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**PARIS COURT OF APPEAL**

**DIVISION 5 – 16**  
**International Commercial Chamber**

**JUDGMENT OF 7 SEPTEMBER 2021**

(No /2021, 11 pages)

General Directory Entry Number: **RG No 20/04480 - Portalis No 35L7-V-B7E-CBTJY**

Decision referred to the Court: Judgment of the 3<sup>rd</sup> Chamber of the Paris Commercial Court dated 6 February 2020, made available at the Clerk's office.

**APPELLANT**

**Company BANQUE FINANCIERE ET COMMERCIALE DU HONDURAS SA (FICOHSA)**

Company under Honduran law

Having its registered office at Efficio Plaza Victoria, Colonia Las Colinas, blvd Francia 38 - 58,  
TEGULCIGALPA MCD - HONDURAS

Represented by its legal representatives,

*Represented by Counsel ( ), member of the Paris Bar, mailing box: ( )*

**RESPONDENT**

**Limited company SADE - COMPAGNIE GENERALE DE TRAVAUX D'HYDRAULIQUE**

Registered with the Trade and Companies Register of Paris under the number **562 077 503**

Having its registered office at 23/25 avenue du Docteur Lannelongue – 75014 PARIS

Represented by its legal representatives,

*Represented by Counsel ( ), member of the Paris Bar, mailing box: ( )*

**Limited company BNP PARIBAS represented by its legal representative domiciled in this capacity at the head office.**

Registered with the Trade and Companies Register of Paris under the number **662 042 449**

Having its registered office at 16 boulevard des Italiens – 75009 PARIS

Represented by its legal representatives,

*Represented by Counsel ( ), member of the Paris Bar, mailing box: ( )*

**Municipality of PUERTO CORTES**

Adress: municipalidad de Puerto Cortes, CA, alcaldia municipal, blvd Curva, PUERTO CORTES,  
CORTES - HONDURAS

Defaulting party

**COMPOSITION OF THE COURT:**

In accordance with the provisions of Articles 805 and 907 of the Code of Civil Procedure, the case was heard on 31 May 2021 in open Court, the lawyers, informed of the composition of the court for the deliberation, not having objected, before Mr. François ANCEL, President, in charge of the report and Mrs. Laure ALDEBERT, Judge.

The judges reported the oral arguments in the Court deliberation, composed of:

Mr. François ANCEL, President  
Mrs. Fabienne SCHALLER, Judge  
Mrs. Laure ALDEBERT, Judge

**Clerk** at the hearing: Inès VILBOIS

## **JUDGMENT:**

- DEEMED ADVERSARIAL
- judgment made available at the Clerk's office of the Court, the parties having been notified in advance under the conditions provided for in the second paragraph of Article 450 of the Code of Civil Procedure.
- signed by François ANCEL, President and by Najma EL FARISSI, Clerk in charge to whom the minute of the decision was delivered by the signatory judge.

## **I- STATEMENT OF FACTS AND PROCEEDINGS**

### **Facts**

- 1- The company BANQUE FINANCIERE ET COMMERCIALE DU HONDURAS (hereinafter « FICOHSA ») is a bank having its head office in HONDURAS.
- 2- The limited company SADE – COMPAGNIE GENERALE DE TRAVAUX D’HYDRAULIQUE (hereinafter « SADE ») is a company specialised in the construction, renovation and maintenance of water and energy networks, as well as civil engineering.
- 3- BNP PARIBAS is a bank having its head office in France.
- 4- On 7 November 2000, the Municipality of Puerto Cortes (Honduras) concluded a contract for the construction of wastewater treatment system with SADE.
- 5- On 3 May 2001, in order to guarantee the proper performance of this contract by SADE, FICOHSA granted the Municipality of Puerto Cortes a first demand guarantee for a period of one year and one month, extended by several amendments until 31 January 2005. It thus committed to “irrevocably” guarantee the payment of the sums owed by SADE to the municipality up to an amount of HNL 6,770,101.08, an amount fixed under the terms of several amendments at USD 151,007.35 and HNL 5,122,732.33.
- 6- On 15 March 2001, BNP PARIBAS committed “*irrevocably to pay*” FICOHSA up to the same amounts “*at [its] first written request on receipt of an authenticated message or registered letter, without deferring payment or raising any objection or dispute to the guarantee.*”
- 7- On 28 and 31 January 2005, following a disagreement between SADE and the Municipality of Puerto Cortes on the finishing touches to the site, the latter called FICOHSA as guarantor, which called in the counter-guarantor of BNP PARIBAS on 18 February 2005.

