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ARTICLE

The Misconception of an Arbitration Agreement's Scope under Chinese Law: Controversial Interpretation by Chinese Courts

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Abstract

The scope of an arbitration agreement shapes and determines an arbitrator's jurisdiction, making it a key issue in international arbitration theory and practice. Courts in pro-arbitration countries usually interpret the scope of an arbitration agreement broadly to cover all disputes related to the contract between the parties. This ensures that arbitration can function as an effective and efficient 'one-stop' forum for business entities. China is a crucial player in the international arbitration system. Despite having maintained an overall pro-arbitration stance, the Supreme People's Court of China (SPC) misconceptualises the scope of an arbitration agreement by equating it with the boundaries of the contract between the parties. This misconception leads the SPC to adopt two problematic legal doctrines. First, it develops a literal approach to interpretation that focuses on an arbitration agreement's exact wording. Second, it conflates the existence of an arbitration agreement with its scope. As a result, the SPC frequently interprets scope narrowly, and wrongly applies the New York Convention and the relevant Chinese law. These problematic approaches stand in stark contrast to the international trend to interpret scope broadly and the SPC's otherwise consistent pro-arbitration stance. So far, this has not received the necessary attention from legal academics. This article identifies the SPC's misconception and the problematic doctrines it has developed, and argues that the SPC should reconsider its case law. Only by doing so can the SPC bring its jurisprudence in line with international practice, strengthen its pro-arbitration stance, and further facilitate economic cooperation between China and other countries. In addition, by exposing the misconception of the SPC, this article will inform business entities around the world and enable them to avoid possible pitfalls when engaging in commercial dealings with China. At the same time, courts in countries striving to build a pro-arbitration reputation can learn from the mistakes of their Chinese counterparts and reflect on how best to interpret the scope of arbitration agreements.

Introduction

Arbitration is one of the most popular methods to resolve international commercial disputes in today's world.[1] Due to its many noticeable advantages, including neutrality of forum, finality and universal enforceability of awards, flexibility and efficiency of proceedings, and so on, arbitration is

[1]See, eg, Emmanuel Gaillard & John Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International 1999) 1; Christian Bühring-Uhle, Lars Kirchhoff & Gabriele Scherer, *Arbitration and Mediation in International Business* (2nd edn, Kluwer Law International 2006) 29; Gary B Born, *International Commercial Arbitration* (3rd edn, Kluwer Law International 2021) 91-96.

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often the preferred choice for corporate parties in cross-border disputes.[2] It therefore plays a pivotal role in the successful and effective resolution of international commercial disputes.[3] As a result, the smooth operation of the international arbitration system reduces transaction costs for business entities across the world, and facilitates transnational business dealings on the whole.[4] In a world where international trade and investment have become the dominant factors for promoting development and prosperity, arbitration is making a significant contribution to the global economy and consequently the entire human society.[5]

Arbitration obviously cannot exist in a vacuum. The legal framework based upon the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) has provided an extremely solid foundation to support the proper functioning of the international arbitration system.[6] With more than 170 contracting states, the New York Convention is one of the most successful treaties in the world, particularly in the area of international commercial law.[7] This arbitration legal framework, however, is by no means simple. Instead, it is rich in theories and never short of complications and intricacies.[8] Most importantly, it relies on the support of national laws as well as judiciaries who interpret and enforce those laws.[9] Luckily in recent history, the world has seen an increase in national legal systems that strive to promote and support arbitration.[10] Enactment of pro-arbitration legislation, together with judicial decisions favouring arbitration, have created an ecosystem where arbitration has thrived as a legal mechanism.[11] Today, in many pro-arbitration jurisdictions around the world, such as France, Switzerland, the United Kingdom (UK), the United States (US), Singapore, and Hong Kong, arbitration has become a flourishing industry.[12]

At the heart of the arbitration system, one of the most crucial issues is how courts enforce an arbitration agreement, which often takes the form of a clause in the contract between the parties.[13] Due to arbitration's consensual nature, arbitrators only have authority to decide a certain case if the parties have validly agreed for them to do so.[14] This means when a party wants to challenge jurisdiction, it can argue that the arbitration agreement in the case is defective, either before the arbitrators themselves or a judge.[15] This matter's importance cannot be overemphasised because even when the arbitrators decide that they enjoy good jurisdiction over the case and issue a final award,

[2]See, eg, Gaillard & Savage (n 1) 1; Bühring-Uhle, Kirchhoff & Scherer (n 1) 107-08; Queen Mary University of London School of International Arbitration and White & Case LLP, '2018 International Arbitration Survey: The Evolution of International Arbitration' (2018) 7 <https://www.qmul.ac.uk/arbitration/media/arbitration/docs/2018-International-Arbitration-Survey—The-Evolution-of-International-Arbitration-(2).PDF> accessed 11 Feb 2026 (2018 Queen Mary Survey).

[3]See Julian D M Lew, Loukas A Mistelis & Stefan M Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) para 1-2.

[4]See Yves Dezalay & Bryant G Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (Chicago 1996) 7; Born (n 1) 97.

[5]See Nigel Blackaby, Constantine Partasides & Alan Redfern, *Redfern and Hunter on International Arbitration* (7th edn, OUP 2022) paras 1.01-1.03.

[6]See Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (Kluwer 1981) 1.

[7]See Kofi Annan, 'Opening Address Commemorating the Successful Conclusion of the 1958 United Nations Conference on International Commercial Arbitration' in United Nations (ed), *Enforcing Arbitration Awards Under the New York Convention: Experience and Prospects* (United Nations 1999) 1, 2.

[8]See Born (n 1) 1-2.

[9]See Lew, Mistelis & Kröll (n 3) para 2-49; Blackaby, Partasides & Redfern (n 5) paras 1.92-1.93.

[10]See Born (n 1) 1-2.

[11]See ibid 2.

[12]See Dezalay & Garth (n 4) 7; 2018 Queen Mary Survey (n 2) 9.

[13]This article will use 'arbitration agreements' and 'arbitration clauses' interchangeably.

[14]See Lew, Mistelis & Kröll (n 3) para 6-1; Franco Ferrari & Friedrich Rosenfeld, *International Commercial Arbitration: A Comparative Introduction* (Elgar 2021) 21.

[15]See Tibor Várady et al, *International Commercial Arbitration: A Transnational Perspective* (7th edn, West Academic 2019) 128.

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a court can ultimately refuse to enforce the award if it concludes that the arbitration agreement in the case is indeed defective.[16] There are many issues over which a court may review an arbitration agreement, although the most important and commonly seen ones relate to its existence, validity, and scope.[17] The scope of an arbitration agreement is therefore a key issue in the theory and practice of international arbitration.[18] Put simply, it focuses on the question of whether a certain dispute can be covered by an arbitration agreement between the parties.[19] If so, the arbitrators will have the jurisdiction to hear the dispute. If not, the parties will need to resolve it via other methods, such as litigation. As a result, an arbitration agreement's scope directly determines an arbitrator's authority.

The scope of an arbitration agreement is seldom provided for specifically in international treaties or national arbitration legislation.[20] Instead, it is often a subject of how an arbitration agreement is interpreted.[21] Therefore, courts and judges are the principal actors in this matter. Luckily for arbitration and the parties involved, courts around the world, especially those in pro-arbitration jurisdictions, have been very supportive when it comes to the scope of an arbitration agreement.[22] They usually adopt a liberal approach when construing the meaning of an arbitration agreement, and interpret its scope broadly to cover all disputes related to the contract between the parties.[23] This means arbitrators will enjoy the authority to hear all issues submitted by parties in relation to their contract. It will also enable parties to use arbitration as an effective and efficient 'one-stop' mechanism to resolve all their disputes, rather than having to split them between different forums such as arbitration and litigation, which would obviously be time-consuming and costly.[24] This will, in turn, ensure the smooth operation of the international arbitration system and the global economy.

As the world's second largest economy, China is undoubtedly a prominent actor on the stage of international trade and investment.[25] Correspondingly, China has also been playing an increasingly important role in the international arbitration system. As an example, the China International Economic and Trade Arbitration Commission (CIETAC), China's flagship arbitration institution, has in recent years consistently administered more cases than any other arbitration institution in the world.[26] It is therefore paramount for the world to understand how the Chinese arbitration legal framework functions, so that disputes involving a Chinese party or occurring in China may be smoothly resolved. Although China has a very long history of alternative dispute resolution that dates back thousands of years, its modern arbitration legal system is relatively young. Promulgated in 1994, the Arbitration Law of the People's Republic of China (PRC Arbitration Law) is the main source of Chinese law that regulates arbitration.[27] While it largely conforms to internationally accepted principles, the statute is by no means perfect. It contains various peculiar rules and doctrines that

[16]See, eg, 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 34(2)(a)(i); United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), art V.1.a (New York Convention).

[17]See Várady et al (n 15) 128.

[18]See Born (n 1) 1424.

[19]See Ferrari & Rosenfeld (n 14) 41.

[20]See Born (n 1) 1424-26.

[21]See ibid 1426; Lew, Mistelis & Kröll (n 3) para 7-59.

[22]See Born (n 1) 1432; Lew, Mistelis & Kröll (n 3) para 7-62.

[23]See, eg, *Fiona Trust v Privalov* [2007] UKHL 40, [2007] 4 All ER 951; *First Options of Chicago Inc v Kaplan* 514 US 938 (1995).

[24]See Born (n 1) 1425; Lew, Mistelis & Kröll (n 3) para 7-67.

[25]See World Bank, 'The World Bank in China: Overview' (World Bank, 20 April 2023) <https://www.worldbank.org/en/country/china/overview#1> accessed 11 Feb 2026.

[26]See Born (n 1) 93; Weixia Gu, *Dispute Resolution in China: Litigation, Arbitration, Mediation and Their Interactions* (Routledge 2021) 90-92; CIETAC, '2024 Work Report and 2025 Work Plan' (CIETAC) <https://www.cietac.org/en/articles/32307> accessed 11 Feb 2026; Markus Altenkirch, Maria Barros Mota & 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 11 Feb 2026.

[27]See The Arbitration Law of the People's Republic of China (PRC Arbitration Law).

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non-Chinese parties should be aware of, if they want to avoid pitfalls when dealing with arbitration in China.[28] Similar to many of its counterparts, the PRC Arbitration Law is silent on how courts and judges should interpret the scope of an arbitration agreement. As a result, one needs to turn to the Chinese judiciary for guidance on this specific issue.

