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A Comparative Study of Securities Arbitration Between China and America

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China has recently established a Securities Arbitration Center, which can be regarded as a new starting point for the development of securities arbitration in the region. The United States is the most developed region in the context of securities arbitration. If we compare the United States case study with that of China, we can observe the scope of securities arbitration gradually expanding. This approach involves establishing and overseeing specialized securities arbitration institutions, ensuring arbitrator selection is impartial, and implementing compulsory arbitration with a reasonable mechanism. We can, therefore claim, that China's securities arbitration has its unique advantages.

Keywords: securities arbitration, FINRA, Shenzhen Securities Arbitration Center, compulsory arbitration

Introduction

Securities arbitration refers to how the parties voluntarily submit their disputes to an arbitration institution and form an arbitral tribunal to adjudicate their disputes according to the selected arbitration rules, and then enforce the arbitral award. This approach is currently one of the most recognized methods in the securities industry.

In October 2021, China issued the Opinions of the China Securities Regulatory Commission and the Ministry of Justice on Conducting the Pilot Program of Arbitration in the Securities and Futures Industry by the Law, and the Securities Arbitration Center was established in Shenzhen in November of the same year. At the beginning of China's securities arbitration period, compulsory arbitration was implemented, which was later deemed invalid due to China's Arbitration Law in 1994. Following that, the securities market and related regulations were perfected, and supporting arbitration institutions were established. Nowadays, China's securities arbitration mechanism is making continuous development and making great progress.

The United States, as the region with the most developed securities arbitration rules and practices in the world, has established its securities arbitration system along with the American securities industry. In 1871, the New York Stock Exchange began to set up its arbitration department, which was initially used to settle disputes between members. With the prohibition of the Wilko v. Swan case in 1953, the McMahon case in 1987, the Rodriguez case in 1989, and the Gilmer case in 1991, securities arbitration changed from being

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prohibited to being allowed, its legitimacy was confirmed, and the scope of application was constantly expanded. In 2007, under the impetus of the United States Securities and Exchange Commission (SEC), the Financial Industry Regulatory Authority (FINRA) was the largest non-governmental financial regulator in the United States. Under FINRA rules, its members are required to submit disputes to arbitration for resolution or face disciplinary action.

This paper analyzes the differences and similarities between China and the United States in the scope of securities arbitration, the establishment of specialized securities arbitration institutions, the selection of arbitrators, the rationality of compulsory arbitration. By comparing the securities arbitration system in the United States, we can see the unique advantages and disadvantages of China's securities arbitration rules and practices.

Scope of Securities Arbitration

The scope of securities arbitration mainly includes two components: the types of securities subject to arbitration and the parties involved.

Types of Arbitrable Securities

There are the types of securities that can be arbitrated. At first, securities arbitration in China was only used to settle disputes arising from the issuance and trading of stocks. However, with the increase in the types of securities, the scope of securities that can be arbitrated in China has gradually expanded. The 2019 Securities Law of the People's Republic of China (hereinafter referred to as the "Securities Law"), covers the issuance and trading of stocks, corporate bonds, depositary receipts, and other financial instruments legally determined by the State Council[1]. Accordingly, the Securities Law is inclusive and predictive in terms of security types. The "Pilot Opinions" also adopted the same way, listing four types of disputes that can be arbitrated in the securities and futures industry. The first three are mainly securities and futures disputes, while the last backstop clause is supposed to meet the needs of future development and innovation of the capital market.

The arbitration of securities disputes in the United States involves a wide range of disputes. The McMahon case in 1987 established the arbitrability of securities disputes under the *Securities Exchange Act*, and the Rodriguez case in 1989 established the arbitrability of securities disputes under the *Securities Act*. Both the *Securities Act* of 1933 and the *Securities Exchange Act* of 1934 provide a detailed definition and comprehensive listing of "securities", including but not limited to stock securities, debt securities, hybrid securities, options, derivatives, and investment contracts that meet the Howe test and other series of products. All types of securities may be submitted for arbitration in the *Securities Arbitration Forum*.

