The international law gaze: the Supreme Court and the UN International Law Commission's dialogue on subsequent conduct in the interpretation of contracts and treaties

Dr Alberto Alvarez-Jimenez of the University of Waikato, on *Bathurst Resources Limited v L & M Coal Holdings Limited*

[A]n agreement is an agreement. There is nothing in this world so powerful as a piece of paper to which a man has put his fingerprint, in front of witnesses.
Wole Soyinka, *Season of Anomy*.

The New Zealand Supreme Court in *Bathurst Resources Limited v L & M Coal Holdings Limited* (*Bathurst Resources Limited v L&M Coal Holdings Limited* [2021] NZSC 85) recently explored the issue of evidence of subsequent conduct in the interpretation of contracts. Generally, the role of subsequent conduct is limited. In 2018, the United Nations International Law Commission (ILC) examined in detail the use of subsequent agreements and practice in the interpretation of international treaties under art 31(3)(a) & (b) and art 32 of the Vienna Convention on the Law of Treaties (VCLT) (*70th Session – Subsequent agreements and subsequent practice in relation to the interpretation of treaties* [2018] (*ILC Subsequent Practice*)). Despite the contrast between contracts and treaties, the ILC's work can be valuable to the Supreme Court. This article explores how.

TREATIES AND CONTRACTS

Unquestionably, treaties and contracts differ. As Sir Kenneth Keith showed ("Interpreting Treaties, Statutes and Contracts" New Zealand Centre for Public Law Occasional Paper No 19. 2009 <www.wgtn.ac.nz/public-law/publications/occasional-papers/pdfs/interpreting-treaties-statues-and-contracts.pdf>) treaties are exercises of state sovereignty pursuing general goals, whilst contracts are generally expressions of free will for private purposes. Their interpretation also varies. Contracts must be interpreted at the time the parties entered into them, but treaties may also be interpreted in an evolutionary way. However, contracts and treaties create rights and obligations, which require interpretation and the interpretative processes have common grounds.

BATHURST V L & M

The Supreme Court has embraced the objective approach to contract interpretation. It said in this decision, quoting *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* (at [43]):

> … the proper approach is an objective one, the aim being to ascertain 'the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.'

The policy reasons are well known. They are, in the Supreme Court's words [at 46]:

> … the desirability of providing the certainty needed to facilitate the efficient conduct of commerce; of holding people to the bargains they make; and of supporting access to justice through the efficient and just conduct of proceedings.

The application of the objective approach may involve assessments of the parties' subsequent conduct for it can constitute evidence of the meaning of the given contract. The Supreme Court offered some examples of subsequent conduct relevant for the purpose of interpretation: mutual conduct, or non-mutual conduct particularly that which is more likely to be pertinent to a claim of estoppel.

FROM THE ILC TO THE SUPREME COURT

The ILC's work could add layers to the Supreme Court's dimensions of subsequent conduct:

1. The ILC recognises that subsequent practice does not need to be joint conduct. Parallel conduct by the parties may be enough, although it must be a sufficient common understanding as to the interpretation of the treaty. A common understanding requires mutual awareness of such understanding.

2. What if there is equivocal conduct? It will sometimes preclude the existence of an agreement, but interpreters should delve deeper into the analysis and evaluate if the treaty provision (or contract clause) accords discretion to the parties. If this is the case, what appears as equivocal conduct is not a conflict of perspectives on the content of the given provision but different exercises of the discretion the precept grants. Moreover, temporary differences of opinion do not mean that the difference is permanent and that no agreement exists.

3. The ILC also explores the issue of a difference of opinion which arises after a subsequent agreement on interpretation has been established under art 31. In the event of a common understanding based on subsequent practice, the ILC is of the view that the rejection by one party undermines the weight attached to the practice, but only after the beginning of the disagreement.

4. The ILC also deals with the weight conferred to subsequent practice in the interpretation process, a topic *Bathurst v L & M* touches upon. The ILC states that weight depends on clarity, specificity, and repetition. Furthermore, the ILC uses the expression "whether and how" the practice is repeated. The ILC finds two standards regarding repetition. One is supported by the WTO Appellate Body, which demands a concordant, common and consistent subsequent practice. A second, more flexible standard is applied by the ICJ. The ILC prefers the latter, for there is no evidence that the Appellate Body's approach is a well-established minimum threshold for a subsequent practice to be used under art 31.3(b). The Supreme Court could explore the criteria concerning weight and the standards on repetition.