Since China's accession to the New York Convention in 1987, the Supreme People's Court of the People's Republic of China (SPC) has made significant efforts to establish and maintain a pro-arbitration stance towards international arbitration.[29] Most notably, the SPC has been keen on ensuring that Chinese courts adopt a uniform front in treating international arbitration favourably, which has particular importance for China, a very large country with immense disparities across regions. For this purpose, the most important and effective measure taken by the SPC is perhaps the creation of a reporting system among all Chinese courts regarding international arbitration. Under this system, if a Chinese court decides to strike down an international arbitration agreement, set aside an international arbitration award made in China, or refuse to recognise and enforce a foreign award under the New York Convention, it must report its proposed decision to its upper level court, which shall, in turn, report further up to the SPC if it agrees with the proposal.[30] The lower-level courts cannot proceed with the proposed decision unless and until the SPC approves it. This system has been later expanded to cover cases involving parties residing in different provinces within China or a request to set aside a Chinese domestic award on the ground of alleged public policy violations.[31] As a result of the reporting system, the SPC is able to control and supervise directly all cases before Chinese courts that may lead to an unfavourable result against international arbitration. This has ensured that Chinese courts can make uniform and pro-arbitration decisions. For example, the SPC has consistently interpreted the New York Convention in similar ways as courts in pro-arbitration jurisdictions have, and often instructed lower-level Chinese courts to recognise and enforce awards notwithstanding the lower courts' proposals to reject them.[32] Combined with cases in which lower-level Chinese courts would decide to enforce a foreign award and thus not report to the SPC, the vast majority of foreign awards submitted before Chinese

[28]A salient example is Chinese law's preclusion of *ad hoc* arbitration. See Tietie Zhang, *Ad Hoc Arbitration in China* (Routledge 2019) for full discussions of the topic.

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

[30]See 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); 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).

[31]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), art 3 (Supreme People's Court) (China).

[32]See, eg, Reply Letter Concerning Wolema Abusaliyamowo Co., Ltd's Request for Recognition and Enforcement of Arbitration Award Issued in Russia (最高人民法院关于沃勒马—阿布萨利亚莫沃有限公司申请承认和执行俄罗斯仲裁裁决一案的复函), (2016) Zui Gao Fa Min Ta No. 97 ((2016) 最高法民他97号) (Supreme People's Court) (2017) 34 Guide on Foreign-Related Commercial and Maritime Trial (涉外商事海事审判指导) 55; Reply Letter to Shandong Province High Court's Request for Instructions Concerning Hailong Yachts Project (China) Co., Ltd's Request for Recognition and Enforcement of Arbitration Award Issued in the UK (最高人民法院关于山东省高级人民法院就海龙游艇项目(中国) 有限公司申请承认和执行英国仲裁裁决一案的请示的复函), (2017) Zui Gao Fa Min Ta No. 114 ((2017) 最高法民他114号) (Supreme People's Court) (2018) 36 Guide on Foreign-Related Commercial and Maritime Trial (涉外商事海事审判指导) 52; Reply Letter to Hebei Province High Court's Request for Instructions Concerning Chinalco Peru Company's Request for Recognition and Enforcement of Arbitration Award No. 19646/AGF/RD Issued by ICC International Court of Arbitration (最高人民法院关于河北省高级人民法院就中铝秘鲁矿业公司申请承认和执行国际商会仲裁院19646/AGF/RD号仲裁裁决一案的请示的复函), (2018) Zui Gao Fa Min Ta No. 175 ((2018) 最高法民他175号) (Supreme People's Court) (2018) 37 Guide on Foreign-Related Commercial and Maritime Trial (涉外商事海事审判指导) 89.

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courts in the past few decades have been recognised and enforced in accordance with the New York Convention.[33]

Despite the SPC's overall pro-arbitration stance, its approach to the scope of an arbitration agreement is strangely not arbitration-friendly at all. Over the last two decades, the SPC has made a series of decisions regarding scope issues. These cases involved different scenarios, such as enforcement of arbitration agreements, setting aside of Chinese arbitration awards, and recognition and enforcement of foreign awards. While the SPC has applied different laws in these cases, including various articles of the PRC Arbitration Law, PRC Civil Procedure Law, and the New York Convention, the key legal questions and grounds were similar.[34] They all focused on whether the relevant disputes fell within or outside the scope of the arbitration agreements between the parties. Because the Chinese arbitration legislation, similar to most other national arbitration statutes in the world, has not specifically provided for the precise scope of an arbitration agreement, the outcome of these cases ultimately depended on how broadly the SPC interpreted scope under different circumstances. This article has chosen to discuss a number of SPC decisions that are most representative, including some of the recently decided and published ones. [35] By looking at these cases, one can have a thorough understanding of how the SPC has consistently conceptualised scope and applied the relevant doctrines in its judicial practice. Sadly, however, the SPC's jurisprudence on this specific issue has not been satisfactory. It has constantly interpreted arbitration agreements' scope narrowly. This position clearly runs against the trend firmly adopted in arbitration-friendly jurisdictions to interpret scope broadly and the otherwise pro-arbitration stance that the SPC has taken itself.

The SPC's problematic position on scope has significant consequences. The scope of an arbitration agreement has a direct impact on an arbitral tribunal's jurisdiction. By interpreting scope narrowly, the SPC has drastically restricted, and often denied, the arbitrator's jurisdiction. This has hampered many parties' dispute resolution processes, and has forced them to either abandon arbitration altogether or split their disputes between litigation and arbitration. It has, therefore, made it substantially more complex and difficult for parties to resolve their disputes in an efficient and effective manner. Furthermore, this may cause a chilling effect for businesses who intend to trade with a Chinese party or invest in China. These entities will have to stay cautious and alert to this bizarre rule under Chinese law in their attempts to avoid potential pitfalls. Consequently, the unnecessary transaction costs and the resulting uncertainty may damage the reputation of China's arbitration legal framework and in turn have an adverse effect on international trade and investment activities related to China.

It is extremely difficult to comprehend the SPC's bizarre position and the mistakes it has persistently made. They firstly cannot be the result of the SPC's intentional choice, which would directly contradict its painstaking and otherwise consistent efforts to maintain the Chinese judiciary's pro-arbitration image in the past few decades. There is no evidence to suggest that the SPC intends to deviate from this overall strategy. On the contrary, all information clearly indicates that it plans to continue on this path. In addition, because these cases were decided during the same period when the SPC made many other pro-arbitration decisions, it would not be sensible to assume that the SPC was trying to sabotage its own efforts. It is therefore logical to view this as an anomaly in an otherwise consistent pro-arbitration stance that the SPC has firmly adopted. As a result, one has to wonder why the SPC has taken this strange and problematic approach towards the scope of arbitration agreements.

Absent a policy reason or another reasonable alternative explanation for the SPC to take this problematic approach, the only rational understanding is that it has made a series of genuine mistakes in

[33]See Gao Xiaoli, 'Chinese Courts Have Taken a Positive Attitude Towards Arbitration' (China International Commercial Court, 15 May 2018) <https://cicc.court.gov.cn/html/1/219/199/203/1056.html> accessed 11 Feb 2026.

[34]See United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), art V.1.c (New York Convention); PRC Arbitration Law (n 27), art 58(2); The Civil Procedure Law of the People's Republic of China, art 291(4).

[35]See Section III for details.

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a consistent manner. A closer look at the cases reveals that the SPC has fundamentally misconceptualised the scope of an arbitration agreement. The SPC mistakenly equated the scope of an arbitration agreement with the boundaries of the contract that contained the arbitration clause (container contract). This has further caused the SPC to adopt two erroneous doctrines on scope. First, the SPC has developed a literal approach to interpretation that focuses on the exact meaning of an arbitration agreement's wording. Under this approach, the SPC interpreted scope extremely narrowly to cover only those issues included in the container contracts, but not those that might extend beyond their boundaries. Second, the SPC has been confused between the existence and the scope of an arbitration agreement, two very different legal concepts, and failed to distinguish them from each other. As a result of this, the SPC has frequently refused to enforce an arbitration agreement or award by holding that the dispute fell outside the scope of the arbitration agreement, when it should have done so by finding that no arbitration agreement existed between the parties. The SPC has made this mistake consistently in cases involving a non-signatory party to the contract. This meant that the SPC has applied the New York Convention and the relevant Chinese law wrongly.

Even more shockingly, the SPC's problematic position on the scope of arbitration agreements is almost completely unnoticed in both legal practice and academia. There is no discussion of this issue whatsoever in either Chinese or English language literature. As a consequence of this neglect, the SPC is regrettably still continuing its mistakes, which can be seen from its recently published decisions. This further reflects a knowledge deficit in the wider Chinese academia. The concept of an arbitration agreement's scope very rarely forms a standalone subject of analysis in existing literature. Instead, relevant discussions often take place under the broader question of arbitrators exceeding their powers.[36] This latter topic, however, may involve issues that are not necessarily related to scope, and is widely recognised as unclearly defined under Chinese law.[37] Consequently, these discussions often do not focus on the scope of the arbitration agreement and sometimes even fail to mention it altogether. [38] Therefore, the scarce exposure and inadequate analysis of arbitration agreements' scope in the literature reflects a lack of thorough understanding of this crucial issue among Chinese legal scholars and practitioners. Against this background, it is no surprise that, when it came to issues related to the scope of an arbitration agreement, the SPC was not able to grasp the relevant concepts accurately or apply the doctrines correctly in its decisions.

As a result, this article will contribute to legal academia and practice, both in China and internationally, in the following ways. Firstly, it will identify the SPC's misconception and erroneous doctrines for the first time among all literature. It will analyse the cases that the SPC has decided in

[36]See, eg, Wenjun Chen & Lianbin Song, 'Yin chaocai jujue chengren yu zhixing zhongcai caijue de anli fenxi (因"超裁"拒绝承认与执行仲裁裁决的案例分析) [A Case Study of Refusals to Recognize and Enforce Arbitral Awards Due to "Over Awarding"]' (2006) 3 Beijing zhongcai (北京仲裁) [Beijing Arbitration Quarterly] 111; Jianqing Di & Qiang Yao, 'Findings of "Over Awarding" by the Judiciary in International Commercial Arbitration: A Commentary on the Applications for Recognition and Enforcement of Foreign Arbitral Awards (国际商事仲裁裁决"超裁"的司法认定——对申请承认及执行外国仲裁裁决纠纷案的评析)' (2016) 3 Tianjin Legal Science (天津法学) 99; Jiyong Zhou (周继勇), 'A Study of the Issue of "Over Awarding" in Arbitration (仲裁超裁法律问题研究)' (2017) 11 Legal System and Society (法制与社会) 111.

