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FRENCH REPUBLIC
IN THE NAME OF THE FRENCH PEOPLE

PARIS COURT OF APPEAL

Division 5 – Chamber 16
International commercial chamber

DECISION DATED SEPTEMBER 7, 2021
(no. /2021, 19 pages)

Registration no. on the general roll: **RG no. 19/17531 – Portalis no. 35L7-V-B7D-CAUYQ**

Decision deferred before the Court: Arbitral award dated _____ – decision no. _____

The arbitral tribunal was comprised of Me _____ (President), Professor _____ (co-arbitrator) and Me _____ (co-arbitrator).

APPELLANT:

The REPUBLIC OF GUINEA Organization

With its registered office: Immeuble de la Poste, Quartier Almamy B.P. 3000
Represented by Maître _____, a State Judicial Agent, located (_____)

Mr. [CO], _____, Ministry of Post, Telecommunications and Digital Economy
for the Republic of Guinea – Ministry of Post – Telecommunications and Economy –
CONAKRY – GUINEA

Represented by Me _____, attorney at the PARIS Bar, court registration:

Represented by Me _____, attorney at the PARIS Bar

**POST AND TELECOMMUNICATIONS REGULATORY AUTHORITY FOR
GUINEA acting through its general director, Mr. .**

With its registered office: Almamy district, the municipality of Kaloum, BP 1500 CONAKRY
GUINEA

Represented by Me _____, attorney at the PARIS Bar, court registration:

Represented by Me _____, attorney at the PARIS Bar, court registration:

RESPONDENT:**S.A. GLOBAL VOICE GROUP SA**

A company governed under the law of Seychelles
 With its registered office: 1st floor, #5 Dekk House, De Zippora Street PO Box 456
 Providential estate, Mahé – REPUBLIC OF SEYCHELLES
 Represented by its legal representatives,
Represented by
attorney at the PARIS Bar, court registration:

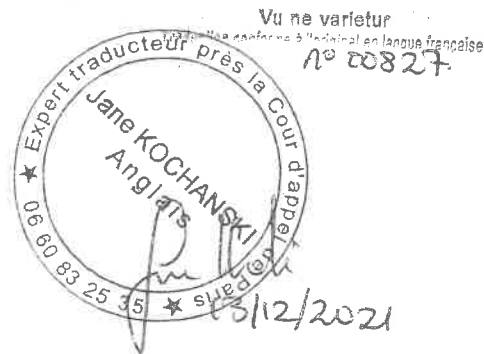
COMPOSITION OF THE COURT:

In accordance with the provisions of Articles 805 and 907 of the French Code of Civil Procedure, the matter was heard on May 25, 2021, in a public hearing, and the attorneys, informed of the composition for the court deliberation and not objecting thereto, before Mr. François ANCEL, President, in charge of the report, and Mrs. Laure ALDEBERT, Judge.

These magistrates reported on the pleadings in the Court deliberation, comprised of:

François ANCEL, President
 Fabienne SCHALLER, Judge
 Laure ALDEBERT, Judge
 who deliberated

Court Clerk, during the proceedings: Inès VILBOIS

**DECISION:**

- IN ADVERSARIAL PROCEEDINGS
- upon availability of the decision to the court registry, with the parties having been previously informed under the conditions provided in the second paragraph of Article 450 of the French Code of Civil Procedure
- signed by François ANCEL, President and Najma EL FARISSI, Court clerk, who received the minutes of the decision by the signatory judge.

1 – THE FACTS AND PROCEDURE

1. **The post and telecommunications regulatory authority for Guinea (ARPT)** is a legal entity under public law, with the mission of ensuring the respect of the telecommunication legislation by the telephone operators. The ARPT is placed under the guardianship of the Ministry in charge of telecommunications for the Republic of Guinea.

2. **Global Voice Group S.A. (hereafter “GVG”)** is a company governed under the laws of Seychelles which commercializes technologies for the control and supervision of telecommunication flows and operations.

3. On May 22, 2009, ARPT and GVG entered into a partnership agreement with the purpose of controlling the telephone communications in Guinea for an initial duration of 60 months as from its signature and tacitly renewable for successive 2 year periods, unless there is an express waiver in writing by either party within a period of 12 months prior to the end of the agreement.
4. Article 17 of this agreement includes an ICC arbitration clause.
5. GVG's remuneration was defined in appendix 1 and set at 7 cents in American dollars per minute of international call to Guinea. The price for international calls to Guinea was fixed by an order adopted on May 29, 2009 "*fixing the international rate for the Republic of Guinea and contributions to pay to the post and telecommunications regulatory authority and the local telecommunications network operators open to the public.*"
6. GVG and ARPT signed an addendum to the Partnership Agreement dated June 10, 2012, pursuant to which the parties acknowledged, on the one hand, that "*Global Voice Group performed the action plan agreed between the parties relating to the obligations mentioned in the "Report for the performance of the contractual obligations between CVG and ARPT, dated May 14, 2012"* and, on the other hand, that ARPT owed GVG the following amounts of 13,237,182.60 USD for the "*cumulative invoices from September 2009 to December 31, 2011*" (Art.2) and 2,206,906.16 USD for the "*remainder of the share of the international flow from Sotelgui*" for the period from September 2009 to December 31, 2011 (Art.A).
7. The parties also agreed that:
- GVG waived the revenues corresponding to the remainder of the share from the international flow from Sotelgui, which amounted to 2,206,906.16 American dollars;
 - GVG accepted to reduce ARPT's debt to 2 million American dollars, with the amount covering all the receivables from ARPT for the period from September 2009 to December 31, 2011;
 - ARPT undertook to reimburse GVG the amount of 2 million American dollars at the latest on December 31, 2012;
 - the new distribution key was as follows: as from January 1, 2012: 9.5 cents in American dollars for ARPT per minute and 2.5 cents in American dollars for GVG per minute.
8. As from the month of May 2014, GVG's invoices have no longer been paid.
9. In a letter dated November 24, 2014, ARPT mentioned to GVG that the Partnership Agreement had ended on May 22, 2014, which it reiterated by letter dated May 15, 2015.
10. To amicably settle the dispute, the Ministry of State for the Post, Telecommunications and New Information Technologies and the President of the National Board for the Post and Telecommunications presented a proposition to the GVG in September 2015, pursuant to which the latter was offered the payment of the amount of 3.9 million USD over 13 months or an extended payment in 10 instalments for an amount of 6,824,441 USD, with the 10 instalments having to be "*extended over six (06) months*".

