



Universiteit
Leiden
The Netherlands

East African Community Law: Institutional, Substantive and Comparative EU Aspects

Ugirashebuja, E.; Ruhangisa, J.E.; Ottervanger, T.R.; Cuyvers, A.

Citation

Ugirashebuja, E., Ruhangisa, J. E., Ottervanger, T. R., & Cuyvers, A. (2017). *East African Community Law: Institutional, Substantive and Comparative EU Aspects*. Leiden Boston: Brill Nijhoff.
doi:10.1163/9789004322073

Version: Publisher's Version

License: [Creative Commons CC BY-NC 4.0 license](https://creativecommons.org/licenses/by-nc/4.0/)

Downloaded from: <https://hdl.handle.net/1887/58822>

Note: To cite this publication please use the final published version (if applicable).

East African Community Law

The Editors are grateful to Allen & Overy LLP, the European Union and the Europa Institute of the University of Leiden for making Open Access publication of this book possible.

ALLEN & OVERY



Universiteit
Leiden
Europa Institute

This is an open access title distributed under the terms of the Creative Commons Attribution-Noncommercial 4.0 Unported License (CC-BY-NC), which permits any non-commercial use, distribution, and reproduction in any medium, provided the original author(s) and sources are credited.

East African Community Law

Institutional, Substantive and Comparative EU Aspects

Edited by

Emmanuel Ugirashebuja

John Eudes Ruhangisa

Tom Ottervanger

Armin Cuyvers



BRILL
NIJHOFF

LEIDEN | BOSTON



Copyright 2017 by Emmanuel Ugirashebuja, John Eudes Ruhangisa, Tom Ottervanger, and Armin Cuyvers

Library of Congress Cataloging-in-Publication Data

Names: Ugirashebuja, Emmanuel, editor.

Title: East African Community law : institutional, substantive and comparative EU aspects / Edited by Emmanuel Ugirashebuja, John Eudes Ruhangisa, Tom Ottervanger, Armin Cuyvers.

Description: Leiden : Brill Nijhoff, 2017. | Includes bibliographical references and index.

Identifiers: LCCN 2017000988 (print) | LCCN 2017001613 (ebook) | ISBN 9789004322066 (hardback : alk. paper) | ISBN 9789004322073 (E-book)

Subjects: LCSH: Law—East African Community. | Law—European Union countries. | International and municipal law—East African Community. | Law—International unification. | Comparative law.

Classification: LCC KQC117 .E27 2017 (print) | LCC KQC117 (ebook) | DDC 349.2676—dc23

LC record available at <https://lcn.loc.gov/2017000988>

Typeface for the Latin, Greek, and Cyrillic scripts: "Brill". See and download: brill.com/brill-typeface.

ISBN 978-90-04-32206-6 (hardback)

ISBN 978-90-04-32207-3 (e-book)

Koninklijke Brill NV incorporates the imprints Brill, Brill Hes & De Graaf, Brill Nijhoff, Brill Rodopi and Hotei Publishing.

All rights reserved. No part of this publication may be reproduced, translated, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without prior written permission from the publisher.

Authorization to photocopy items for internal or personal use is granted by Koninklijke Brill NV provided that the appropriate fees are paid directly to The Copyright Clearance Center, 222 Rosewood Drive, Suite 910, Danvers, MA 01923, USA. Fees are subject to change.

This book is printed on acid-free paper and produced in a sustainable manner.

