CONTENTS

JUSTICIA

HYBRID COURTS AS AN INSTITUTE OF TRANSITIONAL JUSTICE

Oleksandr Yevsieiev

This article examines a new phenomenon in international criminal justice, namely so-called hybrid or internationalized courts, in which foreign judges participate along with national judges. The nature of hybrid courts is underlined as one of the elements of transitional justice that is supported by the United Nations in the interest of countries that are just gaining their statehood or are rebounding after civil wars. The example of specific hybrid judicial institutions reveals the question of the quantitative composition of such courts and countries that most often delegate their representatives to such structures. The advantages and disadvantages of such courts are analyzed and problems are identified that are related to the definition of the law to be applied. In particular, three options are possible: firstly, the procedural rules of hybrid courts are derived from the national system of the country in question; secondly, these rules are derived from the workings of an international tribunal; and thirdly, the rules are derived from legislation that is specially passed for the purpose of a they hybrid tribunal. Particular attention is paid to the difficulties of the psychological and socio-cultural nature that arise when foreign judges work in an alien professional environment. The problem of revising the decisions of hybrid courts is touched upon, and a conclusion is made about the extremely meager procedural resources available for this revision. The possibility of using a hybrid approach in constitutional justice is considered, using Bosnia and Herzegovina and Ukraine as examples. Emphasis is placed on some of the problems that arise in the selection of judges in designated international tribunals.

Keywords: transitional justice; hybrid courts; war crimes; genocide; international tribunals; selection of international judges.

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THE SPECIFIC ISSUES OF RENDERING PROVISIONAL (PRELIMINARY) MEASURES IN THE COURT OF ARBITRATION FOR SPORT IN LAUSANNE

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This article analyzes the specificity of granting provisional measures within proceedings in the Court of Arbitration for Sport in Lausanne (CAS/TAS). The research on this topic has barely been covered in Russian legal science. The article examines the bodies authorized for ordering provisional measures and, in particular, the recently adopted restrictions to the competence of state courts to grant preliminary measures within ordinary and appellant proceedings. The article also provides analysis of the timeline (even before arbitral panel has been formed), prerequisites and conditions for such measures, the cumulative application of these conditions, the uniformity (and more likely lack of uniformity) in practice of application of these conditions, and tendencies of their changing and evolution. The prerequisites for provisional measures applicable the CAS/TAS are as follows: 1. Whether possible harm is irreparable; 2. Whether the positive outcome is probable; 3. Whether the interest of the claimant overwhelms the interests of the respondent to leave the status quo. The article analyzes the practical application of these prerequisites. The article examines types (untypical for international commercial and international investment arbitration), terms, and borders of provisional measures, and also cases when provisional measure is the same as the main relief sought (which raises several procedural risks). The author examines whether provisional measures rendered by CAS may be subject to annulment (and whether there are some exceptions from a general rule), and gives a review of crucial issues regarding their enforcement: either voluntary or through sports organizations. While enforcement through state courts is also theoretically possible, in practice one may face different complications depending on the particular legal system. The article reviews the recent provisional measures requested, declined, and ordered during the 2016 Olympic Games in Rio de Janeiro, and offers reasons for refusal to grant them in favor of Russian sportsmen.

Keywords: Court of Arbitration for Sport; Lausanne; CAS/TAS; provisional measures; preliminary measures; sports disputes; Swiss law.

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JUS COMMUNE

COMPETENCE OF THE EURASIAN ECONOMIC UNION COURT: MYTHS AND REALITIES

Ekaterina Diyachenko, Kirill Entin

In the less than three years of its existence, the Eurasian Economic Union Court has been surrounded by numerous myths due to the significant changes in the Court's statute in comparison to the EurAsEC Court. This in turn has led many researchers to question whether the Court actually possesses the necessary instruments to fulfill its mission and ensure the uniform interpretation and application of EAEU law. This issue is all the more important, because in the European Union the Court of Justice has played one of the leading roles in the development of European integration. Taking into account the numerous restrictions on the competence of the EAEU Court in the Court's Statute, one might be tempted to answer in the negative. However, as the case law of the EAEU Court shows, not all the alleged restrictions prove to be real obstacles. In the present article the authors seek, on the one hand, to dispel some of the myths surrounding the competence of the EAEU Court and, on the other hand, to provide an in-depth analysis of the real problems and restrictions the Court is facing and to suggest possible ways of overcoming them.

Keywords: Court of the Eurasian Economic Union; Eurasian integration; EAEU; Russian civil procedural law; Court of Justice of the European Union.