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11. In a letter dated September 14, 2015, GVG refused this proposition.
12. On December 8, 2016, GVG submitted a request for arbitration before the ICC.
13. In an award dated () rendered in Paris under the aegis of the international chamber of commerce, the arbitral tribunal ruled that the arbitration clause included in Article 17 of the Partnership Agreement was valid; that the State of Guinea was party to the Partnership Agreement and that the arbitral proceedings were validly constituted with regard to ARPT and the State. On the merits, the arbitral tribunal decided that the Partnership Agreement, the Amendment to the Agreement and the Addendum were lawful and, in particular, ordered the State of Guinea and ARPT to pay GVG the amount of 21,797,699.47 USD in compensation.
14. On September 5, 2020, then on September 6, 2020, ARPT and the Republic of Guinea filed an application for annulment against this award before the Paris Court of Appeal, in accordance with Article 1520 of the French Code of Civil Procedure.
15. By Order dated October 27, 2020, the pre-trial judge referred to by the Republic of Guinea for a request for hearing as witnesses of Mr. [NJ] and Mr. [OJ], dismissed this claim.
16. The close of the investigation was pronounced on May 11, 2021.
17. In submissions notified electronically on May 23, 2021, the Republic of Guinea and ARPT referred the matter before the pre-trial judge with a request for the waiver of the closure order rendered on May 11, 2021, in order to have their regularized submissions dated May 19, 2021 accepted in the proceedings and, in the alternative, to hold that the court shall rule in view of their previous submissions dated December 15, 2020.
18. In an order rendered on May 25, 2021, prior to the opening of the proceedings, the pre-trial judge dismissed the claim for the revocation of the closing order.
19. After the opening of the debates, acknowledging the appellants' waiver of their latest submissions notified electronically on May 10, 2021, with such waiver not by any means requiring GVG's acceptance, the court retained their latest submissions as being those previously notified on December 15, 2020.

II-THE PARTIES' CLAIMS

20-In accordance with their latest submissions duly notified on December 15, 2020, the post and telecommunications regulatory authority for Guinea request of the court as follows, on the basis of Articles 1520 1°, 2°, 3°, 4° and 5° of the French Code of Civil Procedure:

CANCEL the arbitral award rendered on , under the aegis of the ICC;
DISMISS GVG of all its claims, pleas and submissions;

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ORDER GVG to pay all the costs of the appeal, for the benefit of Maître ;
ORDER it to pay the amount of 200,000 euros under Article 700 of the French Code of Civil Procedure.

21. **In accordance with its latest submissions notified on March 15, 2021, GLOBAL VOICE GROUP S.A. requested of the Court, under Articles 1466 and 1520, 1°, 2°, 3°, 4° and 5° of the French Code of Civil Procedure, to do as follows:**

DECLARE the Republic of Guinea and ARPT inadmissible in their ground asserted under Article 1520-2° of the French Code of Civil Procedure;

DISMISS the Republic of Guinea and ARPT of all their claims, pleas and submissions;

DISMISS the remedy for annulment filed by the Republic of Guinea and ARPT;

ORDER the Republic of Guinea and ARPT to pay 200,000 euros under Article 700 of the French Code of Civil Procedure and the costs of these proceedings.

III-GROUNDS OF THE DECISION

1-Concerning the ground for annulment on the basis that the court unduly declared itself competent *ratione personae* and *ratione materiae* (Article 1520 I° of the French Code of Civil Procedure)

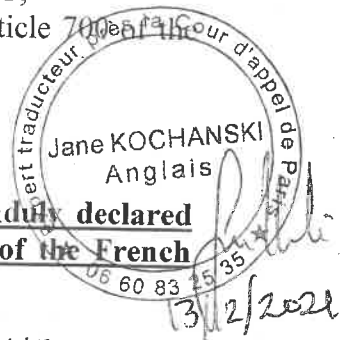
1-1 Concerning the incompetence *ratione materiae*;

22. **ARPT and the Republic of Guinea** assert, in substance, that GVG should have used the arbitral route under Article 77 of the Public Procurement Code (PPC) providing for an *ad hoc* international arbitration procedure, mandatory for the settlement of disputes relating to public procurement contracts and not institutional arbitration of the ICC resulting from Article 17 paragraph 2 of the Partnership Agreement.

23. They asserted that the application of the Public Procurement Code to the Partnership Agreement is imposed by the mandatory nature of the provisions of this Code, insofar as the Partnership Agreement is a public procurement contract, entered into by a legal entity, under Guinean public law, it being added that the Guinean law is that chosen by the parties as substantive law. They consider that Article 77 of the Public Procurement Code shall prevail over the ICC clause under Article 17 of the Partnership Agreement, which is necessarily void and must be deemed invalid.

24. They added that the means of designation of the arbitral tribunal provided under Article 77 of the Public Procurement Code is incompatible with Article 17 of the Partnership Agreement, in particular, insofar as the type of arbitration provided by the Public Procurement Code is bi-party arbitration and not trilateral like the ICC arbitration and, accordingly, in direct contradiction with Article 77 of the Public Procurement Code.