Contents

Preface IX

Notes on Contributors XI

- 1 The Road to East African Integration 1
Wanyama Masinde and Christopher Otieno Omolo
- 1A The Road to European Integration 22
Armin Cuyvers
- 2 The Institutional Framework of the EAC 43
Wilbert T.K. Kaahwa
- 2A The Institutional Framework of the EU 79
Armin Cuyvers
- 3 The Legal Framework of the EAC 103
Elvis Mbembe Binda
- 3A The Legal Framework of the EU 119
Armin Cuyvers
- 4 The Scope, Nature and Effect of EAC Law 139
John Eudes Ruhangisa
- 4A The Scope, Nature and Effect of EU Law 161
Armin Cuyvers
- 5 External Relations and the EAC 182
Leonard Obura Aloo
- 5A External Relations and the EU 196
Armin Cuyvers
- 6 General Principles Governing EAC Integration 202
Khosi Chilomba Kamanga and Ally Possi
- 6A General Principles of EU Law 217
Armin Cuyvers

- 7 Judicial Protection under EAC Law: Direct Actions 229**
John Eudes Ruhangisa
- 7A Judicial Protection under EU Law: Direct Actions 254**
Armin Cuyvers
- 8 Preliminary References under EAC Law 265**
Emmanuel Ugirashebuja
- 8A Preliminary References under EU Law 275**
Armin Cuyvers
- 9 The EAC Common Market 285**
Kennedy Gastorn and Wanyama Masinde
- 9A The EU Common Market 293**
Armin Cuyvers
- 10 Free Movement of Goods in the EAC 303**
Leonard Obura Aloo
- 10A Free Movement of Goods in the EU 326**
Armin Cuyvers
- 11 Free Movement of Workers in the EAC 345**
Caroline Kago and Wanyama Masinde
- 11A Free Movement of Persons in the EU 354**
Armin Cuyvers
- 12 Freedom of Establishment and the Freedom to Provide Services in the EAC 365**
Kennedy Gastorn
- 12A Freedom of Establishment and the Freedom to Provide Services in the EU 376**
Armin Cuyvers

13	Free Movement of Capital and East African Monetary Union	392
	<i>Elvis Mbembe Binda</i>	
13A	Free Movement of Capital and Economic and Monetary Union in the EU	410
	<i>Armin Cuyvers</i>	
14	EAC Competition Law	433
	<i>Joyce Karanja-Ng'ang'a</i>	
14A	EU Competition Law	454
	<i>Pieter Van Cleynenbreugel</i>	
15	Judicial Enforcement and Implementation of EAC Law	467
	<i>James Otieno-Odek</i>	
16	Harmonization in the EAC	486
	<i>Aleem Tharani</i>	
	Bibliography	501
	Index	536

Preface

The East African Community (EAC) is a regional intergovernmental and supranational organization currently comprising the Republics of Burundi, Kenya, Rwanda, South Sudan, the United Republic of Tanzania, and the Republic of Uganda. Established in 2000, the EAC aims at widening and deepening co-operation among its Partner States in, among others, political, economic and social fields.

The organization has established a Customs Union (2005) and a Common Market (2010), and is in the process of establishing a Monetary Union. Its ultimate objective is to establish a complete political (con)federation. It emphasizes strong participation of the private sector and civil society. The accomplishment of these objectives requires an elaborate and functionally-purposed institutional framework.

The EAC aims at far deeper integration than envisioned by its predecessor, whilst simultaneously avoiding the mistakes that led to the failure of previous attempts at East African integration. Important safeguards include a gradual approach to integration and guarantees to ensure an equitable division of the benefits of integration.

There is a general consensus that the European Union (EU) was an important source of inspiration and provided a normative model for the EAC. Indeed the EAC Treaty and the Protocols have adopted and adapted significant parts of the EU's institutional and legal framework. The normative appeal of the EU in this regard can also be readily understood. Despite all the past *and* present failures and challenges facing the EU, no objective observer can deny the benefits of European integration in terms of peace, stability and prosperity. What started 60 years ago as a Community between six Member States in a Europe destroyed by two world wars has now developed into the most peaceful and prosperous block in the world.

Consequently, there are lessons to be learned from the European experience, including the crucial role of the law and of lawyers in the process of integration, be they judges, lawmakers, civil servants, academics or practitioners. The law is one of the most powerful and indispensable instruments to achieve true integration, as effective integration requires some form of supranational legal system. That is what we mean by "Integration through law". Awareness of the possibilities the law offers, therefore, is extremely important for any form of regional integration.

