



FEDERAL DEPOSIT INSURANCE CORPORATION

DIRECTIVE SYSTEM

TYPE AND NUMBER

Circular 5310.1

CONTACT

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DATE

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TO: All Divisions and Offices

FROM: William F. Kroener, III
General Counsel

SUBJECT: Binding Arbitration

1. Purpose

To implement the FDIC's Arbitration Policy, 66 Federal Register 18632 (2001), and provide uniform guidance and controls regarding the use of binding arbitration by the FDIC. The guidance and controls within this directive are critical given the limited rights to appeal a binding arbitration award.

2. Scope

a. The provisions outlined in this directive apply to the FDIC in all capacities and to all Divisions and Offices seeking to use binding arbitration. Additionally, the provisions of this directive shall apply to Federal court-based arbitration programs. Binding arbitration may be used to resolve disputes in a number of situations where it is more practical, cost-effective, or efficient than litigation or other consensual methods of Alternative Dispute Resolution such as negotiation or mediation.

b. This directive will not be construed as requiring the FDIC to participate in binding arbitration. This directive does not address the use of binding arbitration in workplace disputes concerning management and employees; EEO complaints or any other labor and employment disputes (including disputes subject to arbitration proceedings under 5 U.S.C. § 7121); state court-based arbitration programs; contracts or leases entered into by a depository institution prior to the appointment of the FDIC as conservator or receiver; or any of the FDIC's regulatory, compliance or enforcement activities.

3. Authority

The FDIC may enter into binding arbitration pursuant to the Administrative Dispute Resolution Act of 1996 (5 U.S.C. §§ 571-583) and the Alternative Dispute Resolution Act of 1998 (28 U.S.C. §§651-658). This directive does not supplant or

**Authority
(cont'd)**

supercede any applicable FDIC delegations of authority with respect to the compromise or settlement of claims or disputes.

4. Action

This directive should be reviewed by employees in Divisions and Offices who are considering using binding arbitration, and it will be posted and maintained on the FDIC Website for future reference. All Divisions and Offices affected by this directive should update their operating manuals accordingly.

5. Definitions

Terms used in this directive are defined below:

a. **Alternative Dispute Resolution (“ADR”)**. A generic term that encompasses a wide range of practices (binding or non-binding) for managing and resolving disputes other than through litigation or administrative adjudication. Binding arbitration is a form of ADR.

b. **Administrative Dispute Resolution Act of 1996, 5 U.S.C. §§571-583 (“ADRA”)**. The ADRA authorizes the voluntary use of binding arbitration by Federal agencies in administrative matters, pursuant to certain restrictions set forth in the Act. These restrictions are set forth in paragraphs 7. and 8. of this directive.

c. **Federal Arbitration Act, 9 U.S.C. §§ 1-14 (“FAA”)**. This statute provides for the enforcement in Federal court of agreements to arbitrate and arbitration awards. The FAA is procedural, not substantive, in nature and creates no independent basis for Federal subject matter jurisdiction.

d. **Binding Arbitration**. A dispute resolution process similar to litigation where the parties agree to use a privately selected neutral decision-maker to hear their dispute and resolve it by rendering a final and binding award. Like litigation, arbitration is an adversarial, adjudicative process designed to resolve specific issues determined by the parties. Arbitration differs from litigation in that it 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. There are very limited rights of appeal from a binding arbitration award.

e. **Court-Based Arbitration**. An arbitration procedure annexed to a court proceeding and ordered or required by the court. Federal court-based arbitration programs are operated pursuant to the Alternative Dispute Resolution Act of 1998 (28 U.S.C. §§ 651-658).

**Definitions
(cont'd)**

f. **Evaluation.** Usually a non-binding, outcome-determinative process in which a third-party neutral provides an advisory opinion to the parties as to the merits of the dispute, including an opinion as to the strengths and weaknesses of each party's case.

g. **Mediation.** A non-binding, voluntary process involving the use of a third-party neutral who assists the disputants in attempting to resolve their disputes. Unlike arbitrators, mediators have no decision-making authority and cannot impose an award on the parties.

h. **Negotiation.** The primary form of dispute resolution in which the parties communicate or bargain to settle a dispute with no assistance from a third-party neutral.

i. **Pre-Dispute Agreements to Arbitrate.** Agreements in which the parties may agree at the time a contract is entered into to submit a dispute arising from the contract to binding arbitration. The agreements typically set forth the arbitration procedures that will be followed if a dispute arises.

j. **Post-Dispute Agreements to Arbitrate.** Agreements to arbitrate entered into after a dispute has arisen and where no previous contractual dispute resolution mechanism was provided.