25. **In response, GVG** established that the appellants' reasoning failed to comply with the French substantive rule of international arbitration which establishes the principle of the validity of the arbitration agreement, which is independent compared to any State law. It recalled that the existence and the validity of an arbitration agreement under the French law



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for international arbitration shall be considered according to the parties' common intent, without reference to a State law, with the sole reserve of French mandatory rules and international public policy rules. It added that an exemption to the substantive rule of validity of the arbitration agreement shall only apply in the event of an express submission of the latter to a State law, which is not applicable to this case, and, thus, in the absence of an explicit designation in favour of Guinean law to govern the arbitration clause in this case, the latter shall be valid exclusively and independently from any State law.

26. In the alternative, and for the sake of completeness, it asserted that the arbitration clause provided in Article 77 of the Public Procurement Code does not provide for an *ad hoc* arbitration clause, but provides for the settlement of disputes by "*arbitration*", which is a generic term compatible with both institutional and *ad hoc* arbitration.

ACCORDINGLY,

27. According to Article 1520, 1° of the French Code of Civil Procedure, the remedy for annulment is applicable if the Court has unduly declared itself competent or incompetent.

28. The judge ruling on the annulment shall control the decision of the arbitral tribunal concerning its competence, whether the latter has declared itself competent or incompetent, by seeking all the *de jure* or *de facto* elements enabling the scope of the arbitration agreement to be appreciated.

29. In this case, Article 17 of the partnership agreement entered into on May 22, 2009 between ARPT and CVG is drafted as follows:

"Upon failure by the Parties to reach an amicable agreement within a period of six (6) months following the date of the occurrence of the dispute, any dispute of any kind, including the Appendices and any amendments, likely to arise between them, shall be subject to the exclusive competence of the arbitration regulation of the Paris International Chamber of Commerce, by one or several arbitrators appointed in accordance with this Regulation".

30. Article 17.1 also sets forth that "*this Agreement shall be subject to the laws of the Republic of Guinea*".

31. By virtue of a substantive rule of international arbitration law, the arbitration clause is legally independent from the principal agreement, including the latter directly or by reference thereto, and its existence and effectiveness shall be considered, subject to French mandatory rules and international public policy rules, according to the parties' common intent, without it being necessary to make reference to a State law.

32. In this case, the existence and validity of the arbitration clause inserted in the aforementioned agreement are not contested and no mandatory French rule exists, under the French appreciation of international public policy to impede the latter.

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33. Accordingly, the designation of Guinean law as generally governing the agreement shall not be sufficient *per se* to establish the parties' common intent to submit the arbitration clause to Guinean law and thereby derogate from the aforementioned material rule.

34. In this regard, the fact that Article 77 of the Guinean Public Procurement Code, for which the appellants claim application thereof, even assuming that it was mandatory in Guinea, provides recourse to arbitration to settle disputes "in the context of large-scale public procurement contracts", does not characterize such express choice, whereas, specifically, it was in full awareness of the existence of these rules that ARPT, placed under the guardianship of the Minister for Telecommunications in Guinea, decided with GVG, not to refer for arbitration such as provided under Article 77 of the Public Procurement Code, but, on the contrary, to insert a specific arbitration clause in the agreement submitting the latter to the ICC regulation.

35. Accordingly, the arbitral tribunal, as designated, was indeed competent *ratione materiae*.

36. Accordingly, this grievance should be dismissed.

1-2 Concerning the incompetence *ratione personae*

37. **ARPT and the Republic of Guinea** asserted that the Republic of Guinea had not consented to be party to the partnership agreement and was not involved as a party, neither in its conclusion nor in its performance or termination, and, accordingly, the arbitral tribunal unduly claimed competence in its regard.

38. They asserted that the Award was pronounced with regard to the Republic of Guinea without an arbitration clause or arbitration agreement, and that the sole affixation of the signature by the Minister for Post and Telecommunications and the adoption of the Order dated May 29, 2009, which completed the terms of the partnership agreement, by specifying the financial conditions are not sufficient for the Guinean State to obtain the capacity as party to an agreement, but only a guardianship status. They also asserted that the Minister for Telecommunications had been requested as mediator in this file, and that the latter could not cumulate the capacity as party to the agreement and mediator.

39. **In response, GVG sets forth** that the Guinean State was a party to the partnership agreement, and, accordingly, to the arbitration clause included therein, and had not merely acted as a guardian. It asserted that the consent by the Republic of Guinea to be party to the partnership agreement is implied from the Minister's signature affixed on the partnership agreement and its amendment dated July 6, 2009; from the structure of these agreements which enable the Guinean State to benefit from contractual services, by imposing obligations and granting the latter rights, and, finally, the participation of the Guinean state in the establishment of the terms of the partnership agreement, the performance and the termination of the latter and the attempted amicable settlement of the dispute.

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ON THESE GROUNDS,

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40. It must be recalled that an arbitration clause inserted into an international agreement shall have its own validity and effectiveness for which the application must be extended to an individual, who, whilst not expressly mentioned as a “party” to the agreement including the arbitration clause, is directly involved in the performance of the agreement and interested in the benefits thereof, according to the parties’ common intent and the circumstances of the cause.

41. In this case, it results from the exhibits produced that whilst the Republic of Guinea is not included on the first page of the partnership agreement entered into between ARPT and GVG, it is not contested that the latter affixed its signature to this agreement on the last page, and on the amendment dated July 6, 2009.

42. Furthermore, several paragraphs of the agreement make a direct and express reference to the expectations of the Republic of Guinea and, accordingly, presenting the latter as a direct beneficiary.

43. Accordingly, it is set forth as follows in the preliminaries of this agreement “*Considering the necessity for the State to equip the regulatory authority for the telecommunications sector with sufficient tools which shall enable it to fulfil its role as State administrator in the telecommunications sector;*

“*Considering the necessity for the State to control the local and international telephone flows in order to adopt the most appropriate taxation regime for the requirements and realities in terms of taxation and the socio-economic requirements of the Republic of Guinea;*

“*Whereas GVG may enable the Guinean State to use the necessary technological tools and resources for its policy to ensure a more optimal flow in terms of volume by operators of land line and mobile telephones in Guinea*” (passages underlined by the Court).