[37]See, eg, Yi Zhang, 'Guanyu wanshan woguo zhongcai caijue chaocai sifa jiandu de ruogan sikao shang (关于完善我国仲裁裁决"超裁"司法监督的若干思考 (上)) [Some Thoughts on Perfecting the Judicial Supervision of "Over Awarding" Among Arbitral Awards in China (I)]' (2013) 4 Zhongcai yanjiu (仲裁研究) [Arbitration Study] 35, 37; Hao Wang, 'Waiguo zhongcai caijue sifa shencha zhong chaocai rending de shizheng fenxi (外国仲裁裁决司法审查中"超裁"认定的实证分析) [An Empirical Study of the Findings of "Over Awarding" in the Judicial Review of Foreign Arbitral Awards]' (2019) 4 Falv shiyong (法律适用) [Journal of Law Application] 108, 117-18; Jianhua Chen, 'Guoji shangshi zhongcai caijue chaocai de sifa rending jiyu sifa shijian shijiao (国际商事仲裁裁决"超裁"的司法认定——基于司法实践视角) [Finding of "Over Awarding" in International Commercial Arbitration: From the Perspective of Judicial Practice]' (2021) 2 Shangshi zhongcai yu tiaojie (商事仲裁与调解) [Commercial Arbitration & Mediation] 105, 108-09.

[38]See, eg, Shaojie Chi, 'Tantan chaocai wenti (谈谈超裁问题) [About Over Awarding]' (2012) Beijing zhongcai (北京仲裁) [Beijing Arbitration Quarterly] 77.

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the past two decades in relation to the scope of arbitration agreements, and establish that the SPC's misconception has led to these problematic and wrong decisions. This will make a significant contribution to the academic discussions on how the scope of arbitration agreements should be correctly conceptualised and understood under Chinese law. Secondly, by pointing out the mistakes that the SPC has been constantly making regarding scope issues, this article will guide the SPC on how to correct its misconception and rectify its errors. Doing so will not only bring the SPC's jurisprudence on scope issues in line with the international trend but also consolidate the otherwise pro-arbitration stance that the SPC has established and maintained. Thirdly, by exposing the SPC's misconception and the resulting problematic doctrines, this article will inform business entities around the world of this hidden issue under Chinese law. China is a key player on the stage of international arbitration due to its importance in the world economy. The Chinese arbitration legal framework is therefore vital for all businesses in the world that are, or plan on, engaging in commercial dealings with China. Consequently, before the SPC changes its positions, this article will help firms, especially international ones, avoid possible pitfalls both when drafting an arbitration clause involving a Chinese party or calling for arbitration in China, and when actually resolving disputes in such an arbitration. Fourthly, by educating legal academia and the arbitration field in China about the correct concept of an arbitration agreement's scope, this article will raise awareness of the issue as well as its importance across China and pave the way for further improvements in China's arbitration legal system. China has recently amended the PRC Arbitration Law. Given that national arbitration statutes usually do not specifically provide for how scope should be precisely interpreted, the updated legislation has unsurprisingly not included this exact issue.[39] Nevertheless, this article, as a part of a larger project, will have a significant impact on the future development of the entire Chinese arbitration legal framework by advancing the relevant debates and discussions that are crucial for this purpose. Fifthly, the SPC's problematic jurisprudence offers a valuable example for courts across the world, particularly those in countries striving to build a pro-arbitration reputation. They can learn an important lesson from their Chinese counterparts' mistakes and reflect on whether they are understanding and interpreting scope issues correctly in their own judicial practice. This will further enable them to examine how best they can interpret arbitration agreements in general. As such, this article will offer critical insights and serve as a precious resource for these countries' legal reform attempts in the field of international arbitration. Finally, by making useful suggestions for the Chinese arbitration legal system to align more closely with international best practices, and by providing valuable experiences for other jurisdictions, this article will ultimately help advance the harmonisation of the international arbitration legal framework based upon the New York Convention. Due to arbitration's key role in facilitating international trade and investment, this will provide important safeguards for the continuous economic growth and development across the globe.

Section II of this article will introduce the concept of an arbitration agreement's scope. It will discuss the international trend, particularly in pro-arbitration jurisdictions, for courts to adopt a presumptive rule under which they interpret scope broadly to cover all disputes related to the contract between the parties. It will also examine the clear distinction between the existence and the scope of an arbitration agreement. Section III will analyse a series of SPC decisions made in the last two decades that focused on the scope of an arbitration agreement. It will identify the misconception held by the SPC regarding scope, and how it directly caused the SPC to adopt two faulty legal doctrines regarding the issue. Under these erroneous approaches, the SPC has made many problematic decisions, in which it has interpreted scope narrowly and wrongly applied the New York Convention and Chinese law. Section IV will argue that the SPC should correct its misconception and mistakes. Doing so will enable the SPC to interpret scope broadly while still reserving sufficient chances to review an arbitrator's jurisdiction when needed. This will bring the SPC's position on scope in line

[39]See Arbitration Law of the People's Republic of China (amended 12 Sept 2025).

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with the international trend adopted by courts in pro-arbitration jurisdictions, and will consolidate the SPC's otherwise pro-arbitration stance. Section V will conclude the article.

The scope of arbitration agreements

Broad interpretation of scope

The scope of an arbitration agreement is a key issue that determines an arbitrator's jurisdiction.[40] An arbitrator will not have authority to hear or decide a dispute unless it falls within the scope of, or can be covered by, the arbitration agreement between the parties.[41] The precise boundaries of the scope hinge on how arbitrators, and ultimately judges, interpret the arbitration agreement, and whether they do so in a broad or narrow manner.[42] Luckily, nowadays, around the world, courts usually interpret the scope of arbitration agreements broadly.[43] When one of the parties tries to cast doubt on whether the disputes between them, or certain issues involved in those disputes, can be covered by their arbitration agreement, courts usually make their determination based on an assumption that they would fall within its scope, unless there is clear evidence to the contrary.[44]

This pro-arbitration presumption, however, has not always been the standard practice from a historical perspective. There was indeed a time in the past when not all courts were willing to adopt this expansive approach. In particular, courts in common law jurisdictions traditionally focused on the language used in the arbitration agreement to determine its exact scope.[45] They often paid special attention to whether the parties had used 'broad' or 'narrow' wording. For instance, US courts have held that an arbitration agreement, which referred to 'any disputes arising under' an agreement or contract, had a narrow scope,[46] and could therefore only cover issues 'relating to the interpretation and performance of the contract itself'.[47] If, however, the arbitration agreement used phrases such as 'arising out of', 'relating to', or 'in connection with the contract', the courts would have no difficulty in finding a broad scope that covered all relevant disputes in the case.[48] English judges had once also adopted a similar approach.[49]

Unfortunately, however, interpreting an arbitration agreement's scope narrowly would quickly lead to unwelcome consequences. In *Mediterranean Enterprises Inc v Ssangyong Corp* for example, Mediterranean Enterprises Inc (MEI) made six claims against Ssangyong: breach of contract and breach of fiduciary duty (counts 1, 2 and 4), inducing and conspiracy to induce breach of contract (count 7), quantum meruit (count 8), and conversion of documents (count 9).[50] The US Court of Appeals for the Ninth Circuit, applying a narrow interpretation of the arbitration agreement's scope, sent counts 1, 2, and 4 to arbitration, but not counts 7, 8, and 9.[51] The court affirmed the district court's decision to stay the proceeding on those latter counts and wait for the arbitration to conclude first.[52] This bifurcated method was clearly not the most efficient way to resolve the entire dispute

[40] See Várady et al (n 15) 128.

[41] See ibid.

[42] See Born (n 1) 1423.

[43] See Blackaby, Partasides & Redfern (n 5) para 2.74.

[44] See Born (n 1) 1432.

[45] See Andrew Tweeddale & Keren Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (OUP 2005) 165-68.

[46] See, eg, *In re Kinoshita & Co* 287 F 2d 951, 953 (2d Cir 1961); *Sinva Inc v Merrill Lynch Pierce Fenner & Smith Inc* 253 F Supp 359, 364 (SDNY 1966); *Mediterranean Enterprises Inc v Ssangyong Corp* 708 F 2d 1458, 1464 (9th Cir 1983).

[47] See *Mediterranean Enterprises Inc v Ssangyong Corp* 708 F 2d 1458, 1464 (9th Cir 1983).

[48] See, eg, *Prima Paint Corp v Flood & Conklin Mfg Co* 388 US 395, 398 (1967); *Sweet Dreams Unlimited Inc v Dial-A-Mattress Int'l Ltd* 1 F.3d 639, 642 (7th Cir 1993).

[49] See, eg, *Heyman v Darwins* [1942] AC 356, 383 (Lord Wright), 399 (Lord Porter).

[50] See *Mediterranean Enterprises Inc v Ssangyong Corp* 708 F 2d 1458, 1461 (9th Cir 1983).

[51] See ibid 1465.

[52] See ibid.

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between the parties, given the intertwining nature of those relevant issues. Even the court itself recognised that arbitrators, when adjudicating on counts 1, 2, and 4, would likely need to decide issues that might affect the court's future determination of counts 7, 8, and 9.[53] It therefore suggested that those relevant parts of the award, if clearly exceeding the scope of the arbitrators' authority, would not be given effect by the court later on.[54] It could therefore be reasonably foreseen that the bifurcation would make the whole dispute resolution process extremely difficult and complex. It would first and foremost lengthen the time needed, thereby increasing costs for the parties. Complications might also arise if arbitrators and judges reached different or contradictory conclusions. In any event, it would be hard to imagine any parties acting in good faith, particularly those engaging in commercial activities, would welcome this situation.[55] Instead, an interpretation of the arbitration agreement that results in a 'one-stop' dispute resolution proceeding would be more consistent with party intention and business common sense.[56]

As a result, courts around the world, at least those in pro-arbitration jurisdictions, have mostly shifted to a broad interpretation of scope in recent years. While there are still sporadic occasions where US courts continued to interpret the wording 'arising under the contract' narrowly,[57] the majority of them have indicated a clear opposition to the narrow approach and instead applied the pro-arbitration presumption to interpret even such language broadly.[58] The US Supreme Court has firmly, and repeatedly, held that under the US Federal Arbitration Act, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.[59] The highest court in the UK has also been clear that business common sense should lead to a broad reading of scope:

> [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.[60]

Since then, English courts have abandoned their conventional approach and adopted this clearly pro-arbitration presumption in many later decisions.[61] In a similar fashion, Canadian, Australian, and Hong Kong courts have also deviated from focusing on the exact meaning of an arbitration agreement's wording, but instead supported a presumptively broad interpretation of scope.[62] The rationale behind this shift is to make sure that parties may use arbitration as a 'one-stop' forum to resolve all the related disputes between them. This is the only commercially sensible arrangement that parties would want to make, because no reasonable businessperson would rather choose to have separate, time-consuming, costly, and possibly inconsistent parallel proceedings.[63]

[53] See ibid.

[54] See ibid.

[55] See Born (n 1) 1425; Lew, Mistelis & Kröll (n 3) para 7-67.

[56] See Born (n 1) 1425; Lew, Mistelis & Kröll (n 3) para 7-67.

