By order of the Commission.

**Donna R. Koehnke,**

*Secretary.*

[FR Doc. 00–20850 Filed 8–15–00; 8:45 am]

**BILLING CODE 7020–02–P**

## INTERNATIONAL TRADE COMMISSION

**[Investigation No. 731–TA–860 (Final)]**

### Tin- and Chromium-Coated Steel Sheet from Japan

**Determination**

On the basis of the record [1] developed in the subject investigation, the United States International Trade Commission determines,[2] pursuant to section 735(b) of the Tariff Act of 1930 (19 U.S.C. § 1673d(b)) (the Act), that an industry in the United States is materially injured by reason of imports from Japan of tin- and chromium-coated steel sheet, provided for in subheadings 7210.11.00, 7210.12.00, 7210.50.00, 7212.10.00, and 7212.50.00 if of non-alloy steel and under subheadings 7225.99.00 and 7226.99.00 if of alloy steel (other than stainless steel) of the Harmonized Tariff Schedule of the United States, that have been found by the Department of Commerce to be sold in the United States at less than fair value (LTFV).

**Background**

The Commission instituted this investigation effective October 28, 1999, following receipt of a petition filed with the Commission and the Department of Commerce by Weirton Steel Corp., Weirton, WV, the Independent Steelworkers Union, and the United Steelworkers of America, AFL–CIO. The final phase of the investigation was scheduled by the Commission following notification of a preliminary determination by the Department of Commerce that imports of tin- and chromium-coated steel sheet from Japan were being sold at LTFV within the meaning of section 733(b) of the Act (19 U.S.C. § 1673b(b)). Notice of the scheduling of the Commission's investigation and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** of April 24, 2000 (65 FR 21791). The hearing was held in Washington, DC, on June 29, 2000, and all persons who requested the opportunity were permitted to appear in person or by counsel.

The Commission transmitted its determination in this investigation to the Secretary of Commerce on August 9, 2000. The views of the Commission are contained in USITC Publication 3337 (August 2000), entitled Tin- and Chromium-Coated Steel Sheet from Japan: Investigation No. 731–TA–860 (Final).

Issued: August 9, 2000.

By order of the Commission.

**Donna R. Koehnke,**

*Secretary .*

[FR Doc. 00–20848 Filed 8–15–00; 8:45 am]

**BILLING CODE 7020–02–P**

[1] The record is defined in sec. 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR § 207.2(f)).

[2] Chairman Stephen Koplan and Commissioner Thelma J. Askey dissenting.

## DEPARTMENT OF JUSTICE

### Notice of Lodging of Consent Decree Pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act

In accordance with Department policy, 28 C.F.R. § 50.7, notice is hereby given that a consent decree in *United States* v. *RAM Industries, Inc.,* Civil Action No. 00–3826 (E.D. Pa.) was lodged on July 28, 2000, with the United States District Court for the Eastern District of Pennsylvania. The consent decree resolves the claims of the United States against RAM Industries, Inc. under Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended (''CERCLA''), 42 U.S.C. § 9607(a), for reimbursement of response costs incurred by the U.S. Environmental Protection Agency (''EPA'') in connection with the Eighth Street Drum Site located in Chester, Delaware County, Pennsylvania. Under the terms of the consent decree, EPA would receive $13,500, which represents approximately 33% of the amount expended by the Site.

The Department of Justice will receive, for a period of thirty (30) days from the date of this publication, comments relating to the proposed consent decree. Comments should be addressed to the Assistant Attorney General for the Environment and Natural Resources Division, U.S. Department of Justice, Washington, D.C., 20530, and should refer to *United States* v. *RAM Industries, Inc.,* DOJ #90–11–3–06920.

The proposed consent decree may be examined at the offices of the United States Attorney, 615 Chestnut Street, Suite 1250, Philadelphia, PA 19106–4476. A copy of the consent decree may also be obtained by mail from the U.S. Department of Justice Consent Decree Library, P.O. Box 7611, Washington, D.C. 20044. In requesting a copy, please refer to the referenced case and enclose a check in the amount of $6.25 (25 cents per page reproduction cost), payable to the Consent Decree Library.

**Joel M. Gross,**

*Chief, Environmental Enforcement Section, Environment & Natural Resources Division.*

[FR Doc. 00–20740 Filed 8–15–00; 8:45 am]

**BILLING CODE 4410–15–M**

## DEPARTMENT OF JUSTICE

### Core Principles for Federal Non-Binding Workplace ADR Programs; Developing Guidance for Binding Arbitration—A Handbook for Federal Agencies

**AGENCY:** Department of Justice/Federal Alternative Dispute Resolution Council.

**ACTION:** Notice.

**SUMMARY:** This notice contains two documents to assist Federal agencies in developing alternative dispute resolution (ADR) programs: ''Core Principles for Non-Binding Workplace ADR Programs'' and ''Developing Guidance for Binding Arbitration—A Handbook for Federal Agencies.'' These documents were created by the Federal ADR Council, a group of high level government agency officials chaired by the Attorney General. The documents are based on the combined expertise of ADR specialists in federal agencies with active ADR programs. The first document describes ten key elements that are essential in any fair and effective ADR program. The second document provides information and assistance for agencies on the use of binding arbitration.

**FOR FURTHER INFORMATION CONTACT:** Peter R. Steenland and Jeffrey M. Senger, Office of Dispute Resolution, United States Department of Justice, Room 5240, Washington, DC 20530; (202) 616–9471.

Dated: August 8, 2000.

**Jeffrey M. Senger,**

*Deputy Senior Counsel for Dispute Resolution, United States Department of Justice.*

**Federal Register Introduction**

The Administrative Dispute Resolution Act of 1996 (ADRA), 5 U.S.C. 571–584, requires that each Federal agency take steps to promote the use of ADR and calls for the establishment of an interagency committee to facilitate and encourage agency use of ADR. As

the Presidentially appointed chair of this interagency committee, the Attorney General created the Federal ADR Council, an organization composed of high level officials from various agencies with ADR expertise. The Council's mission is to develop policy guidance on crosscutting issues that involve the creation and operation of Federal ADR programs. The first two documents from the Council are published below.

The first document is entitled ''Core Principles for Non-Binding Workplace ADR Programs.'' We believe that any fair and effective program must address the following issues: Confidentiality, neutrality, preservation of rights, self-determination, voluntariness, representation, timing, coordination, quality, and ethics. This document briefly describes the nature of each of these principles.

The second document is called ''Developing Guidance for Binding Arbitration—A Handbook for Federal Agencies'' which provides information and assistance for agencies that are considering the use of binding arbitration. Federal government experience with binding arbitration is limited because it was not explicitly authorized until recently, with the passage of the ADRA. Because participants in binding arbitration must give up various rights and remedies, including the right to appeal, many agencies prefer more consensual forms of ADR, such as mediation. Nonetheless, circumstances may exist where an agency may wish to employ binding arbitration, such as when the need for prompt resolution of a matter is paramount. The ADRA requires that an agency considering binding arbitration develop a policy on its use, in consultation with the Department of Justice. The attached Handbook assists agencies in developing this policy as well as in using arbitration.

Nothing in these guidance documents shall be construed to create any right or benefit, substantive or procedural, enforceable at law or in equity, by a party against the United States, its agencies, its officers or any other person.

*The Federal ADR Council*

*Chair:* Janet Reno, Attorney General, Department of Justice

*Vice Chair:* Erica Cooper, Deputy General Counsel, Federal Deposit Insurance Corporation

*Members:* Leigh A. Bradley, General Counsel, Department of Veterans Affairs; Meyer Eisenberg, Deputy General Counsel, Securities and Exchange Commission; Mary Anne Gibbons, General Counsel, U.S. Postal Service; Gary S. Guzy, General Counsel, Environmental Protection Agency; Jeh C. Johnson, General Counsel, Department of the Air Force; Harold Kwalwasser, Deputy General Counsel, Department of Defense; Nancy McFadden, General Counsel, Department of Transportation; Janet S. Potts, Counsel to the Secretary, Department of Agriculture; Harriett S. Rabb, General Counsel, Department of Health and Human Services; Henry L. Solano, Solicitor, Department of Labor; John Sparks, Principal Deputy General Counsel, Department of the Navy; Peter R. Steenland, Jr., Senior Counsel for Dispute Resolution, U.S. Department of Justice; Mary Ann Sullivan, General Counsel, Department of Energy; Robert Ward, Dispute Resolution Specialist, Environmental Protection Agency.