Therefore, both in China and the United States, the types of stocks that can be used for arbitration are adopted as broadly as possible and leave ample room for future development. The key to the scope of securities arbitration is to avoid making a unified and authoritative regulation of it. In fact, due to the continuous development of the securities market, the types of securities, and the ways of securities trading and issuance are constantly innovated, and the law should not only regulate the existing things but also have a certain foresight.

[1] Article 2 of Securities Law of the People's Republic of China (2019 Revision): This Law shall apply to the issuance and transaction of stocks, corporate bonds, depository receipts, and other securities lawfully recognized by the State Council within the territory of the People's Republic of China.

The Parties Involved in Arbitration

The parties involved in securities arbitration can be divided into three categories. First, financial firms, including securities companies and other institutions that operate, underwrite, provide custody services, consult, and provide other services respectively or concurrently. Second, securities self-regulatory organizations, which mainly include securities trading venues, settlement institutions, and trade associations. The third category is investors, among which China has set up additional protection mechanisms for small and medium-sized investors. All three types of categories can conduct securities arbitration according to disputes among themselves or by themselves. At present, the primary concern of our country revolves around investors, including the civil compensation disputes caused by false statements of market subjects, engaged in market manipulation, insider trading, and actions that harm customer interests. The source of the securities arbitration pilot program is to crack down on securities violations and crimes and protect the interests of investors, especially those of small and medium-sized investors. In the context of securities arbitration in the United States, the disputes are mainly between brokers and clients or members or employment disputes. FINRA’s Dispute Resolution division manages more than 99% of securities-related arbitrations and mediations in the United States (Grannum & Ginter, 2017). The reason for this can be traced back to the history of the formation of the two. An important factor in the development of securities arbitration in the United States is the slow and costly defect of litigation, while the direct cause of the pilot of the securities arbitration system in China is the requirement to mitigate illegal securities activities. Therefore, the focus of securities dispute resolution in China is the protection of small and medium-sized investors. Of course, this does not mean that the United States securities arbitration does not protect public investor interests. If the rights and interests of public investors are not protected, the industry will lose supporters and impartiality, and it will not be further eligible for sustainable development.

The Establishment and Supervision of Specialized Securities Arbitration Institutions

Establishment of Specialized Securities Arbitration Institutions

In 2021, the *Arbitration Law* of the People’s Republic of China (Amendment) (draft for comment) (hereinafter referred to as the “Arbitration Law Draft”) has made clear provisions on the nature of arbitration institutions. In China, arbitration institutions are jointly established by relevant government departments and chambers of commerce. They are non-profit legal entities, registered and qualified as legal persons, and are independent of administrative agencies. As a special arbitration institution, the securities arbitration institution is also a non-profit organization with a legal presence and independent from the administrative agency.

In 1994, the former Securities Commission of the State Council designated the China International Economic and Trade Arbitration Commission (CIETAC) as the arbitration institution for disputes between securities companies and between securities companies and stock exchanges, but the designation has lost its effect. At present, there are two specialized securities arbitration institutions in China. One is the Shenzhen Securities Arbitration Center, which was jointly established by the Shenzhen International Arbitration Court and Shenzhen Stock Exchange in 2021. The other is the Hainan Securities Arbitration Center jointly established by Hainan International Arbitration Court and Hainan Securities and Futures Industry Association, which was newly established in March 2023. The Opinions supports and promotes the establishment of securities and futures arbitration courts (centers) in the three arbitration institutions in Beijing, Shanghai, and Shenzhen, where the securities and futures business are active, and apply special arbitration rules to deal with securities and futures disputes arising from the capital market. However, China's securities disputes are not limited to these two securities arbitration centers, and other arbitration commissions can also conduct such arbitration. CIETAC has formulated special rules for the arbitration of financial disputes, among which the types of financial disputes that can be arbitrated include securities and futures transactions[2].