[57] See, eg, *Cape Flattery Ltd v Titan Mar LLC* 647 F 3d 914, 924 (9th Cir 2011)

[58] See, eg, *Chevron USA Inc v Consolidated Edison Co* 872 F 2d 534, 537-38 (2nd Cir 1989); *Dialysis Access Ctr LLC v RMS Lifeline Inc* 638 F 3d 367, 381 (1st Cir 2011); *Cyganiewicz v Sallie Mae Inc* 2013 WL 5797615, 4 (D Mass 2013).

[59] Eg, *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 of Chicago Inc v Kaplan* 514 US 938, 945 (1995).

[60] See *Fiona Trust v Privalov* [2007] UKHL 40, [2007] 4 All ER 951 [13].

[61] See, eg, *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.

[62] See, eg, *Onex Corp v Ball Corp* 1994 CarswellOnt 228, 7-10 (Ontario Ct Justice); *Hancock Prospecting Pty Ltd v Rinehart* [2017] 257 FCR 442 [193] (Australian Fed Ct); *Giorgio Armani SpA v Elan Clothes Co Ltd* [2019] HKCFI 530 [33] [2019] 2 HKLRD 313, 322 (HK Ct 1st Inst).

[63] See *Terre Neuve Sarl v Yewdale Ltd* [2020] EWHC 772 (Comm); Born (n 1) 1425; Lew, Mistelis and Kröll (n 3) para 7-67.

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In comparison, courts in civil law jurisdictions generally shy away from a detailed analysis of an arbitration agreement's wording, but focus instead on parties' common intent when examining the jurisdiction of an arbitrator.[64] Under this approach, and similarly out of respect for business common sense, they usually interpret scope broadly.[65] For example, Swiss courts routinely read the scope of arbitration agreements in an expansive manner to meet the needs of international commerce.[66] German courts also engage in a liberal reading of scope to avoid splitting a dispute into different proceedings.[67] French courts similarly tend to interpret the scope of arbitration agreements broadly.[68] As a result, it is safe to say that nowadays in the world, particularly in those pro-arbitration jurisdictions, courts usually interpret the scope of arbitration agreements broadly to cover all disputes related to the contract between the parties.

Differences between scope and existence

Issues surrounding an arbitrator's jurisdiction can become thorny when a dispute involves multiple contracts, between the same or different parties, that may not all contain the same arbitration clause or even an arbitration clause at all.[69] Controversies may arise when one party tries to arbitrate with another by resorting to an arbitration clause in one of those contracts. For example, a party, which has initiated arbitration based on an arbitration clause within a contract (the first contract), may have included claims related to another contract (the second contract) that does not contain such a clause. Adopting a pro-arbitration presumption, courts will interpret the scope of the arbitration clause broadly to include all disputes related to the first contract. Under these circumstances, if there is a sufficiently close relationship between the two contracts, courts may feel comfortable to hold that arbitrators have good jurisdiction to hear the entirety of the dispute, because claims under the second contract are related to the first contract and therefore would fall within the arbitration clause's scope as expansively interpreted.[70]

A difficulty, however, may arise if the contracts are concluded between different parties.[71] Arbitration's consensual nature dictates that it can only take place between parties to an arbitration agreement, except in rare situations where courts find that a non-signatory should nonetheless be bound by the agreement in accordance with doctrines such as group of companies, agency, assumption, succession, and so on.[72] As a result, it is usually difficult for arbitrators to exercise jurisdiction over a non-signatory party to the arbitration agreement. In the above example, if the respondent in the case is found to be a party only to the second contract, but not the first one, the claimant will encounter significant difficulties in persuading the court to hold that the arbitration clause in the first contract should bind the respondent. The key issue in this situation is whether an arbitration agreement exists between the two parties.[73] The scope of the arbitration agreement is not relevant,

[64]See Tweeddale & Tweeddale (n 45) 166.

[65]See Ilias Bantekas, *An Introduction to International Arbitration* (CUP 2015) 86.

[66]See Nathalie Voser, 'Chapter 9: The Swiss Perspective on Parties in Arbitration: "Traditional Approach With a Twist regarding Abuse of Rights" or "Consent Theory Plus" 'in Stavros Brekoulakis, Julian D M Lew & Loukas Mistelis (eds), *The Evolution and Future of International Arbitration* (Kluwer Law International B V 2016) 165-66.

[67]See Rolf Trittmann & Inka Hanefeld, 'Part II: Commentary on the German Arbitration Law (10th Book of the German Code of Civil Procedure), Chapter II: Arbitration Agreement, § 1029 – Definition' in Karl-Heinz Böckstiegel, Stefan Michael Kröll & Patricia Nacimiento (eds), *Arbitration in Germany: The Model Law in Practice* (2nd edn, Kluwer Law International 2015) 91.

[68]See Gaillard & Savage (n 1) 260-61.

[69]See Born (n 1) 1478-79.

[70]See ibid 1479-82; Lew, Mistelis & Kröll (n 3) para 7-46.

[71]See Born (n 1) 1483.

[72]See Blackaby, Partasides & Redfern (n 5) para 2.46.

[73]See Born (n 1) 1483.

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because no matter how broad its scope is, the arbitration agreement cannot bind an entity that is not a party to it. [74]

It is therefore very important to distinguish between the existence and the scope of an arbitration agreement. These are two distinct issues that are fundamentally different in nature.[75] Existence refers to the threshold question of whether there is an arbitration agreement between the parties.[76] Only when that is established, one would need to ask whether the current dispute between the parties falls within the scope of that arbitration agreement.[77] As a result of this distinction, courts treat these two issues differently. While, as mentioned above, courts around the world adopt a broad interpretation of scope that presumably covers all disputes between the parties, they are much more cautious when dealing with existence and will not assume that an arbitration agreement exists between the parties.[78] Instead, courts usually apply general contract law rules and principles to determine whether the parties have formed an arbitration agreement between them.[79] As an example, the US courts will only apply the pro-arbitration federal policy when interpreting the scope of an arbitration agreement, but not when deciding whether an arbitration agreement exists between the parties.[80]

In addition, the New York Convention clearly distinguishes between these two issues. While the Convention undoubtedly recognises the importance of existence and scope by including both of them as possible grounds to reject the recognition and enforcement of an award, it provides for them separately. Article V.1.a allows a national court to refuse to recognise and enforce a foreign arbitration award if there is no arbitration agreement between the parties, while Article V.1.c authorises a court to do so if the dispute in the case falls outside the scope of the arbitration agreement.[81] In other words, Article V.1.a deals with the complete absence of an arbitrator's jurisdiction, while Article V.1.c concerns an arbitrator's excess of jurisdiction.[82] As a result, these provisions clearly set the two issues apart, and courts should apply them to existence and scope respectively, if needed. In any event, issues involving an arbitration agreement's non-existence should be governed by Article V.1.a of the New York Convention, and not by Article V.1.c.

As a summary, courts in pro-arbitration jurisdictions usually adopt a presumptive rule, under which the scope of an arbitration agreement is interpreted broadly to include all disputes between the parties unless otherwise agreed. However, if the dispute relates to a non-signatory party, the courts will use caution to decide whether an arbitration agreement exists between the relevant parties. This existence issue is separate, and should be distinguished, from the scope issue. If a court finds that no arbitration agreement exists between the parties, it may refuse to recognise and enforce a foreign award under Article V.1.a, rather than Article V.1.c, of the New York Convention.

The SPC's misconception of scope and the resulting mistakes

Equating scope with boundaries of contract

Over the past two decades, the SPC has consistently interpreted the scope of arbitration agreements narrowly. This position clearly ran against the international trend to interpret scope broadly, as well as the otherwise pro-arbitration stance that the SPC has itself taken. It was also perplexing because there was no apparent reason for the SPC to do so. A closer look at the SPC's decisions, however, has revealed its fundamental misconception of scope. The SPC has misconceptualised the scope of

[74] See ibid.
[75] See Várady et al (n 15) 128.
[76] See ibid 128.
[77] See ibid.
[78] See Born (n 1) 1437.
[79] See ibid 784-85.
[80] See ibid 1437.
[81] See New York Convention (n 34), arts V.1.a & V.1.c.
[82] See, eg, van den Berg (n 6) 312, 317-318, 321; Born (n 1) 3881-82, 3885.

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arbitration agreements by mistakenly equating it with, or confining it within, the boundaries of the contract that contained the arbitration clause (container contract). As a result, the SPC has not been willing to support an arbitrator's jurisdiction over a dispute unless that dispute only concerned the rights and obligations under the container contract itself. If a dispute involved issues outside the container contract, the SPC would likely hold that the dispute fell outside the scope of the arbitration clause. This might occur if two parties had a dispute that arose from a contract or transaction that was separate from but related to the container contract, or if the dispute involved a non-signatory party to the container contract.

Due to this misconception, the SPC has adopted two erroneous legal doctrines on scope issues in the above two scenarios. First, because the SPC assumed that the scope of an arbitration clause could not extend beyond the boundaries of the container contract, it interpreted scope extremely narrowly to cover only those issues included in the container contract, but not those related to it. For this purpose, the SPC has developed a literal approach to interpretation, under which it focused on the exact meaning of the arbitration agreement's wording, and would not give it an expansive reading unless parties specifically used very broad language. Second, the SPC has been confused between the existence and the scope of an arbitration agreement. When it dealt with a case involving a non-signatory party, the SPC frequently rejected the enforcement of an arbitration agreement or award by finding that the relevant dispute fell outside the scope of the arbitration agreement, while in fact it should have done so by holding that no arbitration agreement existed between the parties. The following sections will discuss the SPC's two erroneous doctrines in detail, by analysing a series of representative decisions that it has made over the past two decades.

Narrow interpretation of scope with a literal approach

By confining scope within the boundaries of the container contract, the SPC was often unwilling to allow arbitrators to decide issues that might potentially extend beyond the rights and obligations provided under the container contract. For this purpose, it has interpreted scope narrowly by developing a literal approach similar to those that the US and UK courts had adopted historically. Under this approach, the SPC has given great attention to the exact wording of the arbitration clause to determine its exact scope.

For example, in 2017, the SPC instructed courts in Guangdong Province to set aside an arbitration award made in Shenzhen after holding that parts of the award fell outside the scope of the arbitration agreement.[83] The Property Management Contract in this case contained an arbitration clause, according to which all disputes 'arising from the performance of the contract' should be resolved by arbitration.[84] The arbitrators later decided, among other claims, that the claimant should pay the respondent for the services rendered before the contract was concluded, presumably because the contract provided that the respondent 'shall coordinate and deal with any historical issues related to the property's management'.[85] The SPC, however, focused on the literal meaning of the words 'arising from the performance of the contract' and held that the arbitrators only enjoyed jurisdiction

[83]See Reply Letter to Guangdong Province High People's Court's Request for Instructions Concerning the Application to Set Aside the Arbitration Award Between Applicant Yang Xyun and Respondent Shenzhen Lianma Property Management Co Ltd (最高人民法院关于广东省高级人民法院就申请人杨某云与被申请人深圳市联马物业管理有限公司申请撤销仲裁裁决一案请示的复函), (2017) Zui Gao Fa Min Ta Zi No. 117 ((2017) 最高法民他字第117号) (Supreme People's Court) (2017) 35 Guide on Foreign-Related Commercial and Maritime Trial (涉外商事海事审判指导) 132, 132-33 (Yang Xyun Reply Letter).

