Narrow and Problematic Interpretation of an Arbitration Agreement's Scope under Chinese Law: The Missing Pro-Arbitration Presumptive Rule

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The scope of an arbitration agreement is a crucial issue in the theories and practice of international commercial arbitration, because it directly decides an arbitrator's jurisdiction. Courts in pro-arbitration countries have adopted a presumptive rule, under which an arbitration agreement's scope is interpreted broadly to cover all disputes related to the contract between the parties. This enables the courts to respect parties' intention to arbitrate their disputes and refrain from conducting excessive merit review. Over the past few decades, the Supreme People's Court of China has made many efforts to maintain an overall pro-arbitration stance. Surprisingly, however, it has consistently interpreted scope issues narrowly. This runs against the international trend and the court's otherwise arbitration friendly position. Even more shockingly, this issue has remained unnoticed in both legal practice and academia. This creates potential pitfalls for business entities across the world and damages China's reputation in the field of international arbitration. This article identifies the hidden anomaly under Chinese law and calls on the Chinese supreme court to adopt the presumptive rule. Doing so will enable Chinese courts to interpret scope issues broadly and avoid conducting excessive merit review. This will bring Chinese law in line with the international practice and consolidate its pro-arbitration status. It will further safeguard the smooth operation of the international arbitration system and facilitate continued economic growth of the world.

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I INTRODUCTION

The scope of an arbitration agreement is a key issue in the theories and practice of international commercial arbitration.[1] If a dispute between two parties falls within the scope of the arbitration agreement that they have previously concluded, the dispute should be heard and decided by an arbitrator. If it instead falls outside the scope, the arbitrator will not have the authority to hear the case and the parties will have to resort to litigation or other dispute resolution mechanisms. Therefore, the scope of an arbitration agreement forms a very important basis of an arbitrator's jurisdiction.[2] In addition, the scope issue is subject to court review at various stages in the arbitration process. While an arbitrator has the power to decide his or her own jurisdiction under the widely accepted doctrine of Kompetenz-Kompetenz,[3] a party may request a court to determine the scope of an arbitration agreement before or at the beginning of an arbitration proceeding.[4] Even after an arbitration proceeding is completed and an award is rendered by the arbitrators, a party can still challenge the award before a court by alleging that the dispute falls outside the scope of the arbitration agreement. To do so, the party may request a court in the country where the arbitration is seated to set aside the award in accordance with the local national arbitration legislation,[5] or ask a court in another country to refuse to recognize and enforce the award under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).[6] As a result, the scope issue is a decisive factor in the success of the entire arbitration process. Given that arbitration is one of the most popular methods to resolve international business disputes in today's world, the scope of an arbitration agreement is a highly important issue for the world's economic order.[7]

Despite the issue's paramount importance, national arbitration legislation and international treaties rarely contain specific provisions on the precise boundaries of an arbitration agreement's scope.[8] This is perhaps because they inevitably depend on the contexts and circumstances in individual cases, and are therefore hard to generalize. Instead, legislation and treaties leave this matter to the discretion of arbitrators and judges.[9] In practice, arbitrators and judges may need to review all the relevant facts in a case, before they could interpret the terms of the contract concluded between the parties and decide whether a dispute falls within the scope of the arbitration agreement,

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1 *See* Gary B. Born, *International Commercial Arbitration* (3rd edn, Kluwer Law International 2021) 1424.
2 *See* Tibor Várady and others, *International Commercial Arbitration: A Transnational Perspective* (7th edn, West Academic 2019) 128.
3 *See, e.g.*, UNCITRAL Model Law on International Commercial Arbitration (2006) (A/61/17, amended by the United Nations Commission on International Trade Law (7 July 2006) art 16.
4 *See, e.g.*, ibid art 8.
5 *See, e.g.*, ibid art 34(2)(a)(iii).
6 *See* United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), art V.1.c (New York Convention).
7 *See, e.g.*, Emmanuel Gaillard and John Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International 1999) 1; Várady and others (n 2) 1; Born (n 1) 91-96.
8 *See* Born (n 1) 1424-26.
9 *See* ibid 1426.

usually a clause in the contract also known as the arbitration clause.[10] In order to do so effectively and efficiently, courts in many jurisdictions around the world and particularly those that are pro-arbitration, or friendly towards arbitration, have adopted a presumptive rule, under which the scope of an arbitration agreement is interpreted very broadly to cover all disputes related to the contract between the parties except for those they have explicitly excluded.[11] Under such a presumptive rule, disputes broadly related to a contract as well as those arising out of a supplemental agreement or a settlement agreement are usually deemed as falling within the scope of the arbitration clause in the original contract.[12]

This presumptive rule is pro-arbitration for at least two reasons. First, it enables a judge to focus on and respect adequately the parties' intent to arbitrate. As put by an English judge, parties in a contract likely intend to submit any dispute arising out of their relationship to be decided by the same tribunal.[13] Therefore, if they have chosen arbitration in their contract, it is reasonable to assume that they wanted to arbitrate all their disputes in the same manner.[14] Second, while scope issues can be straightforward in some cases, they are often more complicated than they first appear. In order to reach a conclusion on the scope of an arbitration agreement, courts usually need to review at least some of the merit issues in the case and investigate questions such as, who the parties to the contract are, what the natures of the transactions are, how the disputes relate to the contract, and so on. In some cases, these inquires will likely require a detailed merit review.[15] This, however, may put the courts in a tricky and awkward position. Generally speaking, courts are usually reluctant to review merit issues in a case where both parties have agreed on arbitration.[16] This is once again due to the courts' wish to respect the parties' intent. After all, parties have chosen to arbitrate their dispute precisely because they do not want a court to decide it. Consequently, courts would rather refrain from making excessive merit review in the case and send all disputes between the parties to arbitration. As a result, this broad interpretation of scope is highly pro-arbitration, because it ensures that arbitrators' jurisdictions are supported instead of weakened, and that the parties' intent to arbitrate is respected fully. This will enable the smooth operation of the international arbitration system and promote international trade and investment.[17]

China is a very important player on the stage of international arbitration. Due to its economic power, the world has seen, and will continue to see, a large number of arbitration cases related to China.[18] Under this context, the ways Chinese law and

[10] *See* Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (Kluwer 1981) 270-71.
[11] *See, e.g.*, *Fiona Trust v Privalov* [2007] UKHL 40, [2007] 4 All ER 951; *First Options of Chicago Inc v Kaplan* 514 US 938 (1995); Born (n 1) 1432.
[12] *Hart Enterprises v Anhui Provincial Corp* 888 F Supp 587 (SDNY 1995) (US); Born (n 1) 1451.
[13] *See Fiona Trust* (n 11) [13].
[14] *See* ibid; Julian D M Lew, Loukas A Mistelis and Stefan M Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) para 7-67.
[15] *See* van den Berg (n 10) 270-71.
[16] *See* ibid 269.
[17] *See* Born (n 1) 1445.
[18] *See, e.g.*, Weixia Gu, *Dispute Resolution in China: Litigation, Arbitration, Mediation and Their Interactions*

Chinese courts treat international arbitration have a significant impact on the international dispute resolution system as well as the world's economy more broadly speaking. Fortunately, China has taken an overall pro-arbitration stance in the recent decades. In 1994, the Chinese legislature promulgated an arbitration act that largely conforms to the modern and internationally accepted norms.[19] In addition, ever since the country's accession to the New York Convention in 1987, Chinese courts have recognized and enforced the vast majority of the international arbitration awards brought before them.[20] The Supreme People's Court of China (SPC) has put in place many mechanisms to ensure that Chinese courts remain overall friendly towards arbitration.[21] One example is the Reporting System for international arbitration cases. Under this system, if a Chinese court wants to strike down an international arbitration agreement, refuse to recognize and enforce a foreign arbitral award, or set aside an international award made in China, it needs to report its intended decision to its upper level court, which shall in turn report to the SPC if it agrees with the proposed decision.[22] The lower level courts cannot make the decision until and unless the SPC approves their proposal. In the context of scope issues, this means a challenge before a Chinese court concerning the scope of an international arbitration agreement, either against the arbitration agreement itself or the award based on it, will need the SPC's backing to be successful.