## **Proceedings**

8- On 8 March 2005, the Administrative Court of San Pedro Sula (Honduras), seized by SADE, suspended the order for payment of the guarantee by FICOHSA to the Municipality of Puerto Cortes.

9- Ruling in summary proceedings by order of 17 March 2005, the Paris Commercial Court, also seized by SADE, noting that the San Pedro Court had prohibited FICOHSA from paying the first-rank guarantee called by the Municipality of Puerto Cortes, also provisionally prohibited BNP PARIS to pay the counter-guarantee to FICOHSA "until a court decision be handed down in France, or an agreement between the parties be reached".

10- On 19 September 2013, the Supreme Court of Honduras overturned the decision to suspend payment ordered by the Administrative Court of San Pedro Sula.

11- On 21 February 2014, FICOHSA paid the amounts called in guarantee to the Municipality of Puerto Cortes.

12- In a bailiff's deed dated 24 December 2013, FICOHSA summoned SADE, BNP PARIBAS and the Municipality of Puerto Cortes to appear before the interim relief judge of the Paris Commercial Court for the purpose of lifting the prohibition on payment of the counter-guarantee ordered on 17 March 2005.

13- Having at the same time brought a subrogation action against SADE for repayment of the sums it had paid to the Municipality of Puerto Cortes, FICOHSA finally withdrew from this case at the hearing of 7 May 2014.

14- By judgment of 23 November 2015, SADE was ordered by the Court of SAN PEDRO SULA to pay these amounts to FICOHSA.

15- On 9 August 2017, faced with SADE's refusal to pay this sum, and after a formal notice dated 28 October 2016 that remained unanswered, FICOHSA summoned SADE, BNP PARIBAS and the Municipality of Puerto Cortes before the Paris Commercial Court.

16- In a judgment dated 6 February 2020, the Paris Commercial Court declared FICOHSA's claim for payment of the counter-guarantee against BNP PARIBAS to be time-barred.

17- On 28 February 2020, FICOHSA appealed against this judgment.

## **II- CLAIMS OF THE PARTIES**

**18- Under the terms of its latest submissions, signified electronically on 20 March 2020, FICOHSA asks the Court, under Article 488 of the Code of Civil Procedure, Articles 1134, 2321, 2240, 2245 and 2251 of the Civil Code, to:**

**REFORM THE JUDGMENT IN ALL ITS PROVISIONS, AND CONSEQUENTLY**

**DISMISS** the objection of prescription

**LIFT** the prohibition on payment of the Counter-Guarantee issued against BNP PARIBAS on 15 February 2005;

**IN ANY EVENT**

**ORDER** BNP PARIBAS to pay FICOHSA in performance of the counter guarantee the equivalent in euros of (i) USD 151,007.35 on the one hand, and of (ii) HNL 5,122,732.33 on the other hand, according to the conversion rate in force on the day of the forthcoming judgment,

**FIND** that BNP PARIBAS shall be subrogated to the rights of FICOHSA against SADE as soon as the two payments of (i) USD 151,007.35 on the one hand, and of (ii) HNL 5,122,732.33 on the other hand have been made,

**DISMISS** all parts of the submissions to the contrary

**ORDER** SADE to pay the BANQUE FINANCIERE ET COMMERCIALE DU HONDURAS the sum of 15,000 euros under Article 700 of the Code of Civil Procedure;