**Core Principles for Non-Binding Workplace ADR Programs**

*Confidentiality:* All ADR processes should assure confidentiality consistent with the provisions in the Administrative Dispute Resolution Act. Neutrals should not discuss confidential communications, comment on the merits of the case outside the ADR process, or make recommendations about the case. Agency staff or management who are not parties to the process should not ask neutrals to reveal confidential communications. Agency policies should provide for the protection of privacy of complainants, respondents, witnesses, and complaint handlers.

*Neutrality:* Neutrals should fully disclose any conflicts of interest, should not have any stake in the outcome of the dispute, and should not be involved in the administrative processing or litigation of the dispute. For example, they should not also serve as counselors or investigators in that particular matter. Participants in an ADR process should have the right to reject a specific neutral and have another selected who is acceptable to all parties.

*Preservation of rights:* Participants in an ADR process should retain their right to have their claim adjudicated if a mutually acceptable resolution is not achieved.

*Self-determination:* ADR processes should provide participants an opportunity to make informed, uncoerced, and voluntary decisions.

*Voluntariness:* Employees' participation in the process should be voluntary. In order for participants to make an informed choice, they should be given appropriate information and guidance to decide whether to use ADR processes and how to use them.

*Representation:* All parties to a dispute in an ADR process should have a right to be accompanied by a representative of their choice, in accordance with relevant collective bargaining agreements, statutes, and regulations.

*Timing:* Use of ADR processes should be encouraged at the earliest possible time and at the lowest possible level in the organization.

*Coordination:* Coordination of ADR processes is essential among all agency offices with responsibility for resolution of disputes, such as human resources departments, equal employment opportunity offices, agency dispute resolution specialists, unions, ombuds, labor and employee relations groups, inspectors general, administrative grievance organizations, legal counsel, and employee assistance programs.

*Quality:* Agencies should establish standards for training neutrals and maintaining professional capabilities. Agencies should conduct regular evaluations of the efficiency and effectiveness of their ADR programs.

*Ethics:* Neutrals should follow the professional guidelines applicable to the type of ADR they are practicing.

**Developing Guidance for Binding Arbitration**

A Handbook for Federal Agencies

Prepared by:
Phyllis Hanfling, Department of Energy
Martha McClellan, Federal Deposit Insurance Corporation

This document creates no legal rights or remedies and is intended solely for guidance.

*Introduction*

ADRA of 1996

The Administrative Dispute Resolution Act of 1996 (''ADRA''), 5 U.S.C. 571–583, made substantial changes in the arbitration provisions found in the ADRA of 1990. Specifically, the ADRA of 1996 authorizes the voluntary use of binding arbitration, without the 1990 Act's qualifying proviso that allowed heads of agencies to vacate an arbitrator's award. Before an agency can exercise this new power, it must issue guidance, in consultation with the Attorney General, on the appropriate use of binding arbitration. See 5 U.S.C. 575(c).

Handbook Purpose

This Handbook is designed to do several things: (1) Serve as a practical introduction to binding arbitration; (2) set out the ADRA requirements for federal agencies' use of binding arbitration; (3) introduce the issues which an agency should consider before drafting its arbitration guidance or participating in binding arbitration; and (4) outline Department of Justice requirements for an agency's arbitration guidance.

Form of Guidance

Because of the vast differences among federal entities and their use of ADR, this Handbook does not include model language or recommended guidance. However, agencies may wish to issue their guidance in the form of a rulemaking, to provide constructive notice of policies that may affect members of the public.

*Section I—Arbitration Provisions of the ADR Act*

Specific provisions for the use of binding arbitration are contained in 5 U.S.C. 575–581 and must be reviewed carefully before an agency begins developing binding arbitration guidance. Although the ADRA authorizes

agencies to use binding arbitration at their discretion in appropriate cases, the Act contains a number of requirements limiting that use. These limitations reflect Congressional intent to ensure that the government's interests in maintaining control over policymaking and protecting the federal budget are not compromised by federal agencies' use of arbitration. Thus, the Act is permissive—it authorizes agencies to use binding arbitration, but does not require them to do so; it allows arbitration to be invoked only with the prior, knowing agreement of responsible agency officials; it allows the parties to choose the issues to be submitted to arbitration and requires them to agree in advance on a maximum award. The Act also contains directions regarding the role and authority of the arbitrator, conduct of the arbitration, arbitration awards and judicial review.

This section provides an outline of the ADRA binding arbitration provisions and identifies the requirements that must be met before binding arbitration can be used. It also contains requirements on the use, conduct, or enforcement of the arbitration process. In the section-by-section analysis that follows, requirements appear in bold type.

*Section-by-Section Analysis*

Section 575 Authorization of Arbitration

1. The decision to arbitrate must be voluntary on the part of all parties to the arbitration. (See: 5 U.S.C. 575(a)(1)).

2. A party may limit the issues it agrees to submit to arbitration. A party may agree to arbitrate on the condition that the award is limited to a range of possible outcomes. (See: 5 U.S.C. 575(a)(1)(A) and (B)). Note that this provision does not contradict the requirement (set out in 3., below) that the parties agree on a maximum amount that the arbitrator can award.

3. An agreement to arbitrate must be in writing. It must set forth the subject matter submitted to the arbitrator, and must specify the maximum award or ''cap'' that may be granted by the arbitrator. (See: 5 U.S.C. 575(a)(2)).

4. An agency may not require anyone to consent to arbitration as a condition of entering into a contract or obtaining a benefit. (See: 5 U.S.C. 575(a)(3)).

5. An officer or employee of the agency who offers to use arbitration must otherwise have the authority to enter into a settlement concerning the matter or must be specifically authorized by the agency to consent to the use of arbitration. (See: 5 U.S.C. 575 (b)(1) and (2)).

6. Prior to using binding arbitration under this subchapter, the head of an agency, in consultation with the Attorney General, must issue guidance on the use of binding arbitration and when an agency officer or employee has the authority to settle a dispute using binding arbitration. (See: 5 U.S.C. Sec. 575(c)).

Section 576 Enforcement of Arbitration Agreements

Agreements to arbitrate that are governed by the ADRA are enforceable pursuant to section 4 of title 9 of the United States Code. (See: 5 U.S.C. 576).

Section 577 Arbitrators

1. The parties to an arbitration are entitled to participate in selecting an arbitrator. (See: 5 U.S.C. 577(a)).

2. The arbitrator must meet the definition of a neutral contained in section 573. (A neutral may be a Federal employee or anyone else acceptable to all parties. He or she may have no official, financial or personal conflict of interest with the respect to the issue in controversy, unless that interest is fully disclosed in writing and all parties agree that he may serve.) (See: 5 U.S.C. 577(b)).

Section 578 Authority of the Arbitrator

1. An arbitrator may regulate the course and conduct of the arbitration hearing. (See: 5 U.S.C. 578(1)).

2. An arbitrator may administer oaths and affirmations. (See: 5 U.S.C. 578(2)).

3. An arbitrator may compel the attendance of witnesses and the production of documents. (See: 5 U.S.C. 578(3)).

4. An arbitrator may make awards. (See: 5 U.S.C. 578(4)).

Section 579 Authority of the Arbitrator

1. The arbitrator shall set the time and place for the arbitration hearing and notify the parties at least five days before the hearing.

2. Parties are entitled to a record of the arbitration hearing. Any party wishing a record shall make the arrangements for it, notify the arbitrator and other parties that a record is being prepared, supply copies to the arbitrator and other parties, and pay all costs unless the parties have agreed to share the costs. (See: 5 U.S.C. 579(b)(1) thru (4)).