Despite this highly pro-arbitration stance in general, Chinese courts' positions on scope issues surprisingly run against the international trend. In recent years, the SPC has consistently interpreted the scope of an arbitration agreement in a very narrow fashion.[23] In a number of decisions, the SPC rejected an arbitrator's jurisdiction or an award's enforcement after finding that the dispute fell outside the scope of the arbitration agreement between the parties. Contrary to the presumptive rules adopted by pro-arbitration countries under which the scope of an arbitration agreement is read extremely broadly to cover all disputes related to the contract, it is quite shocking to see that the SPC has chosen a narrow understanding and interpretation of scope in these cases, and has conducted excessively intrusive merit review for that purpose. Among other issues, the SPC has held that an agreement to arbitrate reached between the parties in a section of the contract did not cover all disputes arising out of that contract, and

(Routledge 2021) 90-92; CIETAC, '2022 Work Report and 2023 Work Plan' (*CIETAC*) < http://www.cietac.org/index.php?m=Article&a=show&id=18848&l=en> accessed 26 June 2023; Markus Altenkirch, Maria Barros Mota and Christian Wilke, 'Arbitration Statistics 2021 – Have the Numbers of Arbitration Proceedings Reached Their Ceiling?' (*Global Arbitration News*, 23 November 2022) < https://www.globalarbitrationnews.com/2022/11/23/11937/> accessed 26 June 2023.

[19] *See* PRC Arbitration Law (China).

[20] *See* Gao Xiaoli (高晓力), 'Chinese Courts are Pro-arbitration (中国法院对仲裁持积极态度)' (*China International Commercial Court*, 15 May 2018) < https://cicc.court.gov.cn/html/1/218/62/164/1054.html> accessed 26 June 2023.

[21] *See* Jingzhou Tao, *Arbitration Law and Practice in China* (3rd edn, Kluwer Law International 2012) 18.

[22] *See* Regulations on the Report and Examination of Cases Related to Judicial Review of Arbitration (最高人民法院关于仲裁司法审查案件报核问题的有关规定), Fa Shi (2017) No. 21 (法释[2017]21 号) (Supreme People's Court) (China); Notice on Certain Issues Concerning the People's Courts' Handling of Matters Involving Foreign-Related Arbitration and Foreign Arbitration (最高人民法院关于人民法院处理与涉外仲裁及外国仲裁事项有关问题的通知), Fa Fa (1995) No. 18 (法发[1995]18 号) (Supreme People's Court) (China).

[23] *See* Section III for details.

that disputes arising from a supplemental agreement or a settlement agreement fell outside the scope of the arbitration clause in the original contract. These decisions are not only at odds with the internationally accepted approach to interpret scope issues broadly,[24] but also deviate significantly from the otherwise pro-arbitration stance that the SPC has maintained for decades.[25] Moreover, these decisions by the SPC are perplexing. The SPC is not bound by any legislative requirement to make such narrow interpretation, and there is no obvious policy reason for it to do so. As a result, further research is needed to identify the reasons why the SPC has taken such a bizarre position.

The SPC's position on scope issues has significant consequences for arbitration practice in the world. When dealing with a Chinese party or having transactions otherwise related to China, business entities outside China will need to pay special attention and ensure that their arbitration agreement is written in a way that satisfies the Chinese court's requirements. Failure to do so may frustrate their future attempt to resolve their disputes successfully by arbitration. In addition to the added transaction cost, this narrow understanding and interpretation of scope will most definitely harm Chinese law's pro-arbitration reputation. This may undesirably damage the international community's confidence in the Chinese arbitration legal framework, which would in turn create barriers for international trade and investment between China and the rest of the world. Moreover, there seems to be no valid or reasonable explanation for why the SPC wants to adopt this problematic and internationally inconsistent approach. As a result, it is necessary to alert the SPC and other Chinese courts about this controversial jurisprudence.

Quite shockingly, this crucial issue has remained unnoticed in academia. There is no discussion of the SPC's narrow interpretation of an arbitration agreement's scope among any literature, in either English or Chinese. Academic assessment of this bizarre position taken by the SPC is non-existent. In fact, to date there is very little research among literature on how Chinese courts interpret scope issues altogether. This article will fill the gap in the academic discourse by presenting original and critical analyses on this extremely important issue that has been unfortunately neglected. At the same time, discussions in this article will further form a key probe into Chinese law's stance on international arbitration in general. It will indicate how much Chinese law and Chinese courts respect international arbitration, and provide guidance on how they should further improve. Given the key role that arbitration plays in the international dispute resolution process, maintaining an arbitration friendly legal framework will ensure that China can work with other countries in the world to facilitate the smooth resolution of international commercial disputes. This will in turn safeguard global economic development.

As a result, this article has two main goals. First, it calls on the SPC to change course regarding how it interprets an arbitration agreement's scope. The Chinese

[24] *See, e.g.*, *Fiona Trust* (n 11); *First Options* (n 11); *Hart Enterprises* (n 12).
[25] *See, e.g.*, Gao Xiaoli (n 20).

supreme court should reflect on the nature of arbitration as well as the international trend on this specific issue, and establish a pro-arbitration presumptive rule under which scope issues are interpreted broadly. The SPC should also refrain from conducting excessive merit review when deciding on scope issues. This will bring Chinese law in line with the international practice shared among arbitration friendly jurisdictions in the world. It will further help consolidate the positive pro-arbitration reputation that the SPC has painstakingly fought for over the recent decades. Second, this article forms a part of a larger project that aims at reconceptualising the nature of international arbitration under Chinese law and reforming its legal framework. The Chinese legislature is planning on amending its arbitration statute.[26] This article will provide important insights and perspectives for that attempt.

Section Two of this article will examine the presumptive rule that courts in pro-arbitration jurisdictions have adopted. Under this rule, the scope of an arbitration clause will cover all disputes concerning the contract, including those arising out of any supplemental and settlement agreements related to the original contract, except when there is clear evidence to the contrary. Section Two will also discuss how courts in pro-arbitration jurisdictions would shy away from conducting excessive review over the merit issues in a case and leave them to the arbitrators whenever they could. Section Three will discuss three decisions made by the SPC and other Chinese courts. These cases indicate that the SPC apparently interprets the scope of an arbitration agreement very narrowly, which falls out of line with the strategies adopted by courts in pro-arbitration jurisdictions. Section Four will further analyse the Chinese supreme court's position on scope issues and argue that the SPC should adopt the presumptive rule. It will also try to persuade the SPC to refrain from making excessive merit review in cases related to international arbitration. Section Five will conclude the article.