**ORDER** SADE to pay full costs of the proceedings, including translation costs;

**19- Under the terms of its latest submissions, signified electronically on 18 June 2020, SADE asks the Court, under Article 488 of the Code of Civil Procedure, Articles 1134 (former), 2234, 2241, 2243, 2247 (former), 2250 (former) and 2321 of the Civil Code, Article L. 110-4 of the Commercial Code and the Law of 17 June 2008 on the reform of the statute of limitations, to:**

**CONFIRM** the judgment of the Paris Commercial Court of 6 February 2020 in all its provisions;

**I- Principally, on the statute of limitations of FICOHSA's action against BNP PARIBAS, to:**

**DIRECT AND JUDGE** that FICOHSA's action against BNP PARIBAS is inadmissible as time-barred, and to prohibit BNP PARIBAS from paying to FICOHSA the equivalent in euros of (i) USD 151,007.35 on the one hand, and of (ii) HNL 5,122,732.33 on the other hand, according to the conversion rate in force on the day of the forthcoming judgment;

**DISMISS** FICOHSA of all its requests, ends, conclusions, means and claims;

**CONFIRM** the judgment of the Paris Commercial Court of 6 February 2020 in all its provisions;

**II- In the alternative, on the merits, to:**

**DIRECT AND JUDGE** that the call by the Municipality of PUERTO CORTES on the first rank guarantee granted by FICOHSA is irregular, as it does not comply with the conditions of form, time limits and substance of the guarantee deed;

**DIRECT AND JUDGE** that the call by the Municipality of PUERTO CORTES on the first rank guarantee granted by FICOHSA is manifestly abusive;

**DIRECT AND JUDGE** that FICOHSA was aware of the irregularity and the manifestly abusive nature of the call on its guarantee by the Municipality of PUERTO CORTES;

**DIRECT AND JUDGE** that the call by FICOHSA on the counter-guarantee of BNP PARIBAS is manifestly abusive, and to prohibit BNP PARIBAS from paying to FICOHSA the equivalent in euros of (i) USD 151,007.35 on the one hand, and of (ii) HNL 5,122,732.33 on the other hand, according to the conversion rate in force on the day of the forthcoming judgment;

Consequently,

**DISMISS** FICOHSA's request that BNP PARIBAS be ordered to pay it, in performance of the counter-guarantee, the equivalent in euros of (i) USD 151,007.35 on the one hand, and of (ii) HNL 5,122,732.33 on the other hand, according to the conversion rate in force on the day of the forthcoming judgment;

**DISMISS** FICOHSA of all its requests, ends, conclusions, means and claims;

**III- On the costs and expenses of the proceedings, to:**

**CONFIRM** the judgement insofar as it ordered FICOHSA to pay SADE the sum of 10,000 euros under Article 700 of the Code of Civil Procedure, in addition to the costs of the proceedings;

Adding,

**ORDER** FICOHSA to pay SADE the sum of 20,000 euros under Article 700 of the Code of Civil Procedure, in addition to all costs of the proceedings;

**DISMISS** FICOHSA of all its requests, ends, conclusions, means and claims.

**20- Under the terms of its latest submissions, signified electronically on 22 June 2020, BNP PARIBAS asks the Court, under Articles 1134 (former) and 2321 of the Civil Code, to:**

**PRINCIPALLY**

**Direct and judge** that the action for payment initiated by FICOHSA is time-barred and therefore confirm the judgment handed down by the Paris Commercial Court on 6 February 2020 insofar as it:

**Declared inadmissible** as time-barred the action for payment of the counter-guarantee of FICOHSA

**Dismissed** FICOHSA's request for payment of this counter-guarantee, as well as all its other claims;

**Ordered** FICOHSA to pay the costs of the proceedings

**Ordered** FICOHSA to pay BNP PARIBAS the sum of €5,000 under Article 700 of the Code of Civil Procedure

**IN THE ALTERNATIVE**, in the event that the Court rules that FICOHSA's claims are admissible

**Give notice** to BNP PARIBAS, in view of the applicant's objections invoking the manifestly abusive nature of the call on the counter-guarantee during the initial proceedings, to refer to the Court on the merits of FICOHSA's requests to lift the judicial prohibition on payment of this counter-guarantee.

