

SHOULD COURT-ANNEXED ALTERNATIVE DISPUTE RESOLUTION MECHANISMS BE MANDATORY ? *)

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ABSTRACT

Case backlogs, excessive costs, and delays faced by the Indonesian courts, especially the Supreme Court, are not unique. In fact, the American courts either state courts or federal courts experience the same problems, probably even worse. In the U.S., to overcome those problems courts provide various methods or techniques such as arbitration, mediation, and summary jury trial in the settlement of disputes before them, known as court-annexed alternative dispute resolution (ADR) mechanisms. However, some courts in employing such mechanisms also require litigants to use one of those mechanisms mandatorily before they go to a trial, if the latter is necessary.

The use of court-annexed ADR mechanisms mandatorily has invited different reactions and raised some constitutional issues. Some people agree with this policy while the other challenge it. The purpose of this article is to discuss this controversial question whether the participation of litigants in those mechanisms should be mandatory. It also shows the position of the author regarding this matter.

INTRODUCTION

Alternative dispute resolution (ADR) is a generic term. In a broad sense, it means any techniques or mechanisms employed to resolve disputes other than those used in a formal or an adversary trial. In other words, those mechanisms refer to processes as alternatives to ordinary court processes.¹⁾ Those mechanisms, such as negotiation, mediation, and arbitration, have widely been used voluntarily by private parties to resolve their disputes.²⁾

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1) Cf. National Institute for Dispute Resolution, *Paths to Justice: Major Public Policy Issues of Dispute Resolution*, in Office of the Chairman, Administrative Conference of the United States, Sourcebook: Federal Agency Use of Alternative Means of Dispute Resolution 44 (1987) (report of the Ad Hoc Panel on Dispute Resolution and Public Policy) [hereinafter Sourcebook].

2) See Stephen B. Goldberg et al., *Dispute Resolution: Negotiation, Mediation, and Other Processes* 6-7 (2d ed. 1992).

There are some advantages to use ADR mechanisms rather than those of court processes that is, among other things, less time consuming, relatively inexpensive, confidential, less tense, and flexible. Due to those reasons and in order to overcome case backlogs, excessive costs,³⁾ and delays experienced by the courts, especially in the federal court system,⁴⁾ the courts also employed those mechanisms, known as court-annexed ADR mechanisms. This movement can particularly be traced back to the year 1976 when the National Conference on Causes of Popular Dissatisfaction with the Administration of Justice or the *Pound Conference* was held. At the conference, there was a great concern on increased costs for litigation and delay in court proceedings expressed by leading jurists and lawyers.⁵⁾ It was believed that court-annexed ADR mechanisms would offer a "promise" to overcome the above problems.

In applying ADR mechanisms, federal courts and state courts have no uniform rules.⁶⁾ They implement ADR mechanisms that meet only their own needs. For example, some courts employ only one kind of ADR, for example court-annexed arbitration, and the other, perhaps, use more than two kinds of ADR, for example court-annexed arbitration, summary jury trial, and mediation. In addition, some courts may ask the litigants to use those mechanisms voluntarily or based on the consent of the parties in dispute, and other may require the litigants to participate in those programs mandatorily before they go to a trial, if the latter is necessary.⁷⁾

3) Kathleen A. Devine, *Alternative Dispute Resolution: Policies, Participation, and Proposals*, 11 Rev. Litig. 83, 84 (1991) (noting that more than \$33 billion was spent on legal services in 1983, which is an increase of 58.6% in one decade).

4) Senator Charles E. Grassley & Charles Pou, Jr., *Congress, the Executive Branch and the Dispute Resolution Process*, 1992 J. Disp. Resol. 1, 4 (noting that there were 98,560 civil cases filed in districts courts in 1973); Kim Dayton, *The Myth of Alternative Dispute Resolution in the Federal Courts*, 76 Iowa L. Rev. 889, 889-90 (1991) (noting that cases filed in the federal courts grew from 33,591 in 1938 to 217,879 in 1990, and 207 cases per judgeship in 1955 to 448 cases per judgeship in 1990). Case backlogs are still faced the federal courts although between 1978 and 1984 Congress added 174 new judgeships and, based on Title II of the Judicial Improvements Act of 1990, additional 74 new judgeships. *Id.* at 891.

5) Goldberg et al., *supra* note 2, at 7.

6) This paper focuses a discussion more on court-annexed ADR mechanisms practiced by federal courts.

7) Transformation of using ADR mechanisms from voluntary participation to mandatory one in some courts during the 1980s was intended to improve the legal system. Lucy V. Katz, *Compulsory Alternative Dispute Resolution and Voluntarism: Two-headed Monster or Two Sides of the Coin*, 1993 J. Disp. Resol. 1, 1.

