



FDIC DIRECTIVE 5310.01

Binding Arbitration

Approval Authority: Harrel Pettway, General Counsel

Originating Division/Office: Legal Division

Approval Date: 06/23/2023

PURPOSE

This revised Directive provides uniform guidance and controls regarding the use of binding arbitration as a means of dispute resolution.

SCOPE

This Directive applies to all FDIC Divisions and Offices. This Directive does not cover the use of binding arbitration in state court-based arbitration programs, employment or labor arbitration, contracts or leases entered into by a depository institution prior to the appointment of the FDIC as conservator or receiver, or in connection with any other of the FDIC's regulatory compliance and enforcement activities.

AUTHORITIES

- Title 5, United States Code (U.S.C.), Section 571-583, Administrative Dispute Resolution Act of 1996
- Title 9, U.S.C., Section 1-14, Federal Arbitration Act
- Title 28, U.S.C., Section 651-658, Alternative Dispute Resolution Act of 1998
- Federal Register (FR) 18632, Vol. 66, No. 69, Federal Deposit Insurance Corporation: Statement of Policy Regarding Binding Arbitration, dated April 10, 2001
- FR 66370, Vol. 62, No. 243, Federal Deposit Insurance Corporation: Alternative Dispute Resolution, dated December 18, 1997

FORMS

None.

SUMMARY OF CHANGES

This Directive supersedes FDIC Circular 5310.1, Binding Arbitration, dated September 22, 2009.

REVISION, dated June 23, 2023

This Directive had been revised to reflect current processes in accordance with applicable laws.

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BACKGROUND

This Directive is created pursuant to the Board's Statement of Policy Regarding Binding Arbitration (hereinafter "Binding Arbitration Policy"), adopted on March 26, 2001. The Binding Arbitration Policy was adopted to comply with provisions in the Administrative Dispute Resolution Act that require the agency to issue guidance on the use of binding arbitration before using it [see 5 U.S.C. 575(c)].

The FDIC's Statement of Policy on Alternative Dispute Resolution (hereinafter "ADR Policy") encourages arbitration in appropriate instances to resolve disputes at the earliest stage possible, by the most efficient and least expensive method possible, and at the lowest possible organizational level consistent with applicable delegations of authority (see FR 66370, Vol. 62, No. 243). The ADR Policy supports the use of binding arbitration as a means of dispute resolution in cases where it is more practical, cost-effective, or efficient than litigation or other dispute resolution methods.

This Directive does not require the FDIC to participate in binding arbitration and does not supplant or supersede any applicable FDIC delegations of authority with respect to the settlement of claims or disputes.

Questions regarding this Directive may be directed to the Alternate Dispute Resolution Counsel in the [Ethics and Alternative Dispute Resolution Program, Legal Division](#).

POLICY

The FDIC provides guidance on the use of binding arbitration as a means of dispute resolution in cases where it is more practical, cost-effective, or efficient than litigation or other methods of dispute resolution.

A. Considerations in Rendering a Decision to Use Binding Arbitration

1. To use binding arbitration, the following requirements must be met in accordance with the Administrative Dispute Resolution Act (see 5 U.S.C. 575):
 - a. All agreements to arbitrate disputes must be in writing and specify the subject matter to be submitted to the arbitrator for decision;
 - b. All agreements to arbitrate must include a maximum award amount that may be granted by the arbitrator;
 - c. Any official or employee of the FDIC offering to use binding arbitration in resolution of a dispute must have either the authority to enter into a settlement concerning the matter, or the specific authority to consent to binding arbitration on behalf of the FDIC;
 - d. Binding arbitration is not a condition to contracting with the FDIC; and
 - e. The agreement to use binding arbitration must be voluntary on the part of all parties.
2. Authority is required to agree to or initiate binding arbitration.
3. Binding arbitration may not be appropriate if:
 - a. The dispute raises a definitive or authoritative resolution of the matter required for precedential value, and such a proceeding is not likely to be accepted generally as an authoritative precedent;
 - b. The matter involves or may bear upon significant questions of federal policy that require additional procedures before a final resolution may be made, and such a proceeding would not likely serve to develop a recommended policy for the FDIC;
 - c. Maintaining established policies is of special importance, so that variations among individual decisions are not increased, and such proceedings would not likely reach consistent results among individual decisions;
 - d. The matter significantly affects persons or organizations who are not parties to the proceeding;

- e. A full public record of the proceeding is important, and a dispute resolution proceeding cannot provide such a record; and
 - f. The FDIC must maintain continuing jurisdiction over the matter with authority to alter the disposition of the matter in the light of changed circumstances, and a dispute resolution proceeding would interfere with the FDIC's fulfilling that requirement.
4. Pursuant to the Board's Binding Arbitration Statement of Policy, the provisions of this Directive do not apply to the following:

a. State Court Arbitration Programs

In rare situations where the FDIC (in either a receiver or conservator capacity) is in state court, and the court arbitration program is either mandatory or binding, a thorough assessment of the matter and options for arbitration (including removal of the case to federal jurisdiction) is recommended.

b. Labor Relations Arbitrations

The arbitration of union grievances and collective bargaining disputes is covered by specific labor statutes, regulations, and agreements.

c. Arbitration Clauses in Contracts Entered into by Depository Institutions Prior to Failure

Contracts entered into by depository institutions prior to the appointment of the FDIC (as conservator or receiver) are not subject to the provisions of this Directive. The Legal Division¹ is consulted to assist in determining whether it is in the best interests of the conservatorship or receivership to repudiate or to perform under the contract.

d. FDIC's Regulatory, Compliance, and Enforcement Activities

This Directive does not authorize the FDIC's use of binding arbitration in accordance with its regulatory, compliance, and enforcement activities.