**IN ANY EVENT,**

**Order** the losing party to pay the sum of €5,000 to BNP PARIBAS and to pay the costs of the proceedings.

**21- The Municipality of Puerto Cortes (Honduras) did not present any claim.** It was summoned by bailiff's deed delivered to the Public Prosecutor on 26 August 2020. It appears from the documents submitted that the deed was delivered by post on 14 October 2020.

22 - The order for termination was issued on 9 March 2021.

### **III- REASONS FOR THE DECISION**

#### **On the statute of limitations of the action for payment of the counter-guarantee**

**23- FICOHSA** argues that the enforceability of the counter-guarantee depends on the enforceability of the debt of the first-ranking guarantor, so that its action for payment of the counter-guarantee against BNP Paribas is not time-barred since the five-year statute of limitations was suspended by the judgment of the Administrative Court of SAN PEDRO SULA of 8 March 2005 (i.e. 39 days after the due date) which prohibited it from paying the Municipality of PUERTO CORTES. It states that this period only began to run again from 19 September 2013, date of the decision of the HONDURAS Supreme Court overturning this judgment.

24- The bank argues that in the present case, the parties have made the enforceability of the first-rank guarantee a condition for the enforcement of the second-rank guarantee, so that the due date of the counter-guarantee is the starting point of the limitation period. Consequently, it argues that it had until 10 August 2018 to issue its summons and interrupt the limitation period.

25- It also considers that FICOHSA and BNP PARIBAS are joint and several debtors which are not interested in the same debt (i.e. the debt of the principal debtor, SADE), so that it interrupted the limitation period by acting against SADE before 18 June 2013, pursuant to Article 2250 of the Civil Code.

26- FICOHSA adds that BNP PARIBAS very explicitly acknowledged on two occasions the merits of its action for payment and adds that, under the terms of its submissions dated 8 January 2014, BNP PARIBAS waived its right to invoke the statute of limitations and is no longer entitled to rely on it, pursuant to Article 2251 of the Civil Code.

**27- SADE** argues that FICOHSA's action for payment of the counter-guarantee is inadmissible on the grounds that it is time-barred since 19 June 2013. After having concluded that French law, the law of the place of establishment of BNP PARIBAS, shall apply pursuant to Article 4 of the 1980 Rome Convention, in the absence of a choice of law in the covenant of BNP PARIBAS, SADE argues that because of the autonomous nature of the counter-guarantee both in relation to the basic contract and in relation to the first-rank guarantee, the limitation period begins to run from the time the counter-guarantee is called upon by the first-ranking guarantor and not from the day on which the first-ranking guarantor is required to pay the beneficiary of this guarantee. Therefore, it argues that the performance by the first-ranking guarantor of its covenant or even the calling of its guarantee by the beneficiary are irrelevant.

28- It argues that in this case, as the counter-guarantee of BNP PARIBAS was called upon by FICOSHSA on 18 February 2005, the limitation period had expired on 19 June 2013, by application of the five-year statute of limitations under the Law of 17 June 2008.

29-It argues that the court injunction issued to the first-ranking guarantor not to perform its guarantee does not prevent action against the counter-guarantor, so that FICOHSA is unfounded to invoke the suspension of the enforceability of the first-rank guarantee by operation of the judgment of the Administrative Court of SAN PEDRO SULA.