[84]See Request for Instructions Concerning the Application to Set Aside the Arbitration Award Between Applicant Yang Xyun and Respondent Shenzhen Lianma Property Management Co Ltd (广东省高级人民法院关于申请人杨某云与被申请人深圳市联马物业管理有限公司申请撤销仲裁裁决一案的请示), (2015) Yue Gao Fa Zhong Fu Zi No. 7 ((2015) 粤高法仲复字第7号) (Guangdong Province High People's Court) (2017) 35 Guide on Foreign-Related Commercial and Maritime Trial (涉外商事海事审判指导) 133, 135.

[85]See ibid 134-35.

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over disputes that occurred when the contract was being performed.[86] As a result, the SPC concluded that the relevant parts of the award concerning services rendered before the contract's conclusion fell outside the scope of the arbitration clause, despite that these services were clearly covered under the terms of the contract.[87] This indicated that the SPC has interpreted scope in an extremely narrow way, even to an extent narrower than the boundaries of the container contract. In any event, this approach has undoubtedly demonstrated the SPC's intention to restrict the scope of an arbitration agreement by relying on the literal meaning of its wording.

Similarly, in 2019, the SPC interpreted another arbitration agreement narrowly based on its wording's literal meaning. In this case, two parties agreed on '[a]rbitration in Hong Kong and English law to apply' in a charterparty.[88] Disputes later broke out between them, and one party applied to the Xiamen Maritime Court for seizure of vessel.[89] The other party alleged that the application to seize vessel was made wrongfully, and further claimed for damages in arbitration.[90] The two parties disagreed on whether this tort claim should be decided by the arbitrator or the court, with the key issue being the scope of the arbitration clause.[91] One party argued that the arbitration clause did not use broad wording such as 'any disputes related to or in connection with' so its scope should be given a narrow understanding, while the other submitted that the clause used typical language seen in charterparties and therefore should be interpreted to have the same meaning with the allegedly broader wording from the perspective of business common sense.[92] The SPC held that the clause reflected a 'general agreement on arbitration' between the parties, and should cover both contractual and tort claims based on 'a usual understanding'.[93] Oddly, however, the SPC deduced a narrow scope from the clause's wording, and held that disputes submitted to arbitration should 'arise from the contractual rights and obligations', and 'relate to [their] exercising or performance'.[94] It went on to explain that 'although the alleged tortious act did relate to the contract to a certain extent', it was 'not subject to the rights and obligations under the contract' and 'did not result from exercising the rights or performing the obligations under the contract'.[95] As a result, the SPC concluded that the dispute in this case fell outside the scope of the arbitration clause.[96]

[86] See Yang Xyun Reply Letter (n 83) 132.

[87] See ibid 132.

[88] See Reply Letter to Fujian Province High People's Court's Request for Instructions Concerning the Validity of the Arbitration Clause in the Appeal Case on the Pre-suit Asset Preservation Application Damage Liability Dispute Between Shuntai Shipping (Hong Kong) Co Ltd and Liu Xling, SMY (Hong Kong) Limited (最高人民法院关于对福建省高级人民法院就顺泰船运 (香港) 有限公司与刘某玲、SMY (HONG KONG) LIMITED 因申请诉前财产保全损害责任纠纷上诉一案中仲裁条款效力问题的请示的复函), (2019) Zui Gao Fa Min Ta Zi No. 135 ((2019) 最高法民他字第135号) (Supreme People's Court) (2019) 38 Guide on Foreign Related Commercial and Maritime Trial (涉外商事海事审判指导) 26, 26 (Shuntai Reply Letter).

[89] See Request for Instructions Concerning the Validity of the Arbitration Clause in the Appeal Case on the Pre-suit Asset Preservation Application Damage Liability Dispute Between Shuntai Shipping (Hong Kong) Co Ltd and Liu Xling, SMY (Hong Kong) Limited (福建省高级人民法院就顺泰船运 (香港) 有限公司与刘某玲、SMY (HONG KONG) LIMITED 因申请诉前财产保全损害责任纠纷上诉一案中仲裁条款效力问题的请示), (2018) Min Min Zhong No. 1131 ((2018) 闽民终1131号) (Fujian Province High People's Court) (2019) 38 Guide on Foreign Related Commercial and Maritime Trial (涉外商事海事审判指导) 27, 29.

[90] See ibid 29.

[91] See ibid 29-30.

[92] See ibid.

[93] See Shuntai Reply Letter (n 88) 26.

[94] See ibid 26.

[95] See ibid.

[96] See ibid 26. The SPC went on to find that the parties did not otherwise reach an agreement to arbitrate after the dispute arose, and therefore decided to reject the tribunal's jurisdiction. This article focuses on the scope issue, so will not analyse the other reasons given by the SPC. In any event, whether the parties have reached another agreement to arbitrate after the dispute arose is not relevant to the current analysis, because regardless of the answer to that question, the SPC should have found that the dispute fell within the scope of the arbitration agreement and therefore upheld the tribunal's jurisdiction.

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This was clearly a very narrow interpretation of scope. As the SPC acknowledged, the seizure of the vessel was clearly related to the contract, so it was quite difficult to understand how it would not fall within the scope of arbitration clause based on a 'general agreement' between the parties or a 'usual understanding' of their intention. This interpretation essentially meant that the SPC has adopted a presumption that a general agreement between the parties should have a narrow scope and only cover disputes that would arise from exercising the rights or performing the obligations under the container contract. Under this presumption of narrow scope, the SPC would only interpret scope expansively when an arbitration agreement explicitly used broad language. It has, for example, enforced an arbitration clause which provided that 'any disputes arising out of or in connection with this contract' shall be resolved by arbitration.[97] Although lower-level courts in the case raised doubts on the scope issue,[98] the SPC pointed to the wording of the arbitration clause and held that it was sufficiently broad to cover the disputes in the case.[99]

These cases have demonstrated that the SPC has been extremely reluctant to interpret the scope of arbitration agreements broadly. It tended to restrict the arbitrator's jurisdiction within the boundaries of the container contract. In other words, the SPC was only willing to allow an arbitrator to decide the issues regarding the parties' rights and obligations under the container contract. For this purpose, the SPC usually focused on the literal meaning of the wording used in an arbitration agreement, and would not adopt an expansive interpretation unless parties specifically used very broad language. This stood in stark contrast to the international trend to interpret scope broadly to cover not only the issues under the container contract, but essentially all disputes between the parties that were related to it. This problematic approach has further manifested the SPC's misconception of scope, namely it mistakenly equated the scope of an arbitration agreement with the boundaries of its container contract.

Confusion between existence and scope

Apart from focusing on the literal meaning of an arbitration agreement's wording and interpreting it narrowly, the SPC and other Chinese courts have been extremely wary of scope issues when dealing with multi-party disputes. Under its misconception that equated the scope of an arbitration clause with the boundaries of the container contract, the SPC usually interpreted scope narrowly to the effect that the arbitration clause would not cover any disputes arising out of another contract, even when the other contract was clearly related to the container contract. Accordingly, the SPC would set aside or refuse to recognise and enforce an award if any part of that award dealt with a contract

[97] See Reply Letter to Shandong Province High People's Court's Request for Instructions Concerning the Appeal over Jurisdictional Objections in the Contractual Dispute Between Appellant Southeast Asia Group Investment Development Co Ltd, Appellee Shandong State-Owned Assets Investment Holding Co Ltd, and Third Party in the Original Case Malong Construction Co Ltd, Southeast Asia Shaofu Development Co Ltd, and Southeast Asia (China) Construction Co Ltd, and Southeast Asia Strategy Co Ltd (最高人民法院关于对山东省高级人民法院就上诉人东南亚集团投资发展有限公司与被上诉人山东省国有资产投资控股有限公司及原审第三人马龙基建有限公司、东南亚韶富发展有限公司、东南亚(中国)基建有限公司、东南亚策略有限公司合同纠纷管辖权异议上诉一案请示的复函), (2018) Zui Gao Fa Min Ta Zi No. 53 ((2018) 最高法民他字第53号) (Supreme People's Court) (2018) 37 Guide on Foreign-Related Commercial and Maritime Trial (涉外商事海事审判指导) 30, 31 (Southeast Asia Reply Letter).

[98] See Request for Instructions Concerning the Appeal over Jurisdictional Objections in the Contractual Dispute Between Appellant Southeast Asia Group Investment Development Co Ltd, Appellee Shandong State-Owned Assets Investment Holding Co Ltd, and Third Party in the Original Case Malong Construction Co Ltd, Southeast Asia Shaofu Development Co Ltd, and Southeast Asia (China) Construction Co Ltd, and Southeast Asia Strategy Co Ltd (山东省高级人民法院关于上诉人东南亚集团投资发展有限公司与被上诉人山东省国有资产投资控股有限公司及原审第三人马龙基建有限公司、东南亚韶富发展有限公司、东南亚(中国)基建有限公司、东南亚策略有限公司合同纠纷管辖权异议上诉一案的请示), (2018) Lu Min Xia Zhong No. 96 ((2018) 鲁民辖终96号) (Shandong Province High People's Court) (2018) 37 Guide on Foreign Related Commercial and Maritime Trial (涉外商事海事审判指导) 32, 39-40.

[99] See Southeast Asia Reply Letter (n 97) 31.

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other than the container contract. In truth, the SPC's key concern in this scenario was on the possible non-existence of an arbitration agreement between the parties in dispute. This could explain its guarded attitudes towards a non-signatory party to an arbitration agreement. Due to the misconception, however, the SPC usually framed the issue as falling outside the scope of the arbitration agreement, rather than holding that no arbitration agreement existed between the parties in dispute. Put differently, the misconception has caused the SPC's confusion between existence and scope, two very different legal concepts.