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LEX MERCATORIA

EVIDENCE GETTING AND PRESENTING IN INTERNATIONAL CIVIL PROCEDURE (PARTICULAR THEORETIC AND PRACTICAL PROBLEMS)

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This article offers an analysis of the issues of taking evidence in transnational civil procedure. The research methodology is based on the use of comparative legal analysis. The normative base of the research includes international legal acts, Russian and foreign national legislation, and case law of foreign courts. The authors emphasize that the main difficulties in the resolution of transnational disputes result from the use of different pleading models, different aspects of evaluating evidence (as substantive or procedural categories), and the absence of a universally recognized and mandatory tool of taking evidence in a foreign jurisdiction. The legislation and case law of common law countries provide for provisions on the possibility of using foreign evidence law and conflict rules determining the law applicable to evidence. In civil law systems there is a common rule that procedural matters are resolved in accordance with lex fori, with a developed system of procedural conflict rules. When there is a need to obtain evidence in a foreign jurisdiction, there are two modern ways to do it: 1) using the tools of legal assistance provided for by international agreements (whether global or regional); or, 2) taking evidence directly from a foreign participant, for example by not sending an official request to a court of a State where the evidence and/or information are being held. The first way is the optimal way, but its effectiveness is diminished because of a limited number of members of relevant international treaties. Probably the best methodology in the current situation would be the use of lex merca-

toria tools, in particular, the ALI/UNIDROIT Principles of Transnational Civil Procedure.

Keywords: transnational civil procedure; evidence; burden of proof; model of pleading; relevance and admissibility of evidence; procedural conflict rules; taking evidence in a foreign jurisdiction.

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PRELIMINARY RULING AS AN INSTRUMENT OF RESPONDENT TO LIMIT THE JURISDICTION OF WTO PANEL

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This article deals with the issue of limiting a panel's jurisdiction by means of a preliminary ruling within the World Trade Organization's dispute settlement system. The analysis is based on appellate court jurisprudence concerning the issuance of preliminary rulings. The authors of this article come to the conclusion that, despite the absence of specific provisions in the Dispute Settlement Understanding (DSU) pertaining to preliminary rulings, panels have powers to issue preliminary rulings in relation to the scope of the panel's jurisdiction. Preliminary rulings can be seen as a procedural means for the defendant to defend his interests. To use it properly, the defendant should show that the panel request of the complainant does not meet the criteria of Article 6.2. of the DSU, according to which a panel request must identify the specific measures at issue and provide a brief summary of the legal basis of the complainant. The authors conclude that the defendant has the right to request that the panel exclude the complainant's claims as not satisfying such criteria from the scope of the panel's jurisdiction. Therefore, the defendant may reach a panel's rejection of some or all claims of the complaint even before addressing the merits of the case. This comprises the respondent's defensive concept and may be executed through a preliminary ruling. The paper contains an analysis of (1) the "scope of jurisdiction of the panel", (2) the criteria that the complainant's panel request should satisfy, and (3) possible arguments that the respondent may submit to the panel explaining why the request of the complainant does not satisfy these criteria and that therefore the panel's jurisdiction should be limited by issuing a preliminary ruling.

Keywords: preliminary ruling; WTO Dispute Settlement Body; Appellate Body; Dispute Settlement Understanding; jurisdiction of the panel.

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ACADEMIA

CONVENTUS ACADEMICI

EXPERT DISCUSSION REGARDING THE ORDER OF THE INTERNATIONAL COURT OF JUSTICE ON THE APPLICATION OF PROVISIONAL MEASURES IN THE CASE OF *UKRAINE V. RUSSIA*

On May 25, 2017, an expert discussion was held at the Faculty of Law of the Higher School of Economics that centered on the Order of the International Court of Justice from April 19, 2017 imposing provisional measures in the case of Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of all Forms of Racial Discrimination (Ukraine v. Russia). This summary was prepared based on materials from the expert discussion and includes the presentations of six speakers. The Order from April 19, 2017, was considered in the general context of the scientific discussion of problems connected to the International Court of Justice's applying provisional measures. Among those noted were the loss of this procedural instrument's exclusive character, the complexity of establishing the accountability of the state for not implementing provisional measures, the unsatisfactory situation of cases with execution of such orders, and also difficulties that the International Court of Justice runs into as it searches for a balance between discretion and caution in making decisions on applying provisional measures in each specific case. In the center of the following line of discussion is the question of the contents of provisional measures ordered by the International Court of Justice, and possible approaches to interpreting their scope. The discussion also identified the problem of executing the Order's measures regarding the Mejlis of the Crimean Tatar People, which was recognized by the Russian Federation as an extremist organization and whose operations have been banned. The discussion concluded with a perspective on the International Court of Justice's further consideration of the case of Ukraine v. Russia as it pertains to applying the International Convention for the Suppression of the Financing of Terrorism.

Keywords: provisional measures; International Court of Justice; executing judicial decisions; review of judicial decisions; International Convention for the Suppression of the Financing of Terrorism.