30-SADE further argues that the first-ranking guarantor is not liable for the same debt as the second-ranking guarantor and that there is therefore no joint and several liability between them. It adds that neither the first-rank guarantee of FICOHSA nor the counter-guarantee of BNP PARIBAS stipulate a joint and several liability. It concludes that SADE and BNP PARIBAS are not joint and several debtors due to the autonomy of the guarantee. It thus indicates that the action directed by FICOHSA against SADE could not interrupt the limitation period of its action against BNP PARIBAS.

31-SADE considers that the submissions signified by FICOHSA on 14 March 2005 before the interim relief judge of the Paris Commercial Court cannot be considered as an interruption of the statute of limitations due to the dismissal of the claim, pursuant to Article 2247 of the Civil Code, and that as regard to the submissions signified before the interim relief judge on 8 January 2014, the statute of limitations had already expired. It adds that BNP PARIBAS did not waive its right to rely on the statute of limitations in its submissions of 8 January 2014 on the grounds that there is no unequivocal recognition of the statute of limitations, the bank having only stated that it would refer to the court. It also adds that FICOHSA withdrew from its case, which retroactively dismissed the proceedings.

**32-BNP PARIBAS** argues as a liminary point that French law is applicable, by application of the Rome Convention in the absence of a choice by the parties. It states that the counter-guarantee is an autonomous commitment, payable on simple written demand by the first-ranking bank indicating that it is itself liable for payment. It adds that the autonomous legal nature of the counter-guarantee has not been contested and that, consequently, BNP PARIBAS can only be liable of the provisions of its own counter-guarantee, both to ensure compliance with the terms and conditions of its enforcement and to assess the validity of a call for payment presented by the beneficiary of its commitment, FICOHSA.

33-BNP PARIBAS argues that the enforceability of the autonomous counter-guarantee cannot be made conditional on that of the first-rank guarantee and that it was not for it to verify whether FICOHSA had to pay its own guarantee in order to pay the counter-guarantee, and that is why it noted the irregularity of the calling of the counter-guarantee, on the grounds that it was not formally regular. It also indicates that, in French law, when a right is subordinated to an ongoing action, the suspension of the limitation period can only be retained if an impossibility to act is characterized, which FICOHSA does not demonstrate.

34-BNP PARIBAS also argues that there is no joint and several liability between it and FICOHSA on the grounds that the autonomous counter-guarantee is not only independent of the basic commercial relationship but also of any first-rank guarantee, because the counter-guarantor does not undertake to pay the debt of another, whether that of the applicant or that of the first-ranking guarantor, but its own debt. It adds that joint and several liability cannot be presumed and that there is no mention of any joint and several liability between BNP PARIBAS and FICOHSA, on the contrary, BNP PARIBAS has only committed itself to the benefit of FICOHSA, and not to the Municipality of PUERTO CORTES.

35-BNP PARIBAS finally argues that the fact of referring to the court is not an acknowledgement of a situation or a right, but on the contrary a contestation, and points out that it has always opposed, through its referral to the court, the demands of FICOHSA. It adds that, in any event, any acknowledgement of debt in 2005 would have no effect on the admissibility of an action initiated twelve years later. It also indicates that, pursuant to Article 2250 of the Civil Code, the waiver of the statute of limitations is inapplicable in the absence of an express waiver or circumstances that unequivocally establish the will not to avail oneself of the statute of limitations. Finally, it adds that FICOHSA has withdrawn and that it cannot therefore rely on the acts of the proceedings.

**THEREUPON,**

**On the applicable law:**

36-The present dispute concerns an action for payment brought by a bank under Honduran law, first-demand guarantor, against a bank under French law, counter-guarantor, these guarantees having been granted in the context of a contract concluded between the Municipality of Puerto Cortes and SADE for the construction of a wastewater treatment system.

37-This is a dispute of an international nature for the purposes of which the applicable law must be determined by the conflict of laws rule resulting from the Rome Convention of 19 June 1980 on the law applicable to contractual obligations, the counter-guarantee commitment given by BNP PARIBAS having been made on 15 March 2001.