There is no objection to use voluntary ADR mechanisms by courts because they are based on the consent of the parties in dispute. Therefore, the use of such mechanisms by courts in that sense is not contrary to due process protected by the Constitution.⁸⁾ On the other hand, there are many criticisms against the use of those techniques, in which the courts compel the participation of the litigants in those processes although the parties in dispute, probably, are unwilling to use those mechanisms. However, there are also some proponents who support those practices.

The purpose of this paper is to discuss the issue whether court-annexed ADR mechanisms should be mandatory in order to solve the problems experienced by the courts and the litigants. Therefore, it deals with the opinions and arguments of both sides, the pros and the cons relating to the use of mandatory court-annexed ADR mechanisms. Some studies done in this matter will also be taken into account. In addition, this paper presents the author's position regarding this controversial issue.

BASES OF THE EXISTENCE OF COURT-ANNEXED ADR MECHANISMS

Statutory Bases

Courts usually rely their authority in implementing ADR mechanisms on article 16(c)(7) of the Federal Rules of Civil Procedure. This article gives discretionary authority to the federal courts to "create the possibility of settlement or the use of extrajudicial procedures to resolve the dispute."

Furthermore, in 1978, Congress passed the Court-annexed Arbitration Act, which was then amended by the Arbitration Act of 1988. This amending Act established court-annexed arbitration experiment in the federal district courts. There are twenty federal districts courts determined to implement court-annexed arbitration. Ten district courts implement it with the consent of the parties in dispute and another ten in employing it can compel the participation of the litigants.

Besides those, in order to support an effort to "ensure just, speedy, and inexpensive resolutions of civil disputes," Congress also enacted the Judicial Improvements Act of 1990. Title I of the Act, known as the Civil Justice Reform Act, establishes ADR plans developed by pilot district courts. According to this Act, each pilot district court has to set up a civil justice expense and delay reduction plan, and consider six

8) See G. Thomas Eisele, *From the Bench: No to Mandatory Court-annexed ADR*, 18:1 Litig. 3 (1991); David A. Rammelt, "Inherent Power" and Rule 16: How Far Can a Federal Court Push the Litigant Toward Settlement, 65 Ind. L.J. 964, 972 (1990).

principles and guidelines of litigation management and cost and delay reduction, which includes ADR programs.

In addition, district courts also provide local rules by themselves as the basis for implementing ADR mechanisms. Therefore, the courts' authority to use such procedures cannot be inferred directly from the Constitution.⁹⁾

Judiciary Bases

There are some cases that can be considered as the bases of the courts's authority to implement ADR mechanisms. The first case is *Capital Traction Co. v. Hof*,¹⁰⁾ the leading case regarding the permissibility of using alternate systems to settle disputes. Here, the Supreme Court held that "Congress had 'considerable discretion' to require a preliminary step 'within reasonable bounds' so long as the right to go to trial by jury was not 'unreasonably obstructed'."¹¹⁾ The second is *Link v. Wabash Railroad Co.*,¹²⁾ 370 U.S. 626 (1962) in which the Supreme Court held that the court has "inherent power," which is necessary to accomplish its function well.¹³⁾ Some courts interpret rules underlying that case broadly, including their rights to impose the participation of litigants compulsorily in court-annexed ADR mechanisms. The third is *Rhea v. Massey Ferguson*,¹⁴⁾ where the Court of Appeals held that local-rule mandatory mediation did not violate the seventh amendment right to trial by jury if the rule also provides the parties with resort to a trial de novo.¹⁵⁾

TYPES OF COURT-ANNEXED ADR MECHANISMS

There are several kinds of ADR mechanisms employed by the courts. In all types of mechanisms, a neutral third party is involved. The participation of parties in dispute to those processes could be voluntary or mandatory. They depend on the courts that employ those techniques.

9) Rammelt. *id.* at 979.

10) 174 U.S. 1 (1899).

11) April A. Fredlund, *Just, Speedy, and Inexpensive or Just Speedy and Inexpensive? Mandatory Alternative Dispute Resolution in the Western District of Missouri*, 1992 J. Disp. Resol. 133, 149.

12) 370 U.S. 626 (1962).

13) See Irving R. Kaufman, *Reform for a System in Crisis: Alternative Dispute Resolution in the Federal Courts*, 59 Fordham L. Rev. 1, 33 (1990); Rammelt. *supra* note 8, at 985.

14) 767 F.2d 266 (6th Cir. 1985).

15) Fredlund. *supra* note 11.

In all types of court-annexed ADR mechanisms, decisions or agreements reached in those processes are not binding, unless the litigants agree otherwise. Parties who dissatisfied with the result of the process are entitled to a trial de novo.