44. The implication of the State of Guinea in this agreement is substantiated by the necessity, as emphasized in the preliminaries of the agreement for “*ARPT to evaluate the opportunity to adopt a regulatory context enabling GVG to become an independent signalling and inter-connection service provider*” (FSSI) and “*independent service provider for operator invoicing on behalf of the regulator of the Republic of Guinea (...)*”.

45. Furthermore, several clauses of the agreement mention the benefit of this agreement for the “*Republic of Guinea*” in addition for the benefit for ARPT. Accordingly, in Article 1, it is stipulated that “*the purpose of this Partnership Agreement [...]*” “*the accreditation and approval of Global Voice Group SA as neutral and independent operator on behalf of ARPT and the State of Guinea [...]*”.

46. In Article 3.1 of the partnership agreement, it is also mentioned that ARPT shall undertake to “*assign the technical and legal personnel necessary for the setup of a technico-legal and regulatory context for the creation of a multi-operator and multi-service interconnection*

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Centre with the following cumulative functions: [...] b. Control of the flows and taxation of the international calls for the Guinean State” and to “define the new taxes for the inbound international calls”.

47. In Article 3.2 of this agreement it is provided that “GVG shall undertake to [...] provide and install control tools for the Guinean State, providing it with the capacity to visualize and invoice the totality of the local and international flows by each operator real-time” and that, in addition, it shall undertake to “assist ARPT in the definition of the measures to protect the telecommunications network of the Republic of Guinea against the decline in rates, which represents an enormous loss for the public treasury”.

48. Furthermore, GVG’s remuneration in consideration for this agreement required the publication of a ministerial order dated May 29, 2019, fixing the threshold of the international rate for the destination “Republic of Guinea” at 28 USD cents per minute and the key for the distribution of income between the different participants; that of GVG in its capacity as technical operator ensuring, in particular “the service provision, launch and maintenance” having been fixed at the amount of 7 cents.

49. It results from these stipulations and elements that the Republic of Guinea was directly involved in the determination of the obligational content of the partnership agreement.

50. Furthermore, it results from the exchanges of correspondence between ARPT and GVG in July 2015 that the decision to terminate the contractual relation was not taken by ARPT alone but with the Republic of Guinea, which was announced by the general director of this authority in correspondence dated July 9, 2015, pursuant to which he wrote that “We have provided all the explanations and evidence of our relations between both our institutions to the Ministry of State in charge of telecommunications and the President of the Board, we are reverting back to you to communicate our decision with regard to the continuation of our relation”;

51. Furthermore, in accordance with a letter dated August 6, 2015, pursuant to which ARPT decided to terminate the contractual relation, the latter confirmed the role of the Republic of Guinea in reaching this decision and its direct participation and implication in the process enabling an amicable solution to be reached for the disagreement, as it wrote to GVG, in particular, that “upon request by the Ministry of State in charge of telecommunications, we have met with you to further notify you of all these points, and you also acknowledged that your initial agreements were all badly drafted. In view of the foregoing, we reiterate our non-satisfaction, both from a technical and relational standpoint. As you are also aware, your current services do not correspond to our requirements of control, security and protection against fraud; and we no longer intend to continue the cooperation with you”.

52. It results from all these elements that, according to the parties common intent, the Republic of Guinea was also directly concerned by the benefits of this agreement and involved in the performance of the partnership agreement, implying a role beyond that of a guardian for ARPT.

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53. Accordingly, the arbitral tribunal retained its competence also with regard to the Republic of Guinea.

54. Consequently, the ground based on the incompetence of the arbitral tribunal shall be dismissed.

2. Concerning the annulment ground based on the inconsistent setup of the arbitral tribunal (Art. 1520 2° of the French Code of Civil Procedure)

55. **ARPT and the Republic of Guinea** uphold that the arbitration proceedings, and, in particular, the setup of the arbitral tribunal, were incompatible with the terms of Article 77 of the Public Procurement Code, both with regard to the trilateral nature of Arbitration, and the implication of the ICC in the designation of two members out of three of the arbitral tribunal. They emphasize that two members out of three of the arbitral tribunal were designated against the parties' intent, which is incompatible with Article 77 of the Public Procurement Code. In response to the inadmissibility raised by GVG, they asserted that they mentioned the inconsistent setup of the arbitral tribunal with regard to Article 77 of the Public Procurement Code, in paragraphs 141 and 142 of their submission in a rejoinder dated October 31, 2018.

56. **In response, GVG asserted**, in the principal, that the ground of annulment based on the inconsistency of the setup of the arbitral tribunal is inadmissible in accordance with Article 1466 of the French Code of Civil Procedure, insofar as the Guinean parties failed to assert, during the arbitral proceedings, the fact that the setup of the arbitral tribunal did not correspond to the terms provided in Article 77 of the Public Procurement Code. It emphasized, in the alternative, that the control of the setup of the arbitral tribunal with regard to Article 77 of the Public Procurement Code is irrelevant and that the tribunal was duly setup with regard to the ICC arbitration regulation.

ACCORDINGLY,

57. According to Article 1520, 2° of the French Code of Civil Procedure, the remedy for annulment is available if the tribunal has been unduly setup.

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Concerning the admissibility of this ground;

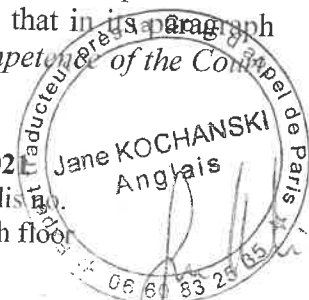
58. In accordance with Article 1466 of the French Code of Civil Procedure, the party, which, in full awareness of the cause and without legitimate reason, fails to duly assert an inconsistency before the arbitral tribunal is deemed to have waived such assertion.

59. In this case, ARPT and the Republic of Guinea in the context of their rejoinder submission, duly upheld that *"the means of setup provided under Article 77 of the Public Procurement Code is not compatible with Article 17 of the Partnership Agreement"* (§ 141 and 142 of this submission dated October 31, 2018).

