

THE PUBLIC-PRIVATE
PARTNERSHIP
LAW REVIEW

SIXTH EDITION

Editors

André Luiz Freire, Thiago Luís Santos Sombra
and Raul Dias dos Santos Neto

THE LAWREVIEWS

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CONTENTS

PREFACE.....	vii
<i>André Luiz Freire, Thiago Luís Santos Sombra and Raul Dias dos Santos Neto</i>	
Chapter 1	ARGENTINA..... 1
	<i>María Inés Corrá and Magdalena Carbó</i>
Chapter 2	AUSTRALIA..... 10
	<i>Andrew Griffiths, Nicholas Carney and Aggie Goss</i>
Chapter 3	BELGIUM 20
	<i>Christel Van den Eynden, Frank Judo, Jan Vreys, Maurits Arnauw and Klaas Goethals</i>
Chapter 4	BRAZIL..... 35
	<i>André Luiz Freire, Thiago Luís Santos Sombra and Raul Dias dos Santos Neto</i>
Chapter 5	CHINA..... 48
	<i>Jihong Wang and Hongwei Tang</i>
Chapter 6	FRANCE..... 58
	<i>François-Guilhem Vaissier, Louis-Jérôme Laisney, Olivier Le Bars, Diane Houriez and Sacha Ruffié</i>
Chapter 7	GERMANY..... 78
	<i>Jan Bonhage and Marc Roberts</i>
Chapter 8	JAPAN..... 91
	<i>Kiyomi Kikuchi and Kazuyuki Wakasa</i>
Chapter 9	KOREA 104
	<i>Soongki Yi, Joon Man Shim and James Jin Chung</i>
Chapter 10	KUWAIT..... 112
	<i>Ibrahim Sattout and Akusa Batwala</i>

Contents

Chapter 11	LEBANON	128
	<i>Hadi Melki</i>	
Chapter 12	MEXICO	137
	<i>Alejandro Rojas V and David Malagón L</i>	
Chapter 13	NIGERIA.....	148
	<i>Fred Onuobia and Okechukwu J Okoro</i>	
Chapter 14	PORTUGAL.....	159
	<i>Manuel Protásio and Catarina Coimbra</i>	
Chapter 15	RUSSIA	171
	<i>Olga Revzina, Roman Churakov and Lola Shamirzayeva</i>	
Chapter 16	SENEGAL.....	184
	<i>Khaled Abou El Houda</i>	
Chapter 17	SERBIA	192
	<i>Jelena Gazivoda</i>	
Chapter 18	SPAIN.....	207
	<i>Manuel Vélez Fraga and Ana María Sabiote Ortiz</i>	
Chapter 19	TAIWAN	220
	<i>Pauline Wang and Yung-Ching Huang</i>	
Chapter 20	TANZANIA.....	232
	<i>Nicholas Zervos</i>	
Chapter 21	THAILAND	241
	<i>Weerawong Chittmitrapap and Jirapat Thammavaranucpt</i>	
Chapter 22	UNITED KINGDOM	252
	<i>Mark Richards, Katherine Calder and Alexander Hadrill</i>	
Chapter 23	UNITED STATES	275
	<i>Dolly Mirchandani and Armando Rivera Jacobo</i>	
Chapter 24	VIETNAM.....	285
	<i>Kazuhide Ohya, Vu Le Bang and Nguyen Van Trang</i>	

Contents

Appendix 1	ABOUT THE AUTHORS.....	299
Appendix 2	CONTRIBUTORS' CONTACT DETAILS.....	317

PREFACE

We are pleased to present the sixth edition of *The Public-Private Partnership Law Review*.

Public-private partnerships (PPPs) are increasingly becoming a solution to a gap in public investment that derives from natural budgetary constraints all over the world. Therefore, combining private and public efforts by means of a long-term contract becomes essential for tackling infrastructure matters that require massive investment for upgrading and expanding services' networks.

PPP contracts are a way of delegating the provision of public services and utilities to the private sector. Such practice induces effectiveness by bringing private sector solutions, technologies and investments, without excluding public sector oversight.

The formation of well-adjusted PPP contracts is no simple task, as they are marked by substantial complexity. In a single contract there are elements revolving around engineering, construction, financing, legal and regulatory aspects that must be addressed for the success of a given PPP.