Mediation

Mediation is "a flexible, nonbinding dispute resolution process in which an impartial neutral party -- the mediator -- facilitates negotiations among the parties to help them reach settlement."¹⁶ Court-annexed mediation as a form of dispute resolution has been used widely in four district courts, that is, the Eastern District of Michigan, the Eastern and Western Districts of Washington, and the District of Kansas. The main purpose of the mediation procedure in all those district courts is the same, that is to encourage litigants to resolve their disputes through an evaluation process that places a settlement value on the case. Nevertheless, the procedures of each district are quite different.¹⁷

In the court-annexed mediation, mediators are appointed by the court. They are usually lawyers or other professionals who meet certain criteria. In some federal district courts, as a matter of fact, judges and magistrates also often serve as mediators.¹⁸

In facilitating negotiations, a mediator or a panel of mediators will hear short presentations made by each counsel concerning key factual and legal issues. There is no live testimony delivered, but documentary evidence is occasionally presented. After both parties presented their arguments, the mediators will deliver their opinions about the case and encourage the parties to reach an agreement. If necessary, they can discuss the dispute privately with each party's counsel, called caucuses, regarding their finding and try to find out the actual interest of each party.

If the parties can reach an agreement, this agreement is binding and sometimes takes the form of a court decision. However, if the parties fail to settle their dispute, they are entitled to demand a trial de novo.

16) Elizabeth Plapinger et al. (eds.), *Judge's Deskbook on Court ADR* 3 (1993) [hereinafter *Judge's Deskbook*].

17) Dayton, *supra* note 4, at 909-11 (describing the differences among district courts which implement mediation in term of a kind of case, the nature of litigants' participation, and whether there is a penalty for failure to get a more favorable decision at a trial than that in mediation).

18) A. Leo Levin & Deirdre Golash, *Alternative Dispute Resolution in Federal District Courts*, 37 U. Fla. L. Rev. 29, 40 (1985).

Court-annexed Arbitration

Court-annexed arbitration (CAA) can be defined as "an adjudicatory process in which one or more arbitrators issue a nonbinding judgment on the merits after an expedited, adversarial hearing."¹⁹⁾ CAA has successfully been employed by the U.S. District Court for the Eastern District of Pennsylvania since 1978.²⁰⁾

CAA is only applied to civil cases for seeking money damages in amount not exceeding \$100,000. Nevertheless, cases regarding social security, civil rights, and cases in which a prisoner is a party are excluded from CAA. Based on the above criteria, courts that apply CAA select cases filed in those courts. If they meet those criteria, the courts may ask the parties to go to the arbitration.

The arbitrators are usually lawyers with certain criteria appointed by district courts. For example, they have at least five year experience in legal practice.

Although the parties' participation in this program in most district courts is mandatory, the award of CAA is not binding on the parties.²¹⁾ A party who is not satisfied with the award can ask a trial de novo, and a trial will be held as if there is no arbitration award.

In order to discourage the litigants to demand a trial de novo, sometimes, a party who rejected the CAA award and failed to have a better result at trial than that in CAA, should pay not only arbitration costs or court costs, but also attorneys' fees of the opposing party.²²⁾ However, if there is no party demanding a trial de novo after a certain period of time the arbitrator(s) filed the award, say 30 days, the award is binding and final, and can be enforced like a court judgment.

Summary Jury Trial

Summary jury trial (SJT) is "a flexible, nonbinding process designed to promote settlement in trial-ready cases headed for protracted jury trials."²³⁾ It was introduced by Judge Thomas O. Lambros of the Northern District of Ohio.

19) Judge's Deskbook, *supra* note 16, at 9.

20) Raymond J. Broderick, *From the Bench: Yes to Mandatory Court-Annexed ADR*, 18:4 Litig. 3, 4 (1992).

21) Therefore, it is quite different from the award of arbitration voluntarily held outside the court, which is usually binding and final.

22) Albert W. Alschuler, *Mediation with a Mugger: The Shortage of Adjudication Services and the Need for a Two-tier Trial System in Civil Cases*, 99 Harv. L. Rev. 1808, 1839 (1986).

This "penalty" is imposed by the courts because, sometimes, people also use courts if they want to delay a decision for as long as possible. Sourcebook, *supra* note 1, at 19.

23) Judge's Deskbook, *supra* note 16, at 19.

For a certain extent, the SJT is a short model of jury trial in the sense that a judge and jury are also involved in the process.²⁴⁾ In this procedure, cases ready for trial are scheduled for a half-day mini trial before a panel of six jurors.²⁵⁾ After the parties presented their own version and, sometimes, followed by proving evidence, the jury delivers a verdict. The verdict is not binding on the parties and does not have any effect to a subsequent trial de novo.