B. Circumstances Where the Corporation Will Not Permit the Use of Binding Arbitration

FDIC personnel must not commit the FDIC to binding arbitration if otherwise prohibited by law or contract. Binding arbitration is not appropriate when the adjudication or resolution of the dispute would:

1. Have precedential value;
2. Involve a significant government policy;

¹ All references herein to the FDIC Legal Division should be understood to refer to the Office of Inspector General's (OIG), Office of General Counsel for matters involving the OIG.

3. Significantly impact persons or organizations not a party to the dispute;
4. Require a public record; or
5. Require monitoring to ensure compliance with the award.

C. Considerations Relating to the Nature and Extent of Damages

The following are limits placed on the use of binding arbitration:

1. Agreements to arbitrate must explicitly exclude any award of punitive, consequential, special, or exemplary damages by the arbitrator.
2. No arbitrator can serve as counsel, advisor, witness, or representative to any party to the arbitration proceedings. Potential conflicts of interest of arbitrators selected pursuant to this Directive must be reviewed by the Legal Division to grant or deny, in writing, waivers of arbitrator conflicts in appropriate circumstances.

D. Responsibility for Costs Associated with Arbitration

Unless waived by a delegated authority, agreements to arbitrate must explicitly state that the parties to the arbitration proceedings each bear their respective arbitration costs, including all attorney fees and expenses (i.e., the agreement to arbitrate must explicitly exclude any award of attorney fees or arbitration costs by the arbitrator).

E. Arbitrator Selection Criteria

The selection of the arbitrator must be based upon the mutual agreement of the parties [see 5 U.S.C. 577(a)]. In no event will the arbitrator have an official, financial, or personal conflict of interest with respect to the issue in controversy, unless that interest is fully disclosed in writing and all parties agree that the individual may serve as the arbitrator [see 5 U.S.C. 573(a) and 577(b)].

F. Arbitration Case Preparation, Processing, and Review Procedures

1. Review and Approval by Legal Division

Divisions and Offices considering the use of binding arbitration agreements where the FDIC is a party must be reviewed and approved by the Legal Division.

2. Case Approval for Binding Arbitration Clauses

- a. Pre-Dispute Agreements

Pre-dispute clauses to arbitrate arise in agreements or contracts where the FDIC has agreed to binding arbitration as a dispute resolution mechanism. Binding arbitration

clauses in FDIC contracts require a case requesting authority for approval to engage in binding arbitration.

b. Post-Dispute Agreements

Post-dispute agreements to arbitrate typically originate from claims, disputes, or litigation. Post-dispute agreements require a case requesting authority to submit the dispute to binding arbitration, in accordance with procedures for exercising delegated authority.

3. Arbitration Process

Parties must use an arbitration process consistent with the procedures described in 5 U.S.C. 579.

4. Arbitration Award Summaries

a. When binding arbitration results in an award, the relevant Division or Office and Legal Division must complete a summary that includes the following:

- 1) The final costs of the arbitration;
- 2) The total amount awarded by the arbitrator;
- 3) The date of the decision;
- 4) The estimated costs to the FDIC had it litigated the matter, if relevant;
- 5) The arbitrator's decision and award; and
- 6) An evaluation of the arbitrator's performance.

b. This summary must be provided to the ADR Counsel, Legal Division, who will keep a record.

RESPONSIBILITIES

A. The Alternate Dispute Resolution Counsel, Ethics and Alternative Dispute Resolution Program, Legal Division:

1. Provides assistance in situations related to binding arbitration; and
2. Maintains Arbitration Award Summaries.

B. Division and Office Directors:

1. Seek advice from the ADR Counsel to identify subject areas and transactions where arbitration may be appropriate;
2. Work with the Legal Division to identify legal issues before agreeing to the use of binding arbitration; and
3. Develop Arbitration Award Summaries when binding arbitration is used and submit to the ADR Counsel, Legal Division.

APPENDIX

None.

GLOSSARY OF TERMS

Alternative Dispute Resolution: A wide range of practices (binding or non-binding) for managing conflicts and resolving disputes other than through litigation or administrative adjudication.

Arbitration: An adjudicative process designed to resolve specific issues determined by parties that does not require conformity with legal rules of evidence and procedure, allows flexibility in timing and choice of decision-makers, is non-public, and results in awards which have no precedential value in other disputes.

Arbitrator: An independent, neutral person or party officially appointed to arbitrate a dispute.

Binding Arbitration: An arbitration process where the decision of the arbitrator binds the parties.

Court-Based Arbitration: An arbitration procedure annexed to a court proceeding and ordered or required by the court.

Pre-Dispute Agreements: Agreements in which parties submit a dispute arising from a contract to binding arbitration. The agreements typically set forth the arbitration procedures that will be followed if a dispute arises.

Post-Dispute Agreements: Agreements to arbitrate after a dispute has arisen and where no previous contractual dispute resolution mechanism was provided.

GLOSSARY OF ACRONYMS

ADR: Alternative Dispute Resolution