II BROAD INTERPRETATION OF AN ARBITRATION AGREEMENT'S SCOPE BY COURTS IN PRO-ARBITRATION JURISDICTIONS

A A Pro-arbitration Presumptive Rule

In countries where international arbitration often takes place, national laws and courts are usually very friendly towards it.[27] On the issue of scope, courts in these jurisdictions often adopt a pro-arbitration presumptive rule, under which the scope of an arbitration agreement is interpreted to the broadest extent possible and may cover any dispute that relates to the contract between the parties.[28] The rationale behind the approach is to respect fully the parties' intention to resolve their disputes by arbitration

[26] Ministry of Justice (司法部), '*Consultation Draft of the Proposed Revisions of the PRC Arbitration Law (中华人民共和国仲裁法(修订)(征求意见稿))'* < https://npcobserver.com/wp-content/uploads/2020/11/Arbitration-Law-2021-Draft-Revision.pdf > accessed 26 June 2023 (China).
[27] *See* Born (n 1) 134; Lew (n 14) para 15-5.
[28] *See* Born (n 1) 1432-45; Lew (n 14) para 7-61, 7-62.

and to ensure that the disputes will be resolved in an efficient manner.[29]

Commercial or business disputes can be quite complex in practice. "One" dispute may in fact involve multiple legal issues and sub-disputes. As a result, when parties have chosen arbitration as their dispute resolution mechanism, the presumption should be that they want the entirety of the dispute resolved by arbitration.[30] This is because splitting related claims between arbitration and litigation would be inevitably time-consuming and costly for all parties involved.[31] Accordingly, in order to respect parties' true intention and ensure that their disputes are resolved efficiently, courts in pro-arbitration jurisdictions have chosen to interpret the scope of arbitration agreements very broadly, so that all relevant disputes in a commercial dealing can be heard by the chosen arbitrators.

English courts, as a good example, are keen on such an expansive reading of scope. In the seminal case of *Fiona Trust & Holding Corp v Privalov*, a ship owner requested an English court to rescind a charterparty, alleging that its conclusion was a result of bribery.[32] While the charterparty contained an arbitration clause providing that "[a]ny dispute arising under this charter" would be resolved by arbitration, the ship owner argued that their claim to rescind the charterparty due to bribery did not "arise under" it, therefore the case should not go to arbitration.[33] Obviously, the strength of this argument hinges on how English judges interpret the scope of this arbitration agreement, namely whether the arbitration clause is broad enough to cover such a claim. Lord Hoffman did not hesitate to give a very broad interpretation of scope by holding that

> [T]he construction of an arbitration clause should start from the assumption that the parties … are likely to have intended any dispute arising out of [their contract] to be decided by the same tribunal … unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction.[34]

This clearly pro-arbitration presumptive rule set out in *Fiona Trust* has been followed in many later English court decisions.[35] Together, they indicate the unquestionable position under the current English law that an arbitration agreement's scope should be interpreted broadly to cover all disputes related to the contract between the parties.

Similar to their English counterparts, US judges have also consistently interpreted the scope of an arbitration agreement broadly. The US Supreme Court has repeatedly

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[29] *See* Born (n 1) 1432; Lew (n 14) para 7-61.
[30] *See* Lew (n 14) para 7-67.
[31] *See* ibid para 7-66, 7-67; Várady and others (n 2) 132-33.
[32] *Fiona Trust* (n 11).
[33] Ibid [3]-[4].
[34] Ibid [13].
[35] *See e.g.*, *Sulamerica Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 638, [2013] 1 WLR 102; *Terre Neuve Sarl v Yewdale Ltd* [2020] EWHC 772 (Comm), [2020] 3 WLUK 444; *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38, [2020] 1 WLR 4117; *Tugushev v Orlov* [2021] EWHC 926 (Comm), [2021] 2 Lloyd's Rep 205.

held that "the [US Federal] Arbitration Act establishes that … any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.[36] Guided by this doctrine, US judges will find that a dispute falls within scope unless there is clear evidence to the contrary, particularly when an arbitration clause includes broad languages such as "any disputes arising from or relating to this agreement".[37] The rationale for this clearly pro-arbitration presumptive rule is to respect parties' intention to arbitrate and ensure the smooth operation of the arbitration system.[38]

Outside the common law systems, many civil law countries have adopted the same approach. For example, French courts have always interpreted the scope of an arbitration agreement in an expansive manner.[39] Swiss courts have repeatedly upheld broad interpretations of scope.[40] Similarly, German courts have also consistently supported an extensive or liberal construction of an arbitration agreement's scope.[41] In addition, this pro-arbitration presumptive rule exists in almost all jurisdictions that have adopted the UNCITRAL Model Law on International Commercial Arbitration, including Canada, Australia, Singapore, Hong Kong, and many others.[42]

B A Broad Interpretation that Covers Successive Contracts

Scope issues can become complicated when the same or similar parties enter into successive contracts but not all of the contracts contain the same exact arbitration clause.[43] For example, after two parties conclude their original contract, they may later reach a supplemental agreement or a settlement agreement. If the original contract contains an arbitration clause, but the supplemental agreement or settlement agreement does not, when a dispute later arises out of the supplemental agreement or settlement agreement, can parties rely on the arbitration clause in the original contract? In other words, is the scope of the arbitration clause in the original contract broad enough to cover the supplemental or settlement agreement? While courts around the world have indeed reached different conclusions on this question due to various concerns and reasons, courts in pro-arbitration countries have often upheld the jurisdictions of arbitrators in such situations by interpreting the scope broadly.[44] The main rationale is again to respect parties' explicit or implicit intention to use arbitration to resolve their dispute at a single forum and in an efficient manner.[45]

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[36] *E.g.*, *Moses H Cone Memorial Hospital v Mercury Constr Corp* 460 US 1, 24–25 (1983); *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc* 473 US 614, 626 (1985); *First Options* (n 11) 945.
[37] *See e.g.*, *Mediterranean Enterprises Inc v Ssangyong Corp* 708 F 2d 1458, 1463, fn 5 (1983) (US).
[38] *See* Born (n 1) 1432.
[39] *See* Gaillard and Savage (n 7) 260-61.
[40] *See* Born (n 1) 1437-38.
[41] *See* ibid 1439.
[42] *See* ibid 1441-45.
[43] *See* ibid 1478-79.
[44] *See* ibid 1479-80.
[45] *See* ibid 1480.

For instance, English courts have held that a dispute arising from a settlement agreement falls into the scope of the arbitration clause in the original contract between the parties. In *Sonact Group Ltd v Premuda SpA "Four Island"*, a charterer challenged the arbitrators' jurisdiction over the case by arguing that their claim arose under the settlement agreement which, unlike the original contract, did not contain an arbitration clause, and that there was no specific agreement between the parties to incorporate the original contract's arbitration clause into the settlement agreement.[46] The English High Court found that it was obvious the parties intended for the arbitration clause in the original contract to continue to apply to the settlement agreement, and that the arbitration clause was sufficient to encompass the claim which represented a new cause of action under the new and binding settlement agreement.[47] In the English judge's opinion, it is inconceivable that the parties would intend to litigate such a claim when they had already chosen arbitration in the original contract.[48]

US courts take a similar position when dealing with settlement agreements. In *Hart Enterprises International Inc v Anhui Provincial Import & Export Corp*, the parties entered into a sales contract which contained an arbitration clause.[49] When a dispute later arose between the parties, they reached a settlement agreement, but the settlement agreement itself did not contain an arbitration clause.[50] After the parties once again fell into dispute under the settlement agreement, the US court interpreted the arbitration clause in the original sales contract broadly to cover the dispute that arose out of the settlement agreement.[51] Similarly in *Becker Autoradio v Becker Autoradiowerk*, another US court held that a failure to renew the contract fell into the scope of its arbitration clause.[52] The court based its decision on the presumptive rule under US law that the scope of an arbitration agreement should be interpreted broadly.[53]

Likewise, French courts have held that a contract's arbitration clause may extend to another contract, if there is a significant and regular business relationship between the parties or the contracts.[54] German and Swiss courts have also adopted a similar approach.[55] This means that disputes arising from a settlement agreement would fall into the scope of the arbitration clause in the original contract, at least when the parties did not specifically agree in the settlement agreement that the original contract would have been terminated or completely replaced.[56]

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46 *See Sonact Group Ltd v Premuda SpA "Four Island"* [2018] EWHC 3820 (Comm), [2019] 1 Lloyd's Rep. 643.
47 *See* ibid [15].
48 *See* ibid [16].
49 *See Hart Enterprises* (n 12) 588.
50 *See* ibid 588.
51 *See* ibid 589.
52 *See Becker Autoradio v Becker Autoradiowerk* 585 F 2d 39 (1978) (US).
53 *See* ibid 44.
54 *See* Gaillard and Savage (n 7) 305-06; Born (n 1) 1485-46.
55 *See* Born (n 1) 1486.
56 *See* ibid 1485-87.