Like in the CAA procedure, a party who is not satisfied with the jury verdict is entitled to demand a trial de novo. However, it is rare that local rules impose penalties to parties for their failure to get a more favorable verdict on trial de novo than that in the SJT.²⁶⁾

SJT is usually used by courts when the result of jury verdict is difficult to estimate. By using this procedure, the litigants can get information about the outcome of their case, including the strengths and weaknesses of their position if they go to an ordinary court process.²⁷⁾

Early Neutral Evaluation

Early neutral evaluation (ENE) is "an ADR process that brings all parties and their counsel together early in the pretrial period to present summaries of their cases and receive a nonbinding assessment by an experienced neutral attorney with subject matter of expertise."²⁸⁾ This procedure has been used by the Northern District of California since 1983.²⁹⁾

In ENE procedure, both sides make brief presentations before an evaluator, who will make an assessment about the case. The evaluator is usually an experienced lawyer appointed by the court.³⁰⁾ If the parties cannot settle their case because they do not agree with the assessment the evaluator, they can demand a trial de novo. In this case, the assessment is kept confidential. In addition, the evaluator sometimes also helps the parties in monitoring discovery requests.³¹⁾

24) See Frances E. Zollers, *Alternative Dispute Resolution and Product Liability Reform*, 26 Am. Bus. L.J. 479, 487 (1988).

25) Dayton, *supra* note 4, at 906.

26) *Id.* at 906-07.

27) *Id.* at 907; Anne E. Billings, *The Public's Need to Know vs. Effective Settlement Techniques: The First Amendment Confronts the Summary Jury Trial*, 1990 J. Disp. Resol. 149, 153-54.

28) Judge's Deskbook, *supra* note 16, at 13.

29) *Id.*

30) Goldberg et al., *supra* note 2, at 251.

31) *Id.*

Settlement Conference

Settlement conference³²⁾ is very similar to mediation. However, unlike mediation in which mediators are usually private persons, the settlement conference involves judges or magistrates who act as neutral third parties to facilitate negotiations between disputants to settle their dispute.

Participation of litigants in this programs in most federal and state courts³³⁾ is required. In those courts, if litigants fail to attend the process, they will get sanctions such as paying the opposing party's costs, probably including attorneys' fees, fines, punishment of civil or criminal contempt.³⁴⁾

Other Court-annexed ADR Mechanisms

Besides court-annexed ADR mechanisms discussed above, there are other mechanisms employed by courts, for example minitrial and special master.

Minitrial is a flexible, nonbinding settlement process particularly used out of the courtroom,³⁵⁾ usually in a room of a law office agreed upon by the parties. In this program, each party presents a brief of its best case to settlement-authorized client representatives in an informal hearing. The hearing is held for one or two days in which there are no witnesses. In this process, the rules of evidence and procedure are relaxed. A judge or magistrate, or another third neutral party presides the process. If necessary, they can also act as advisers to both parties. After hearing, the client representatives meet for negotiating settlement, with or without a neutral party's presence. If the parties fail to reach an agreement, they proceed to trial.³⁶⁾

32) According to Hyman, a member of the Section of Litigation Task Force assigned to evaluate ADR programs, settlement conference is the most popular ADR mechanism in 34 pilot district courts. Anthony E. DiResta, *Districts Take Diverse Approaches to Implementing ADR*, *Litigation News*, Oct. 1992, at 6.

33) Interestingly enough, the settlement conference has also been used with a great success in an intermediate court, the Missouri Court of Appeals for the Eastern District, since 1976. See Susan A. FitzGibbon, *Appellate Settlement Conference Programs: A Case Study*, 1993 *J. Disp. Resol.* 57, 61.

Although the court based on its local rule can compel the participation of litigants to attend the program, in fact, it "invites" the parties to settle their dispute. *Id.* at 73-77. In addition, if both parties agree not to use that program because it seems no possibility to settle their dispute and the conference will merely be a waste of time, the court will allow them to go directly to ordinary procedure of the court. Furthermore, there is no sanction imposed for non compliance to attend the program. Therefore, FitzGibbon concludes that the programs are held voluntarily in nature. *Id.* at 106.

34) Katz, *supra* note 7, at 38.

35) Judge's Deskbook, *supra* note 16, at 25.