60. Similarly, it results from the sentence (§ 97 *et seq.*) that the arbitral tribunal queried their *"reserves"* with regard to the *"setup of the tribunal by the Court"* and that in its paragraph 104, the tribunal considered that this question was *"evidently for the competence of the Court"*.

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which, upon presentation of the parties' position, decided in accordance with the regulation" and that it was not the tribunal's remit "to rule again".

61. It results from these elements that ARPT and the Republic of Guinea are admissible to raise this ground before the Court of appeal.

Concerning the admissibility of this ground;

62. It must be emphasized that this ground is solely focused on the non-compliance by the arbitral tribunal of Article 77 of the Public Procurement Code to govern the setup of the arbitral tribunal.

63. As ruled by this Court above, this ground is inoperable insofar as the arbitral tribunal was setup according to the ICC regulation, which referred to the arbitration clause, thereby excluding the application of Article 77 of the Public Procurement Code.

64. Accordingly, this ground shall be dismissed.

3-Concerning the ground for annulment based on the arbitral award being contrary to international public policy (Article 1520 5° of the French Code of Civil Procedure)

3-1 Concerning the ground based on corruption

65. **ARPT and the Republic of Guinea** uphold that the arbitral award affects French international public policy insofar as it grants effect to agreements based on corruption. As significant, specific and concordant indicators, they asserted Guinean's unstable political context at the time of the conclusion of the partnership agreement; the circumvention of the public procurement contract rules; the existence of the amendment no. 3, for which the Guinean parties reported fraud, insofar as it relates to services already covered by the partnership agreement, whilst providing for a supplementary remuneration for the benefit of GVG; the predation on Guinean public funds, insofar as the exorbitant nature of the tariff contractually provided for the benefit of GVG is evidenced by the fact that the company Subah, its successor, would only have received a remuneration of 2 cents USD contrary to 7 cents USD granted to GVG; the issuance of 13 cheques not crossed out drawn out in the name of Mr. [NJ], Country director for GVG; the connivance with public agents, and, in particular, with the former general director of ARPT, for whom the Guinean parties assert that his consent was impaired and that he is guilty of a fault, independent from that of his duties; excessive donations and gifts by GVG by the acquisition of two vehicles in 2010, which were never delivered to ARPT, and the appointment of Mr. [C], general director of ARPT, at the time of the conclusion of the Partnership Agreement, in 2009, as honorary consul for Haiti in the Republic of Guinea, in 2012; GVG's tax fraud in Guinea and the latter's tarnished reputation, such as related by the press.

66. They added that new elements had occurred since the arbitral award, as it results from the report of Mr. [NJ]'s interview, country director of GVG in Guinea; that concealed links existed between the GVG and Mr. [Y] or GTY that he created, with a view to enabling complementary remunerations for the benefit of the former, by the Amendment no. 3, and

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Mr. [Y] by an agreement entered into between GTY and ARPT, with the intention of recuperating 50% of the amounts received for the national communication flows with the operators.

67. **In response, GVG** objected to an alleged violation of international public policy based on the existence of corruption. It asserted that the Guinean parties merely listed the corruption indexes without relating them to the operative part of the Award. It set forth that it had started on the Guinean telecommunications market in 2002 and, accordingly, well before the rise to power of the military government; that even if the Guinean rules obliging recourse to an invitation to tender had been violated, such element is not sufficient to characterize a violation of international public policy or conclude on the existence of corruption; that the award does not grant effect to the amendment no. 3, for which the disputed nature is alleged, and that the Guinean parties do not establish how the alleged fraud concerning the Amendment 3 would be indicative of corruption for obtaining the partnership entered into in 2009; the price retained in the Partnership Agreement was not exorbitant nor of a nature to evidence an unlawful act in view of the investment realized by the latter.

68. It added that the issuance of 13 cheques for the attention of Mr. [N] corresponds to the payment of the contractual price for the amendment no. 3 and that the connivance with Mr. [Y] is not evidenced, insofar as he had never granted his consent for the Partnership Agreement.

69 GVG asserted that the Guinean parties do not evidence how such alleged donations and gifts are excessive and indicators of acts of corruption; that the tax fraud was not evidenced, with the Guinean authorities never having pursued these offenses and, finally, that the minutes of Mr. [N]'s interview have no probative value given the constraint exercised by the police in order to extort 300,000 USD in relation to GVG.

ACCORDINGLY,

70. The combat against corruption is a pursued objective, in particular, by the OECD Anti-Corruption Convention, dated December 17, 1997, entered into force on February 15, 1999, and by the United Nations Convention against corruption executed in Merida on December 9, 2003, entered into force on December 14, 2005.

71. According to the international consensus expressed by these texts, public agent corruption, whether national or foreign, involves offering the latter, directly or indirectly, an undue benefit, for himself or another person or entity, in order for him to accomplish or refrain from accomplishing an act in the course of his official duties, with a view to obtaining or retaining a procurement contract or other undue benefit, in liaison with the international trade activities.

72. The prohibition of corruption of public agents is amongst the principles for which the French legal system shall not tolerate violation, even in an international context. Accordingly, it is covered by international public policy.

73. The judge ruling on the annulment is not, however, the judge for the agreement, but for the insertion of the arbitral award into the national law.

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74. His control only involves ensuring that no evident, effective and genuine violation of international public policy results from the acknowledgement or enforcement of the award.

75. In this case, it results from ARPT's submissions and those of the Republic of Guinea (§512) that the latter report offenses of corruption which would have occurred in two stages:

"Firstly, upon the conclusion of the Partnership Agreement, emphasizing the following indications: the context of the military coup, the granting of a negotiated public procurement contract, whereas the conditions of such a procurement contract were not met, the development of significant financial imbalances to the detriment of ARPT, which are, at the very least, the demonstration of a disgraceful predation on the Guinean public resources, with Mr. [CC], ARPT director at the time and who was appointed as honorary consul for Haiti in Guinea upon Mr. [L]'s proposition, former CEO of GVG; and

-a second stage between Mr. [Y] and GVG's directors, with an extraordinary acceleration and intensification of the initial corruption manoeuvres".