3. Parties are entitled to be heard and present evidence. (See: 5 U.S.C. 579(c)(1) and (2)).

4. The arbitrator may hear any oral and documentary evidence that is not irrelevant, immaterial, unduly repetitious, or privileged. (See: 5 U.S.C. 579(4)).

5. The arbitrator shall interpret and apply any relevant statutes, regulations, legal precedents and policy directives. (See: 5 U.S.C. 579(5)).

6. No interested party shall have any unauthorized ex parte communication with the arbitrator. If an interested party violates this provision, the arbitrator may require that party to show cause why its claim should not be resolved against it for the improper conduct. (See: 5 U.S.C. 579(d)).

7. The arbitration award shall be made within 30 days after the close of the hearing unless the parties agree to another time limit or the agency rules provide for another time limit. (See: 5 U.S.C. 579(e)(1) and (2)).

Section 580 Arbitration Awards

1. Unless an agency provides otherwise by rule, an arbitration award shall include a brief informal discussion of the factual and legal basis for the award. Formal findings of fact and law are not required. (See: 5 U.S.C. 580 (a)(1)).

2. A final award is binding on the parties and may be enforced pursuant to sections 9 through 13 of title 9. (See: 5 U.S.C. 580(c)).

3. An arbitration award entered pursuant to this subchapter may not serve as an estoppel in any other proceeding and may not be used as precedent in any factually unrelated proceeding. (See: 5 U.S.C. 580(d)).

Section 581 Judicial Review

1. Any action for review of an arbitration award must be made pursuant to sections 9 through 13 of title 9. (See: 5 U.S.C. 581(a)).

2. An agency's decision to use or not use ADR shall not be subject to judicial review, except that arbitration shall be subject to judicial review under section 10(b) of title 9 for evident partiality or corruption of the arbitrator(s). (See: 5 U.S.C. 581(b)).

*Section II—Binding Arbitration Guidance: Suggested Components*

In developing its arbitration guidance an agency must address, at a minimum, the requirements of 5 U.S.C. 575(a) and (b) which are discussed in Section I, supra. We believe there are many other issues an agency also should consider to ensure its guidance is accurate, comprehensive and useful in those situations where the agency chooses to participate in arbitration. We suggest that complete binding arbitration guidance should include the following three components:

*Component 1:* A description of the various types of ADR, a statement of the preference by the agency for consensual forms of ADR, especially mediation, and a statement that binding arbitration is appropriate in some cases,

*Component 2:* A definition of binding arbitration and a description of the various forms of arbitration which the agency will consider using and the circumstances under which they might be used, and

*Component 3:* Substantive arbitration issues.

Each component will be addressed in detail below.

*Component 1—A Description of the Various Types of ADR Statements About Consensual Forms of ADR and Binding Arbitration*

ADR Spectrum

ADR includes all forms of dispute resolution other than court adjudication. ADR processes, as defined in 5 U.S.C. 571(3) include, but are not limited to, conciliation, facilitation, mediation, fact-finding, ombuds, mini-trials, and arbitration. ADR processes are generally designed to reduce costs, avoid the delays of judicial proceedings, protect the privacy of the parties and increase the level of compliance by involving decision makers in the process.

Agencies should be committed to the use of ADR to resolve appropriate disputes in more timely, less costly manner than litigation or administrative adjudication. The use of ADR should not be viewed as an end in itself, but as an additional tool to accomplish the agency's mission efficiently, economically and productively. If an agency has published its ADR Policy, it should be referenced in the statement of support. If an agency has not published an ADR Policy, it can use the Declaration of Policy on Use of Alternative Means of Dispute Resolution in Appendix A. The agency's statement of support should emphasize its preference for consensual forms of ADR, especially mediation.

*Component 2—A Definition of Arbitration and Description of the Various Forms That the Agency Will Use*

Arbitration, especially binding arbitration, is the dispute resolution process most like adjudication. In arbitration, the parties agree to use a mutually selected decision-maker to hear their dispute and resolve it by rendering a final and binding decision or award. The decision to arbitrate may be made after a dispute has arisen between the parties or because an arbitration provision has been included in a contract or agreement that already exists between the parties. Like litigation, arbitration is an adversarial, adjudicative process designed to resolve the specific issues submitted by the parties. Arbitration differs significantly from litigation in that it does not require conformity with the legal rules of evidence and the proceeding is conducted in a private rather than a public forum. Binding arbitration awards typically are enforceable by courts, absent defects in the arbitration procedure. Appeal from arbitration decisions rendered in disputes covered by the ADRA is generally limited to fraud or misconduct in the proceedings, pursuant to the Federal Arbitration Act, 9 U.S.C. 10.

Forms of Arbitration

Parties may decide in advance whether an arbitration will be binding (the parties must accept the award), or non-binding (the arbitrator's award is advisory only). If the award is non-binding, the parties may decide to accept the non-binding opinion, use it as the basis for further settlement negotiations, or reject it and proceed to litigation. (Note that non-binding arbitration is not subject to the arbitration restrictions of the ADRA.) Agencies may wish to consider whether they might find non-binding arbitration useful; they lose the value of finality but gain more of the flexibility inherent in traditional ADR techniques. (An agency should consider neutral evaluation if it wants the opinion of an expert, but would prefer a less formal process than arbitration.)

Arbitration Terms—A Description of the Various Arbitration Forms

*Mediation/Arbitration.*—Arbitration may be part of a mediation/ arbitration (med/arb), where the parties attempt to mediate the dispute first. Failing resolution, the same neutral (or another) arbitrates and issues a binding or non-binding award. Using the same person as both mediator and arbitrator may have a chilling effect on full participation in mediation, as a party may not believe that the arbitrator will be able to discount unfavorable information learned during the mediation.

In co-mediation/arbitration, two neutrals preside over the initial joint session. After that, the neutral designated as the mediator works with the parties. Failing settlement, the case, or any resolved issues, may be submitted to the neutral designated the ''arbitrator'', for a binding decision.

Arbitration/mediation is another way to avoid the problem of one neutral serving as both mediator and arbitrator. The arbitrator hears the case and makes a determination that is not disclosed to the parties. He or she then attempts to mediate, with the understanding that if the parties reach no settlement, his determination will become the award.

*Incentive Arbitration.*—Parties agree, in advance, to a penalty if one of them rejects an arbitrator's non-binding award, resorts to litigation, and fails to improve its position by some specified percentage or formula. Penalties may include payment of expenses and attorney fees. Use of this form of arbitration by Federal agencies may present significant questions of sovereign immunity.

*Party Arbitration.*—Each side selects an arbitrator. Each of these ''party'' arbitrators then selects a third person and the panel, usually of three, hears the case and issues the award. Although favored in cases where there are highly technical issues, party arbitration generally increases the cost and time of the arbitration significantly.

Scheduling with multiple arbitrators and multiple parties is extremely difficult. A single arbitrator is more likely to manage the case expeditiously. In addition, it is important to remember that party-appointed arbitrators are likely to lack, or to appear to lack, neutrality and impartiality. This can be overcome if the parties use a mechanism to jointly appoint both arbitrators who then choose a ''neutral'' tiebreaker.

*Administered Arbitration.*—In administered arbitration, a private ADR provider organization manages the arbitration process. (National and local ADR providers can be found through telephone directories, local bar associations, and court programs. Before choosing any organization, references should be checked as quality can vary widely. Agency Dispute Resolution Specialists and/or the Senior Counsel for ADR at the Department of Justice can assist.) Among other things, the provider may set procedural rules, select or assist the parties in selecting arbitrators, schedule the arbitration, provide a conference room, transfer documents, mail the award and collect any fees. Providers charge varying administrative fees to perform these services.

Government parties must take great care when using administered arbitration to tailor existing rules to meet their specific needs. For example, the ADRA requires that parties are entitled to select the arbitrator(s); thus, an agency may not be able to enter into an agreement for administered arbitration where the arbitrator is selected by the administering organization. There are other limitations on agencies' use of arbitration that must be considered in administered arbitration. For example, federal agencies cannot agree to escrow fees or potential award amounts or to compel attendance by a specific agency official. Nor can an agency agree to keep an arbitration award confidential.