The *Securities* Arbitration Commission, which was first established in the United States in 1871, was established by the New York Stock Exchange (NYSE) to deal with conflicts among its members. After the Securities Arbitration Alliance (SICA) was established in 1976, several self-regulatory organizations, including the Securities Dealers Association and stock exchanges, pushed for the establishment of diversified securities arbitration organizations. However, with continuous reform and innovation, the establishment of securities dispute arbitration institutions in the United States varies. Many arbitration institutions have emerged, each developing its unified securities arbitration rules and authoritative bodies. This process has gradually formed a complete system from the bottom up. At present, the majority of securities arbitration mainly use three forums: FINRA Dispute Resolution Institution, American Arbitration Association (AAA), and Judicial Arbitration and Mediation Services, Inc. (JAMS). Of these, FINRA-ADR is by far the most widely used.

It is necessary to set up a professional body, which has unique advantages such as convenient collection of evidence, preservation of evidence, high efficiency, linkage of penalties in the industry, protection of trade secrets, and deterrence against misconduct.

There are notable differences between the institutional setups of the two countries. Broadly speaking, the United States has transitioned from a pluralistic approach to unity and then to coexistence. Conversely, China has progressed from a limited number of institutions to pluralism and eventually to coexistence. That derives from the fact that the securities arbitration institution is the product of the combination of history, practice, and reality. The United States originally used to resolve disputes between members of the institution, while China was introduced with the need to crack down on illegal securities activities. The advantages and disadvantages of the two are very obvious. China has obvious advantages in agreeing to supervision, but it may lack market competition, while the United States is mainly the source of funds and the influence of justice. To summarize, the securities industry arbitration and other arbitration institutions should form a healthy competition pattern in improving arbitration rules protecting investors' interests, and further improving the competition. Professional arbitration institutions must exist, but cannot monopolize, and coexist and compete with other arbitration institutions.

Supervision of Professional Arbitration Institutions

Supervision generally includes industry self-regulation and external supervision. The self-regulatory convention of the securities industry organization and the rules they enforce to prevent or penalize members for rule violations play an important role in the supervision system of the securities market. The self-regulatory

[2] Article 2 of China International Economic and Trade Arbitration Commission Financial Disputes Arbitration Rules: The term "financial transactions" shall refer to transactions arising between financial institutions inter se, or arising between financial institutions and other natural or legal persons in the currency, capital, foreign exchange, gold and insurance markets that relate to financing in both domestic and foreign currencies, and the assignment and sale of financial instruments and documents denominated in both domestic and foreign currencies, including but not limited to: … 11. Securities and futures.

mechanism ensures the implementation of arbitration rules and the execution of arbitration awards. But the external supervision of our country occupies a more important role because our country's securities market management from the beginning adopted a top-down promotion strategy, with authority to assist our country, has a congenital advantage. Such institutions can play an irreplaceable role in the formulation of arbitration rules, the roster of arbitrators, the selection of arbitrators, and the definition of arbitration procedures and time limits. In particular, they can assist in the enforcement of arbitral awards and provide the necessary support to judicial proceedings. The Opinions hold that professional support will be provided to securities arbitration centers, capital market regulators, and self-regulatory organizations. The role of the China Securities Regulatory Commission （CSRC) is to provide professional support and actively guide the parties to disputes over securities and futures to take the initiative to choose arbitration as the dispute resolution method. The self-regulatory organization points to two aspects: the arbitration institution is a member of the China Arbitration Association and is subject to its supervision. The China Arbitration Association, as a self-regulatory organization in the arbitration industry, is a social organization as a legal person. It supervises the work of arbitration commissions and formulates arbitration rules following the Arbitration Law and the Civil Procedure Law. The Securities and Exchange Act of the United States gives the Securities and Exchange Commission the power to supervise and control the arbitration rules of securities self-regulatory organizations. Although FINRA is a non-governmental organization, it is membership-based and covers almost all securities firms in the United States. It can be regarded as having the power to manage and supervise all securities firms.

Therefore, the main difference between China and the United States in the supervision of securities arbitration institutions is that China's history and current practice pay more attention to external constraints and are working toward the direction of internal supervision of the industry. The United States has gradually formed a powerful and unified internal supervision mechanism from the industry's self-discipline at the very beginning.