36) *Id.*

A special master is usually used in complex litigation, where the master appointed by courts assists counsel of both sides to develop information during the pretrial period and to facilitate settlement.³⁷⁾ Special masters are usually lawyers with or without technical expertise. In addition, law professors or retired judges who are well respected in a pertinent substantive area of the law and/or for their skills in facilitating communication, analysis, and negotiation can function as special masters.³⁸⁾

CONSTITUTIONAL ISSUES OF USING MANDATORY COURT-ANNEXED ADR

Although the authority of the courts to implement ADR mechanisms can generally be accepted, the use of such mechanisms that requires mandatory litigants' participation imposed by some courts, has invited some criticisms. Some people worry that those mechanisms employed by the courts will threaten their fundamental rights and essential foundations of the judicial process guaranteed by the Constitution.³⁹⁾ Those concerns raising some constitutional issues relating to implementing mandatory court-annexed ADR mechanisms, are, among other things, a right to jury trial as provided by the seventh amendment, a right to due process as provided by the fourteenth amendment, equal protection under the law, judicial power as provided by article III of the Constitution, and a right of public access.⁴⁰⁾

Seventh Amendment Right of Trial by Jury

The right of jury trial as provided by the seventh amendment⁴¹⁾ is one of the most serious constitutional questions raised by the use of mandatory court-annexed ADR mechanisms.⁴²⁾ Nevertheless, there are some cases that indicate that the use of mandatory court-annexed ADR mechanisms does not violate the right of trial by jury, provided a jury trial is still available at trial de novo. Two Supreme Court decisions

37) Wayne D. Brazil, *Effective Approaches to Settlement: A Handbook for Lawyers and Judges* 41 (1988).

38) *Id.* at 42.

39) See Devine, *supra* note 3, at 90.

40) See Dwight Golann, *Making Alternative Dispute Resolution Mandatory: The Constitutional Issues*, 68 Or. L. Rev. 487, 502-57 (1989); Katz, *supra* note 7, at 22-31.

41) The seventh amendment states that "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved...." Black's Law Dictionary 1646 (6th ed. 1990).

42) Golann, *supra* note 40, at 502.

support this position, that is, *Capital Traction v. Hof*⁴³⁾ and *Peterson*.⁴⁴⁾ In *Capital Traction*, the Supreme Court stated that

[i]t is not "a trial by jury" but "the right to trial by jury" which the amendment declares "shall be preserved." It does not prescribe at what stage of an action a trial by jury must, if demanded, be had; or what conditions may be imposed upon the demand of such a trial, consistently with preserving the right.⁴⁵⁾

In *Peterson*, the Court again affirmed that the use of ADR before a trial does not automatically violate seventh amendment rights.⁴⁶⁾

Generally speaking, courts consider that pretrial mandatory ADR mechanisms do not unreasonably violate the right of trial by jury. This conclusion can be found, for example, in *Rhea v. Massey Ferguson, Inc.*⁴⁷⁾ in which the court upheld that the local-rule mandatory mediation did not infringe the seventh amendment right to jury trial because the local rule also provides the parties with resort to a trial de novo.⁴⁸⁾ Furthermore, in *Anderson v. Eliou*,⁴⁹⁾ the court upheld that "mandatory arbitration of attorney-client fee dispute does not violate state constitutional rights to jury trial."⁵⁰⁾

Based on the above reasons, the use of ADR mechanisms by the courts does not infringe the right of trial by jury. Such techniques, at the worst, only delay that right, not avoiding it.

Fourteenth Amendment: Due Process Clause

The due process clause under the fourteenth amendment provides state court litigation with some fundamental rules for fair dealings, which apply to deprivations of life, liberty or property. In other words, the Constitution guarantees the right of people to access to the courts.

The use of court-annexed ADR mechanisms does not violate that right. Some state court decisions support this argument. For example, in *Healy v. Onstott*,⁵¹⁾ the court held that "compulsory arbitration is invalid only if the arbitral award is final and

43) 174 U.S. 1 (1899).

44) 253 U.S. 300.

45) Katz, *supra* note 7, at 23.

46) Golann, *supra* note 40, at 507-08.

47) 767 F.2d 266 (6th Cir. 1985).

48) Fredlund, *supra* note 11, at 149.

49) 555 A.2d 1042 (Me. 1989).

50) Katz, *supra* note 7, at 23.

51) 237 Cal. Rptr. 540, 542 (Ct. App. 1987).

binding, and parties are deprived of any subsequent judicial hearing."⁵²⁾ Furthermore, in *American Universal Ins. Co. v. DelGreco*,⁵³⁾ the court held that "compulsory arbitration statutes that effectively close the courts to the litigants by compelling them to resort to arbitrators for a final and binding determination are void and against public policy and are unconstitutional."⁵⁴⁾

The Supreme Court has also applied due process principles continually to mandatory ADR mechanisms for more than twenty years.⁵⁵⁾ Therefore, like seventh amendment claims, due process arguments to challenge the validity of mandatory court-annexed ADR mechanisms are rarely successful in the federal courts.⁵⁶⁾