A comparative study comprising practical aspects and different perspectives and viewpoints on PPP issues serves to spread knowledge of this contractual model around the world in the hope of consolidating a relevant benchmark worldwide. For instance, the United Kingdom is known as one of the pioneers regarding the use of PPPs and has structured projects ranging from telecom, power (electricity and gas), water and waste, and logistics (airports and railways). This experience, as well as the experience of other countries, certainly may serve as useful guidelines for the implementation of PPP projects

Therefore the purpose of this edition is to clarify and explain legal and other practical aspects involved in the formation of PPP contracts for disseminating best practices used by private professionals and governmental entities that rely on PPP projects for the provision of key infrastructure and public services and utilities. A comparative study is always useful for anyone who wants to know more about some phenomenon, and this edition will help those interested in PPPs.

The sixth edition brings chapters regarding PPP practices prepared by distinguished law firms from countries such as Argentina, Australia, Belgium, Brazil, China, France, Germany, Japan, Korea, Kuwait, Lebanon, Mexico, Nigeria, Portugal, Russia, Senegal, Serbia, Spain, Taiwan, Tanzania, Thailand, the United Kingdom, the United States and Vietnam.

We hope you enjoy this sixth edition and that it serves as a definitive and comprehensive guide for topics related to PPPs.

André Luiz Freire, Thiago Luís Santos Sombra and Raul Dias dos Santos Neto

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São Paulo

March 2020

TANZANIA

*Nicholas Zervos*¹

I OVERVIEW

The Tanzanian legal system has evolved largely on the basis of English common law because of British presence in the country from 1919 until independence in 1961. In Zanzibar, the legal system has evolved from both English common law and Islamic law. The legal framework in Tanzania comprises statutes, rules and regulations enacted by Parliament as well as those formulated by other statutory and professional bodies. The Constitution is the fundamental law prevailing over all other legislation and includes a Bill of Rights.

The government of Tanzania published a National PPP Policy in 2009 that recognises the role of the private sector to bring about socio-economic development through investments and to ensure efficiency, effectiveness, accountability, quality and outreach of services.

The projects relevant for PPPs are in 'productive and social sectors' including but not limited to the following sectors:

- a* agriculture;
- b* infrastructure;
- c* industry and manufacturing;
- d* exploration and mining;
- e* education;
- f* health;
- g* environment and waste management;
- h* information and communication technology (ICT);
- i* trade and marketing;
- j* sports, entertainment and recreation;
- k* natural resources and tourism; and
- l* energy.

II THE YEAR IN REVIEW

The Public Private Partnership (Amendment) Act 2018 (PPP Amendment Act 2018) is now in place to rationalise the PPP framework by merging the two original PPP Units into one PPP Centre, replacing the PPP Technical Committee with the Public Private Partnership Steering Committee, and deleting the National Investment Steering Committee. The Minister of Finance and Planning is the minister responsible for PPPs (the Minister). The PPP Amendment Act 2018 also clarifies that all PPPs shall be procured through an open and

¹ Nicholas Zervos is a partner at VELMA Law.

competitive bidding process, for both solicited and unsolicited proposals, and for ensuring that the Minister for Investment shall prepare specific regulations for unsolicited proposals. The PPP Amendment Act 2018 further provides that the Minister of Finance and Planning may exempt procurement of an unsolicited project from competitive bidding process where it meets certain given criteria.

The PPP Regulations 2020 were gazetted and published on 24 January 2020 and repeal the PPP Regulations 2015.

PPPs have been identified as a key tool in aiding development. Major ongoing undertakings include the Dar es Salaam Rapid Transit (DART) project.

III GENERAL FRAMEWORK

The PPP Act 2010 came into effect in 2010 with PPP Regulations in 2011. There have been various subsequent amendments to the legislation, the latest in 2020. The PPP Act was last revised in October 2018 and the latest PPP Regulations 2020 have been in place since 24 January 2020.

The PPP Act and Regulations provide for the institutional framework for the implementation of public private partnership agreements between the public sector and private sector entities, set rules, guidelines and procedures governing public-private partnership procurement, development and implementation of public-private partnerships and provide for other related matters.