Selection of Arbitrators and Composition of the Arbitral Tribunal

An important reason for choosing arbitration over other alternatives is the professionalism and independence of the arbitrators, which can ensure that awards are based on factual evidence and legal principles rather than political factors. Arbitration commissions are independent entities; they are independent of national or local authorities. This structure keeps the arbitration process from being influenced by local or state agencies. It also facilitates arbitrators to make rulings based on law and facts rather than politics (Wang, 2012). In securities arbitration, however, the arbitrator's expertise in securities-related matters is a very important factor. Due to the highly technical nature of securities and the high entry threshold, the relationship between the parties is more complicated, and the support of professional knowledge is inseparable from the confirmation of legal liability and the calculation of damages. It's difficult to envision how an arbitrator without experience in securities can effectively assist parties in resolving their disputes. However, the composition of the arbitral tribunal does not conform to the agreement of the parties or the legal procedures and thus, can seriously damage the rights and interests of the parties, which is the ground for revoking the award under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). Such an award may also encounter obstacles in recognition and enforcement.

Appointment of Arbitrators

According to Article 7 of the Opinions, China has been emphasizing roster establishment, sourcing, recommendation, selection, and training of professional securities arbitrators. It is required that the pilot arbitration commission establish a special roster of professional securities and futures arbitrators. That is, the current Shenzhen Securities Arbitration Center and Hainan Securities Arbitration Center should establish a special roster, but there is no distinctive difference between professional securities arbitrators and general arbitrators.

In typical commercial arbitration, arbitral institutions also offer a list of arbitrators for parties to choose from but usually allow parties to select arbitrators not on the list, as seen in the CIETAC rules. However, in securities arbitration, the option to choose non-listed arbitrators is not specified. If the selection of non-roster arbitrators is allowed, it will cause a dilemma when there are requirements on the identity of the arbitrator. Therefore, it is not possible to determine whether the off-roster arbitrator is a professional arbitrator or a general arbitrator, which is confusing in the case of a panel request. Whether it is allowed and who makes the judgment are problems that will arise in the future.

The creation and enforcement of arbitration rules led by individuals outside the securities industry can prevent the conflict of interest inherent in self-regulation within the industry. This approach ensures the application of fair self-regulatory practices benefiting investors, guided by principles of objectivity and neutrality. FINRA in the United States has set up a roster of arbitrators and divided it into professional arbitrators and general arbitrators, including different standards and relevant requirements. The three-member tribunal comprises two public arbitrators and one industry arbitrator, or it consists entirely of public arbitrators[3]. If a sole arbitrator is appointed, they must be a public arbitrator. The composition of the sole or collegiate panel in FINRA is based on the amount of the subject matter, which is a quick and convenient way to judge[4]. The selection is made using the List Selection Algorithm (a computer algorithm), which randomly generates a list of arbitrators from FINRA's roster of arbitrators. The specific case type will affect the number of lists generated as well as the number of arbitrator names for each list. This process has become complicated, and FINRA outlines the arbitrator selection process on its website which can increase parties' sense of trust in arbitrators in terms of procedural setup.

Qualification Requirements, Causes, and Advantages of a Split Arbitrator

FINRA's two types of arbitrators should have detailed provisions, but China does not have special qualification requirements for securities professional arbitrators at present. Taking China's "Arbitration Law" as a model, arbitration institutions have their requirements for arbitrators, mainly targeting professionals, who experience years of personality and other types of judgment.

There are two ways to deal with this. One is to increase the selection of professional arbitrators, specify their qualifications, and conduct training and regular assessments. The other is also the method adopted in China's commercial arbitration practice at present: the arbitration institution classifies the recommended roster of arbitrators according to different specialties. The parties can search and screen, see the resume, specialty, good

[3] 11-05 of Regulatory Notice, Customer Option to Choose an All Public Arbitration Panel in All Cases, Published Date: February 01, 2011, Effective Date: February 1, 2011.

[4] 12401 of FINRA RULES, Number of Arbitrators: (a) Claims of $50,000 or Less; (b) Claims of More Than $50,000 Up to $100,000; (c) Claims of More Than $100,000; Unspecified or Non-Monetary Claims.

direction, and other contents of the arbitrator, to select the arbitrator with professional knowledge, educational background, or work experience. China can even follow the practice of the United States, and select professional arbitrators and general arbitrators to form a three-person collegiate panel.

