]
7	Termination of mediation due to no conclusive outcome	1. The mediation ended when one party left the mediation, as it is considered a loss of interest to pursue mediation and could not come to a conclusive outcome.	[1]
		2. Mediation with no conclusive outcome or failed mediation does not amount to a valid settlement agreement.	[6]
8	Finality of mediation	1. No "ruling" and "appeal in court" should exist in mediation as an outcome. Instead, it should come from the parties and not from the third party.	[1]
		2. A settlement agreement must be honoured once both parties have agreed on it. The settlement agreement is enforceable through contract act provisions.	[3]
		3. The agreed settlement reached during the mediation was valid and enforceable.	[12]
9	Proceeding timeframe	–	
10	Admissibility of document for arbitration and litigation	1. Communication and content of mediation is highly confidential and should not be presented in court proceedings, except for particular strict circumstances.	[6]
		2. Details and records of mediation are confidential.	[2]
		3. Matters discussed during the mediation are privileged and cannot be admitted as evidence in court.	[8]

DISCUSSION

From the legal document analysis and case law analysis, three main findings were: (1) many procedural rules were clearly established and legally coherent, (2) certain provisions remained ambiguous due to inconsistencies in legal drafting or interpretation and (3) some areas of the mediation law were underdeveloped and require further legal articulation. Clearly established and legally coherent rules included the provisions concerning Themes 1, 4, 5, 6, 7, 8 and 10. Figure 3 summarises the analytical trail through a network diagram featuring the comparison between procedural rules in the form of contract and case law findings on the same set of themes.

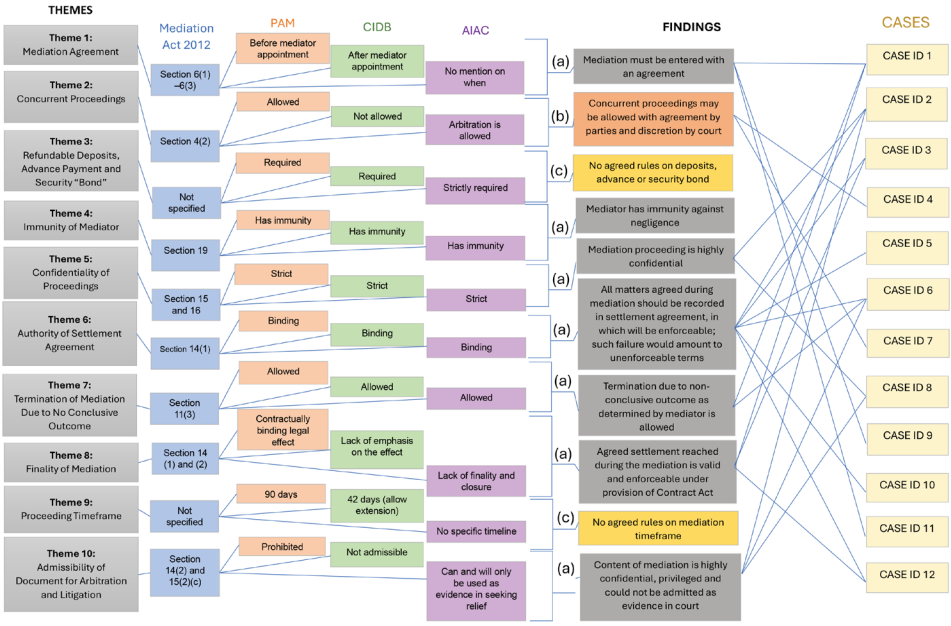

Figure 3. Doctrinal legal analysis network diagram

A mediation agreement is an important component in mediation. The agreement binds parties to mediation proceedings and benchmarks the existence of mediation and the obligation towards it. The Mediation Act and most procedural rules emphasise the need for a mediation agreement to be signed before the proceeding, except for the AIAC Mediation Rules. The cases also highlighted that a mediation agreement is essential in marking the start of mediation and binds parties to the proceeding. However, there was a difference regarding the time that an agreement should be signed, whether before or after the appointment of a mediator. Each sequence would vary in terms of the point of involvement of a mediator in the proceedings and