This confusion could be found consistently in the SPC's decisions over the past two decades. In 2003, for instance, the SPC instructed courts in Anhui Province to reject an award's enforcement under the New York Convention after finding that it fell outside the scope of the arbitration agreement.[100] In this case, Gerald Metals Inc (GMI) requested courts in Anhui to recognise and enforce a London award against Wuhu Smelting Plant (WSP) and Wuhu Hengxin Copper Group Co., Ltd (Hengxin) according to the New York Convention.[101] The SPC agreed with the Anhui High Court's opinion that Hengxin was not a party to the arbitration agreement, because the contract in the case was concluded only between GMI and WSP.[102] As a result, the SPC approved the Anhui High Court's request to reject the award under the New York Convention.[103] Bizarrely, however, while this was a classic non-existence situation, namely there was no arbitration agreement between GMI and Hengxin, which should have fallen under Art V.1.a of the New York Convention, the SPC and the Anhui High Court refused the award's recognition and enforcement on the ground of Art V.1.c and held that the dispute fell outside the scope of the arbitration agreement.[104]

Similarly, in 2006, the SPC approved the Shanghai High Court's request to set aside a CIETAC award after finding it out of scope.[105] In this case, Jiangyin Qingmaman Automobile Plastic Parts Co., Ltd (Jiangyin) and Jiehua Industrial Co., Ltd (Jiehua) entered into a sales contract of an automatic production line (Contract 96).[106] When the automatic production line later turned out to be defective, the two parties tried to salvage the deal by sourcing necessary replacement equipment, although those successive agreements were concluded between their affiliated companies rather than themselves.[107] After they subsequently submitted the dispute to arbitration, the tribunal found that all those contracts were in fact related to one another, and decided the case based on the arbitration clause in the Contract 96.[108] Upon review, however, the SPC set aside the award, holding that it has exceeded the scope of the arbitration clause because the arbitrators adjudicated on the rights of entities that were not parties to the clause.[109]

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[100]See Reply Letter Concerning the Application Made by the US GMI Company for the Recognition of Arbitration Award Issued by London Metal Exchange in the UK (最高人民法院关于美国GMI 公司申请承认英国伦敦金属交易所仲裁裁决案的复函), (2003) Min Si Ta Zi No. 12 ([2003]民四他字第12号) (Supreme People's Court) (China) (GMI Reply Letter).

[101]See Request for Instructions Concerning the Application Made by the US GMI Company for the Recognition of Arbitration Award Issued by London Metal Exchange in the UK (安徽省高级人民法院关于对美国GMI 公司申请承认英国伦敦金属交易所仲裁裁决一案的请示), (2002) Wan Min Er Ta Zhong Zi No. 10 ([2002]皖民二他终字第10号) (Anhui Province High People's Court) (China) (GMI Request).

[102]See GMI Reply Letter (n 100); GMI Request (n 101).

[103]See GMI Reply Letter (n 100).

[104]See ibid.

[105]See Reply Letter to the Request for Instructions Concerning Whether to Set Aside the Award Issued by China International Economic and Trade Arbitration Commission Shanghai Sub-Commission (最高人民法院关于是否裁定撤销中国国际经济贸易仲裁委员会上海分会仲裁裁决的请示的复函), (2006) Min Si Ta Zi No. 7 ([2006]民四他字第7号) (Supreme People's Court) (Jiehua Reply Letter).

[106]See Request for Instructions Concerning the Application Made by Jiehua Industrial Co Ltd for Set Aside of Arbitration Award (上海市高级人民法院关于捷华实业有限公司申请撤销仲裁裁决一案的请示), (2005) Hu Gao Min Si (Shang) Ta Zi No. 3 ([2005]沪高民四 (商) 他字第3号) (Shanghai City High People's Court) (China) (Jiehua Request).

[107]See ibid.

[108]See Jiehua Reply Letter (n 105); Jiehua Request (n 106).

[109]See Jiehua Reply Letter (n 105).

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Afterwards in 2013, a Chinese court in Wuxi, Jiangsu Province refused to recognise and enforce an English award under the New York Convention.[110] Although the SPC's instructions in this case were not made public, it could be safely assumed that the SPC approved this outcome due to the reporting system and also because the SPC specifically endorsed this decision in an article that it has recently published.[111] The Wuxi court based its refusal of the award's recognition and enforcement on the finding that one of the respondents in the case was not a party to the contract in dispute and therefore the arbitration agreement could not bind that party.[112] The court, however, framed this as a scope issue and cited Art V.1.c of the New York Convention, rather than identifying it as a non-existence issue and relying on Art V.1.a.[113] The SPC very clearly agreed with and approved of this approach.[114]

Later in 2018, the SPC once again instructed the Guangdong High Court to refuse to recognise and enforce a Korean award based on Art V.1.c of the New York Convention.[115] This case involved a similar situation, in which both the Guangdong High Court and the SPC found that the party against whom the award was sought to be recognised and enforced was not a party to the contract or the arbitration clause in dispute.[116] Interestingly, the Guangdong High Court requested to reject the award under Art V.1.a of the New York Convention, which would, in fact, have been the correct decision.[117] Strangely, however, the SPC instructed the Guangdong High Court to do so under Art V.1.c.[118]

The SPC has consistently applied this approach in one of its most recent decisions on scope.[119] In this case, Yili'ai New Energy Technology (Tianjin) Co., Ltd (Yili'ai) and Beijing Wanyuan Industrial Co., Ltd (Wanyuan) entered into a Purchase and Sales Contract.[120] The contract contained a series of

[110]See *Jess Smith Cotton LLC v Wuxi Natural Textile Industrial Co Ltd & Wuxi Natural Green Fiber Technology Co Ltd* (Jess Smith & Sons Cotton LLC、无锡市天然纺织实业有限公司等申请承认和执行外国仲裁裁决民事裁定书), (2013) Xi Shang Wai Zhong Shen Zi No. 7 ((2013) 锡商外仲审字第7号) (China) (*Jess Smith & Sons*).

[111]See The Supreme People's Court Fourth Civil Trial Division Research Project Group (最高人民法院民事审判第四庭课题组), 'Study Report on the Judicial Review of International Commercial Arbitration Cases (国际商事仲裁司法审查案例研究报告)' (2019) 38 Guide on Foreign Related Commercial and Maritime Trial (涉外商事海事审判指导) 169, 207-08 (published in October 2022) (SPC Study Report).

[112]See *Jess Smith & Sons* (n 110).

[113]See ibid.

[114]See SPC Study Report (n 111) 207-08.

[115]See Reply Letter to Guangdong Province High Court's Request for Instructions Concerning Pixelplus Co Ltd's Request for Recognition and Enforcement of Arbitration Award Issued by the Korean Commercial Arbitration Board (最高人民法院关于广东省高级人民法院就派视尔有限责任公司申请承认和执行韩国商事仲裁院仲裁裁决一案的请示的复函), (2018) Zui Gao Fa Min Ta No. 15 ((2018) 最高法民他15号) (Supreme People's Court) (2018) 36 Guide on Foreign Related Commercial and Maritime Trial (涉外商事海事审判指导) 95, 95 (Pixelplus Reply Letter).

[116]See Pixelplus Reply Letter 95, Request for Instructions Concerning the Application Made Pixelplus Co Ltd's for the Recognition and Enforcement of Arbitration Award Issued by the Korean Commercial Arbitration Board (广东省高级人民法院关于派视尔有限责任公司申请承认和执行韩国商事仲裁院仲裁裁决一案的请示), (2014) Yue Gao Fa Zhong Fu Zi No. 11 ((2014) 粤高法仲复字第11号) (Guangdong Province High People's Court) (2018) 36 Guide on Foreign Related Commercial and Maritime Trial (涉外商事海事审判指导) 96, 100.

[117]See ibid 100.

[118]See Pixelplus Reply Letter (n 115) 95.

[119]See Reply Letter to the Request for Instructions Concerning the Application Made by Equipaggiamenti Elettronici Industriali S P A and Yili'ai New Energy Technology (Tianjin) Co Ltd for Set Aside of Arbitration Award (最高人民法院关于申请人Equipaggiamenti Elettronici Industriali S.P.A.、意利埃新能源科技 (天津) 有限公司申请撤销仲裁裁决一案请示的复函), (2019) Zui Gao Fa Min Ta No. 14 ((2019) 最高法民他14号) (Supreme People's Court) (2019) 38 Guide on Foreign Related Commercial and Maritime Trial (涉外商事海事审判指导) 74 (published in October 2022) (Equipaggiamenti Reply Letter).

[120]See Request for Instructions Concerning the Application Made by Equipaggiamenti Elettronici Industriali S P A and Yili'ai New Energy Technology (Tianjin) Co Ltd for the Set Aside of (2017) Zhong Guo Mao Zhong Jing Cai Zi No. 0578 Arbitration Award Issued by China International Economic and Trade Arbitration Commission (北京市高级人民法院关于申请人Equipaggiamenti Elettronici Industriali S.P.A.、意利埃新能源科技 (天津) 有限公司申请撤销中国国际经济贸易仲裁委员会 (2017) 中国贸仲京裁字第0578号仲裁裁决案件的请示), Jing

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annexes, among which Annex 7 was a Letter of Guarantee.[121] Equipaggiamenti Elettronici Industriali S.R.L (EEI),[122] the parent company of Yili'ai, signed the Letter of Guarantee, promising to guarantee the full performance of the Purchase and Sales Contract and be jointly liable together with Yili'ai.[123] Disputes later broke out between the parties, and Wanyuan initiated arbitration against Yili'ai and EEI at CIETAC.[124] After hearing the case, the arbitrators decided against the two respondents and awarded damages for Wanyuan.[125] The SPC instructed courts in Beijing to set aside the award after holding that EEI was not a party to the arbitration clause and that the award fell outside its scope.[126]

It appeared that the SPC would only find an award involving a non-signatory party to be within the scope of the arbitration agreement if it was confident that the award would not impact the non-signatory. For example, it has held that the relevant parts of an award did not fall outside the scope when they 'formed the factual basis of, and provided reasons for, the award but did not reach a finding of the third party's legal rights and obligations, and that the award did not hold the third party liable'.[127] Similarly, it would supposedly be fine if an award touched upon a contract other than the container contract, but did not deal with this other contract by not awarding a specific remedy related to it.[128]

The cases discussed above, together with other similar ones,[129] indicated that the SPC has been particularly skeptical in disputes involving non-signatory parties to the arbitration agreements, and would usually not allow arbitrators to exercise jurisdiction under the circumstances. Most bizarrely,

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Gao Fa (2018) No. 801 (京高法 (2018) 801号) (Beijing City High People's Court) (2019) 38 Guide on Foreign Related Commercial and Maritime Trial (涉外商事海事审判指导) 75, 83.

[121]See ibid 83.

[122]Later renamed as Equipaggiamenti Elettronici Industriali S.P.A, see ibid 84.

[123]See ibid 83.

[124]See ibid 83.

[125]See ibid 84.

[126]See Equipaggiamenti Reply Letter (n 119) 74.

[127]See Reply Letter to Shandong Province High Court's Request for Instructions Concerning the Application Made by Weihai Honglin Electric Technology Share Stock Company for Non-Enforcement of Arbitration Award (最高人民法院关于山东省高级人民法院报请威海市泓淋电力技术股份有限公司申请不予执行仲裁裁决一案请示的复函), (2019) Zui Gao Fa Min Ta No. 35 ((2019) 最高法民他35号) (Supreme People's Court) (2019) 38 Guide on Foreign Related Commercial and Maritime Trial (涉外商事海事审判指导) 89, 89.