Due to the complexity and professional character of securities disputes, the original design intention of including professional arbitrators in the arbitral tribunal is undoubtedly good. However, the principle of voluntariness of arbitration is questionable in theory. The parties' right to self-determination in arbitration extends to various aspects, including the decision to opt for arbitration as a dispute resolution method, the selection of the arbitration institution, the choice of arbitration venue, the arbitration rules, and the composition of the arbitral tribunal, all of which should be determined by mutual agreement between the parties. If the parties are forced to choose arbitrators in the roster or must choose an arbitrator with knowledge of securities, the right to self-determination of the parties may be infringed. This may be a dilemma. If it is in the case of a three-member court, both can be satisfied, but who should serve as the chief arbitrator is a new problem. FINRA's rules strike a preliminary balance on this issue by highlighting the role of professional arbitrators on the one hand and institutionally restricting them on the other. It will avoid a situation in which professional arbitrators dominate the arbitral tribunal.

The classification of public arbitrators and non-public arbitrators has long existed in the National Association of Securities Dealers (NASD) period, which is based on the identity of arbitrators, that is, the relationship between arbitrators and the securities industry. The sole arbitrator or the presiding arbitrator of the collegial panel can only be a public arbitrator. Under FINRA, public arbitrator status can be eliminated for a variety of reasons.

If an arbitrator was disqualified based on his/her status or conduct, there are two types of disqualification: permanent disqualification and temporary disqualification. In the former case, because arbitrators themselves have a very close relationship with the securities market, there are requirements on identity and duration of service, such as brokers, securities firms, lawyers, accountants, and 15 years, or a total of 15 years, of service. On the other hand, the temporary disqualification can still be re-qualified as a public arbitrator if certain conditions are met, such as after a five-year "look-back period". Public arbitrator disqualification may also be based on the actions of others, such as profiting from an employer, but this is also temporary and may be reinstated two years after the termination of employment with the company. The influence of immediate family members on the ability of an arbitrator to serve as an arbitrator is also multifactorial. An immediate family member may be disqualified from serving as a public arbitrator by FINRA, and even after the termination of the relationship, a period of two years may be required. The 15-year amendment expands the scope of immediate family members to include three new types: spouse, partner in a civil union, and domestic partner.

Therefore, FINRA's requirements for public arbitrators are gradually stricter, and higher standards need to be met to become a public arbitrator. On the whole, the revised standards on the identity division of the two types of arbitrators gradually expand the scope of the definition of non-public arbitrators and limit the scope of the definition of public arbitrators. The neutrality of public arbitrators is purer so that securities arbitration can better balance the value of fairness and efficiency from the aspect of arbitrator selection.

While possessing professional knowledge of securities is significant, in dispute resolution, the ability to ascertain facts and render impartial judgments based on legal provisions takes precedence, making legal expertise the foremost requirement for arbitrators. Ultimately, in case adjudication, while professional judgment holds significance, prioritizing the assessment of merits and achieving justice is paramount. Of course, at present, many securities arbitrators have been able to pay equal attention to both. With the development of career paths and the improvement of arbitrators' own legal and arbitration professional abilities, this issue will gradually no longer need too many entanglements. Instead of strictly classifying arbitrators, the parties should be provided with the qualifications and strengths of arbitrators in detail, and the parties themselves should weigh the proportion of professionalism and legality to make a choice that suits their interests. This should also be part of future methodology.