Under the amended PPP Act:

- a* the PPP Centre shall administer PPPs as a 'one-stop centre' and in so being, it shall, for effective discharge of its functions seek recommendations from the Ministries responsible for investment, finance, planning or any other ministry, department or agency;
- b* the Public Private Partnership Steering Committee shall consider and approve PPP projects and agreements.

The Minister is allowed make regulations for better carrying out of the provisions of the PPP Act, prescribing:

- a* levying of fees and charges;
- b* investment opportunities and promotion;
- c* functions of local government authorities under the PPP Act and clear linkages of roles between the implementing ministries and appropriate bodies at the local government;
- d* evaluation, operation and management of projects under the PPP Act;
- e* the management of, and terms and conditions for accessing the Facilitation Fund;
- f* procedures for procurement of private parties and matters incidental thereto;
- g* the manner in which the empowerment of citizens of Tanzania may be implemented including provision of goods and services by Tanzanian entrepreneurs, training and technology transfer, employment of Tanzanians and corporate social responsibility;
- h* process and procedure for scrutiny and analysis of projects that require provision of government support; and
- i* any other matter in the promotion and furtherance of objectives of the Act.

In addition to the above powers, the Minister may also make rules and guidelines for the better implementation of PPP Act.

Each project requires a feasibility study to demonstrate that the PPP shall, among other things, be affordable to the contracting authority, shall provide value for money, and shall transfer appropriate technical, operational or financial risks to the private party.

The Public Procurement Act and Regulations do not apply to PPPs. The PPP Act and Regulations govern the procurement procedures of the PPPs. PPP projects that relate to natural wealth and resources shall take into account the provisions of Natural Wealth and Resources (Permanent Sovereignty) Act 2017 and Natural Wealth and Resources Contracts (Review and Re-negotiation of Unconscionable Terms) Act 2017. A Facilitation Fund shall be set up (see Section VI.i, below for more details).

The PPP Centre functions include:

- a* mobilising resources;
- b* ensuring that government departments integrate PPP plans;
- c* implementing a fair, transparent, competitive and cost-effective procurement process;
- d* dealing with fiscal risk allocation;
- e* monitoring and evaluating the performance of the PPP projects; and
- f* undertaking research on PPP matters.

The PPP Steering Committee functions include:

- a* reviewing policy, legislation, plans and strategies pertaining to the promotion, facilitation and development of PPPs and advising the Minister accordingly;
- b* advising the Minister on matters relating to the implementation of the PPP Programme;
- c* considering and approving detail projects report, selection of preferred bidders, agreements and any amendment to the agreements;
- d* approving allocation of project development funds from the Facilitation Fund or the Treasury;
- e* assigning to contracting authority's terms and conditions for utilisation of the Facilitation Fund; and
- f* subject to the recommendation made by the PPP Centre, approving feasibility studies, selection of preferred bidder agreements and amendment to agreements.

Both solicited projects (i.e., competitively tendered initiated by the public sector) and unsolicited projects (i.e., initiated by a written proposal from a private party to a contracting authority) are permitted.

PPPs in the energy sector have additional requirements that are set out in more detail in Section IV, below.

PPPs must endeavour to provide opportunity for empowerment of the citizens of Tanzania. The government has resolved to take measures designed to promote and facilitate economic initiatives aimed at empowering Tanzanians; and has agreed in terms of the National Economic Empowerment Policy 2004 and the National Economic Empowerment Act 2004 that natural resources, trade, agriculture, industry and other economic opportunities must generate wealth and boost the small and medium enterprise sector, in order to bring about a sustainable affirmative action and facilitate genuine and positive economic empowerment for the population of Tanzania. It has also stated that economic empowerment is a central means for bringing about economic growth and social justice among Tanzanians that is necessary for the promotion of peace, tranquillity and social stability.

Every operator of an approved PPP project shall enshrine and implement local content and corporate social responsibility as stipulated under the PPP Act. Parties to a

PPP agreement shall, at any appropriate point in the course of implementing a PPP project, endeavour to prioritise acquisition of goods and services, in the first instance, in favour of a local service provider or locally manufactured goods, provided that such goods or services are of competitive terms and meet standards acceptable by Tanzania Bureau of Standards or other internationally acceptable standards. PPPs must also ensure that qualified Tanzanians are afforded first opportunity for employment, ensure prioritisation of on-the-job training for Tanzanians, ensure that there is a succession plan, and, where applicable, ensure that a Tanzanian citizen is given priority in any matter relating to the technology transfer, research, development and innovation in any PPP related activities; and PPPs must adhere to corporate social responsibility and the associated disclosure requirements.