whether it was beneficial to the parties if the involvement of a mediator started before the signing of an agreement. The rules were also very clear on the issue of the confidentiality of the whole mediation process. The rules were made to protect the secrecy of the proceeding, the confidentiality of the settlement agreement as the outcome document of mediation and the restriction on the admissibility of mediation content in other proceedings. As mediation upholds itself to be private and confidential, the affirmation of rules on these principles was reassuring. In addition, as stated by the rules that mediators are protected against liabilities in the case of negligence, the legislation and procedural rules were also very clear on this. However, although both the doctrines and law cases emphasised that the finality of the settlement agreements is to be imposed and made binding on the parties, limited enforcement was observed.

Procedural rules were also ambiguous due to inconsistencies in legal drafting or interpretation of Theme 2. Generally, the court allowed for and held no restriction against concurrent proceedings, which was similar to the Mediation Act that allows for concurrent proceedings to take place. However, PAM Handbook and CIDB Rules disallow concurrent proceedings as they hinder the overlap of jurisdiction, for instance, when both proceedings produce their contrasting outcomes. As a result, choosing one outcome over another undermines the authority of the smaller proceedings. There had been no instances addressing this specific topic.

Rules identified as underdeveloped and requiring further legal articulation included Themes 3 and 9. Most procedural rules require some sort of deposit or provisional advance payment as a form of security. This is a good practice, as it provides assurance and security to the mediators in terms of the fees and mediation expenses. Unlike litigation, where the power of the court is well-defined and the order for payment is authoritative, mediation lacks such authority. To date, no case has been revealed to have addressed such issues. Similarly, with regard to the preceding timeframe, there is currently no consistency on the ideal timeframe of a mediation proceeding. Some might argue that giving too much time for mediation is uneconomical, while others opine that keeping the timeframe short would not allow ample time for the parties to organically arrive at an agreed settlement. Further enrichment through further application and legal observation should be beneficial to the future development of mediation.

Research Scope and Limitation

The research focused on the main mediation legislation, the Mediation Act 2012, and the use of procedural rules for mediation parallel with the construction contracts, namely the CIDB Mediation Rules, PAM Mediation

Handbook, and AIAC Mediation Rules 2023. This study excluded procedural rules for mediation initiated through litigation, such as court-annexed mediation and/or judge-led mediation.

CONCLUSION

This study established the black letter law for mediation procedural rules through doctrinal legal analysis by utilising the Mediation Act 2012, in comparison to mediation procedural rules used in the construction industry, as parallelly used with respective forms of construction contract, such as PAM Mediation Handbook, CIDB Mediation Rules and AIAC Mediation Rules. To complete the doctrinal legal research and have a comprehension of procedural rules, 12 law cases were examined. The black letter law for mediation procedural rules discovered in this research includes:

1. Mediation must be initiated with a mediation agreement, in which the absence of such an agreement indicates the non-existence of a mediation proceeding.
2. The mediator has immunity against liability in negligence, except for fraud and wilful misconduct.
3. All matters relating to mediation, including mediation proceedings, materials used in and produced from the mediation and the settlement agreement, are highly confidential and cannot be used in arbitration and litigation without the consent of the parties.
4. Mediation shall only be concluded with the settlement agreement, which would also bind the parties to be bound by it.
5. Mediators may conclude the mediation with no conclusive outcome.

The current study identified certain procedural rules necessitating clarification, as certain case laws have not sufficiently resolved various concerns. Accordingly, further possible enrichments can be considered, but in due time, further application and observation should be considered. Future research recommendations should include the mediation practitioners' views pertaining to current mediation practice and the potential needs for improvement in the pursuit of producing the best mediation practice framework suited to the construction industry. It is also beneficial to examine the view of the SME firms on mediation and how this method would benefit small organisations in managing disputes.

ACKNOWLEDGEMENTS

This research is supported by Universiti Malaya Research Excellence Grant 2025 (UMREG009-2025).

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