Equal Protection of the Law

According to Dwight Golann, there are three issues which are involved in equal protection analysis of mandatory ADR mechanisms: (1) whether ADR programs create classifications within the meaning of the equal protection clause of the federal and state constitutions; (2) what the standard of review should be to such classifications; and (3) whether classifications are acceptable.⁵⁷⁾ First, accordingly, ADR programs create classifications for equal protection purposes. For example, court-annexed arbitration typically covers only monetary claims for less than certain dollar amount. Other ADR mechanisms are used to settle cases within a limited subject area, such as child custody disputes, medical malpractice cases, or worker's compensation claims.⁵⁸⁾

Second, the standard of review for classifications of cases should meet a reasonable or rational relationship between the classification at issue and a legitimate governmental goal. Nevertheless, a strict scrutiny standard is difficult to accomplish.⁵⁹⁾ It should be admitted that this classification may not satisfy every individual disputant. However, it is claimed that many people directed into mandatory ADR mechanisms are satisfied by having a speedy and inexpensive resolution of their dispute.⁶⁰⁾

52) Katz, *supra* note 7, at 25; Golann, *supra* note 40, at 534.

53) 530 A.2d 171 (Conn. 1987).

54) Katz, *supra* note 7, at 25.

55) Golann, *supra* note 40, at 534-35. Cases that indicate this position, are *Goldberg v. Kelly*, 397 U.S. 254 (1970)(termination of welfare benefits); *Mathews v. Eldrige*, 424 U.S. 319 (1976)(termination of social security disability benefits); and *Walters v. National Association of Radiation Survivors*, 473 U.S. 305 (1985)(denial of veterans' disability benefits). *Id.*

56) Katz, *supra* note 7, at 24.

57) Golann, *supra* note 40, at 549-50.

58) *Id.* at 550.

59) *Id.*

60) *Cf. id.* at 551.

Third, although the Supreme Court has never ruled expressly on whether the classifications made by mandatory ADR programs infringe the equal protection clause, the Court's decisions regarding the validity of other conditions on entry into litigation can be applied by analogy. For example, *Capital Traction*, the case challenging the validity of a system of "quasi-jury" trials in the District of Columbia, also involved an equal protection claim.⁶¹⁾ In addition, there are a number of state court decisions that have addressed the issue whether mandatory ADR mechanisms violate federal or state equal protection guarantees.⁶²⁾

There are also some cases in which there is a violation of equal protection under the law because ADR mechanisms are applied differently to plaintiffs and defendants in the same law suit. For example, in *Lindsey v. Normet*,⁶³⁾ the Supreme Court held that an Oregon requirement, which provides "that tenants, not landlords, who appeal from an eviction proceeding must post bond for double the rent expected to accrue during the appeal, is arbitrary and irrational."⁶⁴⁾ Another case is *Motor Vehicle Mfrs. Ass'n of the United States, Inc v. O'Neill*,⁶⁵⁾ in which the Court overruled the automobile lemon law of that state since "it allowed only consumers, and not manufacturers, to reject unfavorable arbitration award and to demand a trial de novo."⁶⁶⁾

Article III of the Constitution: Judicial Power

According to the Constitution, the judicial power is vested in judges appointed by the President and confirmed by the Senate. However, in court-annexed ADR mechanisms, as a matter of fact, arbitrators, mediators, and other impartial third parties are usually not judges. Therefore, in order to meet the Constitution's order, as far as decisions of non-judges are not binding, they are constitutional. This rule can be found in *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*,⁶⁷⁾ in which the Supreme Court held that "non-Article III judges may not decide dispute within the power of Article III courts."⁶⁸⁾

61) *Id.* at 552-53 n.290.

62) *Id.* at 553.

63) 405 U.S. 56 (1972).

64) Katz, *supra* note 7, at 27.

65) 561 A.2d 917, 923 (Conn. 1989).

66) *Id.*

67) 458 U.S. 50 (1982).

68) *Id.* at 28.

First Amendment: Public Access

Confidentiality is important in mediation, arbitration, and other agreed procedures, especially in the settlement of disputes on commercial matters. Because procedures in such mechanisms are traditionally closed, the non disclosure of those procedures to the public access is not contrary to the Constitution. This rule was upheld in *Cincinnati Gas & Elec. Co. v. General Elec. Co.*,⁶⁹⁾ in which the court stated that "public access would be detrimental to the purpose of the summary jury trial whenever the parties were concerned with confidentiality."⁷⁰⁾

ADVANTAGES OF USING MANDATORY COURT-ANNEXED ADR MECHANISMS

There are several advantages of ADR mechanisms employed by the courts. First of all, it is believed that those mechanisms can reduce caseloads, costs, and delay. By enforcing litigants into those programs, those techniques will be used widely. In turn, it is hoped that there are many disputes that can be settled through those mechanisms without going into a trial. Therefore, this program is very helpful for the courts in order to decrease their burden.⁷¹⁾

Secondly, since the cost of litigation is so expensive that many people cannot afford it, ADR mechanisms can broaden access for the people to the justice system. Those programs will provide mechanisms that give litigants a speedy settlement of disputes at a reasonable cost.⁷²⁾ This goal cannot be reached, if those mechanisms are based on voluntary participation of the parties. A party in dispute cannot compel an unwilling opposing party into the programs if those programs are voluntary.⁷³⁾

Thirdly, ADR mechanisms will provide the litigants with speedier and less expensive alternative than that in the courtroom trial. Although at first some litigants are probably unwilling to resolve their dispute through those programs because they do not believe that they can settle their dispute. However, after they participated in those mechanisms, some can settle their dispute, or at least they can get some benefits

69) 854 F.2d 900 (6th Cir. 1988).