C Limited Merit Review in Relation to Scope Issues

Scope issues can become complex, because they are often intricately related to the merits of the case. In order to ascertain the precise boundaries of an arbitration agreement's scope, courts and arbitrators may need to look carefully into the factual background of the case, such as who the parties of the contract exactly are, under what circumstances the contract was concluded, what precise intentions the parties had when they concluded the contract, and so on.[57] Understandably, some of these issues can be rather complex and would require careful fact-finding and application of law. That being said, whilst there was a time in history when courts would review the merits of an arbitrator's decision, modern day arbitration legislation and jurisprudence have long abandoned the intrusive, or at least excessively intrusive, judicial review over merit issues in arbitration cases.[58]

Nowadays in the world, although courts may conduct limited review over merit issues in an arbitration case under exceptional circumstances, such as when public policy is involved, judges usually defer to arbitrators' decisions on merits.[59] For example, in *International Standard Electric Corp v Bridas Sociedad Anonima Petrolera*, a US court held that merit review in an arbitration case is "wholly out of step with the universal concept of arbitration in all nations",[60] and that "[t]he whole point of arbitration is that the merits of the dispute will not be reviewed in the courts".[61] In the court's opinion, "this principle is so deeply imbedded in American … jurisprudence, that no further elaboration of the case law is necessary."[62] In a similar fashion, English courts have also held that arbitrators' erroneous decisions on fact finding or application of law are not subject to judicial review under English law.[63] Therefore, when interpreting an arbitration agreement's scope, courts in pro-arbitration countries will usually refrain from conducting excessive merit review of the case.

As a summary, the major arbitration jurisdictions in the world have adopted a pro-arbitration presumptive rule regarding the scope of an arbitration agreement. Under this rule, the scope is interpreted very broadly to cover all disputes related to the contract between the parties. This would encompass any successive contracts that the parties have entered into, such as a supplemental or settlement agreement, which may not contain the same exact arbitration clause in the original contract. The courts will conduct limited review over the merits of the case, and will support the arbitrators' jurisdiction as long as the parties have expressed an intention to arbitrate. The rationale

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[57] *See* van den Berg (n 10) 270-71.
[58] *See* Nigel Blackaby, Constantine Partasides and Alan Redfern, Redfern and Hunter on International Arbitration (7th edn, OUP 2022) para 10:04; Margaret L Moses, *The Principles and Practice of International Commercial Arbitration* (3rd edn, CUP 2017) 3; Lew (n 14) para 15-5.
[59] *See, e.g.*, Case C126/97 *Eco Swiss China Time Ltd v Benetton International Nv* [1999] ECR I-3055.
[60] *International Standard Electric Corp v Bridas Sociedad Anonima Petrolera* 745 F Supp 172 (SDNY 1990) 178 (US).
[61] Ibid.
[62] Ibid.
[63] *See e.g.*, *Omnium de Traitement et de Valorisation SA v Hilmarton Ltd* [1999] 2 All ER (Comm) 146 ; *B v A (Arbitration : Chosen Law)* [2010] EWHC 1626 (Comm), [2010] 2 Lloyd's Rep 681.

behind this doctrine is to respect party intention fully and to ensure that all disputes between the parties will be resolved efficiently at a single forum.

III Chinese Courts' Apparently Narrow Interpretation of an Arbitration Agreement's Scope

Similar to many other national arbitration legislation, the PRC Arbitration Law does not specifically prescribe how the scope of an arbitration agreement should be interpreted.[64] As a result, relevant issues need to be dealt with by the Chinese courts. In recent decades, the Supreme People's Court of China (SPC) has addressed the scope of arbitration agreements in a number of cases. These decisions offer a very good insight into how scope issues are understood and decided in Chinese jurisprudence. Unfortunately, however, these decisions have not been encouraging. In this section, we will discuss three important cases, in which the SPC has surprisingly chosen to interpret the scope of an arbitration agreement in a very narrow or restrictive manner, despite having adopted an otherwise pro-arbitration stance consistently since the 1980s. These decisions were made in distinct, but representative, contexts, including whether the scope of an arbitration clause would cover the entire contract, a supplemental agreement, and a settlement agreement. The SPC's rulings and reasoning in these cases may raise serious doubts and questions, but they do shed light on how the court conceptualizes scope issues in general.

A Narrow Interpretation of the Scope of an Arbitration Clause

In 2013, the SPC instructed courts in Zhejiang Province to strike down an arbitration agreement after finding the dispute falling outside its scope.[65] This case arose in a contractual dispute between ProEvents Overseas Limited (ProEvents) and Hangzhou Little Donkey Sports Agency Ltd (Little Donkey). Previously in 2011, the English football club Arsenal authorized ProEvents to organize and arrange for the club's trip to Asia in the July of the same year.[66] ProEvents subsequently concluded a Commission Contract with Little Donkey, under which Little Donkey would promote a friendly match between the Arsenal team and a football team in Hangzhou, China.[67] Article 4 of the Commission Contract contained a list of rights, responsibilities, and obligations that ProEvents enjoyed and undertook. Among them, Item 15 provided that,

> [B]oth parties agree that all current Arsenal players shall visit China, and if an

[64] *See* PRC Arbitration Law (China); Born (n 1) 1425-26.

[65] *See* Reply Letter to the Request for Instructions Concerning the Validity of the Arbitration Clause in the Commission Contract Dispute Case Between ProEvents Overseas Limited and Hangzhou Little Donkey Sports Agency Co Ltd (最高人民法院关于国际文娱海外有限公司诉杭州小毛驴体育经纪有限公司委托合同纠纷案所涉仲裁条款效力问题请示的复函), (2013) Min Si Ta Zi No. 53 ([2013]民四他字第 53 号) (Supreme People's Court) (China) (ProEvents Reply Letter).

[66] *See ProEvents Overseas Limited v Hangzhou Little Donkey Sports Agency Co Ltd* (国际文娱海外有限公司与杭州小毛驴体育经纪有限公司委托合同纠纷一审民事判决书), (2013) Zhe Hang Shang Wai Chu Zi No. 85 ((2013)浙杭商外初字第 85 号) (Hangzhou City Intermediate People's Court) (China) (ProEvents First Instance Judgment).

[67] *See* ibid.

> Arsenal player cannot visit China due to reasons other than those specifically provided in the following, it would be considered a breach of contract and the case, together with all details of compensation, shall be subject to arbitration by the China Economic and Trade Arbitration Commission in Hangzhou.[68]

Arsenal's visit to Hangzhou, China took place in July 2011. A dispute, however, later arose between the two parties. After negotiations failed in 2013, ProEvents filed a lawsuit at the Intermediate Court of Hangzhou City (Hangzhou Intermediate Court) against Little Donkey, claiming for payment due under the Commission Contract.[69] Little Donkey, however, requested that the court should refer the case to the China Economic and Trade Arbitration Commission (CIETAC), because of the arbitration clause. After this case reached the SPC following the Report System, the SPC held that because the arbitration clause was written in the section of the Commission Contract that listed the rights and obligations of ProEvents, the arbitration clause only applied to the specific issue of whether any breach of contract had occurred due to an Arsenal player's absence in the Hangzhou trip, but did not apply to other disputes arising under the Contract.[70] Accordingly, the SPC decided that ProEvents' claim against Little Donkey for overdue payment under the Commission Contract fell out of the scope of the arbitration clause, and therefore ruled that the Hangzhou Intermediate Court had the jurisdiction to hear the merit issues of the dispute.[71]