The main challenges facing the EAC today in this regard are how to safeguard the quality of the increasing body of Community law, how to monitor compliance, and how to make EAC law binding and enforceable within national legal systems. All of these are challenges that the EU has faced in the past and is still facing, and where both the success and the failures of the EU may be of comparative use to the EAC, certainly considering the many similarities in the institutional and legal framework of both and the similarities of the challenges faced.

The main purpose of this book, initiated by the Leiden Centre for the Comparative Study of EAC law (LEAC) in close cooperation with Hon. Justice Dr Ugirashebuja, the current President of the East African Court of Justice, is to be a source of information and education for all those involved in shaping, improving and studying integration in the EAC. By comparing each aspect of both institutional and substantive EAC law with its nearest counterpart EU law, we hope to have created a vital tool to better understand and move forward the integration process in East Africa.

Considering these aims, we are proud that, thanks to the generous support of the law firm Allen & Overy LLP, the European Union and the Europa Institute of the University of Leiden, this book will not just be available in printed form but will also be freely available online via a completely Open Access agreement with Brill Publishers.

We have been fortunate to find excellent authors from the different EAC Partner States, all leading experts in their respective fields, enabling us to cover all legal aspects of the EAC. We are very grateful for their wonderful contributions and constructive participation in this ambitious project. In addition, we have greatly benefitted from the excellent research and editorial assistance provided by Ties Boonzajer Flaes, Louise O'Callaghan, Brenden Fourie, Timothy Kawira, Carlota de Paula Coelho, and Merel Valk, as research assistants of the LEAC. We are much indebted to them for, among other things, ensuring consistency between the chapters. As always, however, responsibility for the final product remains with the authors and editors.

Emmanuel Ugirashebuja

John Eudes Ruhangisa

Tom Ottervanger

Armin Cuyvers

November, 2016

Notes on Contributors

Leonard Obura Aloo

Lecturer, School of Law, University of Nairobi; Legal Practitioner, Mwaura & Wachira Advocates, Nairobi, Kenya.

Elvis Mbembe Binda

The author is a trained lawyer and a lecturer at the School of Law of the University of Rwanda where he teaches i.a Economic and Financial Law with an emphasis on the EAC regional economic integration. He obtained a PhD at the University of Utrecht and is President of the Initiative for Peace and Human Rights (IPHR).

Armin Cuyvers

Assistant professor of EU law at the Europa Institute of Leiden University; Co-Director of the Leiden Center for East African Community Law (LEAC); PhD, Leiden; Mjur Oxford; Visiting Fellow “European Political Strategy Centre” of the European Commission (Brussels).

Kennedy Gastorn

Secretary General of the Asian-African Legal Consultative Organization (AALCO). The author was previously a Professor at the University of Dar es Salaam where he headed the Department of Public Law of the School of Law. The views expressed are purely those of the author and may not in any circumstances be regarded as stating an official position of the AALCO.

Wilbert T.K. Kaahwa

Former Counsel to the East African Community (July 2000-January 2015). He now works as the Director and Lead Consultant for M/s Attune Interlink Consultants Limited in which capacity he has been engaged as Senior Legal Consultant at the African Development Bank (Abidjan, Cote d’Ivoire), as Legal Advisor by M/s SAI Consulting Engineers Pvt Limited (Ahmedabad, India) and M/s Carelink Uganda Limited (Kampala, Uganda).

Caroline Kago

Chairperson Department of Private Law, Kenyatta University School of Law, Nairobi, Kenya, Advocate of the High Court of Kenya. The Author is a PHD Candidate at the University of the Witwatersrand, and holds an LL.M from the University of Western Cape, South Africa, and an LL.B University of Nairobi.

Khoti Chilomba Kamanga

Associate Professor, Department of Public Law, University of Dar es Salaam. Ph.D., Patrice Lumumba University (Moscow), LL.M. in European Union Law, University of Amsterdam.