In contracts for goods and related services to be awarded on the basis of international competitive tendering or national competitive tendering, procuring entities shall grant a margin of preference of up to 15 per cent to domestically manufactured or produced goods and related services.

A non-local company that intends to provide goods, works or services to the PPP projects within Tanzania shall, subject to the Minister's approval, after thorough scrutiny by the PPP Centre and recommendation by the Public Private Steering Committee to the Minister, enter into any arrangement that will guarantee a local participation of at least 10 per cent shares, interest or equity of the contract value for the provisions of the works, goods and services provided that such arrangement does not divert from the PPP arrangement.

IV BIDDING AND AWARD PROCEDURE

All PPP projects shall be procured through an open and competitive bidding process except for unsolicited project exempted by the Minister having met the following criteria:

- a* the project shall be of priority to the government at the particular time and broadly consistent with the government strategic objectives;
- b* the private proponent does not require government guarantee or any form of financial support from the government;
- c* the project shall have unique attributes that justify departing from a competitive tender process;
- d* the project is of significant size, scope and requires substantial financing as per conditions provided in the regulations;
- e* the project shall demonstrate value for money, affordability and shall transfer significant risks to the private proponent;
- f* the project has wide social economic benefits including improved services, employment and taxation; and
- g* the proponent commits to bear cost of undertaking a feasibility study.

All solicited and unsolicited projects shall be procured through an open and competitive bidding process and in a manner prescribed in the PPP Regulations. The current PPP Regulations 2020 specify that for solicited projects, at least two months before the beginning of the budget cycle, each contracting authority will submit to the PPP Centre a concept note of all potential projects to be undertaken in partnership with the private sector. Based on the recommendation of the PPP Centre, the contracting authority may then proceed to conduct a full feasibility study of the project.

For unsolicited projects, upon approval of project concept, the private proponent shall make a commitment to undertake the project by depositing a refundable amount of not exceeding three percent of the estimated cost of the project to be conducted. The private party is required to put forward a project concept to the proposed contracting authority, which may then be forwarded to the PPP Centre for review.

The PPP Regulations 2020 provide for the involvement of local government authorities in small-scale PPPs, these being PPPs whose total project value does not exceed US\$20 million (as per the PPP Amendment Act 2018, which reduced this from US\$70 million) and that entails an agreement not exceeding a maximum duration of 15 years.

There are additional requirements in respect of PPPs in the energy sector, which include:

- a* the electricity utility, TANESCO, must obtain approval first of the regulator, the Energy and Water Utilities Regulatory Authority (EWURA), before initiation of procurement of any power project;
- b* the application to EWURA must be made for solicited proposals, before releasing the tender and for unsolicited proposals, after TANESCO has accepted the proposer's project concept but before commencing any formal negotiations for a power purchase agreement;
- c* EWURA will evaluate compliance with all required legislation, including the PPP legislation; and
- d* EWURA may nominate a representative to observe the procurement process to be followed by TANESCO.

There are special regulations and a standard power purchase agreement (SPPA) for energy projects of less than 10MW under the recently enacted Electricity (Development of Small Power Projects) Rules 2019.

Wind and solar projects must be solicited proposals (i.e., competitively bid) approved by EWURA. Hydro and biomass projects shall be procured through a letter of intent with an SPPA power buyer.

There are further special rules for mini projects of less than 1MW (called 'very small power projects'/VSPP), such as no requirement for EWURA approval of the retail tariff but EWURA may review the tariff if petitioned to do so by 15 per cent of affected households.

V THE CONTRACT

A contracting authority can enter into an agreement with the private sector for the performance of functions of the contracting authority.

The contracting authority shall form a multi-disciplinary negotiating team with knowledge, skills and experience on the subject matter of the project.