The SPC clearly chose to interpret the scope of the arbitration clause in this case extremely narrowly. Admittedly, the arbitration clause in the Commission Contract was not perfectly drafted. If it were a standalone contract clause which explicitly stated that it would cover all disputes arising under the contract, there would be little doubt that its scope would be broad enough to cover the claim made by ProEvents. As the clause was, however, it would nonetheless be completely reasonable for a court to interpret it broadly. First, there was no other dispute resolution clause in the Commission Contract, so if a court wanted to focus on the intent of the parties, it could assume that they would want all their disputes to be resolved by arbitration. Second, it wouldn't be reasonable to ask the parties to litigate some of the issues in their dispute but arbitrate the others, especially when these issues were closely connected. It would therefore be wise to keep the dispute resolution process together at one forum. Third, and even more importantly, Little Donkey argued to the Chinese courts that the main reason why it withheld payment was precisely because Francesc "Cesc" Fàbregas Soler (Fàbregas), a key player and the captain of the Arsenal team at the time, did not join the trip to Hangzhou and did not have a reason specifically listed in Article 4 of the Commission Contract.[72]

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[68] Ibid.
[69] *See* ibid.
[70] *See* ProEvents Reply Letter (n 65).
[71] *See* ibid.
[72] *See* Request for Instructions Concerning the Arbitration Clause in the Commission Contract Dispute Case Between ProEvents Overseas Limited and Hangzhou Little Donkey Sports Agency Co Ltd (浙江省高级人民法院关于国际文娱海外有限公司诉杭州小毛驴体育经纪有限公司委托合同纠纷一案仲裁条款问题的请示报告), (2013) Zhe Shang Wai Que Zi No. 3 ([2013]浙商外确字第 3 号) (Zhejiang Province High People's Court) (China).

Even following the SPC's narrow interpretation that the scope of the arbitration clause only covered the specific issue of whether a breach has occurred due to a player's absence in the Hangzhou visit, the dispute in this case was indeed related to and based on that specific question, and therefore should fall within the scope of the arbitration clause.

What happened in the case afterwards was even more puzzling. After the SPC refused to enforce the arbitration clause, the Hangzhou Intermediate Court went on to hear the merit issues in the case. When Little Donkey argued that ProEvents breached the Commission Contract because Fàbregas did not visit Hangzhou with the Arsenal team and did not have a valid reason as specifically listed under the contract, the court held that this argument could not stand because this issue should have been decided in arbitration according to the arbitration clause, despite having previously held, as instructed by the SPC, that the case should not be heard by an arbitrator.[73] This extremely problematic and self-contradictory decision left Little Donkey with no opportunity to argue their case.

In any event, the SPC's decision in this case clearly indicated a very narrow interpretation of the scope of an arbitration agreement. The SPC did not assume that an arbitration clause agreed in a contract would apply to any disputes related to the contract, nor did it assume that parties would want all their disputes under the same contract to be resolved together in one forum. The SPC ignored the parties' intention to arbitrate expressed explicitly in the contract as well as the close relationship between the dispute and the arbitration clause. The decision even left the party with no opportunity to present its case. This extremely narrow interpretation of scope is clearly unsatisfactory and problematic.

B Narrow Interpretation of Scope in the Context of a Supplemental Agreement

In 2016, the SPC instructed courts in Jiangsu Province not to enforce an arbitration agreement after finding the dispute falling outside its scope.[74] In this case, the predecessors of Jiangsu Xinyu Air-Condition Ltd (Jiangsu Xinyu) and Knorr-Bremse Espana S.A. (Knorr-Bremse) concluded a Technology Transfer Agreement in 2007.[75] The agreement allowed Jiangsu Xinyu to use Knorr-Bremse's technology and

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[73] *See* ProEvents First Instance Judgment (n 66).

[74] *See* Reply to the Case Concerning the Confirmation of the Validity of the Arbitration Agreement Dispute Between Applicant Jiangsu Xinyu Air-Conditioning Co., Ltd. And Respondent KNORR-BREMSE ESPANA SA (最高人民法院关于申请人江苏新誉空调系统有限公司与被申请人 KNORR-BREMSE ESPANA SA 确认仲裁协议效力纠纷一案的答复), (2016) Zui Gao Fa Min Ta No. 35 ([2016]最高法民他 35 号) (Supreme People's Court) (China) (Jiangsu Xinyu Reply Letter).

[75] *See* Request for Instruction in the Case Concerning the Confirmation of the Validity of the Arbitration Agreement Dispute Between Applicant Jiangsu Xinyu Air-Conditioning Co., Ltd. and Respondent KNORR-BREMSE ESPANA SA (formerly known as MERAK SISTEMAS INTECRADOS DE CLIMATIZACION SA) (江苏省高级人民法院关于申请人江苏新誉空调系统有限公司与被申请人 KNORR-BREMSE ESPANA SA(原名为 MERAK SISTEMAS INTECRADOS DE CLIMATIZACION SA)确认仲裁协议效力纠纷一案的请示), (2005) Su Shang Wai Ta Zi No. 00001 ([2015]苏商外他字第 00001 号) (Jiangsu Province High People's Court) (China).

manufacture a series of air-conditioning devices to be equipped onto certain specific models of high speed trains in China. According to the arbitration clause in the Technology Transfer Agreement, any dispute arising from or related to the agreement shall be resolved by arbitration with CIETAC in Beijing.[76]

In March 2009, the two parties signed a Memorandum of Understanding (MOU) regarding further cooperation on a new line of high speed trains to be produced in China (the New Project) that was not previously included in the Technology Transfer Agreement. In the MOU, the companies agreed that they would conclude a supplemental agreement to the Technology Transfer Agreement before 30 April 2009 to cover the New Project. Subsequently, the parties drafted a Supplemental Agreement which provided that all terms in the Technology Transfer Agreement would apply to the New Project unless specifically excluded. Despite never signing the draft, the parties began performing the Supplemental Agreement by conducting a series of transactions related to the New Project, including purchase and sales of equipment as well as transfer of relevant technology and design. Disputes later broke out between the parties unfortunately, and Knorr-Bremse initiated arbitration at CIETAC claiming for overdue payment and damages related to the New Project. Jiangsu Xinyu, however, filed a case at the Intermediate Court of Changzhou City (Changzhou Intermediate Court), requesting the court to declare that the dispute related to those transactions under the Supplemental Agreement, or the New Project, fell outside the scope of the arbitration clause in the Technology Transfer Agreement.[77]

The majority opinion of the Changzhou Intermediate Court was that the arbitration clause in the Technology Transfer Agreement should not apply to the Supplemental Agreement, or the New Project, because the Technology Transfer Agreement only covered specific types of high speed trains not including those involved in the New Project.[78] The court further concluded that given the parties never signed the draft Supplemental Agreement, its reference to the arbitration clause in the Technology Transfer Agreement was invalid.[79] A dissenting opinion of the court, however, would find the dispute within the scope of the arbitration clause of the Technology Transfer Agreement. This was because the two parties did agree to enter into a supplemental agreement in the MOU, and the arbitration clause in the Technology Transfer Agreement would apply to the New Project because it had not been specifically excluded. In addition, the parties already started to perform the Supplemental Agreement, despite not formally signing it.[80] As per the Report System established by the SPC, the Changzhou Intermediate Court reported the case to the High Court of Jiangsu Province (Jiangsu High Court), which agreed with the majority opinion of the

[76] *See* ibid.
[77] *See* ibid.
[78] *See* ibid.
[79] *See* ibid.
[80] *See* ibid.