5. Finally, the ILC assesses the possible effects of subsequent practices under art 31 of the VCLT. The first is to help interpreters identify the ordinary meaning of a particular term. The term might have different possible meanings with broader or narrower implications. An international court or tribunal may have preliminarily chosen one, and the use of subsequent agreements and practices under art 31 may confirm the choice made. Secondly, treaties may have a variety of objects and purposes. Additionally, there may be general objects and purposes of a treaty, but certain provisions may have also a specific object and purpose. The use of subsequent agreements and subsequent practice can help courts and tribunals clarify the object and purpose that is more relevant to the precept being interpreted. This analysis can equally apply to the assessment of the background knowledge in contract interpretation.

FROM THE SUPREME COURT TO THE ILC

Subsequent conduct contradicting the party's interpretation in judicial proceedings merits a comment. This class of non-mutual subsequent conduct was relevant in *Bathurst v L & M*. The Supreme Court assessed evidence of Bathurst's financial statements over three years acknowledging a meaning of a key word in the main contractual clause under dispute. The Court of Appeal did not assess the conduct because it was not mutual. The Supreme Court disagreed and stated (at [151]):

> The position taken by Bathurst in relation to the obligation to pay the performance payment is consistent throughout this series of documents. It is evidence that could support the inference that the meaning now argued for by Bathurst was not the meaning the parties attributed to those words at the time. … While we do not attach much weight to this evidence, it is properly regarded as corroborative of the interpretation we favour.

This kind of subsequent unilateral conduct is rarely mentioned by the ILC, though it should have been. It is not subsequent practice under art 31(3)(a) or (b) of the VCLT but could only be so under art 32, which is not the appropriate fit for this practice. International courts and tribunals routinely assess it under art 31(1).

SOME CONSTRAINTS ON THE DIALOGUE

The Supreme Court is somewhat constrained in carrying out the hypothetical dialogue with the ILC. In effect, the Supreme Court highlighted the intimate connection between the rules of evidence and the principles of contractual interpretation (at [55]):

> The approach to be taken to contractual interpretation is governed by the law of contract, but it is the law of evidence that ensures the trial court's inquiry focusses only on evidence that will materially assist in applying that test.

The pertinent provision for present purposes is s 8(1) of the Evidence Act:

> General exclusion

> (1) In any proceeding, the Judge must exclude evidence if its probative value is outweighed by the risk that the evidence will—
> (a) have an unfairly prejudicial effect on the proceeding; or
> (b) needlessly prolong the proceeding.

The Supreme Court expressed (at [64]):

> In the context of contractual interpretation, s 8(1)(b) will often be relevant to a court's task in determining admissibility. This provision addresses the policy concerns that the admission of extrinsic material will involve unnecessary expenditure of time and resources for the parties and the courts. Where the judge's assessment is that the probative value of the evidence is outweighed by the risk that it will needlessly prolong the proceeding, the evidence will be excluded …

No similar requirement to s 8(1)(b) exists in international law. Concerns for the highest efficiency in the use of court time are less pressing for international courts and tribunals, with some exceptions such as the Appellate Body of the World Trade Organization.

Another reason is that subsequent practice in treaties has a richness that can be difficult to find in contracts, though exceptions may occur. Indeed, the range of subsequent actions and omission by States in treaties is much wider than that by parties to contracts. The number of State actors involved in State practice under a treaty may also be greater than in contracts (legislative, executive, judicial acts and event private acts that can be attributed to a State). Treaties also tend to have a longer duration than contracts.

Thus, limiting the role of these practices for the purpose of treaty interpretation seems unwise, particularly for international courts and tribunals whose aim is to promote the peaceful settlement of the inter-State dispute at issue. A persuasive judgment will stand a better chance of compliance by the losing State or facilitate further negotiations to end the controversy. The full use of subsequent practices of various kinds may add to such persuasiveness, even if the assessment of the pertinent evidence prolongs the proceedings.

Unsurprisingly, the ILC is particularly generous with the acceptance of subsequent practice and its supportive evidence. Subsequent practice that does not fall under art 31 of the VCLT may still be relied upon by international courts and tribunals under art 32. As the ILC stated: "any practice in the application of the treaty that may provide indications as to how the treaty is to be interpreted may be a relevant supplementary means of interpretation under article32". (*ILC Subsequent Practice* at 33).

IN A NUTSHELL

The ILC has made an important contribution to the conceptualization of subsequent practice within the interpretation of treaties, on which the Supreme Court and other domestic courts could draw on for the interpretation of contracts.

P.S. This article is dedicated to Escilda I. Jimenez Gomez (1922 – 2022), *in memoriam.*