38-In this respect, in the absence of a choice of law by the parties in this case, Article 4 of the Rome Convention of 1980 provides that “*the contract shall be governed by the law of the country with which it is most closely connected*” and “*it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, its habitual residence, or, in the case of a body corporate or unincorporate, its central administration*”.

39-In the case of a first-demand guarantee, or a counter-guarantee, the characteristic of the contract is the irrevocable undertaking by the guarantor to pay, which in this case is the responsibility of BNP PARIBAS, based in France.

40. French law shall therefore be applied to settle this dispute, in accordance with the request of the parties which have placed themselves under the authority of that law.

**On the ground of non-admissibility based on the statute of limitations;**

***On the starting point of the statute of limitations***

41-It should be recalled that the starting point of a time period on the expiry of which an action can no longer be pursued is the date on which the obligation which gave rise to it becomes due.

42-In the case of an action seeking the enforcement of a counter-guarantee, the starting point of the statute of limitations shall accordingly be the day on which the counter-guarantee becomes due, unless otherwise provided.

43-In the present case, it is common ground that on 15 March 2001, BNP PARIBAS granted a counter-guarantee to FICOHSA, which had granted a first demand guarantee to the Municipality of Puerto Cortes to guarantee the obligations of SADE under a contract concluded with that Municipality.

44-According to its counter-guarantee, BNP PARIBAS undertook “*irrevocably to pay [the guarantor] (...) at [its] first written request on receipt of an authenticated message, or registered letter, without deferring payment or raising any objection or dispute relating to the guarantee*”.

45-On 18 February 2005, FICOHSA called in the counter-guarantee of BNP PARIBAS after having indicated, in accordance with the necessary formal requirement, that it had been asked to pay the Municipality of Puerto Cortes the sums of USD 151,007.35 and HNL 5,122,732.33 (“we have to pay ...”).

46-It follows that the debt obligation of BNP PARIBAS towards FICOHSA became due on 18 February 2005.

47-Pursuant to Article L. 110-4 of the Commercial Code “*obligations arising in the course of trade between merchants or between merchants and non-merchants are prescribed by five years if they are not subject to special shorter statute of limitations*”.

48-However, at the time of the events, this period was 10 years.

49-Pursuant to Article 26-II of the law of 17 June 2008 on the reform of the statute of limitations in civil matters, which reduced this period to 5 years, these new provisions “*which reduce the duration of the statute of limitations apply to statutes of limitations as from the day of the entry into force of the present law, without the total duration exceeding the duration provided for by the previous law*”.

50-As a result, since the statute of limitations for FICOHSA's action against BNP PARIBAS began on 18 February 2005, the action had to be brought, in accordance with the aforementioned Article 26-II, by



19 June 2013 at the latest, subject to the examination below of the alleged causes of suspension and/or interruption.

***On the ground alleging causes of suspension;***

On the suspension of the enforceability of the first demand guarantee granted by FICOHSA

51-The commitment given by BNP PARIBAS to pay a sum on first demand must be analyzed as an autonomous guarantee.

52-Such a commitment is autonomous both with regard to the contract concluded between SADE and the Municipality of PUERTO CORTES and with regard to the first-demand guarantee granted by FICOHSA to the latter.

53-Consequently, the enforceability of the counter-guarantee cannot, in the absence of a contrary clause, be dependent on the enforceability of the first demand guarantee, and the condition likely to affect the latter is neither likely to affect the enforceability of the counter-guarantee.

54-In this respect, contrary to FICOHSA's argumentation, the parties did not make the enforceability of the first-rank guarantee a condition for the enforcement of the second-rank counter-guarantee.

55-Indeed, the only mention required in the counter-guarantee undertaking that "*Your written request must indicate that you shall pay, in accordance with what is stipulated in your guarantee issued under our responsibility, the maximum amount mentioned above*", as the Paris Commercial Court judged, cannot be interpreted as implying a parties' desire to make the enforceability of the counter-guarantee depend on that of the first: this purely formal mention, for the declaration of enforcement of the counter-guarantee, cannot be assimilated to a substantive requirement, in the absence of another precise clause in this sense marking the parties' will to derogate from the guarantees' autonomy.