Changzhou Intermediate Court and thus reported the case in turn to the SPC.[81]

The SPC first declared that an arbitration agreement should be in writing form under Chinese law, and that arbitration should be based on the common intent of the parties.[82] It then found that the two companies in this case expressed their intention to conclude a supplemental agreement in the MOU, but did not specifically indicate in the MOU that the terms in the Technology Transfer Agreement would automatically apply to the New Project, nor did they agree on another arbitration clause in the MOU.[83] In contrast, the MOU mentioned that the parties would conclude a supplemental agreement before 30 April 2009. As a result, the SPC held that there was no written common intent between the parties to submit disputes related to the New Project to arbitration.[84] In essence, the SPC held that the dispute related to the Supplemental Agreement, or the New Project, fell outside the scope of the arbitration clause in the Technology Transfer Agreement.

The SPC's reasoning was clearly questionable. First, there was most definitely a written arbitration agreement between the parties, namely the arbitration clause in the Technology Transfer Agreement. Second, it should be assumed that the parties shared a common intent to continue with the arbitration clause in the Technology Transfer Agreement, given that neither of them tried to exclude it during any part of the negotiations and that they have already begun to perform the draft Supplemental Agreement. In any event, because the dispute between the parties under the Supplemental Agreement, or the New Project, clearly related to the Technology Transfer Agreement, it is safe to assume that courts in a pro-arbitration jurisdiction would find that the dispute falls within the scope of the existing arbitration clause.[85] The SPC, however, did not reach this conclusion. It avoided addressing the scope issue directly, but chose to focus on the fact that the parties did not specifically affirm the existing arbitration clause or conclude a new one. It appeared that the SPC was only willing to send the case to arbitration until and unless it found a written confirmation by the parties that the Supplemental Agreement should be subject to the arbitration clause in the Technology Transfer Agreement. In other words, the SPC has essentially adopted a presumption that disputes arising from a supplemental agreement would fall outside the scope of the arbitration clause in the original contract, unless the parties specifically agreed otherwise. This "reverse presumption" means that the SPC's interpretation of an arbitration agreement's scope is extremely narrow in the context of a supplemental agreement.

C Narrow Interpretation of Scope in the Context of a Settlement Agreement

In late 2018, the SPC authorized courts in the southern Chinese province of Hainan

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[81] *See* ibid.
[82] *See* Jiangsu Xinyu Reply Letter (n 74).
[83] *See* ibid.
[84] *See* ibid.
[85] *See* Section IIIB.

to refuse to recognize and enforce significant parts of an arbitration award rendered in San Francisco, California.[86] The SPC and the lower lever courts made the decision after conducting extensive review over the merits of the dispute and finding those relevant parts of the award outside the scope of the arbitration agreement.[87]

Between 2010 and 2011, Triton Container International Ltd (Triton) and Hainan P O Shipping Ltd (HPO) entered into six container lease agreements, numbered from HPO40 to HPO45. All six agreements contained an arbitration clause which provided that the parties shall arbitrate any dispute related to the agreements in San Francisco under the Commercial Arbitration Rules of the American Arbitration Association (AAA).[88] Yangpu Economic Development Zone Construction Investment and Development Ltd (YCID) initially signed on to Lease Agreement No. HPO41 (HPO41) and Lease Agreement No. HPO42 (HPO42), but later the parties mutually agreed to remove YCID from HPO41. After that YCID remained a party to only HPO42 among the six agreements.[89] In addition, HPO42 contained a Power of Attorney (POA) clause, which provided that YCID unconditionally and irrevocably authorized HPO to take any steps that HPO considered desirable in connection with HPO42 and to incur all liabilities that might arise in relation to HPO42 for and on behalf of YCID.[90] Also according to this POA clause, YCID shall be bound by any decision HPO makes in connection with HPO42, and YCID shall be jointly and severally liable with HPO for damages and losses incurred as a result of or in connection with HPO42.[91]

In January 2013, because of disputes arising from the performance of these agreements, Triton initiated arbitration in San Francisco under the arbitration rules of the International Centre for Dispute Resolution (ICDR), the international division of the AAA, and claimed for damages against both HPO and YCID.[92] Later in June of the same year, all parties agreed to settle the case by concluding a Workout Agreement contained in a letter (Settlement Agreement).[93] In particular, HPO signed the Settlement Agreement on behalf of YCID in accordance with the POA clause in

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[86] *See* Reply Letter to the Second Request for Instructions Concerning the Recognition and Enforcement of Arbitral Award No. 50-125-T-00029-13 Issued by the US International Centre for Dispute Resolution (最高人民法院关于对海南省高级人民法院就承认和执行美国国际争议解决中心 50 – 125 – T – 00029 – 13 号仲裁裁决一案再次请示的复函), (2018) Zui Gao Fa Min Ta No. 108 ([2018]最高法民他 108 号) (Supreme People's Court) (China) (Triton Reply Letter).

[87] *See* ibid; Second Request for Instructions Concerning the Recognition and Enforcement of Arbitral Award No. 50-125-T-00029-13 Issued by the US International Centre for Dispute Resolution (海南省高级人民法院关于承认和执行美国国际争议解决中心 50 – 125 – T – 00029 – 13 号仲裁裁决一案的再次请示), (2015) Qiong Min San Ta Zi No. 3 ((2015)琼民三他字第 1 号) (Hainan Province High People's Court) (China) (Triton Second Request); *Triton Container International Ltd v Yangpu Economic Development Zone Construction Investment and Development Co Ltd and Hai Nan P O Shipping Co Ltd* (特莱顿国际集装箱有限公司与洋浦经济开发区建设投资开发有限公司、海南泛洋航运有限公司特别程序民事裁定书), (2015) Qiong Hai Fa Ta Zi No. 1 ((2015)琼海法他字第 1 号) (Haikou Maritime Court) (China) (*Triton v Yangpu*).

[88] *See Triton v Yangpu* (n 87).

[89] *See* ibid.

[90] *See* ibid.

[91] *See* ibid.

[92] *See* ibid.

[93] *See* Triton Second Request (n 87).

HPO42.[94] The Settlement Agreement covered all matters under the six lease agreements, and contained an arbitration clause which provided that "any dispute arising from or relating to this [Settlement Agreement], or any prior agreement relating to any containers the [six lease agreements] cover, shall be settled by arbitration in the same manner the [six lease agreements] provide."[95] Unfortunately, disputes between the parties continued, and Triton partially revoked the Settlement Agreement in September 2013.[96] In the end, the arbitrator rendered an award on 30 December 2013, holding HPO and YCID jointly and severally liable under the six lease agreements and the Settlement Agreement.[97] Triton then sought to recognize and enforce the award in China, particularly targeting YCID due to HPO's bankruptcy in 2013. On 30 December 2019 and in accordance with the SPC's instructions, Haikou Maritime Court recognized and enforced the award against the bankrupt HPO, but rejected all enforcement requests against YCID by resorting to Article V.1.c of the New York Convention and finding that the parts of the award regarding YCID fell outside the scope of the arbitration agreement and that they were inseparable from the rest of the award.[98]

The main reason the SPC gave for this decision was that YCID was a party to only HPO42 but not the other five lease agreements, and therefore YCID was only bound by the arbitration clause in HPO42 but not those in the other five lease agreements.[99] The SPC concluded that the arbitrator only enjoyed jurisdiction over YCID under the arbitration clause in HPO42 and for that reason exceeded the scope of the arbitration agreement when holding YCID liable towards Triton under the other five lease agreements.[100] Haikou Maritime Court further added that because the POA clause under HPO42 was limited within the scope of HPO42, it could not bind YCID to any obligations outside HPO42, and therefore YCID could only be held liable within the scope of HPO42.[101]

The line of reasoning that the Chinese courts adopted in this decision is seriously flawed. It appears that they completely misunderstood the concept of an arbitration agreement's scope and confused it with the scope of contractual liability. On the one hand, the precise scope or extent of HPO's liability under HPO42, including whether HPO had the authority to enter into the Settlement Agreement on behalf of YCID, is a merit question that should be decided only by the arbitrator. Most importantly, the arbitrator's decision on this merit issue is not subject to review in the recognition and enforcement proceeding under the New York Convention or Chinese national law.[102] As a result, the Chinese courts should not have considered this issue in the first place. Furthermore, their determination of this issue might have been wrong. This is because

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94 *See Triton v Yangpu* (n 87).
95 *See* Triton Second Request (n 87).
96 *See* ibid.
97 *See* ibid.
98 *See Triton v Yangpu* (n 87); Triton Reply Letter (n 86).
99 *See* Triton Reply Letter (n 86).
100 *See* ibid.
101 *See Triton v Yangpu* (n 87).
102 *See* New York Convention art V; PRC Civil Procedure Law, art 290 (China).

the POA clause clearly provided that HPO had the authority to incur all liabilities which might arise in relation to HPO42 for and on behalf of YCID, and that YCID shall be bound by any decision HPO makes in connection with HPO.[103] It therefore did appear legitimate for HPO to bind YCID under all other lease agreements in the Settlement Agreement, because all these transactions were clearly related to and connected with HPO42.