Joyce Karanja- Ng'ang'a

Partner and Head of Competition, Bowmans Kenya, Advocate of the High Court of Kenya, member: Law Society of Kenya, International Bar Association. Author: Mergers and Acquisitions Review, Kenya Chapter (2015), The African and Middle Eastern Antitrust Review 2014: Kenya Issues and Challenges in Competition, The COMESA Merger Assessment Guidelines, 2014 explained; The American Bar Association: Essentials of Merger Review (2011,2012), Nature of Law: Broadcasting Regulations (2010), Reform of Kenyan Company Law (2011).

Wanyama Masinde

Director of the Centre for Regional Integration, Founding Director of the Institute for Regional Integration and Development (IRID) at the Catholic University of Eastern Africa, Nairobi, Kenya. The author also served as a Regional Integration Policy and Strategy Advisor to the Government of Kenya, is a Visiting Professor at several academic institutions in Africa, including the UN Africa Institute for Economic Planning & Development.

James Otieno-Odek

Judge of the Court of Appeal and Director of the Judiciary Training Institute of the Republic of Kenya. He is also an Associate Professor of Law at the University of Nairobi. The views expressed are purely those of the author and may not in any circumstances be regarded as stating the position of the Judiciary Kenya or the University of Nairobi.

Christopher Otieno Omolo

Lecturer at the Institute for Regional Integration and Development (IRID) at the Catholic University of Eastern Africa (CUEA), Nairobi, Kenya; Coordinator of the IRID Master of Arts program in Regional Integration. The author holds a Master of Public Policy (specializing in European Public Policy and International Affairs and Development) from the Willy Brandt School of Public Policy at the University of Erfurt, Germany, and a B.A. from the University of Zimbabwe.

Tom Ottervanger

Of Counsel and former Partner at the law firm Allen & Overy LLP (Brussels/Amsterdam); Professor of European and Competition law at the Europa Institute of Leiden University; Chair of the Leiden Center for East African Community Law (LEAC); Visiting Professor LUISS University, Rome; deputy-Justice at the Court of Appeal in The Hague.

Ally Possi

The author (LLB (Mzumbe), LLM Cape Town) is an advocate of the High Court and a lecturer at the Law School of Tanzania. He has a PhD from the University of Pretoria. The major area of his research concerns human rights and aspects of international courts.

John Eudes Ruhangisa

Judge of the High Court of Tanzania; Founding Registrar of the East African Court of Justice 2001-2014; former professor of law at Tumaini-Makumira University, Tanzania, Visiting Professor at i.a Pretoria University (South Africa), Tanzania-German Centre for Postgraduate Studies in Law (TGCL) (Dar es Salaam), Catholic University (CUEA) (Nairobi). He has written extensively on human rights, constitutional law, environmental law, regional integration. PhD in law from the University of London (SOAS). The views expressed are purely those of the author and may not in any circumstances be regarded as stating the position of the Tanzanian judiciary.

Aleem Tharani

Partner in the Corporate and Commercial Department of Anjarwalla & Khanna, specialized in energy, natural resources and infrastructure project development and finance. The author *inter alia* holds a Postgraduate Diploma in Law from the Kenya School of Law (2006), a Diploma in Legal Practice (Dist.) from Nottingham Law School, UK (2006) and an LL.B (Hons.), from the Victoria University of Manchester, UK (2005).

Emmanuel Ugirashebuja

President of the East African Court of Justice, previously *inter alia* Dean of the Law School, University of Rwanda (2009–2014); former Member of the Superior Council of Judiciary (2009–2014); Member of the Supreme Council of prosecution (2009–2014); and Senior Lecturer at the National University of Rwanda. The author holds a PhD and an LLM in Law from the University of Edinburgh, and an LL.B. From the University of Rwanda.

Pieter Van Cleynenbreugel

The author (Ph.D., KU Leuven, LL.M, Harvard) is Professor of European Union law at the University of Liège, Belgium, where he also presides the Institut d'Etudes Juridiques Européennes. Previously, assistant professor at the Europa Institute, Leiden University. His research focuses on the public and private enforcement of competition law and on EU administrative law.