Just as the decision to use arbitration must be voluntary and agreed to by the parties, the operative rules should be negotiated and agreed to by the parties. Any reputable ADR provider that administers arbitration will work with the parties in making necessary changes to the providers' arbitration rules. It is expected that the major ADR providers will adjust their generic rules to accommodate Federal agencies.

*Ad Hoc Arbitration.*—In contrast to administered arbitration, the parties in an ad hoc arbitration manage the process themselves. The parties jointly select the arbitrator(s) and either craft their own rules or use those from a private ADR organization. The same care as discussed above must be taken to tailor the rules to ensure compliance with both the ADRA and an agency's arbitration guidance. The agency Dispute Resolution Specialist or an agency attorney should be designated to review all agreements to arbitrate.

Arbitration Techniques

The following are arbitration techniques designed to limit the amount an arbitrator may award. Any of these will meet the ADRA requirement of setting a cap on the award.

*Baseball Final Offer or Last Best Offer.*—Each party, prior to the arbitration, submits a proposed award amount to the arbitrator, who must choose one as the final award. This approach gives the parties a strong incentive to offer a reasonable proposal and is especially useful following mediation where the parties reached impasse. The two numbers selected would be the parties' last offers. Note that because the ADRA requires the parties to agree on a cap, BOTH parties would have to agree to the higher number.

*Night Baseball.*—Related to baseball arbitration, this requires the arbitrator to make a determination without knowledge of the parties' proposals. The actual award would then be the party's figure that was closest to the arbitrator's determination. This type of binding arbitration must be preceded by an agreement between the parties to establish maximum exposure, as required by the ADRA.

*High-Low.*—

The parties agree privately without informing the arbitrator that the final award will be within certain parameters. At the conclusion of the hearing, if the arbitrator's award is within the agreed upon range, the parties are bound by that figure. If, however, the award is outside the parameters, it is adjusted accordingly. For example, if the high-low figures were $50,000 and $100,000 and the award was $25,000, it would be adjusted to $50,000. Similarly, if the award were $250,000, it would be adjusted to $100,000.

*Component 3—Checklist of Substantive Issues To Consider*

The following checklist of questions includes not only the ADRA requirements, but also related issues that agencies are encourged to consider in order to avoid the problems and pitfalls of choosing and participating in binding arbitration. Section III, which follows, contains a discussion of each issue on the checklist.

*Issue 1*—For what type of cases will the agency be willing to use binding arbitration?

*Issue 2*—Will the agency agree to arbitrate issues other than money, e.g., specific performance, punitive damages, injunctive relief, apportionment of fees?

*Issue 3*—How and by whom will the agency's decision to arbitrate be made?

a. Who will have authority to recommend arbitration?

b. Who has the authority to enter into settlement? Can this authority be delegated?

c. Who will negotiate the cap on the award?

d. Who will negotiate the rules and selection of the arbitrator?

e. Who will draft the Agreement to Arbitrate?

*Issue 4*—What will the process be for entering into arbitration?

*Issue 5*—What should the Request to Arbitrate memo include?

*Issue 6*—How can an agency encourage the efficiency of the arbitration process?

*Issue 7*—How and by whom will requests for binding arbitration from people outside the agency be accepted?

*Issue 8*—Will the agency allow arbitration clauses to be written into contracts?

*Issue 9*—If the agency allows arbitration clauses in contracts, what should be included in the clause?

*Issue 10*—What is the arbitrator's role under the ADRA?

*Issue 11*—Will the agency agree to a panel of arbitrators in some circumstances?

*Issue 12*—What selection criteria will be considered in choosing an arbitrator?

*Issue 13*—Will the agency agree to allow non-attorneys to represent a party, or for a party to appear pro se, at the arbitration?

*Issue 14*—What should an Agreement to Arbitrate include?

*Issue 15*—How will the agency pay the arbitrator(s)?

*Issue 16*—Is the agency willing to use administered arbitration?

*Issue 17*—What must the arbitration award include?

*Issue 18*—Will the agency allow arbitration on the documents only, without a hearing, and if so, in what circumstances?

*Issue 19*—What selection criteria will be considered in choosing or amending arbitration rules and what must those rules include?

*Section III—Discussion of Substantive Issues*

The following discussion is intended to raise many of the most important and difficult issues concerning the use of binding arbitration in federal agencies. It is not intended or expected that any agency guidance will address all of them; they are listed for information and consideration.

Issue 1—For What Type of Cases Will the Agency Be Willing To Use Binding Arbitration?

The Alternative Dispute Resolution Act explicitly includes binding arbitration among the ADR processes available to federal agencies. However, most federal agencies encourage the use of consensual forms of ADR such as mediation in contrast to binding arbitration. Even those agencies that actively discourage the use of arbitration may find that there are situations where binding arbitration may be the most appropriate alternative to litigation. In other cases, agencies may find that binding arbitration is required under a contract the agency has ''inherited'' by one means or another. Each agency must consider when, and under what conditions, it will agree to use binding arbitration. To do this, it is important to consider both the benefits and the risks of choosing to arbitrate.

Benefits

The *Benefits* of binding arbitration may include: Savings of time and money; finality, and a knowledgeable decision-maker.

Risks

The *Risks* of binding arbitration may include: an award that may be arbitrary and without basis in fact or law; severely limited grounds for appeal [Under the Federal Arbitration Act, 9 U.S.C. 10, an award may be vacated only if procured by corruption, fraud, or undue means; or if an arbitrator exhibits ''evident partiality'', when misconduct by the arbitrator prejudices the rights of a party or if the arbitrator exceeded his power.]; parties' loss of control over the process and outcome; a long, expensive proceeding, if not structured properly by the parties, and continued hostility between parties who may have an ongoing relationship.

In addition, a party cannot unilaterally withdraw from binding arbitration once an arbitration agreement has been signed. For these reasons, careful consideration by senior agency officials and legal consultation should precede any decision to arbitrate.

Determining Appropriateness of ADR

When considering whether arbitration is appropriate, agencies should first look to the ADRA which contains guidance for considering whether arbitration or any ADR process is appropriate for a particular dispute. Section 572 (b) of the Act suggests that agencies should consider NOT USING ANY ADR process if: There is a need for precedent on the issue; the matter involves significant matters of policy and ADR cannot help develop policy on the issue; an established, consistent policy on an issue is necessary and the possibility of inconsistent results in individual cases would not be helpful; the case involves issues which affect persons or organizations not a party to the ADR; a public record is needed; or the agency must retain control over disposition of the matter in the event that circumstances change.

Determining Appropriateness of Arbitration

In deciding which type of ADR to use, arbitration can be most useful in disputes which are highly fact specific, and in which the decision is likely to be single issue and quantitative. For example, arbitration may be appropriate where the parties are only concerned with monetary remedies such as ''the machine was to perform at ABC level and the contractor was to be paid XYZ amount''. Arbitration may also be attractive when the dispute is highly technical and the parties can pick an arbitrator with mutually accepted expertise, thus obviating the need to educate him and to reduce technical arguments. Arbitration is also highly useful when finality is a desired result and there is little concern over the risks or costs of remedies (for example, resolving a small dollar figure dispute that has been ongoing for a long period), or where the parties need a decision made for them by a third party, but wish to avoid the cost and delay of a trial.

Other factors to consider are:

1. Will the parties both agree to arbitrate? (Pursuant to the ADRA, arbitration must be voluntary).

2. Have consensual forms of ADR, such as mediation, been tried first?

3. Will the parties be able to find an arbitrator with appropriate subject matter expertise?

4. Are the issues narrowly defined?

5. Will the parties be able to negotiate a maximum award ''cap'' in advance of the hearing? (This is mandatory under the ADRA).

6. Are the parties concerned about maintaining an ongoing relationship?

7. Can the parties agree on governing rules for the arbitration, including negotiating time limits so that costs do not escalate?

