

Contents

<i>Table of Cases</i>	xxi
<i>Table of International Instruments</i>	xli
<i>List of Abbreviations</i>	li
Introduction	1
I. Introduction to the Research Theme	1
II. Definitions and Scope	4
A. On the Term 'Common Law of International Adjudication'	4
B. On 'Procedure' and 'Remedies'	6
1. <i>'Procedure' in International Adjudication</i>	7
2. <i>'Remedies' in International Adjudication</i>	9
C. Scope of the Book	9
1. <i>Aspects of International Adjudication</i>	9
2. <i>Coverage of International Courts and Tribunals</i>	10
III. Outline of the Book	12
1. The Emergence of a Common Law of International Adjudication against a Background of Proliferation and Fragmentation	15
Introduction	15
I. Proliferation of International Courts and Tribunals	17
II. Reasons for Proliferation	22
III. Proliferation and Fragmentation	23
A. International Law as an 'Anarchical' Domain?	23
B. Proliferation as a Cause of Jurisdictional Competition and Fragmentation	25
1. <i>Overlapping Jurisdictions of International Courts</i>	28
2. <i>Doctrinal Inconsistencies in the Jurisprudence of International Courts</i>	29
C. The International Law Commission's Consideration of Fragmentation	32
Conclusion	33
2. Methods Used by International Courts and Tribunals to Engage in Cross-Fertilization	35
Introduction	36
I. Sources of Law relating to Procedure and Remedies	36
A. Constitutive Instruments of International Courts	37
B. Rules of Procedure of International Courts	38

C. Sources of Law when International Courts are faced with <i>Lacunae</i>	40
1. <i>Interpretation by International Courts of their Constitutive Instruments</i>	41
2. <i>Custom, International Judicial Practice, and General Principles of Law</i>	53
3. <i>Inherent Powers</i>	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. <i>The Exercise of Inherent Powers depends on Unlimited Compulsory Jurisdiction</i>	58
2. <i>International Courts can only exercise Expressly Conferred Powers</i>	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. 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. <i>Rules of Procedure</i>	88
2. <i>General Principles of Law</i>	89
3. <i>Inherent Powers</i>	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	111
D. Power to Order Expert Reports	112
Conclusion	118
4. Power of International Courts to Grant Provisional Measures	119
Introduction	119
I. Purpose of Provisional Measures in International Adjudication	121
II. Source of the Power to Grant Provisional Measures	123
A. Constitutive Instruments of International Courts	123
B. Rules of Procedure of International Courts	125
C. Power to Grant Provisional Measures as a General Principle of Law	126
D. Power to Grant Provisional Measures as an Inherent Power	127
1. <i>The Power is necessary to carry out the Functions of International Courts</i>	128
2. <i>Practice of International Courts supporting the Existence of the Power</i>	130
E. Limitations on the Power to Grant Provisional Measures	133
III. Common Features in the Exercise of the Power	135
A. Question of Jurisdiction over the Merits	136
B. Circumstances Relevant to the Granting of Provisional Measures	139
1. <i>Prevention of Irreparable Prejudice to the Rights of the Parties</i>	139
2. <i>Urgency</i>	142
3. <i>Other Factors</i>	145
C. Binding Quality of Provisional Measures	146
D. Power to Grant Provisional Measures <i>Ultra Petita</i> or <i>Proprio Motu</i>	150
Conclusion	151
5. Power of International Courts to Interpret and Revise Judgments and Awards	152
Introduction	153
I. Post-Adjudication Role of International Courts and Tribunals	153
A. Finality of Adjudication	153
B. Limits to the Principle of Finality	156
II. Source of the Powers of Interpretation and Revision	158
A. Constitutive Instruments of International Courts	158
1. <i>Power of Interpretation</i>	158
2. <i>Power of Revision</i>	159
B. Rules of Procedure of International Courts	160
1. <i>Power of Interpretation</i>	160
2. <i>Power of Revision</i>	161
III. Powers of Interpretation and Revision as Inherent Powers	161
A. Possible Objections to the Powers as Inherent Powers	161

B. Practice of International Courts supporting the Existence of the Powers	165
1. <i>Power of Interpretation</i>	165
2. <i>Power of Revision</i>	166
C. Exercise of Post-Adjudication Powers in WTO Dispute Settlement	171
D. Conclusion	173
IV. Issues relevant to the Exercise of the Powers of Interpretation and Revision	173
A. Jurisdiction of the International Court hearing the Request	175
B. Composition of the International Court hearing the Request	176
C. Scope of the Powers	177
D. Conditions for the Exercise of the Powers	178
1. <i>Power of Interpretation</i>	178
2. <i>Power of Revision</i>	179
Conclusion	183
6. Remedies in International Adjudication	185
Introduction	185
I. Source of the Power to Award Remedies	187
II. 'Reparation' as the Remedy in International Law	190
A. Generally	190
B. The Three Forms of Reparation	190
C. Agreement and Disagreement in the Law of Remedies	192
III. Forms of Reparation in Particular Disputes	195
A. Restitution	195
B. Compensation	198
1. <i>Compensation for Damage to the State</i>	199
2. <i>Compensation for Injury to Private Property</i>	200
3. <i>Compensation for Personal Injury</i>	206
C. Declaratory Judgments	208
D. Mandatory or Consequential Orders	209
1. <i>An available remedy in International Adjudication?</i>	209
2. <i>Practice of International Courts making such Orders</i>	212
IV. Remedies in WTO Dispute Settlement	216
A. WTO Remedies as <i>Lex Specialis</i>	217
B. Influence of Reparation in WTO Dispute Settlement	220
Conclusion	223
7. A Common Law of International Adjudication:	
Reasons and Limitations	225
Introduction	225
I. Reasons for the Emerging Common Law of International Adjudication	226

II. Limitations to the Development of a Common Law of International Adjudication	234
Conclusion	237
8. Implications of a Common Law of International Adjudication	238
Introduction	238
I. Practical Implications	239
A. Generally	239
B. Practical Implications with respect to Problems posed by Proliferation	240
1. <i>Power of Summary Dismissal</i>	242
2. <i>Power to Suspend Proceedings</i>	250
3. <i>Power to Enjoin Parties from pursuing Parallel Proceedings</i>	252
C. Conclusion	255
II. Theoretical Implications	255
Conclusion	258
Conclusion	260
<i>Bibliography</i>	263
<i>Index</i>	295