56-Consequently, the causes of suspension that may affect the payment of the first guarantee do not affect the enforceability of the counter-guarantee. This is the case of the suspension from which FICOHSA benefited between 8 March 2005 and 19 September 2013 in application of the decisions rendered by the Honduran courts, to which BNP PARIBAS was not a party.

57-Similarly, if by an order issued in summary proceedings on 17 March 2005, the president of the Paris Commercial Court, also seized at SADE's initiative, pronounced a provisional prohibition against BNP PARIBAS "*until a court decision in France, or the agreement between the parties decided*" to pay the counter-guarantee to FICOHSA, this prohibition directed against BNP PARIBAS alone, did not have a suspensive effect on the enforceability of the debt to FICOHSA.

58-In fact, if this decision rendered a provisional prohibition on the request of SADE to BNP PARIBAS to pay the counter-guarantee, it does not characterize an impossibility of acting pursuant to article 2234 of the Civil Code of FICOHSA before the judge of the merits to interrupt the statute of limitations running against it.

On the ground of joint and several liability between BNP PARIBAS and FICOHSA and the interruption of the statute of limitations due to the principal debtor apprehension

59-If joint and several liability is presumed in commercial matters, it presupposes that two or more debtors are liable for the same debt.

60-In this case, FICOHSA and BNP PARIBAS have committed themselves as guarantor and counter-guarantor by two separate acts:

-On the one hand, FICOHSA granted the Municipality of Puerto Cortes on 3 May 2001 a first demand guarantee in favor of the Municipality itself, to guarantee SADE's commitments up to the amount of HNL 6,770,101.08, subsequently reduced to the sums of USD 151,007.35 and HNL 5,122,732.33

-On the other hand, and by separate deed, BNP PARIBAS granted on 15 March 2001 an autonomous counter-guarantee in favor of FICOHSA, undertaking to pay it the sum of HNL 6,770,101.08, subsequently reduced to USD 151,007.35 and HNL 5,122,732.33.

61-Even if the maximum amount covered by these guarantees is identical, this does not mean that the same debt is being paid, as each of the banks is obliged to pay their own debt under their respective independent guarantee.

62-No joint and several liability can therefore be established, so that the ground based on the alleged benefit of the interruptive effect of the action taken by FICOHSA against SADE with regard to a joint and several debtor will be rejected.

On the recognition by BNP PARIBAS of its debt:

63-Pursuant to Article 2240 of the Civil Code, *"the recognition by the debtor of the right of the person against whom he was prescribing interrupts the statute of limitations"*.

64-FICOHSA maintains that BNP PARIBAS acknowledged its debt on two occasions in written submissions to the interim relief judge of the Paris Commercial Court, on 14 March 2005 and on 8 January 2014.

65-In this respect, FICOHSA considers, solely on the basis of the written submissions of BNP PARIBAS dated 14 March 2005 in the action brought before the interim relief judge of the Paris Commercial Court, that the recognition by BNP PARIBAS of its debt results from the fact that it mentions that *"unless the applicant can prove in due course that the call on the counter-guarantee was abusive or fraudulent, or else of the fraudulent collusion of the first-ranking bank with the beneficiary, the bank issuing this autonomous counter-guarantee cannot evade compliance with the irrevocable payment obligation, as soon as it is regularly called upon"*.

66-However, this mention alone does not constitute an acknowledgement by BNP PARIBAS of its debt.

67-It should be noted that this extract from the written submissions is inserted in a paragraph named "nature and scope of the counter-guarantee" and is intended to present the state of the law, without BNP PARIBAS expressly indicating that it considered that it could not itself avoid its obligation in this case.