8. Are the parties concerned about limited appeal rights?

9. Are the parties interested in more confidentiality than a trial affords? (Note, however, that the final award is not confidential under ADRA.)

10. Do the parties (need) want a decision made for them by a third party but want to avoid the delay of trial?

Agencies may decide to limit arbitration to certain categories of cases, issues, or dollar amounts.

Issue 2—Will the Agency Agree To Arbitrate Issues Other Than Money, e.g. Specific Performance, Punitive Damages, Injunctive Relief, and Apportionment of Fees?

An arbitrator may not award punitive damages against the government as the Department of Justice views them as a violation of sovereign immunity. In general, given the express legislative command to cap agency monetary exposure, great care and precision is necessary in drafting the outer limits of an arbitrator's ability to award non-monetary relief.

Issue 3—How and By Whom Will the Decision To Arbitrate Be Made?

There are generally three ways in which parties may enter the arbitration process: at the request of one of the parties, through a pre-existing arbitration clause in a contract, or by court direction.

Agencies are given absolute discretion in the ADRA to decide whether or not to participate in any ADR process, including binding arbitration. One of the decisions an agency must make in deciding to participate in arbitration is whether or not to entertain requests for binding arbitration from parties outside the agency. (See Issue No. 7). This decision may depend in large part on the approach an agency takes to using binding arbitration generally. If an agency wants to limit the use of binding arbitration, one way it could do that is by refusing to accept requests from outside parties. Likewise, agencies must determine if they will allow arbitration language governing future disputes to be written into contracts. (See Issue No. 8.)

Authority To Recommend

A. *Who will have authority to recommend arbitration?* The agency should require, or at least encourage, that the recommending official, whether it be a contracting officer, staff attorney, or program official, consult with the Dispute Resolution Specialist. This should ensure that, at an early stage, the parties consider or attempt the preferred

consensual forms of ADR when appropriate. Such consultation should also ensure that disputes which are inappropriate for arbitration, whether based on the ADRA specifications, practical considerations or agency requirements and policy, do not go forward to formal submission.

Authority To Settle

B. *Who has the authority to enter into settlement?* The ADRA requires that a person entering into binding arbitration on behalf of the agency must have the authority to otherwise enter into a settlement concerning the matter, or be specifically authorized by the agency to consent to arbitration.

Most agencies already have procedures in place for settling disputes, especially for resolution of disputes arising out of contracts with outside parties. One approach is to delegate the authority to consent to arbitration to the person (or position) that currently has authority to resolve the dispute, such as a contracting officer, subject to his warrant and internal agency review procedures. This approach takes advantage of the existing procedures while providing an additional means of resolving the dispute. It also has the benefit of simplicity; any new procedures are added to the existing structure rather than creating an entirely separate system.

However, the decision to use binding arbitration involves so many important and complex issues that agencies should consider delegating the authority to use binding arbitration to a high-level decision-maker like the General Counsel. Agency procedure should alert the designee to the fact that the agency is considering entering into a process that is, in many ways, more binding than litigation. The person authorizing arbitration should be made aware of what the capped amount of the award will be.

Negotiate Award Cap

C. *Who will negotiate the cap on the award?* This may be the contracting officer, an attorney, or other person making the recommendation to arbitrate.

Rules and Arbitrator Selection

D. *Who will negotiate rules and selection of the arbitrator?* After approval to arbitrate has been granted by the authorized official, negotiating rules and selection of the arbitrator can be done by the recommending official, in conjunction with the Dispute Resolution Specialist.

Agreement to Arbitrate

E. *Who will draft the Agreement to Arbitrate?* The Agreement must be in writing, setting forth the subject matter of the arbitration and the maximum award or ''cap.'' It must be agreed to by the parties and should be drafted by an attorney, in consultation with the Dispute Resolution Specialist. (See Issue No. 14).

Issue 4—What Will Be the Process for Entering Arbitration?

A request to use binding arbitration may come from an outside party or may originate from agency personnel. In either case, the procedures for requesting and obtaining authority to arbitrate need to be clear and readily available. The initial consideration of a request to arbitrate may be informal and should involve consultation with agency or subdivision ADR specialists. If an agency designates a specific office or position to initiate the arbitration approval process, it will be necessary to identify the office and the steps required for requesting that approval.

Therefore, the agency should identify the official who will have authority to determine, on a case-by-case basis, whether to agree to submit a dispute to binding arbitration. This will ensure that an agency official will only agree to submit a dispute to binding arbitration if: (1) There are sufficient funds committed to cover the maximum possible award against the agency; and (2) prior written approval has been obtained from the authorized agency official to enter into the arbitration proceeding.

Since it is likely that the final decision-maker will have little knowledge of the specific issues or risks involved in the dispute, a written justification (the Request to Arbitrate Memorandum) should be prepared.

Issue 5—What Should the Request To Arbitrate Memorandum Include?

Request to Arbitrate Memo

This is an internal document intended for the agency decision making and approval process. The following information should be included.

Facts

A presentation of the factual bases, legal reasons, and policy considerations supporting the use of binding arbitration to resolve the particular dispute, including:

A detailed description of the analysis that resulted in the recommendation of whether to arbitrate. If the recommendation is to arbitrate, this should compare the benefits of arbitrating the matter with the benefits of litigating the matter, including potential appellate litigation as well as the ability to withdraw from litigation, to pursue settlement, to establish precedent, etc.

A detailed cost/benefit analysis of arbitrating the matter, including the estimated costs of the arbitrator, agency personnel costs, outside counsel costs (if applicable).

An estimate of the timeline for the arbitration process, including time to negotiate the arbitration agreement, compared to a timeline for litigation.

A litigation risk analysis.

Maximum Award

The proposed maximum award, as a dollar figure, should be specifically addressed in the memorandum.

ADR Use Justified

An explanation supporting a determination that none of the following factors exists, or if one or more does exist, binding arbitration is nevertheless the most appropriate method to resolve the dispute:

—A definitive or authoritative resolution of the matter is required for precedential value, and a binding arbitration proceeding is not likely to be accepted generally as an authoritative precedent;

—The matter involves or may bear upon significant questions of Government policy that require additional procedures before a final resolution may be made, and a binding arbitration proceeding would not likely serve to develop a recommended policy for the agency;

—Maintaining established policies is of special importance, so that variations among individual decisions are not increased, and a binding arbitration proceeding would not likely reach consistent results among individual decisions;

—The matter significantly affects persons or organizations who are not parties to the proceeding;

—A full public record of the proceeding is important, and a binding arbitration proceeding cannot provide such a record; or

—The agency must maintain continuing jurisdiction over the matter with authority to alter the disposition of the matter in the light of changed circumstances, and a binding arbitration proceeding would interfere with the agency's fulfilling that requirement.

Source of Request

Whether the initial request is from an outside party, a joint request of the agency and an outside party or from specified agency personnel.

Recommendation

Whether the initiating agency official recommends accepting or denying the request to arbitrate.

Disputed Issues

A brief description of the disputed issues, or if in litigation, the status of the litigation.

Failure of Consensual Forms of ADR

A description of the consensual forms of ADR that have been offered or attempted and the outcome. This should include a statement of why further attempts with consensual approaches are inappropriate or impractical.

Parties

A list of the parties' representatives for the arbitration. (Under the ADRA, federal agencies must have policies regarding outside parties use of non-attorneys to represent them in alternative dispute proceedings. (See Issue No. 13.))

Draft Agreement to Arbitrate

A draft arbitration agreement agreed to by both parties as an attachment to the memorandum.

Issue 6—How Can an Agency Encourage the Efficiency of the Arbitration Process?

A. Limit the scope of discovery.

B. Establish reasonable deadlines for discovery, the hearing, and rendering the award. Concerning the hearing, the ADRA states only that it shall be conducted expeditiously. See section 579(c)(3). Therefore, it may be useful to include specifics about timing in the agreement to arbitrate.