The contract shall cover the following items:

- a* specify the responsibilities and the private party;
- b* specify the relevant financial terms;
- c* ensure for the management of performance of the private party;
- d* provide for undertaking by the contracting authority to the private party in obtaining licences and what may be necessary for the implementation of the project;
- e* provide for the return of assets, if any, to the contracting authority, at the termination or expiry of the contract;
- f* specify the roles and risks undertaken by either party;

- g* provide for the payment to the private party, by way of compensation from a revenue fund charges or fees, collected by the private party from users or customers of the service provided by it;
- b* specify payment of the private party to the contracting authority;
- i* provide for remedies in the event of default by either party;
- j* impose financial management duties on part of the private party, including procedures relating to internal financial control, budgeting, transparency, accountability and reporting;
- k* provide for the termination of the contract in case of breach of terms and conditions by either party;
- l* provide for the conditions for the provision of service, where necessary;
- m* provide for the period of execution; and
- n* contain such other information as may be necessary.

The contract shall ensure that:

- a* the private party undertakes to perform a contracting authority's function on behalf of the contracting authority for a specified period;
- b* the private party is liable for the risks arising from the performance of its functions;
- c* the environmental impact assessment certificate has been issued in respect of the project;
- d* government facilities, equipment or other state resources that are necessary for the project are transferred or made available to the private party on a timely basis; and
- e* the public and private assets are clearly specified.

The rights, obligation and controlling interests of the private party in the project shall not be transferred or assigned to a third party without the prior written consent of the contracting authority.

The duration of a contract shall be provided for in the contract and shall not be extended unless:

- a* there is a delay in completion or interruption of operations owing to circumstances beyond any party's control;
- b* there was an increase in costs arising from requirements of the PPP Centre or contracting authority that were not foreseen or included in the contract; and
- c* the service is required and the contracting authority has no capacity or immediate intention to take over and run the project.

A violation of these provisions by either of the parties shall render a defaulting party liable for any pecuniary loss incurred by the other party.

i Termination of the agreement

Under the PPP Regulations 2020, parties shall have a right to terminate the project if it fails to fulfil the conditions set out under the project agreement. Any such reasons and resultant compensation are required to be included as provisions in the agreement. Upon such termination, the contracting authority may, pursuant to the PPP Act and Regulations, engage another party.

ii Contract approval

The contracting authority shall ensure that the contract is executed under procedures stipulated and through institutions specified under the PPP Act.

The contract shall be signed by the accounting officer of the contracting authority after it has been considered and approved by, among others, the Office of the Attorney General. The accounting officer shall sign the contract upon fully satisfying him or herself that the contract has complied with the provisions of PPP Act and any other relevant laws. Any person who contravenes these requirements commits an offence.

The accounting officer who has entered into a contract shall take all necessary and reasonable steps to ensure that:

- a* the outsourced activity is effectively and efficiently carried out in accordance with the contract;
- b* any public property that is placed under the control of the private party, in terms of the contract, is appropriately protected against forfeiture, theft, loss, wastage and misuse; and
- c* the contracting authority has adequate contract management and monitoring capacity.

The contract shall be submitted to the Office of the Attorney General for a legal opinion.

iii Contract dispute resolution

The contract shall be governed and construed in accordance with the laws of mainland Tanzania.

Any dispute arising during the course of the contract shall be resolved through negotiation, mediation or arbitration and (as per PPP Amendment Act 2018) in the case of mediation or arbitration, be adjudicated by judicial bodies or other organs established in the United Republic and in accordance with laws of Tanzania.

iv Offences

Any person who commits an offence under:

- a* the PPP Act shall, when the offence has no specific prescribed penalty, be liable to a fine not less than 5 million Tanzanian shillings and not exceeding 50 million Tanzanian shillings, in addition to any illicit monies gained or to imprisonment for a term not less than three months and not exceeding three years, or both; and
- b* the Electricity (Initiation Power Procurement) Rules 2014 may be liable to a fine from 10 million Tanzanian shillings to 100 million Tanzanian shillings, or imprisonment for a term of up to three years, and this applies to directors, managers or officers of the utility in breach.

VI FINANCE

i Project development

The Facilitation Fund shall be set up with:

- a* moneys allocated by Parliament and from development partners, public entities, parastatal organisations and social security funds and funds previously advanced to contracting authorities; and
- b* approval by the PPP Steering Committee.