68-Moreover, under the terms of the claims made by BNP PARIBAS before the interim relief judge, listed in the order by the latter, it appears that BNP PARIBAS asked the interim relief judge to give it notice *"of its referral to the court on the questions of the formal regularity of the enforcement of the first-rank guarantee during the period of validity of that guarantee, as well as on the proof of the clear abuse of this enforcement"* and *"in the event that [the interim relief judge] considers that the first-ranking bank is not liable for payment in view of the expiry of its commitment before it was properly called upon, or in view of a known misuse by FICOHSA"*, to *"declare that SADE is entitled to oppose payment of the counter-guarantee issued by BNP PARIBAS"*.

69-In any event, it cannot be inferred from these references alone that BNP PARIBAS has unequivocally acknowledged its debt to FICOHSA.

70-Finally, with regard to the written submissions of BNP PARIBAS dated 8 January 2014, which were intended to be presented to the interim relief judge of the Paris Commercial Court, FICOHSA also relies on them to characterize, according to it, an acknowledgement of debt on the part of the former through the following extract: *"As a third party and not having to deal with a debate concerning the good or*

*bad performance of the commercial contract, BNP PARIBAS had not contested and still does not contest that its commitment had been regularly called upon during its period of validity, nor consequently that it is obliged to honor this autonomous counter-guarantee”.*

71-However, it is not disputed that these proceedings before the interim relief judge resulted in the withdrawal of FICOHSA by order of the interim relief judge on 7 May 2014.

72-In any event, these writings, even if they could be admissible and assimilated to an acknowledgement of debt, took place after the statute of limitations had expired on 19 June 2013, so that they could not revive an acquired statute of limitations.

73-This ground shall therefore also be dismissed.

#### On the withdrawal of BNP PARIBAS

74-Pursuant to Article 2251 of the Civil Code, “*waiver of the statute of limitations is either express or tacit. / Tacit waiver results from circumstances which unequivocally establish the will to not avail oneself of the statute of limitations”.*

75-Pursuant to Article 2250 of the same Code, “*only an acquired statute of limitations can be waived”.*

76-In the present case, FICOHSA also relies on the aforementioned extract from the submissions of BNP PARIBAS dated 8 January 2014 in the summary proceedings before the president of the Paris Commercial Court, to consider that these written statements constitute a waiver by BNP PARIBAS of the statute of limitations, which had run its course by that date.

77-However, it is not disputed that the summary proceedings for which these submissions were intended, governed by an oral procedure, were extinguished by the effect of a withdrawal by FICOHSA, so that, on the one hand, there is no evidence that these submissions were taken up again at a hearing before the interim relief judge and that, on the other hand, the extinctive effect entailed the annihilation of all the previous procedural acts.

78-These writings cannot therefore entail a waiver by BNP PARIBAS to invoke the statute of limitations.

79-It is clear from these elements that, as no cause of suspension and/or interruption can be invoked, the action brought by FICOHSA by bailiff's deed dated 9 August 2017 was therefore time-barred on that date.

#### Costs and expenses of the proceedings:

80-FICOHSA, the losing party, shall be ordered to pay the costs of the proceedings.

81-In addition, it shall be ordered to pay SADE and BNP PARIBAS, which had to incur unrecoverable costs in order to assert their rights, damages under Article 700 of the Code of Civil Procedure, which it is fair to set at the sum of €10 000 and €5 000 respectively.

#### IV- OPERATIVE PART:

For these reasons, the Court:

1-Confirms the judgment of the Commercial Court of Paris dated 6 February 2020;

Adding,

2-Orders BANQUE FINANCIERE ET COMMERCIALE DU HONDURAS to pay to SA SADE - COMPAGNIE GENERALE DE TRAVAUX D'HYDRAULIQUE the sum of €10,000 under Article 700 of the Code of Civil Procedure and the sum of €5,000 to BNP PARIBAS for the same reason;

3 - Orders BANQUE FINANCIERE ET COMMERCIALE DU HONDURAS to pay the costs of the proceedings

**THE CLERK**

**THE PRESIDENT**