76. This second stage is related to the signature of the amendment no.3 dated May 22, 2009, with ARPT and the Republic of Guinea emphasizing that there would have been *"an intensification and acceleration of the corruption between Mr. [Y] and GVG, in view of creating complementary remuneration for GVG by the Amendment no.3 and for Mr. [Y] by the agreement between GTY and ARPT"*.

77. Nonetheless, it must be emphasized that the arbitral award does not pronounce any sentence on the basis of the alleged amendment no. 3 and also not on the alleged agreement between GVG and GTY, managed by Mr. [Y].

78. Whilst the amendment no.3 was asserted before the arbitral tribunal, the latter considered that the *"Amendment no.3 had been replaced by another agreement, and, accordingly, it was not necessary to pronounce the invalidity thereof"* (§233), and, thus, the claim under this amendment no.3 was dismissed.

79. Accordingly, it results from the arbitral award that the penalties pronounced against the appellants include, the payment of invoices issued by virtue of the Partnership Agreement between September 1, 2009 and May 31, 2015 and which are still outstanding *"and for the invoices which would have been invoiced from the period between June 1, 2015 and May 22, 2017, as damages"*.

80. Consequently, the insertion of the arbitral award into the French legal system, which does not grant effect to this amendment no. 3, for which ARPT and the Republic of Guinea assert to be part of a fraudulent act related to corruption, does not breach international public policy, whether evidently, effectively or definitely.

81. It results that all the corruption indications alleged by ARPT and the Republic of Guinea for the aforementioned *"second stage"*, for which the elements are related to the conclusion of said amendment no.3, and, in particular, the existence of such amendment, the issuance of 13

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cheques for the benefit of a GVG employee, for the payment of services included, or which should have been included under this amendment, or the donations which were intended to “facilitate the conclusion” of this amendment, and the connivance with Mr. [Y] (ARPT director) are not relevant and may not be duly asserted to substantiate the ground for annulment against the award which, in any event, does not grant effect to this amendment.

82. The same applies to the interview report by the Conakry police for Mr. [N], former country director of GVG in Guinea, who, albeit dating from April 12, 2011, was produced by ARPT and the Republic of Guinea only in the context of this remedy for annulment, and for which the declarations, which, at the time, did not give rise to any judicial follow-up, are, in addition, contested by the latter and, in any event, relate to events in relation to the signature of the amendment no.3 on the national communication flows, and the contractual relations between GVG and GTY, created by Mr. [Y], former general director of ARPT, and, accordingly, on contractual relations not submitted before the arbitral tribunal, for which the award, consequently, grants no effect.

83. Accordingly, it is for the court to appreciate whether the indications alleged by ARPT and the Republic of Guinea under the “first stage” which only concern the agreements for which the award grants effect thereto, constitute significant, specific and concordant indicators providing evidence of corruption, which implies that an individual and collective examination thereof shall be required, with the evidence of corruption which may result from an accumulation thereof.

84. Amongst the relevant indications with regard to the control of the disputed award for international public policy, those which relate to events in relation to GVG and the purpose of the dispute relate to allegations of circumvention of the rules for public procurement contracts, predation of Guinean public funds and tax fraud, upheld against GVG in Guinea.

85. The lack of recourse to an invitation to tender for the conclusion of a public procurement contract may constitute an operative indication. However, it is not established, in this case, that the disputed procurement contract systematically required recourse to an invitation to tender albeit that it remained subject to the Public Procurement Code.

86. It results from the Guinean Public Procurement Code that certain agreements under its remit may also be concluded “directly” (see Article 27.2) and, in particular, if “the compelling urgency substantiated by unforeseeable circumstances and force majeure for the delivery of supplies, does not enable the performance of the works or industrial procurement contracts”.

87. In this regard, as emphasized by the arbitral tribunal, and without this being contested, this same process was used by the Subah agreement, which replaced the partnership agreement entered into with GVG, with this agreement having been entered into without an invitation to tender (§ 186 and 187 of the award).

88. Accordingly, the arbitral tribunal was able to consider that “in the same manner as the Subah agreement, as the succeeding agreement, the circumstances of the period of the signature of the partnership agreement justified that the Public Procurement Code invitation

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to tender procedure be dismissed” and, thus with regard to these elements, such an indication loses its effect in this case to characterize the alleged corruption.

89. With regard to the indication drawn from the imbalanced nature of the agreement, it shall be established that an imbalanced agreement shall not imply corruption.

90. Furthermore, it must be emphasized that the arbitral tribunal used the appreciation of the economic model resulting from this agreement and, by taking into consideration GVG’s initial investment of more than 13 million dollars, but also the “costs of the operation to be assumed, and the risks that it exclusively assumed in this project (...), in particular, the country risk related to investments in Guinea, for which both parties agree to be amongst the most significant in the world (§222).

91. Accordingly, the arbitral tribunal considered that “with regard to such an investment and endorsement of risks”, ARPT and the Republic of Guinea “did not provide evidence as to what extent the partnership agreement, applicable for five years and providing significant revenue for the State, results from an unlawful economic model, nor how such model is per se an indication of corruption” (§ 223).

92. It results from these elements, duly controlled by the arbitral tribunal, that the unlawful nature of the economic model resulting from this agreement is not evidenced albeit particularly beneficial for GVG, at least in the first stage of its enforcement.

93. It shall also be added that to evaluate the amount of the sanctions pronounced against ARPT and the Republic of Guinea under this agreement, the arbitral tribunal used as a basis, not the cost per minute such as initially fixed by the ministerial order dated May 29, 2009, but that resulting from the Addendum, for which the amount was significantly reduced, i.e., 0.025 USD per minute.