70) *Id.* at 29-30.

71) The estimated cost to the federal government of a tort suit filed in a federal district court in 1982 was \$1,740 and in certain tort cases tried by juries, the average cost was \$15,028 while the federal government obtained only \$60 per case in filing fees. Alschuler, *supra* note 22, at 1812.

72) Broderick, *supra* note 20, at 4.

73) Sourcebook, *supra* note 1, at 30.

from the process.⁷⁴⁾ This opinion is reflected in *G. Heileman Brewing Co. v. Joseph Oath Corp.*⁷⁵⁾ and *In re Novak*.⁷⁶⁾

CRITIQUE OF USING MANDATORY COURT-ANNEXED ADR MECHANISMS

Notwithstanding the success of employing ADR mechanisms in some courts,⁷⁷⁾ there are some criticisms of using those mechanisms mandatorily. Critics base their arguments on constitutional, statutory, and practical grounds to attack those courts' practices.

As can be seen in Part IV, it seems that there is no so serious constitutional issue that prevents the courts to use such mechanisms mandatorily. However, there is a criticism on the constitutional basis. In certain mandatory court-annexed ADR mechanisms, a party demanding a trial de novo sometimes should pay a penalty if he failed to get a better decision at trial, while actually he exercised his constitutional right of a trial by jury.⁷⁸⁾

Based on the enactment process of the statute, a critic disagrees with the argument of proponents of ADR in federal courts who contend that Rule 16 of the Federal Rules of Civil Procedure, as amended in 1983, authorizes federal district courts to employ mandatory ADR mechanisms. He asserts that the history and purposes of amended Rule 16 do not allow such a broad interpretation.⁷⁹⁾ The Rule itself does not expressly allow courts to adopt mandatory ADR mechanisms. This position has a

74) Katz, *supra* note 7, at 37.

75) 871 F.2d 648. *Id.* at 35 (noting that the Seventh Circuit Court of Appeals held that "a district judge could order a represented corporate defendant to send a corporate representative with authority to settle to a pretrial conference and approved sanctions in the amount of the opposing party's costs and attorneys' fees for refusal to attend").

76) 932 F.2d 1397. *Id.* at 36 (noting that the Eleventh Circuit affirmed the district court's order which imposed the party's attendance to a pretrial conference).

77) For example, the Eastern District of Pennsylvania is very successful in employing ADR mechanisms mandatorily. Those mechanisms provide not only a speedy and less expensive settlement of dispute than court processes but also give a positive impact to the court, in which court processes in that district can be held earlier. Broderick, *supra* note 20, at 60. Another example is the Eastern District of Michigan, which has successfully employed mandatory mediation. Dayton, *supra* note 4, at 911.

78) *Id.* at 930.

79) *Id.* at 932-33.

support in *Strandell v. Jackson County, Illinois*,⁸⁰⁾ in which the Circuit Court held that Rule 16 did not justify the mandatory summary jury trial.⁸¹⁾

There is another objection to use mandatory ADR mechanisms on the statutory basis. The language of the Civil Justice Reform Act of 1990 or its legislative history does not support the argument that all federal district courts now have authority to implement any kind of mandatory ADR mechanisms.⁸²⁾ Accordingly, unless expressly provided by law, federal courts can only employ voluntary ADR mechanisms.

There are some criticisms based on practical grounds. First of all, some empirical studies on this matter arrived at a conclusion that district courts applying ADR mechanisms do not differ from non-ADR districts in respect to the variables that indicators of cost and delay. In other words, those programs do not have any measurable impact on caseloads and delays in those individual district courts.⁸³⁾

Secondly, since ADR mechanisms employed by courts are not binding and the percentage of parties demanding a trial de novo is quite high, those mandatory programs will add one layer for the settlement of disputes to the justice system in the entire court process. Apparently, parties should pay more and waste their time if they cannot reach settlement in ADR mechanisms.

