Brown Chester
A common law of international adjudication

Contents

Table of Cases xxi
Table of International Instruments xli
list of Abbreviations li

Introduction

I. Introduction to the Research Theme

II. Definitions and Scope
   A. On the Term 'Common Law of International Adjudication'
   B. On 'Procedure' and 'Remedies'
      1. 'Procedure' in International Adjudication
      2. 'Remedies' in International Adjudication
   C. Scope of the Book
      1. Aspects of International Adjudication
      2. Coverage of International Courts and Tribunals

III. Outline of the Book

1. The Emergence of a Common Law of International Adjudication against a Background of Proliferation and Fragmentation

   Introduction
   I. Proliferation of International Courts and Tribunals
   II. Reasons for Proliferation
   III. Proliferation and Fragmentation
      A. International Law as an "Anarchical" Domain? 23
      B. Proliferation as a Cause of Jurisdictional Competition and Fragmentation
         1. Overlapping Jurisdictions of International Courts
         2. Doctrinal Inconsistencies in the Jurisprudence of International Courts
      C. The International Law Commission's Consideration of Fragmentation

   Conclusion

2. Methods Used by International Courts and Tribunals to Engage in Cross-Fertilization

   Introduction
   I. Sources of Law relating to Procedure and Remedies
      A. Constitutive Instruments of International Courts
      B. Rules of Procedure of International Courts
C. Sources of Law when International Courts are faced with \textit{Lacunae} 40
   1. \textit{Interpretation by International Courts of their Constitutive Instruments} 41
   2. \textit{Custom, International Judicial Practice, and General Principles of Law} 53
   3. \textit{Inherent Powers} 55

II. Inherent Powers in International Adjudication 55
   A. The Concept of 'Inherent Powers' 55
   B. Arguments against the Exercise of Inherent Powers by International Courts 58
      1. \textit{The Exercise of Inherent Powers depends on Unlimited Compulsory Jurisdiction} 58
      2. \textit{International Courts can only exercise Expressly Conferred Powers} 59

III. Inherent Powers in the Practice of International Courts 60

IV. Source of Inherent Powers 66
   A. Inherent Powers are derived from General Principles of Law 67
   B. Inherent Powers are Implied Powers 69
   C. Inherent Powers are Derived from the Identity of Courts as Judicial Bodies 70
   D. Inherent Powers are Necessary to Ensure the Performance of the Functions of International Courts 71

V. Extent of the Inherent Powers of International Courts 72
   A. Functions of International Adjudication 72
   B. Limitations on the Exercise of Inherent Powers 78

Conclusion 81

3. \textbf{Aspects of Evidence in International Adjudication} 83

Introduction 83

I. Sources of Rules of Evidence in International Law 85
   A. Constitutive Instruments 86
   B. Other Sources of Evidentiary Rules in International Adjudication 88
      1. \textit{Rules of Procedure} 88
      2. \textit{General Principles of Law} 89
      3. \textit{Inherent Powers} 90

II. Evidential Issues in International Adjudication 90
   A. Admission of Evidence 90
   B. Burden of Proof 92
   C. Standard of Proof 97
   D. Conclusion 101

III. Powers of International Courts Regarding Evidence 102
   A. Judicial Notice of Facts 102
   B. Power to Order the Production of Evidence 104
C. Power to Make Site Visits
D. Power to Order Expert Reports

Conclusion

4. Power of International Courts to Grant Provisional Measures

Introduction

I. Purpose of Provisional Measures in International Adjudication
II. Source of the Power to Grant Provisional Measures
   A. Constitutive Instruments of International Courts
   B. Rules of Procedure of International Courts
   C. Power to Grant Provisional Measures as a General Principle of Law
   D. Power to Grant Provisional Measures as an Inherent Power
      1. The Power is necessary to carry out the Functions of International Courts
      2. Practice of International Courts supporting the Existence of the Power
   E. Limitations on the Power to Grant Provisional Measures

III. Common Features in the Exercise of the Power
   A. Question of Jurisdiction over the Merits
   B. Circumstances Relevant to the Granting of Provisional Measures
      1. Prevention of Irreparable Prejudice to the Rights of the Parties
      2. Urgency
      3. Other Factors
   C. Binding Quality of Provisional Measures
   D. Power to Grant Provisional Measures Ultra Petita or Proprio Motu

Conclusion

5. Power of International Courts to Interpret and Revise Judgments and Awards

Introduction

I. Post-Adjudication Role of International Courts and Tribunals
   A. Finality of Adjudication
   B. Limits to the Principle of Finality

II. Source of the Powers of Interpretation and Revision
   A. Constitutive Instruments of International Courts
      1. Power of Interpretation
      2. Power of Revision
   B. Rules of Procedure of International Courts
      1. Power of Interpretation
      2. Power of Revision

III. Powers of Interpretation and Revision as Inherent Powers
   A. Possible Objections to the Powers as Inherent Powers
IV. Issues relevant to the Exercise of the Powers of Interpretation and Revision

A. Jurisdiction of the International Court hearing the Request
B. Composition of the International Court hearing the Request
C. Scope of the Powers
D. Conditions for the Exercise of the Powers

/. Power of Interpretation
2. Power of Revision

Conclusion

6. Remedies in International Adjudication

Introduction

I. Source of the Power to Award Remedies

II. ‘Reparation’ as the Remedy in International Law

A. Generally
B. The Three Forms of Reparation
C. Agreement and Disagreement in the Law of Remedies

III. Forms of Reparation in Particular Disputes
A. Restitution
B. Compensation
   1. Compensation for Damage to the State
   2. Compensation for Injury to Private Property
   3. Compensation for Personal Injury
C. Declaratory Judgments
D. Mandatory or Consequential Orders
   1. An available remedy in International Adjudication?
   2. Practice of International Courts making such Orders

IV. Remedies in WTO Dispute Settlement
A. WTO Remedies as Lex Specialis
B. Influence of Reparation in WTO Dispute Settlement

Conclusion

7. A Common Law of International Adjudication:

Reasons and Limitations

Introduction

I. Reasons for the Emerging Common Law of International Adjudication
IL Limitations to the Development of a Common Law of International Adjudication

Conclusion

8. Implications of a Common Law of International Adjudication

Introduction

I. Practical Implications

A. Generally

B. Practical Implications with respect to Problems posed by Proliferation

1. Power of Summary Dismissal

2. Power to Suspend Proceedings

3. Power to Enjoin Parties from pursuing Parallel Proceedings

C. Conclusion

II. Theoretical Implications

Conclusion

Bibliography

Index