Compulsory Securities Arbitration

Analysis of Compulsory Arbitration

Commercial arbitration follows the principle of voluntariness on the part of the parties, not only because the parties agree to choose arbitration as the procedure for settling disputes, but also because they can jointly choose important procedural factors such as arbitration rules, venue, institution, and arbitral tribunal. Generally speaking, an arbitration agreement is the cornerstone of the arbitration system, and the conclusion of an effective arbitration agreement is an important basis for the arbitral tribunal to obtain the right of arbitration without the jurisdiction of the court and then award the disputed case. From this point of view, compulsory arbitration violates the basic principles of arbitration and is illegal from a legal perspective. Secondly, arbitration must be conducted even if an arbitration clause has not been signed in advance, which deprives the parties of their right of action and puts arbitration above other means of dispute resolution. Third, requiring parties to choose arbitration to settle disputes infringes on the litigant's litigation rights, and citizens have the right to choose litigation for relief. Even if compulsory arbitration is stipulated, it can also be directly sued for relief to break it, so compulsory arbitration is unenforceable in practice.

However, in the long-term practice of securities arbitration, compulsory arbitration has been repeatedly mentioned and discussed. This mainly indicates that the parties must first choose arbitration as the means of dispute resolution when there is a securities dispute. The fundamental reason is that as a kind of commercial arbitration, compulsory arbitration should follow the voluntary principle of arbitration, but it should be consistent with the principles of securities law and regulations. The particularity of securities arbitration comes from the particularity of securities disputes. In the securities market, no matter the management of participants and behaviors, or the settlement of entry, exit, and disputes, there are complete and detailed regulations. Securities laws and regulations are extremely typical and technical laws and regulations. They are rigorous and complex at the same time, with a high entry threshold, professionalism, and technicality. It is necessary to integrate its characteristics under the premise of maintaining the principle of commercial arbitration and maximizing the advantages of securities arbitration as a dispute method.

There are two points to pay attention to compulsory arbitration of securities. First, the target, investors cannot be forced into compulsory arbitration. Requiring the parties to choose arbitration as the means of resolution of securities disputes often means requiring the parties to submit to a certain arbitration institution and use its arbitration rules. In this way, investors are easily controlled by "arbitration institutions", which affects the fairness of arbitration in the securities industry. Especially when investors are in a disadvantageous position in the award or their claims are not recognized, they may attribute the failure to the intentional bias of the arbitrator or arbitration institution, thus making the award difficult to be enforced. Consequently, investors must not be compelled to partake in arbitration under any circumstance.

Similarly, if both parties involved are securities brokers, the aforementioned occasion does not apply, which is advantageous. The mandate for compulsory arbitration for brokers typically arises within the membership terms. If a broker is not a member, they are unable to engage in the market or avail themselves of membership benefits. The rights and obligations are consistent, and supervision is also necessary. This kind of self-regulatory supervision greatly reduces the pressure on the securities administration, and internal penalty can be carried out when the broker carries a misconduct. When securities disputes arise, the administration has a better understanding of the situation of brokerages during arbitration and can quickly make fair and impartial rulings. Some rulings can even play an exemplary role in the industry. The Securities Industry Association can also take the form of an internal penalty to urge the implementation of arbitral awards or impose additional penalties.

Next is the method of application. Prior acceptance of the articles of association containing an arbitration clause may be regarded as voluntary or consensual, but there is a difference between such consent and the voluntary nature of a specific arbitration agreement. The former is general consent concerning the type of dispute rather than its specific subject matter. Similarly, various parties may interpret the content and extent of prior consent differently, leading to disputes regarding whether the specific subject matter falls within the arbitration scope.

Provisions on Compulsory Securities Arbitration Between China and the United States

Arbitration under FINRA in the United States covers all securities disputes between member firms and their clients. For a firm to trade in the U.S. securities market, it must register with the SEC, become a member of FINRA, and be subject to a combination of both. Any agreements with investors that contain a pre-dispute arbitration clause must have the clause highlighted[5]. Arbitration proceedings may start as a result of a written arbitration agreement or at the request of the client[6]. This gives the client a great deal of choice and can also be regarded as a form of compulsory arbitration. The enforcement of any arbitration clause depends on whether the investor knows and chooses the arbitration clause when entering into the contract, and whether the arbitration clause violates the mandatory provisions of the securities law (Wang, 2015). In this case, it can be seen that the object of compulsory arbitration is the member company, which means that almost all participants, except investors, are excluded. However, this right cannot be exercised in reverse, thereby securities brokers cannot force public investors to arbitrate.