**6. Background
of FDIC
ADR Program**

The FDIC ADR Program is an organization-wide effort implementing ADR processes such as negotiation, mediation, evaluation, and arbitration (when authorized and when appropriate) for resolving disputes (see FDIC ADR Policy at 62 Federal Register 66370). This directive reiterates the FDIC's commitment and full support for using ADR and sets forth a framework for continuing and expanding the use of ADR by providing for the use of binding arbitration in appropriate cases as a means of dispute resolution. Although the FDIC encourages non-binding, consensual forms of ADR, the FDIC views the use of binding arbitration in appropriate circumstances as an additional ADR technique to accomplish its business in an efficient, economical, and productive manner.

**7. Requirements
for Use of
Binding
Arbitration**

To use binding arbitration, the following statutory requirements must be met:

a. All agreements to arbitrate disputes must be in writing and must specify the subject matter to be submitted to the arbitrator for decision (5 U.S.C. § 575(a)(2));

**Requirements
for Use of
Binding
Arbitration
(cont'd)**

- b. All agreements to arbitrate must include a maximum award amount that may be granted by the arbitrator (5 U.S.C. § 575(a)(2));
 - c. Any officer 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 (5 U.S.C. § 575(b)(1) and (2));
 - d. There may be no requirement that anyone consent to binding arbitration as a condition to contracting with the FDIC (5 U.S.C. § 575(a)(3)); and
 - e. The agreement to use binding arbitration must be voluntary on the part of all parties (5 U.S.C. § 575(a)(1)).
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**8. Restrictions on
Use of Binding
Arbitration**

- a. Binding forms of ADR such as arbitration shall not be used (except in exceptional circumstances) if the dispute:
 - (1) Requires an authoritative determination as precedent for other cases;
 - (2) Involves a significant question of government policy;
 - (3) Significantly impacts persons who are not parties to the proceedings;
 - (4) Requires a public record of the proceedings;
 - (5) Must be monitored on an on-going basis by a court or an administrative body to ensure compliance; and
 - (6) Must be adjudicated to establish a body of law.
- b. In addition to these considerations, this directive places the following limits on the use of binding arbitration at the FDIC, absent waiver by delegated authority:
 - (1) All agreements to arbitrate shall explicitly exclude any award of punitive, consequential, special or exemplary damages by the arbitrator.
 - (2) All agreements to arbitrate shall explicitly state that the parties to the arbitration proceedings must each bear their respective arbitration costs, including all attorneys fees and expenses. The agreement to arbitrate shall explicitly exclude any award of attorneys' fees or arbitration costs by the arbitrator.

Restrictions on Use of Binding Arbitration (cont'd)

(3) 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's Conflicts Committee. The Conflicts Committee will grant or deny, in writing, waivers of arbitrator conflicts in appropriate circumstances.

9. Exclusions

The provisions of this directive do not apply to the following:

- a. **State Court Arbitration Programs.** The FDIC should carefully consider whether to engage in binding arbitration in state court. In the rare situation where the FDIC in either a receiver or conservator capacity is in state court and the court arbitration program is either mandatory or binding, careful assessment of the case and options to arbitration (including removal of the case to Federal jurisdiction) is recommended.
- b. **Labor and Employment Arbitration.** Conflicts that arise during the course of employment, such as wrongful termination, sexual harassment, and discrimination based on race, color, religion, sex, national origin, age, and disability, union grievances and collective bargaining agreement disputes may be candidates for arbitration. However, the arbitration of these disputes is covered by specific labor statutes, regulations, and FDIC policies and procedures. Questions concerning labor and employment arbitration should be directed to the Corporate Affairs Section, Legal Division.
- 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. For those situations, the Legal Division should be 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.** The policy and this directive are not intended to authorize the FDIC's use of binding arbitration in connection with its regulatory, compliance, and enforcement activities.

10. Delegations of Authority

The decision to use binding arbitration, whether pre- or post-dispute (see paragraph 11., below), is similar to decisions to contract, to initiate litigation, or to settle or compromise a

Delegations of Authority (cont'd)

dispute. Each of these decisions requires the written approval of one or more officers of the FDIC with the necessary delegated authority. The FDIC's practice is to treat binding arbitration as either the compromise of a claim or the settlement of litigation, with approvals required at the appropriate level for both the compromise or settlement activity and for the dollar amount. Authority to determine the maximum award amount for any given arbitration is reflected in the expenditure and/or compromise and settlement delegations.

11. Pre- and Post- Dispute Agreements to Arbitrate

a. Form of Agreement:

(1) Binding arbitration is a complete dispute resolution mechanism which has few, if any, rights of appeal. It is imperative that any arbitration provisions for use by the FDIC (whether in a pre- or post-dispute agreement) be carefully drafted and reviewed to ensure that all pertinent arbitration issues have been addressed for the particular transaction.

(2) The Legal Division has developed standard or model arbitration provisions and clauses that may be used for form contracts and which may be tailored to suit the needs of particular situations. Divisions and Offices of the FDIC considering the use of binding arbitration shall use the forms and language provided by the Legal Division. **Any language intended to invoke the use of binding arbitration where the FDIC is a party must be reviewed and approved by the Legal Division.**

b. Case Approval for Binding Arbitration Provisions:

(1) Pre-Dispute Agreements:

(a) The FDIC is a party to a wide range of contracts and agreements in all its capacities. FDIC pre-dispute clauses to arbitrate arise in agreements or contracts where the FDIC has agreed to binding arbitration as a dispute resolution mechanism. The FDIC recognizes that the optimal time for determining contract dispute resolution provisions is often at the inception or drafting of the contract.