The issuance of the award, an area in which delay frequently occurs, has been dealt with more specifically in the ADRA. Section 579(d)(1) requires that an award be issued within 30 days after the close of the hearing or filing of post-hearing briefs

authorized by the arbitrator, unless otherwise agreed to by the parties or so stated in an agency rulemaking. Finally, the ADRA states that awards can only be enforced 30 days after service on both parties, when they are considered as ''final''. See section 580(b).

C. Limit the number of witnesses.

D. Use one arbitrator and give that person the authority to tightly control the proceeding.

E. Agree to arbitrate by document review or by phone in appropriate cases.

Issue 7—How and By Whom Will Outside Requests for Binding Arbitration Be Accepted?

Forms of Request

If an agency decides to entertain requests for binding arbitration from outside parties, it should consider having both an informal and a formal process for receiving them. The informal process might be nothing more than a party asking the designated agency representative if the agency would consider using binding arbitration, or might include a short request form to be filled out by the outside party and delivered to the agency representative. The request form will ensure that the agency can track arbitration requests efficiently and will be an easy way to obtain the opposing party information that may be needed to complete the agency's arbitration recommendation process.

The agency should determine who will respond and whether to suggest that a formal request should be made.

Formal Request Process

A formal request process should require the outside party or its representative to submit a written request to a specific agency office for initial processing and tracking purposes and might include a checklist provided by the agency to ensure that all the information necessary to process the request is obtained. A formal request for arbitration would require the agency to conduct a formal review and prepare a written response approving or rejecting the request.

It is recommended that all arbitration requests be screened by the agency's Dispute Resolution Specialist.

Issue 8—Will the Agency Allow Arbitration Clauses To Be Written Into Contracts?

Normally, parties enter arbitration at the request of either party to a dispute, although both must agree to arbitrate. As detailed below, parties may also use a pre-existing arbitration clause they have negotiated in a contract. Regardless of how arbitration is begun, it is critical that the ground rules are carefully negotiated to meet the requirements of the ADRA and the goals of the agency. For agencies which allow binding arbitration clauses to resolve future disputes, i.e., in contracts, it is important to draft the provision carefully, since the agency must comply whenever the other party requests arbitration pursuant to the contract. It is imperative for agencies to balance their statutory duty to limit agency exposure with a desire to include provisions calling for the use of arbitration in pre-existing contracts. Despite the most careful drafting, it is unlikely that the original drafters can foresee the exact nature of a future dispute. Therefore, it is useful to include a statement to this effect:

If there is a dispute under this contract that is subject to arbitration, the parties will meet and negotiate in good faith any necessary procedural changes from the original requirements, in an effort to reasonably expedite the process and otherwise to fit the process to the dispute and the value at risk.

Issue 9—If the Agency Allows Arbitration Clauses in Contracts, What Should Be Included in the Clause?

An agency might want to include the necessity for negotiation by senior fficials and/or mediation before arbitration may be invoked. See Appendix B for Sample Dispute Resolution Contract language. Agencies must also devise a means to satisfy the statutorily required cap on government exposure when including arbitration clauses in contracts.

Issue 10—What is the Arbitrator's Role Under the ADRA?

Under the ADRA, arbitrators may: Regulate the course and conduct of hearings; Administer oaths; Compel attendance of witnesses and production of evidence, to the extent that the agency is authorized to do so by law; and Issue awards.

In a complex arbitration, it is useful to have a case management approach, negotiated by the parties, for the arbitrator to follow. This will save time and money without diminishing the results. It is also recommended that the parties choose an arbitrator who will respect the time limits established in the agreement and move the process along.

Issue 11—Will the Agency Agree to a Panel of Arbitrators in Some Circumstances?

Generally, a single arbitrator is sufficient and saves time and money. Exceptions might be technical cases where a person with relevant expertise is deemed necessary. Traditionally, when more than one arbitrator is desired, each party picks one and they agree on the third. However, since the costs in time and money increase exponentially as the number of arbitrators increases, it may be wise to try to find one person with the necessary expertise.

Issue 12—What Selection Criteria Will Be Considered in Choosing an Arbitrator?

The ADRA allows an agency to use, with or without reimbursement, the services and facilities of other Federal agencies, State, local, and tribal governments, public and private organizations and agencies, and individuals, with the consent of such agencies, organizations, and individuals, and without regard to the provisions of 31 U.S.C. 1342. A judge from a Federal Board of Contract Appeals may also be used if the parties agree.

As with any other neutral, an arbitrator who is agreed upon by the parties may be selected non-competitively. The contract must be in place before any work begins. See Appendix C for a checklist for selection of arbitrators.

Issue 13—Will the Agency Agree To Allow Non-Attorneys To Represent a Party, or for a Party To Appear Pro Se, at the Arbitration?

Federal agencies should have policies regarding the use of non-attorneys by outside parties in arbitration. Agencies may decide that it will not allow non-attorneys, or parties appearing pro se in all cases, or that it will require attorneys only in highly complex or specialized proceedings.

Both in choosing to arbitrate and in engaging in the actual arbitration, parties irrevocably impact their rights and potential legal remedies, far more so than in consensual decision-making ADR processes. Because the arbitration decision rests in the hands of a third party neutral, the ability of the parties to present and argue evidence adequately is far more essential than in other, non-binding forms of ADR. If an agency chooses to allow representation by non-attorneys (or by the parties acting pro se), it should consider requiring the parties to sign an acknowledgment of the risks and limitations of arbitration before agreeing to arbitrate the dispute.

Issue 14—What Should an Agreement To Arbitrate Include?

The agreement to arbitrate must be in writing and should include:

1. The names of the parties.

2. The issues being submitted to binding arbitration. The parties can submit all or only certain issues in controversy to binding arbitration.

3. The maximum award (cap) that the arbitrator may direct. (This must be negotiated by the parties prior to signing the Agreement.)

4. Any other conditions limiting the range of possible outcomes.

5. The scope of the arbitration. This will limit time and cost and give the arbitrator power to be a ''case manager''.

A sample case management provision might read, ''The Arbitrator is expected to assume control of the process and to schedule all events as expeditiously as possible, to insure that an award is issued no later than ____ days from the date of this agreement. Failure of the arbitrator to assume such responsibility shall be deemed a breach of this contract.'' This lets the arbitrator know he has the support of the parties to manage them and the arbitration.

6. A reference to which procedural rules will apply. This must be designed to comply with the ADRA, including the amount and nature of the discovery to be allowed, and the deadlines to be imposed for discovery, the hearing, and the arbitrator's award. Agencies should not enter into pre-dispute binding arbitration clauses or post-dispute agreements to arbitrate without careful consideration of any other local, state or federal substantive, procedural, and arbitration statutes. Without a well-drafted choice of law provision, an arbitrator may be free to disregard any applicable statute of limitations, may be free to disregard either the substantive or procedural law the agency intended to be applied in the arbitration, and may be free to disregard the arbitration law the agency expected to be applied.

Including an explicit limitation period in the agreement to arbitrate or arbitration

clause will avoid most statute of limitations disputes. Questions of which substantive or procedural law should apply can be limited by avoiding the common ''this contract shall be construed under the law of * * *'' language and using a more generic clause like ''all disputes referred to arbitration and the statute of limitations and the remedies for any wrongs that may be found, shall be governed by the law of * * *''. Similar care should be given to the designation of the ADRA or Federal Arbitration Act as the applicable arbitration statute.

7. The name of the arbitrator, the amount of compensation and how it will be paid. (Avoid any agreement or rule that provides for deposits in an escrow account to pay for expenses of the proceeding, that is, in advance of incurring such expenses.)

8. The date when the arbitration will commence.

9. The type of remedy available.

A sample Agreement to Submit to Binding Arbitration is at Appendix D.

Issue 15—How Will the Agency Pay the Arbitrator(s)?

Generally, the parties agree in advance to share administrative fees and arbitrator fees and costs, which will be paid after issuance of the award. The government may not escrow funds or pay in advance for arbitrator or administrative fees.

Issue 16—Is the Agency Willing To Use Administered Arbitration?

Agencies may use an ADR organization to administer an arbitration. The organization could assist in the following tasks: Narrowing the issues, negotiating the cap, selecting the arbitrator (with the parties' participation), providing rules, scheduling the hearings, mailing the awards and billing for services. Organizations charge a fee which should be paid equally by the parties.