Thirdly, some parties in civil litigation are concerned because they feel that they get less justice⁸⁴⁾ in court-annexed ADR mechanisms than in ordinary court processes.⁸⁵⁾ Such mechanisms tend to concern with speed and efficiency, not justice.⁸⁶⁾ Although speed is an important element in the settlement of disputes that should be taken into account, however, it can also destroy opportunities for developing evidence, particularly in case ADR mechanisms are used to cut short discovery.⁸⁷⁾

80) 838 F.2d 884 (7th Cir. 1987).

81) *Id.* at 935 n. 206.

82) *Id.* at 948.

83) *Id.* at 915-16.

84) Sharon A. Jennings, *Court-Annexed Arbitration and Settlement Pressure: A Push Towards Efficient Dispute Resolution of "Second Class" Justice?*, 6:2 J. Disp. Resol. 313, 332 (1991) (suggesting that coercive sanctions should not be used in court-annexed arbitration because they are practically useless in decreasing case congestion and create pressure).

85) *See* Katz, *supra* note 7, at 5.

86) *See* Fredlund, *supra* note 11.

87) Katz, *supra* note 7, at 5.

Finally, it is suspected, since in the summary jury trial a verdict is advisory, not binding, jury will make its decision not serious. This practice in turn will "decline the conscientiousness of jurors."⁸⁸⁾

DISCUSSION

Although it is believed that court-annexed ADR mechanisms have some advantages, studies on the application of such techniques in federal district courts showed that the effect of this movement in reaching its purpose is mixed. For example, the Eastern District of Pennsylvania is very successful in applying court-annexed arbitration, whereas the District of Connecticut (one of the three original pilot districts) abandoned its program because such a program required a disproportionate share of the court's administrative resources.⁸⁹⁾

In selecting cases whether they will be settled by court proceedings or court-annexed ADR mechanisms, almost all of the district courts use the amount of money sought as criteria. According to Judge Broderick of the Eastern District of Pennsylvania,⁹⁰⁾ the amount of money in controversy should be limited so that it will discourage the losing party to demand a trial de novo. Judge Eisele of the Eastern District of Arkansas strongly criticizes this practice. According to him, this practice does not make sense by saying that "if 'big money' is involved, you are entitled to your traditional day in court, ... But if you have a relatively small claim, no."⁹¹⁾

In addition to criticizing this practice, the National Institute of Dispute Resolution asserts that the most important thing in determining the appropriate form for resolving a dispute is the nature of the dispute, not because of a lot of money involved.⁹²⁾ Accordingly, the nature of dispute is more important to determine what technique should be used to settle a particular dispute. However, it seems not easy, although not impossible, to fix an appropriate form of mechanisms without being contrary to the equal protection clause.

Except for court-annexed arbitration in ten district courts, which are authorized by the Arbitration Act of 1988 to implement it mandatorily, there is still an uncertainty

88) See Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U.Chi.L.Rev. 366, 386-87 (1986).

89) Dayton, *supra* note 4, at 915.

90) Quoted in Eisele, *supra* note 8, at 5.

91) *Id.*

92) Sourcebook, *supra* note 1, at 26.

whether courts can compel litigants' participation in ADR mechanisms. Even in the same court, there is a different opinion regarding the nature of ADR mechanisms whether they should be voluntary or mandatory. This more confusing situation can be found in the Seventh Circuit's holdings in *Strandell* and *Heileman*⁹³⁾ in which the Seventh Circuit has different holdings. In the former case, it invalidated a mandatory summary jury trial, while in the latter case it validated mandatory settlement conference. This fact would obviously make the litigants unsatisfied and confused, and, of course, it is also unfavorable to support the effort to mete out justice in the society. One of the results, because some of the litigants have challenged the validity of those practices, this means that some cases should be added to the bulk files of the existing cases pending decisions.

CONCLUSION

Although there is no serious constitutional issue that prevents the use of mandatory ADR mechanisms by courts, there are some drawbacks of employing such mechanisms, especially if they are imposed to parties who are unwilling to participate in the programs. They add unnecessary tense and money, if both parties since the beginning have considered that they would not settle their dispute through such techniques.

The use of mandatory ADR mechanisms by courts is more problematic rather than that of voluntary ones. For example it has invited criticisms and even challenges. In addition, the result of using such mechanisms mandatorily is not so obvious that they are better than those of voluntary ones. In fact, some courts have successfully implemented ADR mechanisms voluntarily. Besides that, the atmosphere of ADR mechanisms' processes is more suitable to make them voluntary than mandatory.

Despite the above reasons, it seems that studies in this field should be furthered in order to evaluate whether those mandatory mechanisms work. Since the Arbitration Act of 1988 also established voluntary court-annexed arbitration for another ten district courts, comparison between the success, and also the failure, of two different kinds of approaches in achieving the purpose of this program will be very useful for the decision makers to take into account.

93) *See. supra* notes 75 and 80.