However, almost all securities brokers and dealers are members of NYSE, NASD, and FINRA, and arbitration between members is often regarded as compulsory arbitration in practice. Similarly, this requirement

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[5] 2268 b (1) of FINRA Manual, Requirements When Using Predispute Arbitration Agreements for Customer Accounts: In any agreement containing a predispute arbitration agreement, there shall be a highlighted statement immediately preceding any signature line or other place for indicating agreement that states that the agreement contains a predispute arbitration clause. The statement shall also indicate at what page and paragraph the arbitration clause is located.

[6] 12200 of FINRA Manual, Arbitration Under an Arbitration Agreement or the Rules of FINRA: Parties must arbitrate a dispute under the Code if: • Arbitration under the Code is either: (1) Required by a written agreement, or (2) Requested by the customer; • The dispute is between a customer and a member or associated person of a member; and • The dispute arises in connection with the business activities of the member or the associated person, except disputes involving the insurance business activities of a member that is also an insurance company.

for members to adhere to the arbitration clause outlined in the association rules or articles of association implies that all securities brokers must accept arbitration requests from investors. In other words, investors can demand dispute resolution through arbitration from securities firms, while securities firms themselves cannot initiate the same process. Therefore, the so-called “compulsory arbitration” is bound by the articles of association or the rules of the association, to ensure that the disputes are settled by arbitration as proposed by investors. While brokers are required to arbitrate their disputes with clients, and clients can compel brokers to do so, the opposite is not true. A broker cannot force a client to arbitrate a dispute under FINRA rules.

According to the Interim Regulations on the Administration of Stock Issuance and Trading in 1993, disputes arising from the issuance or trading of stocks between securities operating institutions and between securities operating institutions and securities trading venues shall be mediated and arbitrated by arbitration institutions established or designated with the approval of the Securities Commission. The former CITEAC was appointed as the arbitration institution in that case. However, this provision was self-nullified with the “Principle of voluntary Arbitration” of the 1994 Arbitration Law and the requirement that “other arbitration institutions established before the implementation of this Law that do not comply with the provisions of this Law shall be terminated as of the date of the implementation of this Law.” Temporary compulsory arbitration has played an important role in the promotion of securities arbitration in China’s securities disputes. Before 2007, there were many discussions in academic circles on the topic, but the positive significance of its existence was still unanimously recognized. After the rapid development in the first 30 years, arbitration as a convenient and quick way to solve securities disputes in China has been deeply rooted in people’s hearts, and with its professional ability, can attract the parties, and no longer need compulsory provisions.

Neither the Arbitration Law nor the Securities Law have any relevant provisions for compulsory arbitration in China. The guideline stressed the need for agencies to guide parties to choose arbitration as a means of dispute resolution. In securities and futures business disputes between members or participants of capital market self-regulatory organizations such as securities and futures trading venues, securities registration and settlement institutions, and securities and futures industry associations, or between investors and members or participants of capital market self-regulatory organizations, the parties may agree on arbitration clauses in a contract or agreement in advance or reach an arbitration agreement afterward. The articles of association of members of the capital market self-regulatory organization may specify arbitration clauses for disputes involving securities and futures business between members, stipulate or agree on the scope of disputes to be settled by arbitration, and the parties may apply for arbitration under the arbitration clauses.

According to the above provisions, it is not difficult to find that “compulsory arbitration” may occur only when the parties are all members of the self-regulatory organization and the articles of association of the members have stipulated that arbitration should be used as a means of dispute settlement between its members. Similarly, in China’s context, the member management regulations of the three exchanges do not mandate arbitration as the sole or preferred method for resolving disputes. These regulations offer more flexibility, allowing business disputes between members to be settled through negotiation, mediation, arbitration, or litigation. This approach not only provides multiple options but also does not prioritize any specific method. The rules of the Shenzhen Exchange also include disputes between members and customers but do not limit the options for members and customers to handle disputes.