(b) Binding arbitration clauses may be drafted to be **voluntarily** invoked as agreed to by the parties when a dispute arises during performance of the contract. The decision to invoke voluntary binding arbitration clauses must be reviewed and approved by the Legal Division in accordance with this directive. Binding arbitration clauses

**Pre- and
Post-Dispute
Agreements
to Arbitrate
(cont'd)**

may also be written to **require** the parties, starting from the time the contract is executed, to resolve any disputes that may arise through binding arbitration. Clauses requiring the use of binding arbitration to resolve any disputes between the parties must be prepared in accordance with the procedures set forth in this directive and applicable Delegations of Authority.

(c) Binding arbitration clauses in contracts intended to be used by the FDIC in any capacity must be accompanied by a case requesting authority for approval to engage in binding arbitration. The case recommending the use of such arbitration clauses must contain the following information:

1. The nature or substance of the transaction where the arbitration provision is intended to be used;
2. The nature of disputes intended to be resolved by the provision;
3. Potential dollar amounts in controversy or at risk (maximum award amount);
4. Whether other forms of ADR have been or will be used;
5. The advantages or benefits for the transaction of using binding arbitration; and
6. A draft arbitration clause or agreement proposed to be used in the transaction.

(2) Post-Dispute Agreements:

FDIC post-dispute agreements to arbitrate typically arise from newly arising or ongoing claims, disputes, or litigation. The FDIC shall consider arbitration in the post-dispute context on a case-by-case basis. The decision to use binding arbitration should be in accordance with the existing corporate procedures for requesting the authority to settle or compromise a case. The case memorandum requesting authority to enter into a post-dispute agreement is similar to the pre-dispute case approval authority in subparagraph 11.b.(1), above, and shall contain:

- (a) The nature or substance of the transaction where the dispute arose;

**Pre- and
Post-Dispute
Agreements
to Arbitrate
(cont'd)**

- (b) If in litigation, a description of the case and the status of the litigation;
- (c) Potential dollar amounts in controversy or at risk (maximum award amount);
- (d) The advantages or benefits to the FDIC and the transaction of using binding arbitration versus the use of litigation (this statement should include a discussion on the ability to withdraw from the litigation, to pursue settlement, establish precedent, have open records, and pursue an appeal);
- (e) Estimated costs to the FDIC in arbitrating the matter, including arbitrator costs, FDIC personnel costs, outside counsel costs, and case administration compared with the costs to litigate;
- (f) Whether other forms of ADR have been or will be used; and
- (g) A draft arbitration agreement proposed to be used in the transaction.

c. Summaries:

In all pre- and post-dispute agreements where binding arbitration is used, the responsible FDIC Division or Office must, at the cessation of arbitration proceedings, complete a summary. This summary shall be an assessment of the use of arbitration and shall:

- (1) Indicate the final costs of the arbitration;
- (2) Reflect the total amount awarded by the arbitrator;
- (3) Show the date of the decision;
- (4) Estimate the costs to the FDIC had it litigated the matter; and
- (5) Include the arbitrator's summary of decision and award and an evaluation of the arbitrator's performance.

This summary shall be forwarded to the ADR Unit of the Legal Division and the Division or Office Director or his designee participating in the arbitration proceeding.

12. Responsibilities

a. All **Divisions and Offices** considering the use of binding arbitration shall:

- (1) Identify subject areas and transactions where arbitration may be appropriate to resolve disputes;
- (2) Develop plans and strategies for the implementation of binding arbitration in general and this directive specifically in identified subject areas; and
- (3) Work with the Legal Division to identify legal issues that may affect the substantive transaction/subject area and the implementation of the use of binding arbitration.

b. The **Legal Division** shall:

- (1) Provide consultation and assistance in the development of each case for use of binding arbitration in pre- and post-dispute agreements;
- (2) Review and concur in each case of binding arbitration;
- (3) At the request of a Division or Office, address legal issues that may occur if arbitration is used to resolve disputes arising in a transaction;
- (4) Provide a requesting Division or Office with standard forms (model agreements, clauses, and the like) to use binding arbitration where approved;
- (5) Assist in arbitration design;
- (6) Assist in selection of arbitrators when requested; and
- (7) Assist in the enforcement of arbitration agreements or awards pursuant to the terms of the Federal Arbitration Act.

Note: For purposes of this directive, references to the Legal Division shall, in the case of the Office of Inspector General, be deemed to be references to the Office of Counsel to the Inspector General.

13. Contact

Questions regarding this directive should be directed to the ADR Unit of the Legal Division in Washington.

14. Effective Date

The provisions of this directive are effective immediately.