[128]See Reply Letter to the Request for Instructions Concerning Raffles International Ltd's Request for Recognition and Enforcement of Arbitration Award Made in Hong Kong (最高人民法院关于对莱佛士国际有限公司申请认可与执行香港仲裁裁决一案请示的复函), (2017) Zui Gao Fa Min Ta No. 16 ((2017) 最高法民他16号) (Supreme People's Court) (2017) 35 Guide on Foreign-Related Commercial and Maritime Trial (涉外商事海事审判指导) 41, 41; SPC Study Report (n 111) 208.

[129]See, eg, Reply Letter to the Request for Instructions Concerning the Application Not to Recognize and Enforce the ICC Arbitration Award (最高人民法院关于不予承认和执行国际商会仲裁院仲裁裁决的请示的复函), (2008) Min Si Ta Zi No. 11 ([2008]民四他字第11号) (Supreme People's Court); Reply to Hubei Province High Court's Request for Instructions Concerning the Application Made by Applicant FSG Automotive Holding AG Against Respondent Wuhan Fanzhou Machinery Manufacturing Co., Ltd for the Recognition and Enforcement of Arbitration Award No. SCH-5239 Issued by the International Arbitral Centre of the Austrian Federal Economic Chamber (最高人民法院关于湖北省高级人民法院就申请人FSG 汽车工业控股公司与被申请人武汉泛洲机械制造有限公司申请承认和执行奥地利联邦经济会仲裁中心SCH-5239号仲裁裁决一案请示的答复), (2015) Min Si Ta Zi No. 46 ((2015) 民四他字第46号) (Supreme People's Court); Reply Letter to the Request for Instructions Concerning Spliethoff's Bevrachtingskantoor BV's Request for Recognition of Arbitration Award No. HULL XXK06-039 issued by Arbitral Tribunal in London, UK (最高人民法院关于西特福船运公司申请承认英国伦敦仲裁庭作出的"HULL XXK06-039"号仲裁裁决案件请示的复函) (2015) Min Si Ta Zi No. 48 ((2015) 民四他字第48号) (Supreme People's Court); Reply Letter to Jiangsu Province High Court's Request for Instructions Concerning the Application Made by Applicant Bright Morning Limited Against Respondent Yixing Leqi Textile Group Co., Ltd for the Recognition and Enforcement of Arbitration Award No. ARB130/11/MJL Issued by the Singapore International Arbitration Centre (最高人民法院关于江苏省高级人民法院就申请人Bright Morning Limited与被申请人宜兴乐祺纺织集团有限公司申请承认和执行新加坡国际仲裁中心2011年第130号 (ARB130/11/MJL) 仲裁裁决一案请示的复函), (2017) Zui Gao Fa Min Ta No. 44 ((2017) 最高法民他44号) (Supreme People's Court) (2017) 34 Guide on Foreign Related Commercial and Maritime Trial (涉外商事海事审判指导) 78.

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however, the SPC routinely based its decisions upon findings that the disputes or awards fell outside the scope of the arbitration agreements, rather than relying on the correct analysis that no arbitration agreement existed between the non-signatories and the other parties. This evidently demonstrated that the SPC was confused and failed to distinguish between the existence and the scope of an arbitration agreement, two distinct legal concepts.

This wrong approach was the result of the SPC's misconception of scope, under which it mistakenly equated the scope of an arbitration agreement with the boundaries of the container contract. Consequently, if a dispute involved a different contract, or a non-signatory party to the container contract, the SPC would view it as having extended beyond the boundaries of the container contract, and therefore would find that it has fallen outside the scope of the arbitration agreement. What the SPC failed to realise, however, was that this was a typical example of 'non-existence', rather than 'out of scope'. To be more specific, the crucial issue here was whether an arbitration agreement existed between the non-signatory party and the other parties. If not, the arbitrator should not enjoy jurisdiction to hear or decide the dispute involving the non-signatory. It was, however, not a scope issue. The scope of the arbitration agreement would actually be broad enough to cover the dispute, if there was a sufficient relationship between the parties or the contracts. Due to its misconception, the SPC was confused and failed to distinguish between existence and scope. As a result, the SPC often provided the wrong reason to set aside or refuse to recognise and enforce an award. It frequently based its decisions on the disputes falling outside the scope of the arbitration agreement, rather than correctly holding that no arbitration agreement existed between the non-signatory and the other parties. In other words, the SPC has failed to identify the correct issue, and therefore applied the wrong law.

In addition, the above cases showed that the SPC's confusion existed consistently in different scenarios related to scope, including when they decided whether to enforce an arbitration agreement, set aside an award made in China, or recognise and enforce a foreign award under the New York Convention.

The SPC should correct its misconception and mistakes

The SPC should distinguish scope from boundaries of contract

As demonstrated above, the SPC has fundamentally misconceptualised the scope of an arbitration agreement by equating it with the boundaries of the container contract. This has further given rise to two erroneous doctrines, under which the SPC routinely interpreted scope narrowly with a literal approach and was confused between the existence and the scope of an arbitration agreement. The SPC must correct its misconception and mistakes to make sound decisions on scope and maintain its otherwise pro-arbitration stance.

The SPC must first understand that the scope of an arbitration agreement is not equivalent with the boundaries of its container contract. These are two different concepts. The scope of an arbitration agreement refers to what disputes it may cover, namely what disputes the parties have authorised an arbitrator to hear and decide.[130] Modern day commercial disputes are often complex and frequently involve various issues that are intricately related. It is therefore hugely beneficial and important that parties have a 'one-stop' forum to resolve all their disputes. Business common sense should therefore lead to the assumption that parties would want to submit all their disputes to arbitration altogether. [131] As a result, the scope of an arbitration agreement should be reasonably understood to cover not only disputes under the container contract itself, but also those under a different contract or legal relationship that are nonetheless related to the container contract. This consequently means that the scope of an arbitration agreement naturally extends beyond the boundaries of its container contract.

[130] See Ferrari & Rosenfeld (n 14) 41.

[131] See Born (n 1) 1425; Lew, Mistelis & Kröll (n 3) para 7-67.

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As a result, the SPC should not equate scope with the boundaries of the container contract, but should instead clearly distinguish between the two concepts. In future cases, the SPC should assume that parties would want to resolve all their related disputes in the same forum, and therefore interpret the scope of an arbitration agreement broadly. This means the SPC should find that an arbitration clause's scope could exceed the boundaries of its container contract and cover disputes arising from the other related contracts.

The SPC should interpret scope broadly

Having distinguished the scope of an arbitration agreement from the boundaries of its container contract, the SPC needs to interpret scope broadly. Again, business common sense decides that parties should be reasonably expected to choose a single forum to resolve all their disputes. The SPC, therefore, needs to interpret scope broadly, so that arbitrators can have the authority to complete their task given by the parties. In fact, this is the reason why courts in pro-arbitration jurisdictions adopt a pro-arbitration presumptive rule, under which the scope of an arbitration agreement is read expansively to cover all disputes between the parties.[132] The Chinese courts' current method of separating different issues within a single case based on a narrow interpretation of scope has created unnecessary hurdles for parties in practice.[133] While the Chinese courts were not the only ones in history to do this, courts in many pro-arbitration countries have changed course and supported the 'one-stop' approach.[134] The SPC should follow suit.

In order to interpret scope broadly, the SPC needs to abandon its overly strict literal approach. The Chinese legal system is based on civil law tradition.[135] Different from their counterparts in common law jurisdictions, Chinese law and Chinese courts are usually more liberal on the issue of contract interpretation and may not overly concentrate on a term's exact meaning.[136] Consequently, the SPC's literal reading of arbitration agreements is not a result of its conventional approach. Instead, it is a product of the SPC's misconception. While the SPC has tried hard to establish and maintain a pro-arbitration stance over the past few decades, it appears that the SPC has unfortunately overlooked its problematic approach to interpret arbitration agreements' scope. It is therefore crucial that this issue is brought to the SPC's attention. Moreover, even US and UK courts, which have traditionally adopted a similar literal approach, have abandoned it in recent years and switched to a more expansive interpretation of scope.[137] This is consistent with the international trend to interpret scope broadly. There is no reason why Chinese courts should deviate from this trend.

As a result, the SPC should interpret the scope of arbitration agreements broadly in its future cases. For this purpose, the SPC should abandon its overly strict literal interpretive approach that focuses on the exact meaning of the wording used in arbitration agreements. It should instead establish a presumptive rule, under which it will interpret an arbitration agreement's scope broadly to cover all related disputes between the parties, unless they have specifically agreed otherwise.

[132] See Born (n 1) 1425; Lew, Mistelis & Kröll (n 3) para 7-67.

[133] See Section III.B for details.

[134] See Section II.A for details.

[135] See Xiaobo Dong & Yafang Zhang, *On Contemporary Chinese Legal System* (Springer 2023) 31.

[136] See The Civil Code of the People's Republic of China, art 142; Zuigao renmin fayuan guanyu shiyong zhonghua renmin gongheguo minfadian hetongbian tongze ruogan wenti de jieshi (最高人民法院关于适用《中华人民共和国民法典》合同编通则若干问题的解释) [Interpretation on Certain Issues Concerning the Application of the General Part of the Book of Contract of the Civil Code of the People's Republic of China], art 1 (Supreme People's Court).

[137] See Section II.A for details.

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The SPC should distinguish scope from existence

Scope issues in multi-contract scenarios are often complex. It can become controversial whether a dispute arising out of one contract may be covered by the arbitration clause in another contract.[138] The fact that the two contracts do not share the exact same parties does not necessarily mean that the dispute will fall outside the scope of the arbitration clause.[139] To the contrary, if the two contracts are sufficiently related to each other, the dispute may well fall within scope, particularly in accordance with a broad interpretation of scope often supported by court decisions around the world.[140] Over the past two decades, however, the SPC has often interpreted scope extremely narrowly and would not allow it to cover a dispute that was 'related to' the container contract.[141] This was a result of the SPC's misconception of equating the scope of an arbitration clause with the boundaries of its container contract.

The misconception has caused the SPC to refuse the enforcement of an arbitration agreement or an award after finding that the issue fell outside the scope of the arbitration agreement, whereas the correct reason for it to do so should have been that no arbitration agreement existed between the parties. This has indicated the SPC's confusion between the existence and the scope of an arbitration agreement, which are two fundamentally different legal concepts. As previously discussed, the existence issue refers to whether there is an arbitration agreement between the parties, while the scope issue deals with whether the existent arbitration agreement can cover a certain dispute between the parties.[142] The New York Convention has also provided for the two issues separately.[143] As analysed above, the SPC's confusion between out-of-scope and non-existence scenarios has caused it to apply the New York Convention and the relevant Chinese law wrongly.[144] Therefore, the SPC will for sure need to distinguish clearly between existence and scope. Doing so will enable the SPC to identify the precise issue, provide accurate analysis, apply the correct law, and make sound decisions in cases related to scope and therefore maintain its pro-arbitration stance.