On the other hand, and contrary to the SPC's opinion, the scope of the arbitration clause in HPO42 must extend outside the boundaries of HPO42 itself. This is because the arbitration clause contained the broad language that any disputes arising from or relating to HPO42 shall be resolved by arbitration.[104] Therefore, disputes arising from the Settlement Agreement, as heard by the arbitrator, were clearly within the scope of the arbitration clause under HPO42, given the clear relationship between them. The SPC, however, mistook the scope of contract liability for the scope of an arbitration clause. It essentially held that the dispute fell outside the scope of the arbitration clause because it thought the arbitrator wrongly held YCID liable outside the contract. Put differently, in the opinion of the SPC, YCID should not be liable for any obligations that were not written in HPO42, so the award for any such liability would be outside the scope of the arbitration clause. Quite obviously, the SPC mistakenly based its decision of the arbitration clause's scope on the determination of contract liability, a merit issue. It also neglected the broad language in the arbitration clause that covered all disputes related to HPO42. This again meant that the SPC erroneously conducted merit review not allowed under the New York Convention or Chinese law, and, in that process, significantly narrowed down the scope of the arbitration clause.[105]

Furthermore, if the Chinese courts were struggling with the scope of the arbitration clause in HPO42, they could have resolved the issue by focusing on the Settlement Agreement's arbitration clause, which obviously covered disputes related to all six lease agreements. Had the courts done so, they could comfortably find that all the disputes in this case would fall within its scope. Unfortunately, however, the courts missed this chance after concluding that there was no stand-alone arbitration clause in the Settlement Agreement.[106] This was clearly contrary to the facts of the case, because there was indeed such an arbitration clause in the Settlement Agreement.[107] The courts may have reached this conclusion because Triton partially revoked the Settlement

[103] *See Triton v Yangpu* (n 87).
[104] *See* ibid.
[105] An alternative way to understand the SPC's problematic reasoning is that it might relate to the non-existence of an arbitration agreement between the parties and therefore Art. V.1.a of the New York Convention. What the SPC might have meant was that given YCID was not a party to the other five arbitration clauses, the arbitrator did not have jurisdiction to hold YCID liable under those lease agreements. Unfortunately, however, this approach did not address the scope question. This is because the arbitrator did have legitimate jurisdiction based on the arbitration clause of HPO42, the scope of which, if interpreted broadly, should cover the Settlement Agreement and therefore all the other five lease agreements given their clear relationship. As a result, the arbitrator still enjoyed jurisdiction to decide all the issues in the case. Whether YCID should be held liable under the five lease agreements is again a merit issue that should be decided by the arbitrator, whose decision is not subject to review under the New York Convention.
[106] *See* Triton Second Request (n 87).
[107] *See* ibid.

Agreement after HPO and YCID failed to perform their obligations thereunder. However, by virtue of the well-established separability doctrine under Chinese, the arbitration clause in the Settlement Agreement should still exist after the partial revocation and continue to bind all the parties in this dispute.[108] As a result of these errors, the Chinese courts failed to seize the opportunity to support the arbitrator's jurisdiction by relying on the arbitration clause in the Settlement Agreement.

In summary, the Chinese courts' decision in this case was seriously flawed. The extent of a party's liability under a contract is a merit issue not subject to review under the New York Convention.[109] The Chinese courts in this case, however, not only reviewed this merit issue, but also mistook it for the scope of the arbitration clause in that contract. This caused the courts to interpret the scope of the arbitration clause very narrowly, by concluding that an arbitrator cannot hold a party liable for anything outside a specific contract, while ignoring that the rightful scope of the arbitration clause should be broad enough to cover all disputes that relate to the contract. Such a narrow approach is particularly problematic in the context of a settlement agreement. This is because it is very common for parties in a settlement agreement to amend their scopes of liability under the original contract. But once they have done so, the Chinese courts, under this erroneous "scope of contract liability" approach, will inevitably hold that the changes fall outside the scope of the arbitration clause. This will make it very difficult for an arbitration clause in the original contract to cover a related settlement agreement. In any event, the decision in this case indicates that the SPC's understanding and interpretation of an arbitration agreement's scope in the context of a settlement agreement is extremely narrow.

IV CHINESE LAW NEEDS A PRO-ARBITRATION PRESUMPTIVE RULE

A Problematic Approaches on Scope Issues under Chinese Law

While Chinese law and Chinese courts have taken an overall pro-arbitration stance towards international arbitration,[110] recent decisions made by the SPC, including those analysed above, have clearly indicated that their approaches on scope issues stand out as a very surprising exception.

First, the SPC has consistently interpreted the scope of an arbitration agreement in a narrow and restrictive manner. This stands in stark contrast to the broad and expansive approaches adopted in pro-arbitration jurisdictions.[111] Different from courts in major arbitration countries who would assume that disputes between the parties fall within the scope of their arbitration agreement unless there is clear and convincing evidence to the contrary, Chinese courts are very cautious with such an expansive reading. In *ProEvents v Little Donkey*, the SPC was not willing to assume that parties would want to resolve

[108] *See* PRC Arbitration Law, art 19 (China).
[109] *See* New York Convention art V.
[110] *See* Gao Xiaoli (n 20).
[111] *See* Born (n 1) 1432.

all their disputes in the same case at one forum.[112] On the contrary, it held that the arbitration clause only covered the specific part of the contract where the clause was written, and disputes arising from the whole contract should be heard by courts.[113] In *Jiangsu Xinyu v Knorr-Bremse*, despite claiming to focus on parties' common intent, the SPC chose not to uphold a broad interpretation of scope.[114] Instead, it effectively assumed that transactions carried out in relation to the supplemental agreement between the parties would fall outside the scope of the arbitration clause in the original contract, unless otherwise confirmed by the parties explicitly in writing.[115] Finally in *Triton v HPO and YCID*, the SPC was not interested in holding disputes arising from a settlement agreement, which is undoubtedly related to the original contract by all means, as within the scope of the arbitration clause in the original contract.[116] These decisions unquestionably indicate a very narrow interpretation, and understanding, of the scope of an arbitration agreement under Chinese law. This narrow and restrictive approach of interpretation runs completely against the international trend on this specific issue and the otherwise pro-arbitration stance that the SPC has taken in the past decades.

Second, apart from interpreting an arbitration agreement's scope narrowly and restrictively, the SPC has also conducted excessive review over the merit issues in those cases. While courts sometimes do need to consider the substantive matters in a case in order to reach a decision on scope issues, they should do so with caution.[117] After all, it is a fundamental principle in arbitration that merit questions should be left for the arbitrators to decide. Especially in a recognition and enforcement proceeding conducted under the New York Convention, courts should not re-examine the case's merits.[118] However, the SPC's decisions, particularly in *Triton*, clearly contradict this principle. In *Triton*, the SPC was confused between the scope of an arbitration clause and a party's scope of liability under the contract. In effect, the court erroneously rejected the arbitrator's jurisdiction and thus the award, because it found that the arbitrator reached the wrong conclusion on the merits of the case.[119] The SPC has therefore clearly overstepped the boundaries in its review of international arbitration awards. It should refrain from making excessive merit review in the future.