Outside organizations are more likely to be needed where the dispute has been longstanding and there is a great deal of animosity between the parties. In addition, when agencies use arbitration clauses in contracts, it is important that they NOT merely incorporate the rules of an ADR organization and assume they will apply when and if a dispute later arises. There will likely be provisions in these rules which are inconsistent with the ADRA. Thus, any arbitration rules must be jointly reviewed before adoption or inclusion in a contract.

If an agency prefers ad hoc, or ''do it yourself'' arbitration, it should have clear guidance and well-trained personnel, who consult with the agency Dispute Resolution Specialist.

Issue 17—What Must the Arbitration Award Include?

Form of Award

An arbitrator's decision is called an ''award'' and the opinion, or findings and conclusions, are known as ''reasons''. Under the ADRA, an arbitration award must be in the form of a document that can be filed with the parties, including the relevant Federal agency.

Confidentiality

Although it is often the practice in the private sector to keep arbitration awards confidential, *Federal Agencies Cannot Keep Arbitration Awards Confidential.* In addition, such awards will be agency records for the purposes of FOIA and subject to disclosure. Protected proprietary or Privacy Act information can be redacted and is subject to reverse FOIA actions. Under the requirements of the ''Electronic FOIA'' amendments, agencies must provide electronic access to material that is subject to repeated request, which may include arbitration awards.

Cap on Award

An arbitration award under the ADRA cannot exceed the monetary cap negotiated by the parties and specified in the arbitration agreement. A well-drafted arbitration agreement should also have limited the type and form of remedy that an arbitrator can award. In most (though not all) jurisdictions, an arbitrator can utilize any form of remedy a court in that jurisdiction may provide; in some jurisdictions, an arbitrator may order any remedy that is not specifically forbidden by the arbitration agreement. The ADRA provides that an arbitration award cannot be used to estop a party on an issue in another proceeding, and that arbitration awards cannot be used as precedent, or ''otherwise be considered in any factually unrelated proceeding.'' We note, however, that arbitration decisions are given precedential weight in some fields and, as an agency's (and the federal sector's) experience with arbitration grows, its arbitration decisions may come to have informal, if not formal, persuasive power.

''Naked Award''

An agency might want to consider permitting a ''naked award'' which provides only a monetary amount. This has the advantage of reduced time and cost and may be all the parties require. The parties may be able to request to have this award issued immediately post-hearing. Many arbitrators prefer this type of award as well, as it limits grounds for appeal. Arbitration awards under the ADRA are subject to enforcement under the Federal Arbitration Act (FAA), Title 9, United States Code. The FAA and the relevant case law provide very limited grounds on which a court may vacate an arbitration award, beyond fraud in the arbitration process. Unlike judicial opinions, clear or even egregious error of fact or law may not sufficient to overturn an arbitration award. Courts tend to require a very strong showing on the available appeal grounds before declining to enforce arbitration awards. To vacate an arbitration award, it will probably be necessary to show manifest disregard of the law (which some jurisdictions limit to cases in which a party can show that an arbitrator knowingly misapplied the relevant law; even gross error may not be sufficient if it cannot be shown to be intentional) or that an arbitrator acted outside of the scope of arbitral authority defined in the underlying arbitration agreement. The simpler and more limited form of award the agency requires, the less likely it is that any party will be able to sustain an appeal to an arbitration award in court. Similarly, an arbitration award which requires more than basic information into the arbitrator's reasoning provides greater opportunity for successful appeal of a poorly reasoned arbitration decision. In considering requirements for arbitration awards, agencies must weigh the value of finality against the ability to seek correction of significant error by arbitrators. Other factors will affect this decision. For instance, if the agency will use arbitration only in certain areas or when there is only a low monetary exposure, the value of finality is likely to outweigh the concern for appeal. If, however, the parties believe they need more than a ''naked award,'' they may set a page limit for the arbitrator or request that the award state only those reasons necessary to support it, rather than address all issues presented in evidence. Or, they can request a more complex award form, including formal findings of fact and law and articulated reasoning.

Flexible Format

An agency that wishes to provide flexibility for parties to mutually agree to an award format other than a ''discussion of the factual and legal basis for the award'' is required by the ADRA to publish a rule in the **Federal Register** authorizing that procedure. See: 5 U.S.C. 580(a)(1). As it would be a procedural rule and would have no significant effect or impact on the substantive rights or obligations of non-agency persons, prior notice and opportunity for public comment is not required.

Issue 18—Will the Agency Allow Arbitration on the Documents Only, Without a Hearing, and if so, in What Circumstances?

In simpler cases, the parties may agree to have the arbitrator issue an award after only a document review. This has the advantage of saving time, money and avoiding scheduling conflicts. It may not, however, be the best choice where credibility of a party or witnesses is an issue, as there will be no opportunity to argue or cross-examine.

The arbitrator may also conduct all or part of a hearing by telephone, video conferencing or computer, as long as each party has an equal opportunity to participate.

Issue 19—What Selection Criteria Will Be Considered in Choosing or Amending Arbitration Rules and What Must Those Rules Include?

Many ADR providers, or large international organizations, have rules which will require some changes to conform to the ADRA. In time, they will most likely develop special rules for Federal agencies.

In addition, most providers have expedited rules which agencies should consider. Simple cases require less rigorous rules than do complicated, expensive ones.

*Section IV—Procedures for Obtaining Department of Justice Approval for Agency Binding Arbitration Guidance*

This portion of the Handbook addresses the procedures for obtaining Department of Justice approval of agency guidance on the subject of binding arbitration. Pursuant to section 575(c) of the Administrative Dispute Resolution Act of 1996, 5 U.S.C. 575, agencies that wish to use binding arbitration must issue guidance on the appropriate use of this dispute resolution process. Such

guidance must take into account the factors identified by Congress in section 572(b) of the Act, and should identify when an officer or employee of the agency has authority to settle an issue in controversy through binding arbitration. Congress also provided that agency guidance on this subject be issued in consultation with the Attorney General.

As a general rule, the Department of Justice will defer to the judgment and expertise of other agencies in the use of binding arbitration to resolve issues in controversy pending before those agencies. The Department interprets its statutory obligation under section 575(c) as a duty to insure that those agencies seeking to use binding arbitration will be able to make appropriately informed judgments, mindful of the concerns of Congress that led it to authorize this process in a limited and carefully circumscribed manner.

These are the standards that the Department of Justice will apply in reviewing agency guidance for use of binding arbitration.

Does the agency's guidance facilitate a thorough application of the statutory criteria in section 572(b) for when dispute resolution proceedings are inappropriate to the issues in controversy for which binding arbitration might be considered.

Does the agency's guidance contain sufficient information to permit users of that document to make informed decisions about the use of binding arbitration, including an assessment of the benefits of binding arbitration as measured against the costs or risks associated with that process for resolving specific issues in controversy.

Does the agency's guidance demonstrate that it was prepared with specific reference to the types of issues in controversy that arise in the course of fulfilling that agency's statutory missions.

Agencies seeking Department of Justice review of binding arbitration guidance should send such documents to the Office of Dispute Resolution, U.S. Department of Justice, Washington, D.C. 20530. Where appropriate, the Office of Dispute Resolution may consult with other components of the Department of Justice as part of the review process. Questions concerning this process can be presented by calling the Office at 202–616–9471.

## Appendix A—Declaration of Policy on Use of Alternative Means of Dispute Resolution

Pursuant to the provisions of the Administrative Dispute Resolution Act of 1996 and the Presidential Memorandum of May 1, 1998, implementing that act, the _____ Department/Agency recognizes that in appropriate circumstances, there may be more effective methods to resolve issues in controversy that arise involving the Department/agency than through reliance upon more adversarial administrative processes. The voluntary use of alternative means of dispute resolution, such as mediation, fact-finding, ombuds, neutral evaluation, and arbitration, often can provide faster, less expensive, and more effective resolution of disputes that arise with employees, contractors, the regulated community and others with whom the Department/agency does business. In recognition of this, the _____ Department/agency declares that: (1) Its managers and attorneys will be knowledgeable about alternative means of dispute resolution; (2) its managers and attorneys will examine the suitability of using alternative means of dispute resolution when issues in controversy arise involving the Department/agency; and (3) in appropriate disputes, its managers and attorneys will use alternative means of dispute resolution in a good faith effort to achieve consensual resolutions of issues in controversy involving the Department/Agency.