94. Accordingly, in any event, the award does not use as a basis the economic model defined as imbalanced by ARPT and the Republic of Guinea to sanction the latter, but took into consideration a significant reduction of tariff such as that resulting from the Addendum.

95. The unlawfully imbalanced nature of the agreement, for which, in any event, the award does not grant any effect, is, accordingly, not sufficiently corroborated to constitute a significant indicator likely to be taken into account to characterize corruption.

96. With regard to the tax fraud accusation, it must be noted that the latter is not corroborated by any document. Whilst, with regard to corruption, direct substantive evidence is complex, and thus recourse to indicators shall be possible, this does not apply to tax fraud, for which the substantive evidence may be established, which is not applicable in this case, and, accordingly, it shall not be considered as an admissible indicator.

97. The other indicators provided by ARPT and the Republic of Guinea, which relate to the Guinean context at the time of the conclusion of the Partnership Agreement, GVG’s tarnished reputation such as related by the press, or even Mr. [CC]’s appointment, former ARPT director at the time, as honorary consul of Haiti in Guinea, are less significant indicators,

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insofar as they relate either to general considerations, for which the direct relation with the events herein is not established, or to ancillary events without any genuine relation with the dispute.

98. Accordingly, the invocation of the general context of corruption in Guinea in 2009, even added to other previously alleged indicators, shall not confer a significant, specific and concordant nature thereon.

99. On the one hand, a State may not be exempt from its contractual commitments by merely alleging a general context of corruption in its administration.

100. On the other hand, whilst it is not required for the annulment of an award that the initiation of proceedings against the alleged offenders and criminal sanctions were pronounced, such situation shall also not result in the judge ruling on the annulment from ignoring the evident inaction by the public authorities prior to or during the arbitral proceedings to contest the legality of the disputed agreement before the arbitral tribunal, the rightful judge for the agreement.

101. In this case, no action intended to pursue the acts of corruption was initiated prior to the arbitral proceedings, whereas before the Court of Appeal, ARPT and the Republic of Guinea produced an interview report drafted at the police office dated April 12, 2011 and for which the appellants must or should evidently have been made ware thereof well before the introduction of the dispute.

102. The same applies to the argument based on “*GVG’s tarnished reputation, such as related in the press*”, asserted by ARPT and the Republic of Guinea, insofar as, in addition, the articles produced do not concern the disputed agreement or Guinea, but related to GVG’s practices which would have been practiced in other countries (Senegal, Haiti, Central Africa, Liberia).

103. Finally, Mr. [CC]’s appointment, former ARPT director at the time, in his capacity as the honorary consul of Haiti in Guinea, which occurred in November 2012, albeit that he was appointed upon proposition by Mr. [L], former CEO for GCG, constitutes a minimal indicator to characterize Mr. [CC]’s corruption for the conclusion of the agreement that occurred more than three years previously, as was rightly recalled by the arbitral tribunal.

104. Accordingly, it results both from the control by the arbitral tribunal, as it was duly entitled so to do, that the analysis of each of the indicators considered both separately and globally, that the alleged actions do not characterize significant, specific and concordant indicators likely to result in an annulment of the award for failure to comply with international public policy.

105. Therefore, this grievance shall be dismissed.

3-2 Concerning the grievance based on the non-compliance of the adversarial principle:

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106 – ARPT and the Republic of Guinea asserted the breach of the adversarial principle on the basis of the equality of arms and the rules relating to the burden of evidence, insofar as they considered that the tribunal had required them to provide positive evidence of corruption. They considered that the arbitral tribunal substituted for GVG by automatically raising the criteria of urgency to justify GVG obtaining the partnership agreement without an invitation to tender and retained the existence of a substitution agreement for Amendment no. 3 solely based on the information provided by this party, without requesting any evidence therefor.

107. In response, GVG asserted that the arbitral tribunal had not breached the adversarial principle insofar as the criteria of urgency on which the latter had based its argument, was an element raised by the Guinean parties. It asserted that the element used as the basis of the arbitral tribunal's reasoning for its refusal to annul the Amendment no. 3 was subject to much debate, as the Guinean parties contested the existence of a new agreement having replaced Amendment no.3.

ACCORDINGLY,

108. The adversarial principle only required that the parties were able to file their pleas *de facto* and *de jure*, and that they were able to discuss with the opposing party to such extent that no basis of the arbitrators' decision had been eluded from such adversarial debate.

109. Accordingly, the adversarial principle prohibits *de facto* or *de jure* grounds from automatically being raised without first convening the parties to comment thereon.

110. On the other hand, such adversarial principle does not oblige the arbitral tribunal to firstly submit the legal argumentation substantiating its motivation for discussion by the parties.

111. In this case, it results from paragraphs 186-195 of the arbitral award that the arbitral tribunal considered that it resulted, in particular, from the fact that the Subah agreement dated November 20, 2015 had also been entered into without recourse to an invitation to tender procedure that "*the State is authorized, in certain circumstances, to circumvent the invitation to tender stage (...). Yet, it evidently results from Mr. [D]*'s interview that in 2009, at the time of the conclusion of the Partnership Agreement, the Republic of Guinea was subject to the military regime and in a state of utter political instability (...). The arbitral tribunal defined that such circumstances also alimented the state of urgency provided under the terms of the Public Procurement Code".

112. Whilst this criteria was provided and included in the debates to justify any recourse or not to an invitation to tender by ARPT and the Republic of Guinea (in particular, in its rejoinder submissions, dated October 31, 2018 in §535) for the Subah agreement; as this agreement was included in the debates, the tribunal could also assert the latter to justify the absence of recourse to an invitation to tender for the partnership agreement without such consideration being considered non-compliant with the adversarial principle.

113. Concerning the tribunal's refusal to annul amendment no. 3, ARPT and the Republic of Guinea contested the fact that the tribunal had based its reasoning on a mere assertion of the

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existence of an agreement which would have replaced amendment no.3. By doing so, under the guise of a ground based on the non-respect of the adversarial nature, ARPT and the Republic of Guinea requested of the court to revise the reasons adopted by this tribunal, which is not part of the court's remit.