Third, a minor but related issue is that the SPC needs to rethink what law it should apply when reviewing an arbitration agreement's scope, particularly as part of a recognition and enforcement proceeding under Art. V.1.c of the New York Convention. It is true that the New York Convention is silent on this specific choice-of-law issue, and most national courts may not address it when making a decision under Art. V.1.c.[120] A better approach for the courts is, however, to apply an international standard or to

[112] *See* ProEvents Reply Letter (n 65).
[113] *See* ibid.
[114] *See* Jiangsu Xinyu Reply Letter (n 74).
[115] *See* ibid.
[116] *See Triton v Yangpu* (n 87).
[117] *See* van den Berg (n 10) 270-71.
[118] *See* ibid 313.
[119] *See* Section IIIC.
[120] *See* New York Convention art V.1.c; Born (n 1) 3893.

consider the scope issue under the law governing the arbitration agreement or the *lex arbitri*.[121] While resorting to the international standard, i.e. the widely accepted presumptive rule, would certainly be pro-arbitration, applying the law governing the arbitration agreement or the *lex arbitri* might lead to a similar result. In *Triton* for example, if the SPC had applied the *lex arbitri*, US law in this case, when it reviewed the scope of the arbitration agreement, it would have reached the correct conclusion. This may provide an alternative option for the SPC, before it establishes its own presumptive rule for scope issues.

B Chinese Courts Need to Establish a Pro-arbitration Presumptive Rule for Scope Issues

A key reason why the SPC and the other Chinese courts made the flawed and problematic decisions analysed above is that they have not adopted a clear presumptive rule for scope issues, under which all disputes related to a contract should be deemed as within the scope of its arbitration clause unless otherwise excluded by the parties clearly. This pro-arbitration rule has been endorsed by major arbitration jurisdictions in the world.[122] It is consistent with parties' common intent, and will save the courts from conducting excessive merit review.[123] The SPC should establish this presumptive rule. Doing so will bring Chinese law in line with the international trend on this specific issue and ensure that Chinese courts remain pro-arbitration consistently.

First, the SPC would not have made the wrong decisions in all the three cases discussed above, if it had adopted the presumptive rule and interpreted scope broadly in accordance with it. In *ProEvents*, the SPC would have agreed with the English court in *Fiona Trust* that parties presumably want their disputes resolved at the same forum.[124] Because the parties in *ProEvents* had already agreed in the contract to arbitrate at least some disputes, it should be assumed that they would want all their disputes resolved by arbitration.[125] Combined with the fact that at least some disputes in that case indeed arose from the issues that the parties specifically agreed to arbitrate, the SPC would have held the disputes to be within the scope of the arbitration clause.[126] Furthermore, had the SPC adopted the presumptive rule in *Jiangsu Xinyu*, it would have found that disputes arising from a supplemental agreement should presumably fall within the scope of the arbitration clause in the original contract.[127] Similarly in *Triton*, it would have concluded that disputes arising from a settlement agreement would presumably fall within the scope of the arbitration clause in the original contract.[128] As a result, a presumptive rule would have saved the SPC from making those painstaking,

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[121] *See* van den Berg (n 10) 312-313; Born (n 1) 3893.
[122] *See* Born (n 1) 1432-45.
[123] *See* ibid 1432.
[124] *See Fiona Trust* (n 11) [13].
[125] *See* ProEvents Reply Letter (n 65).
[126] *See* ibid.
[127] *See* Jiangsu Xinyu Reply Letter (n 74).
[128] *See Triton v Yangpu* (n 87).

and ultimately wrong, analyses and helped it reach the correct conclusions easily.

Second, the SPC wouldn't need to conduct excessive merit review, if it had adopted the presumptive rule. Take *Triton* as an example, under the presumptive rule, there would be no need for the SPC to scrutinize the case's merits on such a deep level, and the SPC would most definitely not consider whether the arbitrator had decided those merit issues correctly.[129] In other words, the adoption of the presumptive rule would have helped the SPC shy away from conducting excessive merit review, which is not allowed under the New York Convention in the first place.

Third, adopting the presumptive rule does not mean that the SPC will have fewer or inadequate opportunities to review a problematic arbitration agreement or award. Nor will it deprive the SPC of any chances to review merit issues in a case when this is legitimately needed. After all, if there are important matters related to an arbitration agreement or award that deserve the attention of the court, such as those related to the public policy of China, the SPC has ample chances or avenues to step in, both under the Chinese law and the New York Convention.[130] In any event, adopting the presumptive rule will not cause the SPC to lose any chance or authority to review an arbitration agreement's scope when doing so is justified. It will, however, enable the court to do so in a much more efficient and appropriate manner.

V CONCLUSION

The scope of an arbitration agreement is a decisive factor in determining an arbitrator's jurisdiction, and therefore a crucial issue in the theories and practice of international arbitration. Across the world, and especially in pro-arbitration jurisdictions, courts have adopted a presumptive rule under which an arbitration agreement's scope is interpreted broadly to cover all disputes related to the contract between the parties. This enables the courts to respect parties' intention to arbitrate their disputes and refrain from conducting excessive merit review in relation to it. This further ensures the smooth operation of the international arbitration system on the whole.

China plays an important role in the international arbitration system. Due to its economic power, disputes involving a Chinese party or a transaction related to China are frequently seen in international business and commerce. Chinese arbitration law and practice therefore has a significant impact on the successful resolution of international commercial disputes in the world. In the past few decades, Chinese law has maintained a pro-arbitration stance overall. The SPC has taken many measures and made a large number of decisions that are friendly towards the international arbitration legal framework based upon the New York Convention. This has proven helpful for

[129] *See* ibid.
[130] *See* PRC Arbitration Law, art 20 (China); PRC Civil Procedure Law, arts 278, 281, 290 (China); New York Convention art V.

promoting international trade and investment between China and the world, and has contributed to global economic development.

Surprisingly, however, the SPC has consistently interpreted the scope of an arbitration agreement in an extremely narrow way. This position runs against the international trend of adopting a broad interpretation, and stands in contrast to the SPC's otherwise pro-arbitration stance. Given the lack of legislative or policy reasons for doing so, it is very difficult for the SPC to justify its position on this issue. What is even more shocking is that this issue has remained completely unnoticed. There is no debate in practice or academia, in both English and Chinese literature, regarding this bizarre position taken by the SPC. This hidden issue may create potential pitfalls for business entities and cause unnecessary obstacles for legal practice. On a larger scale, the SPC's problematic approaches will seriously damage China's reputation in international arbitration. By examining a series of decisions made by the SPC, this article has identified the anomaly under Chinese law for the first time among all literature. It has filled this gap by providing a detailed analysis of the issue as well as its relevant contexts and impacts. This article has raised awareness on this vital issue and opened the door for further discussions and research.

Given the inconsistency between the SPC's position on scope issues and the international trend as well as the otherwise pro-arbitration stance that the SPC has worked tirelessly to maintain over the past few decades, it is only reasonable for the SPC to change course on how it interprets an arbitration agreement's scope. The SPC should adopt a presumptive rule under which an arbitration agreement's scope is interpreted broadly and refrain from conducting excessive merit review when deciding on scope issues. This will bring Chinese law in line with laws of other pro-arbitration jurisdictions on this specific issue, and will consolidate Chinese law's arbitration friendly status. These will, in return, safeguard the smooth operation of the international arbitration system, and facilitate continued economic growth of the world.