It can be said that in China, the first kind of “compulsory arbitration” does not exist in practice. However, Opinions also require that securities disputes between members are resolved by arbitration, on the occasion that a pilot arbitration commission is selected as the arbitration institution. At present, it refers to the Shenzhen Securities Arbitration Center, but it is not certain whether it includes the Hainan Securities Arbitration Center. This makes the choice of the compulsory arbitration institution. Before the establishment of the pilot securities arbitration commissions in Shanghai and Beijing, members of the Shanghai and Beijing exchanges may need to go to the Shenzhen Securities Arbitration Center, if they chose to settle their securities disputes by arbitration. This undoubtedly placed undue obligations on members, and there were also inconveniences and increased costs associated with obtaining evidence across stock exchanges.

When considering the principle of voluntary arbitration, it should not mandate arbitration as the sole method for resolving disputes, nor should it restrict or eliminate the parties’ right to choose other arbitration commissions or institutions. At the same time, even if the securities industry is characterized by professionalism and may have certain exclusivity, industry-led arbitration does not mean that the industry monopolizes arbitration.

Conclusion

The securities market is constantly developing and innovating, and securities-related products emerge one after the other. The lag of legal basis makes it difficult to make pre-regulation and judgments for every case. However, the arbitral tribunal can make a fair and harmonious decision as far as possible on the legal principles and the commercial practices of the securities industry, by exercising its discretion without violating the current legal provisions. While resolving disputes, it may also make innovations to resolve disputes and provide support and inspiration for judicial practice.

The securities arbitration industry in the United States has a long history and is relatively well-developed. Although China has had a relatively short time in the industry, it has still drawn the influence of other countries and formed a complete and unified system in combination with the social reality of China. The key issue is how to set up supporting measures to implement these rules and make them play their due roles. At present, China emphasizes the diversified resolution of securities disputes, rather than solely suggesting a solution for arbitration, which is more innovative.

References

Astarita, M. J. (2024). Securities arbitration overview-2023 update—Securities arbitration is not like any other proceeding. Retrieved February 6, 2024 from https://seclaw.com/overview-securities-arbitration-process/

Born, G. B. (2009). *International commercial arbitration*. New York: Aspen Publishers.

Buhring-Uhle, C. (2006). *Arbitration and mediation in international business* (2nd ed.). London: Kluwer Law International.

Fan, Z. F., & Wang, H. (2008). About the securities investment disputes arbitration. *Hebei Law Science, 26*(6), 110-116.

Grannum, S. D., & Ginter, J. (2017). Nuts and bolts: Securities arbitration. *Journal of Investment Compliance, 18*(4), 1-7.

Gross, J. I. (2010). The end of mandatory securities arbitration. *Pace Law Review, 30*(4), 1174-1194.

Gross, J. I. (2016). The customer’s nonwaivable right to choose arbitration in the securities industry. *Brooklyn Journal of Corporate, Financial & Commercial Law, 10*(2), 383-404.

Jiang, J. T. (2021). On perfection of the diversified settlement mechanism of securities disputes in China. *Journal of Luoyang Normal University, 40*(8), 63-68.

Joelson, M. R. (2015). Arbitration in the United States under the financial industry regulatory authority. *Arbitratin Internationnal 31*(3), 465-472.

Johnson, J. J. (2005). Wall Street meets the wild west: Bringing law and order to securities arbitration. *North Carolina Law Review, 84*(1), 123-180.

Lin, Y. F. (2018). Arbitrability and arbitral scope. In *Judicial review of arbitration: Law and practice in China* (pp. 197-224). Alphen aan den Rijn: Kluwer Law International.

Nolan-Haley, J. (2001). *Alternative dispute resolution in a nutshell* (3rd ed.). Saint Paul: West Academic Publishing.

Rao, C.-L., & Chang, J. (2006). The perfecting of the legislative arbitration of the security dispute—Centering on the safeguard of investors' legitimate rights and interests. *Journal of Shanghai University (Social Sciences), 13*(2), 124-130.

Wang, K. Y. (2015). Study on improvement in China's arbitration mechanism for securities tort dispute. *Legal Forum, 30*(2), 109-118.

Wang, M. (2012). Securities arbitration: An alternative form of dispute resolution for public investors in China. *The International Lawyer, 46*(2), 691-707.