In addition, the SPC should have the confidence to interpret scope broadly to cover all disputes between the parties that relate to the container contract, without being overly concerned about losing the ability or opportunity to review the arbitrator's jurisdiction when the dispute involves a non-signatory party. This is because there are still ample chances for the SPC to reject the enforcement of an arbitration agreement or an award when it has genuine doubts about whether a non-signatory party can be bound by an arbitration agreement. The key issue, however, should be the possible non-existence of an arbitration agreement between the parties, rather than whether the dispute falls outside its scope.

As a result, the SPC should clearly distinguish between existence and scope issues. When it decides not to enforce an arbitration agreement or award after finding that no arbitration agreement exists between the parties, it needs to refer to this 'non-existence' issue clearly and rely on the correct statutory provisions, such as Article V.1.a of the New York Convention. It should not refer to this as an 'out-of-scope' scenario or base its decision on the wrong legal ground, such as by citing Article V.1.c of the New York Convention. Choosing the correct reason for its decisions would reduce uncertainty in the SPC jurisprudence and avoid causing confusion for the parties.

In summary, the SPC needs to correct its misconception of an arbitration agreement's scope as well as the erroneous legal doctrines that it has adopted. First, it should assume that the scope of an arbitration agreement naturally extends beyond the boundaries of its container contract, and therefore stop equating the two different concepts. Second, the SPC should interpret scope broadly. This

[138] See Born (n 1) 1478-79.
[139] See Ferrari & Rosenfeld (n 14) 42-43.
[140] See Born (n 1) 1478-80.
[141] See Section III.B & III.C for details.
[142] See Section II.B for details.
[143] See New York Convention (n 34), arts V.1.a & V.1.c.
[144] See Section III.C for details.

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will enable arbitrators to have the authority to hear and decide disputes arising from not only the container contract but also those related to it. The SPC should therefore abandon its literal interpretive approach that focuses on the wording of an arbitration agreement and instead adopt a pro-arbitration presumptive rule under which scope is interpreted broadly. This is consistent with parties' presumed intention to have all their disputes resolved efficiently at one single forum and the international trend to read scope expansively. Third, the SPC should clearly distinguish between the existence and the scope of an arbitration agreement. When the SPC comes to the conclusion that an arbitration agreement cannot bind a non-signatory party, it should make this decision based on the reason that no arbitration agreement exists between the non-signatory and the other parties, rather than that the dispute falls outside the scope of the arbitration agreement. Doing so will not only make sure that the SPC accurately applies the law, including the relevant provisions under Chinese law and the New York Convention, but will also allow the SPC to interpret the scope of an arbitration agreement broadly with confidence, without fearing that it will not have sufficient opportunities to review the arbitrators' jurisdiction. All the above will, in turn, enable the SPC to consolidate its otherwise pro-arbitration stance.

Conclusion

As one of the most popular methods to resolve international commercial disputes, arbitration plays an essential role in promoting global economic development and prosperity. The scope of an arbitration agreement is a key issue in international arbitration theory and practice, because it directly determines the arbitrator's jurisdiction. This will, in turn, decide whether an arbitration proceeding can advance smoothly and whether the ensuing award is enforceable by courts. At its heart, the scope issue focuses on whether an arbitration agreement can cover a certain dispute between the parties. Its exact breadth is often a matter of interpretation by arbitrators and judges because international treaties and national arbitration statutes seldom provide for the issue specifically. Nowadays in the world, at least in pro-arbitration jurisdictions, courts usually interpret the scope of an arbitration agreement broadly to cover all disputes related to the contract between the parties. This approach ensures that arbitration may function as an effective and efficient 'one-stop' forum for the parties, and is consistent with business common sense as well as parties' intention when they choose arbitration as their dispute resolution mechanism. This broad interpretation is also in line with the general pro-arbitration stance firmly supported by courts in many jurisdictions. This position encourages business entities to choose these jurisdictions as their seat of arbitration, which would help promote the local legal service industry. In addition, having a legal system that reliably supports arbitration provides certainty and trust for business entities to choose this effective method of dispute resolution, which would help reduce transaction costs and increase efficiency for international trade and investment. All these would undoubtedly contribute to the economic growth of the relevant regions and the entire world.

Given China's economic might, it is paramount for the world to learn about how Chinese law and Chinese courts treat international arbitration. Luckily, China has adopted a relatively modern arbitration statute that largely conforms to internationally accepted principles. In addition, the SPC has painstakingly tried to maintain an overall pro-arbitration stance ever since China's accession into the New York Convention in 1987. These attempts have definitely provided important safeguards for the country's economic rise in the past few decades. Unfortunately, however, the SPC has taken some odd and problematic approaches on issues related to the scope of an arbitration agreement. It has routinely interpreted scope very narrowly, and has frequently found a dispute to be outside the scope of the arbitration agreement when it involved a non-signatory party to the container contract. These flawed decisions by the SPC will lead to grave consequences. They have undoubtedly created difficulties for the parties involved in those cases, by hampering their abilities to use arbitration as a convenient and efficient mechanism to resolve their disputes and by increasing their financial and

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time costs. Even more importantly, these decisions will likely damage the reputation of the Chinese arbitration legal framework and reduce business entities' trust in China as an arbitration-friendly jurisdiction. If this is not corrected, businesses might shy away from arbitrating in China or with a Chinese party, and, in a more extreme situation, even reconsider whether they would continue doing business in China altogether. This will no doubt hurt both the Chinese and the world economy on the whole. As a result, the significance of this issue cannot be neglected.

From a different perspective, and even more intriguingly, the approaches adopted by the SPC are extremely puzzling. They stand in stark contrast to the international trend which interprets scope broadly and the SPC's otherwise pro-arbitration stance. What is more perplexing is that there is no obvious or sensible reason for the SPC to take these positions. On the contrary, the SPC has been keen on maintaining its pro-arbitration stance, and the decisions it has made during the same period, except for those related to scope, are consistently arbitration-friendly. At the same time, there is no apparent policy reason for the SPC to single out scope issues either. In other words, there is no obvious reason for the SPC to adopt these baffling approaches to the scope issue, and no relevant research in the existing literature has offered an explanation. Given that there is no sensible alternative explanation for the SPC's bizarre positions on scope, and that it forms possibly the only exception in the SPC's otherwise consistent pro-arbitration strategy, it is safe to assume that the SPC has genuinely misunderstood the concept of scope and the legal doctrines related to it.

After studying scores of decisions made by the SPC over the past two decades regarding the scope of arbitration agreements, this article has, for the first time ever among all literature in both Chinese and English, identified the SPC's misconception of scope, namely that the SPC has mistakenly equated the scope of an arbitration agreement with the boundaries of its container contract. Under this misconception, the SPC has often been reluctant to allow arbitrators to decide issues that could potentially extend beyond the rights and obligations provided under the container contract. This misconception has further caused the SPC to adopt two erroneous doctrines. First, the SPC has developed a literal approach to interpretation which focused on the exact wording of an arbitration agreement. Under this approach, the SPC has frequently interpreted scope extremely narrowly. Second, the SPC has been confused, and failed to distinguish clearly, between the existence and the scope of an arbitration agreement, two inherently distinct legal concepts. The SPC has been extremely cautious when dealing with a dispute that involved a non-signatory party to the container contract, and has routinely found the dispute to be outside the scope of the arbitration agreement, when the correct analysis should have been that no arbitration agreement existed between the parties. This means that the SPC has wrongly applied the New York Convention and the relevant Chinese law. These mistakes made by the SPC have fundamentally undermined its own efforts to establish and maintain China's image as a pro-arbitration jurisdiction. As an issue that directly decides an arbitral tribunal's jurisdiction, the scope of an arbitration agreement is a key question at the centre of an arbitration legal framework. It also closely reflects a judiciary's attitude towards arbitration in general. As a result, this is a serious shortcoming in the SPC's jurisprudence.

Moving forward, this article argues that the SPC should correct its misconception of scope and the erroneous doctrines that resulted from it. The SPC should first abandon its literal interpretive approach and instead adopt a presumptive rule so that it would interpret scope broadly. It should also clearly distinguish between the existence and the scope of an arbitration agreement, and stop relying on scope issues when dealing with non-existence of arbitration agreements between the parties in dispute. Making these corrections will ensure that the SPC can apply the relevant international and domestic law correctly. It will also bring the SPC's jurisprudence in line with the international trend to interpret scope broadly and will consolidate its otherwise pro-arbitration stance. Only by doing so can the SPC make sure that business entities all around the world will see China as an arbitration-friendly jurisdiction.

Furthermore, a direct cause for the SPC's misconception is likely the lack of knowledge within the whole Chinese arbitration field in general. The scope of an arbitration agreement is not a concept

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widely understood in Chinese academia or among legal practitioners. Against this background, it is not surprising that the SPC has been unable to grasp the concept and apply the legal doctrines correctly. By identifying the misconception and proposing solutions to correct it, this article has filled the gap in the current literature and provided valuable insights for the entire Chinese legal academia and arbitration field regarding how to understand and conceptualise the scope of an arbitration agreement correctly. This will raise awareness of this crucial issue across China and hopefully educate the Chinese judiciary as well as the arbitration practitioners more generally, so that Chinese courts will be able to correct their mistakes and properly decide cases involving scope issues in the future. It is also hoped that this article will inspire further discussions regarding the deeper level reasons why this knowledge deficit exists in the first place and how best to address it. These debates will for sure contribute significantly to the improvement of the Chinese arbitration legal framework in general. This article forms part of a bigger research project that aims at calling for change in the Chinese arbitration legal system and aligning it more closely with the international framework based upon the New York Convention. Doing so will certainly facilitate commercial activities between China and the rest of the world.

With those in mind, before the SPC corrects its misconception of scope and the entire Chinese arbitration legal framework can improve, this article will bring this hidden issue to the attention of business entities around the world. They need to remain alert to this peculiar problem in their business dealings with China so that they can avoid possible pitfalls. Accordingly, future improvement to the Chinese arbitration law regarding scope issues, as called for in this article, will for sure benefit firms worldwide by reducing unnecessary risks and transaction costs. In addition, the SPC's mistakes have provided a valuable example for courts in many jurisdictions around the globe, especially those that intend to build a pro-arbitration reputation. This article has offered critical insights on how they should best interpret scope and arbitration agreements in general. Altogether, this article will help both China and other countries liberalise their arbitration laws by aligning them with international best practices. This will in turn advance the harmonisation process of the international arbitration legal framework based on the New York Convention. Due to arbitration's essential role in international trade and investment, the advancement will make sure that it could continue to promote and safeguard the economic prosperity of the entire world.

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