It will be used for:

- a* financing wholly or partly feasibility studies and other project preparation costs as may be required by a contracting authority;
- b* providing resources to enhance the viability of projects that have high economic benefits that have demonstrated to be of limited financial viability; and
- c* any such other purposes as may be prescribed in the regulations.

ii PPP fees

A PPP contract enables the private party to receive a benefit for performing on behalf of contracting authority function or from utilising the public property, either by way of:

- a* the consideration to be paid by the contracting authority, which derives from a revenue fund, or, where the contracting authority is a central government or local government authority, from the revenues of such authority;
- b* charges or fees to be collected by a private party or its agent from users or customers; or
- c* a combination of such consideration and such charges or fees.

iii Government support

The PPP Centre shall mobilise government support to PPP projects.

There is a definition of ‘contingent liability’ of government in the PPP Act, but it is not used in the present PPP Act.

For unsolicited projects, a contracting authority shall not conduct a procurement process proposal that requires government financial support.

There is specific legislation relating to the government guarantee of loans, but not for the guarantee of contractual obligations of a contracting authority.

For projects that require public funding and any other forms of contribution, upon receipt of request for funding from the PPP Steering Committee, the Technical Debt Management Committee shall undertake an analysis of fiscal risk and other financial matters of the project prior to forwarding the same to the National Debt Management Committee for determination by the Minister. The National Debt Management Committee in the course of undertaking its scrutiny and analysis shall have regard to the project’s value for money, affordability, bankability, technology transfer and innovation.

iv Security for lenders

Collateral available in Tanzania includes mortgages over land, fixed charges over assets (including cash at bank), share charges and pledges, assignment by way of security, (including the benefit of contracts and receivables) liens and floating charges (together with security interests) and guarantees.

Generally, there is no restriction of foreign ownership or management of companies established in Tanzania except in some highly regulated sectors such as natural resources, financial and telecom sector. Foreign ownership of title to land is not permitted unless the foreign-owned company has a certificate of incentives from the Tanzania Investment Centre, which has approved the project for investment purposes.

Generally, inter-creditor agreements are used by local banks in Tanzania to subordinate debt and to adjust the ranking of secured creditors by way of a contractual agreement. The enforceability and operation of these inter-creditor agreements have not to our knowledge been challenged in the courts in Tanzania.

In the case of a company insolvency, preferential debts will be paid as a priority. Preferential debts include specified taxes, specified government rents and specified wages or salaries.

Generally, a security interest is perfected by registration at the Business Licensing Regulatory Authority (BRELA) within 42 days of the date of its creation, otherwise it will be void on the insolvency of the company against the liquidator or administrator, or any creditor of the company. Mortgages must also be registered at the relevant land registry, and some documents should also be registered at the registry of documents. The priority of security interests is generally determined by the date of the document, and the priority of mortgages is generally determined by the date of registration at the relevant land registry, in each case, provided it is registered in time and there is no agreement to the contrary.

VII RECENT DECISIONS

Steps are under way to assist PPPs by, for instance, capacity building, more project preparation, viability gap funding and covering other costs necessary for the government to develop PPP projects.

Despite various amendments and revisions to the current PPP legislation and regulations, there remain some gaps and areas that need to be improved to create a solid basis on which the PPP programme can be developed.

VIII OUTLOOK

PPP is recognised as an important instrument for the government to attract private investment with a view to providing better public services. The PPP Amendment Act 2018 provides that the Minister shall, for the purpose of ensuring investment in PPP projects and in consultation with the Minister responsible for investment, prepare programmes for development and maintenance of favourable environment for investment through PPP arrangements.

The outlook for PPPs in Tanzania is rapidly improving as steps are taken to clarify and improve the processes and formal relationships between public and private sectors in a clear regulatory framework.

ABOUT THE AUTHORS

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Nicholas Zervos is a partner at VELMA Law and a senior commercial transactional lawyer with expertise in international corporate matters and project and structured finance, particularly in East Africa, the United Kingdom and central and eastern Europe.

Nicholas has lived and worked as a lawyer in Dar es Salaam since November 2006. Before then he was a senior partner with a major firm in London (and Hong Kong), advising sponsors and banks on commercial and financing agreements for infrastructure projects in developed and emerging markets. His areas of specialism include commercial law, project finance, finance and corporate law.

Nicholas has a law degree from the University of Nottingham, and is admitted to the English, Tanzanian and Hong Kong bars. Nicholas is a member of the Law Society of Tanganyika and the Law Society of England and Wales.

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