## Appendix B—Dispute Resolution Contract Clause

*1. Negotiation*

The parties shall attempt in good faith to resolve any dispute arising out of or relating to this Agreement by negotiating between executives and/or officials who have authority to settle the controversy and who are at a higher level of management than the persons with direct responsibility for administration of this contract. Any party may give the other party written notice of any dispute not resolved in the normal course of business. Within 15 days after delivery of the notice, the receiving party shall submit to the other a written response. The notice and the response shall include: (a) A statement of each party's position and a summary of arguments supporting that position, and (b) the name and title of the executive or official who will represent that party and of any other person(s) who will accompany the executive or official. Within 30 days after delivery of the disputing party's notice, the representatives of both parties shall meet at a mutually acceptable time and place, and thereafter as often as they reasonably deem necessary, to attempt to resolve the dispute. All reasonable requests for information made by one party to the other will be honored.

If the matter has not been resolved within 60 days of the disputing party's notice, or if the parties fail to meet within 30 days, either party shall/may initiate mediation of the controversy or claim as provided hereafter.

*2. Mediation*

In the event the dispute has not been resolved by negotiation as provided herein, the parties agree to participate in mediation, using a mutually agreed upon mediator. The mediator will not render a decision, but will assist the parties in reaching a mutually satisfactory agreement. The parties agree to share equally the costs of the mediation. The first mediation session shall commence within 30 days from agreement. If the matter has not been resolved within 60 days of the first mediation session, either party may/shall initiate arbitration as provided hereafter.

*3. Arbitration*

Any dispute not otherwise satisfactorily resolved (shall, may) be submitted to arbitration. (Details for specific arbitration procedures to be added; for example, the name of an ADR provider, the rules under which the arbitration will be conducted, the method the parties will use to select an arbitrator, etc.

## Appendix C—Checklist for the Selection of Arbitraror

1. Determine the number of arbitrators to conduct the proceeding. (See Issue No. 11).

2. Design the selection procedure so the agency may place names on the proposed list of arbitrators along with the other parties.

3. Provide an opportunity for the agency to strike any of the proposed arbitrators.

4. Establish time limits so the selection process moves expeditiously to completion.

5. Consult with your agency's Dispute Resolution Specialist, Senior Counsel for Dispute Resolution at DOJ, local bar organizations, and ADR entities for lists/rosters of arbitrators suitable for governmental use.

6. Determine if the parties will agree on selection of the arbitrator themselves or if they will use an organization to assist them.

7. Research carefully the experience and ability of all proposed arbitrators. In addition, consider the following factors:

Does the arbitrator have a reputation for integrity? (Check references)

Does the arbitrator have extensive arbitration experience?

What kind of specific subject matter expertise, if any, is needed?

Does the arbitrator's background show any leaning or predilections?

If the arbitrator is a practicing attorney, does he specialize in plaintiffs' and/or defendants' work?

Has the arbitrator worked with big companies, small companies and/or governmental agencies?

Where is the arbitrator located geographically?

Does the arbitrator's background indicate a preference for more formal proceedings as opposed to less formal ones?

Is the arbitrator available when necessary, and is the arbitrator's calendar free enough to expeditiously handle your case?

Does the arbitrator have a record of being reasonably prompt in scheduling hearings and issuing decisions?

Is the arbitrator's rate for services consistent with the rates that the agency ordinarily would pay for similar services? (Check to see if a government rate is available.)

8. Establish disclosure requirements that comply with agency conflict of interest regulations to ensure that an arbitrator has no official, financial, or personal conflict of interest with any of the involved entities, unless such interest is fully disclosed in writing to all parties, and all parties agree that the arbitrator may serve.

9. Provide procedures to replace the arbitrator if the position becomes vacant by disqualification or disability.

**Note:** You may hire an ADR provider to administer the arbitration and perform all these functions for you. (See Issue No. 16.)

### Appendix D—Agreement to Submit to Binding Arbitration

We, the undersigned parties, hereby voluntarily agree to submit the following controversy to binding arbitration: (briefly describe the controversy). We agree upon _____ as the arbitrator, to be paid at the rate of $_____, which will be jointly shared by the parties. We further agree that the arbitration shall be conducted under the (identify the applicable procedural rules). We further agree that we shall faithfully observe this agreement and the (applicable procedural rules), that we will abide by and perform any award rendered by the arbitrator, and that a judgment of a court with appropriate jurisdiction may be entered on the award. Finally, we agree that the maximum award that the arbitrator can issue in this binding arbitration shall not exceed (insert here the maximum award that may be issued by the arbitrator and specify other conditions limiting the range of possible outcomes).

[FR Doc. 00–20828 Filed 8–15–00; 8:45 am]

BILLING CODE 4410–AR–P

## DEPARTMENT OF JUSTICE

### Federal Bureau of Investigation

### Criminal Justice Information Services (CJIS) Division Agency Information Collection Activities: Proposed Collection: Comment Request

**ACTION:** Revision of previously approved collection: Analysis of Law Enforcement Officers Killed and Assaulted.

The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted until October 16, 2000.

Request written comments and suggestions from the public and affected agencies concerning the proposed collection of information. Comments should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques of other forms of information technology, *e.g.*, permitting electronic submission of responses.

Comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to Greg Scarbro (phone number and address listed below). Additional information as well as copies of the proposed information collection instrument with instructions are available by contacting Greg Scarbro, Unit Chief, telephone 304–625–4830, FBI, CJIS Division, Statistical Unit, E–3, 1000 Custer Hollow Road, Clarksburg, WV 26306.

Overview of this information collection:

(1) Type of information collectin: Previously approved collection by OMB; request for revision of current form used for collecting information.

(2) The title of the form/collection: Analysis of Law Enforcement Officers Killed and Assaulted.

(3) The agency form number, if any, and applicable component of the department sponsoring the collection. Form: 1–728. Federal Bureau of Investigation, Department of Justice.

(4) Affected public who will be asked or required to respond, as well as brief abstract. Primary: Local and State Law Enforcement Agencies. Collection will be printed in English and Spanish. This collection is needed to provide data regarding Law Enforcement Officers Killed and Assaulted throughout the United States. Data is analyzed, tabulated, and published in the comprehensive annual *Law Enforcement Officers Killed and Assaulted.*

(5) The FBI UCR Program is currently reviewing its race and ethnicity date collection in compliance with the Office of Management and Budget's *Revisions for the Standards for the Classification of Federal Data on Race and Ethnicity.*

(6) An estimate of the total number of respondents and the amount of time estimated for an average respondent to reply: 17,667 agencies with 570 estimated annual responses (zero reports are not required); and with an average of 1 hour per report per responding agency.

(7) An estimate of the total public burden (in hours) associated with this collection: 570 hours annually.

If additional information is required contact: Mr. Robert B. Briggs, Clearance Officer, United States Department of Justice, Information Management and Security Staff, Justice Management Division, Suite 850, Washington Center, 1001 G Street, NW., Washington, DC 20530.

Dated: August 11, 2000.

**Robert B. Briggs,**

*Department Clearance Officer, United States Department of Justice.*

[FR Doc. 00–20813 Filed 8–15–00; 8:45 am]

BILLING CODE 4410–02–M

## DEPARTMENT OF JUSTICE

### Federal Bureau of Investigation

### Criminal Justice Information Services (CJIS) Division Agency Information Collection Activities: Proposed Collection: Comment Request

**ACTION:** Revision of previously approved collection: Law Enforcement Officers Killed and Assaulted LEOKA.

The proposed information collection is published to obtain comments from