114. It results from these elements that the grievance pertaining to the lack of respect of the adversarial principle shall be dismissed.

115. Accordingly, the ground based on the breach of international public policy shall be dismissed.

4- Concerning the ground for annulment based on the fact that the arbitral tribunal failed to comply with its mission (Article 1520 4° of the French Code of Civil Procedure)

116. With regard to the grievance related to the lack of substantiation of the Award, ARPT and the Republic of Guinea asserted the superficial and insufficient nature of the motivation.

They asserted that the arbitral tribunal had not motivated its decision with regard to the arguments relating to the *ad hoc* nature of arbitration provided under Article 77 of the Public Procurement Code, drawn from the bi-partite nature of the arbitration and the tribunal's methods of constitution and the President's designation. They added that their arguments to evidence the abnormal nature of GVG's remuneration did not receive any response by the arbitral tribunal. They also asserted that the arbitral tribunal did not take into account the fact that the material element of the offense of corruption may also be constituted by the promise of donations and that it should have identified whether such a donation had not been made by GVG prior to the conclusion of the Partnership Agreement and Amendment no.3 in order to facilitate the conclusion.

117. In response, GVG set forth that the arbitrators provide on each of the points judged, the reasons which justify their position, in their opinion. Furthermore, they asserted that the defaulting motivation cases of the Award were not identified upon the control by the judge ruling on the annulment, whether concerning an incomplete, irrelevant or erroneous motivation.

ACCORDINGLY,

118. According to Article 1520, 3° of the French Code of Civil Procedure, the annulment remedy is applicable if the tribunal decided without complying with its mission.

119. In accordance with Article 1509 of the French Code of Civil Procedure, "*the arbitration agreement may, directly or by reference to an arbitration regulation or procedural rules, settle the procedure to be followed in the arbitral proceedings. If no response is provided in the arbitration convention, the arbitral tribunal shall settle the procedure, as necessary, either directly or by reference to an arbitration regulation or procedural rules*".

120. In this case, Article 31 of the ICC regulation (version 2012) applicable to the arbitral proceedings sets forth that "*the arbitral award must be substantiated*".

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121. Accordingly, in this case, the arbitral tribunal was required to substantiate its award in compliance with its mission.

122. In this case, ARPT and the Republic of Guinea contest that the arbitral tribunal failed to substantiate its decision “with regard to the arguments relating to the ad hoc nature of arbitration provided in Article 77 of the Public Procurement Code”.

123. Nonetheless, it results from this point of the award that the tribunal had expressly dismissed the application of Article 77 of the Public Procurement Code for the benefit of the arbitration clause provided in the partnership agreement as recalled above, during the examination of the competence, and the court shall not provide an appreciation on the sufficiency and grounds adopted by the tribunal.

124. ARPT and the Republic of Guinea also contested that the tribunal did not respond to several “arguments” that they had provided to evidence the abnormal nature of GVG’s remuneration.

125. Nonetheless, on the one hand, the arbitrators are not obliged to respond to the totality of the parties’ argumentation.

126. On the other hand, this argument was asserted in support of the ground based on the corruption of the agreement, that the tribunal considered non-established in its paragraphs 221 to 224 of its award, contesting, in particular that ARPT and the Republic of Guinea had not sufficiently substantiated the evidence of allegations on the economically unlawful nature of the partnership’s economic model.

127. ARPT and the Republic of Guinea also contest that the arbitral tribunal did not respond to the “arguments relating to the subjective cause of Amendment no. 3, the cashing at bank agencies, accordingly for cash, of cheques not crossed out by GVG’s country director in Guinea, the tax fraud...”.

128. Nonetheless, the tribunal dismissed all these arguments in §233 of its award and the court may not, under the guise of the control of the respect of its mission, operate a control of the relevance of the motivation.

129. ARPT and the Republic of Guinea also contest that the arbitral tribunal failed to “consider as offenses of fraud and misappropriation of public funds with regard to those acknowledged against GVG”. Nonetheless, the tribunal considered in paragraph 225 of its award that these arguments could not be retained as they were not sufficiently substantiated.

130. Finally, with regard to the grounds raised by the arbitral tribunal according to which the ICC arbitration was not contrary to Guinean public policy, due to the reform of the dispute resolution in public procurement contracts under Article 134 of the New Public Procurement Contract, or the arbitral tribunal’s grounds concerning donations and gifts, ARPT and the Republic of Guinea, which set forth that these cases include a “defective motivation”

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accordingly criticize, not the existence of these grounds, but their relevance or insufficiency, which eludes the control by the judge ruling on the annulment.

131. It results from these elements that, under the guise of a lack of motivation, ARPT and the Republic of Guinea contest that the tribunal failed to substantiate its motivation, which could not result in the annulment of an award.

132. Accordingly, this ground shall be dismissed.

Concerning the expenses and costs

133. ARPT and the Republic of Guinea shall be ordered to pay the costs, as the unsuccessful parties.

134. Furthermore, they shall be ordered to pay GVG, which incurred unrecoverable costs to assert its rights, a global indemnity under Article 700 of the French Code of Civil Procedure, which may be equitably set at 200,000 euros.

IV-DECISION

On these grounds, the court:

1-Declared admissible the Post and telecommunications regulatory authority for Guinea and the Republic of Guinea in their ground asserted under Article 1520, 2° of the French Code of Civil Procedure;

2-Dismissed the remedy for annulment against the award rendered on () under the aegis of the international commercial chamber;

3-Order the Post and telecommunications regulatory authority for Guinea and the Republic of Guinea to pay Global Voice Group S.A. the amount of 200,000 euros under Article 700 of the French Code of Civil Procedure.

4-Order the Post and telecommunications regulatory authority for Guinea and the Republic of Guinea to pay the costs.

THE COURT CLERK

THE PRESIDENT



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