



SUPREME COURT OF THE PHILIPPINES
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Republic of the Philippines
Supreme Court
Manila

SECOND DIVISION

THE MERCANTILE INSURANCE
CO., INC.,

Petitioner,

G.R. No. 205007

Present:

- versus -

CARPIO, *Acting C.J.*,*
Chairperson,

CAGUIOA,
J. REYES, JR.,
LAZARO-JAVIER, and
ZALAMEDA, JJ.

DMCI-LAING CONSTRUCTION,
INC.,*

Respondent.

Promulgated:

16 SEP 2019

X-----X

DECISION

CAGUIOA, J.:

This is a petition for review on *certiorari*¹ (Petition) under Rule 45 of the Rules of Court assailing the Decision² dated July 30, 2012 (Assailed Decision) and Resolution³ dated January 7, 2013 (Assailed Resolution) rendered by the Court of Appeals (CA) in CA-G.R. SP. No. 80705.

The Assailed Decision and Resolution reverse the Decision⁴ promulgated on November 7, 2003 issued by the Construction Industry Arbitration Commission (CIAC) Arbitral Tribunal (Tribunal) in CIAC Case No. 10-2003 which, in turn, dismissed the claim filed by respondent DMCI-Laing Construction, Inc. (DLCI) against Altech Fabrication Industries, Inc. (Altech) and petitioner The Mercantile Insurance Co., Inc. (Mercantile).

* Also referred to as "DMCI Laing Construction, Inc." in some parts of the *rollo*.

* Designated as Acting Chief Justice per Special Order No. 2703 dated September 10, 2019.

¹ *Rollo*, pp. 9-49.

² Id. at 50-74. Penned by Associate Justice Elihu A. Ybañez, with Associate Justices Japar B. Dimaampao and Victoria Isabel A. Paredes concurring.

³ Id. at 161-162.

⁴ Id. at 75-101. Dated October 27, 2003 and issued by the Arbitral Tribunal consisting of Chairman Alfredo F. Tadiar and Members Joven B. Joaquin and Felicitas A. Pio Roda.

The Facts

The facts, as narrated by the CA, are as follows:

On March 17, 1997, Rockwell Land Corporation (“Rockwell”), as the owner and developer, entered into an agreement with [DLCI], as the General Contractor, for the construction of The Condominium Towers and associated external landscaping works of Hidalgo Place, Rizal Tower, Luna Garden, [and] Amorsolo Square (the “Project”) at the Rockwell Center, Makati City. Part of [DLCI’s] scope of work in the Project [was] the supply and installation of glazed aluminum and curtain walling. Part of the terms and conditions of the contract between Rockwell and DLCI (the “Main Contract”) [was] the appointment of [Altech] as Rockwell’s nominated sub[-]contractor to DLCI for the supply and installation of glazed aluminum and curtain walling.

On July 30, 1997, in compliance with the agreement between Rockwell and DLCI, Rockwell sent a Notice of Award to Proceed [(NTP)] to Altech for the supply and installation of the glazed aluminum and curtain walling at the Project. Said [NTP] bears the conformity of DLCI and Altech.

Pursuant to the [NTP] and the Sub-Contract Agreement [(Sub-Contract)] between DLCI and Altech, **Altech secured a Performance Bond from Mercantile for its scope of work in the [P]roject.** On September 5, 1997, Mercantile, as surety, with Altech, as principal, issued Performance Bond No. G(13)-1500/97 in favor of Rockwell and DLCI, as obligee, for the amount of Php90,448,941.60.

On September 8, 1997, Mercantile issued [B]ond [E]ndorsement No. E-109/97 ST, **correcting the effectivity of the Performance Bond from September 5, 1997 to September 5, 1999.** Thereafter, on September 12, 1997, Mercantile issued [B]ond [E]ndorsement No. E-116/97 ST, **correcting the obligee of the [P]erformance [B]ond to DLCI alone,** and not in favor of Rockwell and DLCI. Subsequently, on August 26, 1999, Mercantile issued [B]ond [E]ndorsement [N]o. E-220/99 ST, **extending the effectivity of the Performance Bond for another six (6) months from September 5, 1999 to March 5, 2000.**⁵ (Emphasis supplied)

On November 9, 1998, DLCI called Altech’s attention to the poor progress of the works subject of their Sub-Contract in its Letter⁶ addressed to Altech’s President and General Manager, Nicanor Peña:

[W]e detail below a programme status report of your installation works-

Panel installation at Rockwell as [of] [November 7, 1998]

	Total Panels	Planned %	Planned No	Actual %	Actual No
Hidalgo	4623	75%	3406	14%	664
Rizal	4830	60%	2919	5%	264

⁵ Id. at 51-52.

⁶ Id. at 229-230.

Luna	3100	36%	1110	NIL	NIL
Amorsolo [east and west]	3500	35%	1235	NIL	NIL
Project Total	16,053	54%	8670	6%	928

We would record that this situation is totally unacceptable, and we hereby request, in compliance with the proposed sub-contract conditions, the submission of your revised sub-contract works programme and recovery proposals identifying the methodology by which the agreed completion dates for your works are to be maintained.

x x x x

We would remind you that as a direct consequence of these delays[,] Altech maybe held liable for x x x any costs, losses or expenses caused by the delays, and subsequently suffered by DLCI.⁷

DLCI was constrained, in several instances, to undertake the completion and rectification of unfinished and sub-par works to avert further delay. DLCI apprised Altech of these instances, as well as its intention to charge the corresponding costs against Altech's account.⁸

On September 3, 1999, DLCI sent a letter to Mercantile, demanding "liquidation of the [Performance Bond]" with interest at the stipulated rate of 2% per month (First Call).⁹ DLCI's First Call was reiterated in its subsequent letters dated September 30, 1999,¹⁰ October 18, 1999,¹¹ and March 3, 2000.¹² The First Call and the reiterative letters sent by DLCI demanded the liquidation of the Performance Bond, but did not indicate the exact amount claimed.¹³

On January 20, 2000, Altech advised DLCI that it had relinquished its major assets to its bank due to financial difficulties.¹⁴ Nevertheless, Altech assured DLCI that it "[would] continue to provide [its] whole hearted support in terms of the logistical needs of the [P]roject."¹⁵

On February 21, 2000, DLCI terminated its Sub-Contract with Altech effective immediately. The Termination Letter reads, in part:

This termination is due to [Altech's] failure x x x to perform in accordance with the agreed terms of the sub-contract stipulated in the Notice of Award as well as in the documents referred to therein such as, but not limited to, the [Sub-Contract]. **Despite numerous written communications from**

⁷ Id. at 229-230.

⁸ As documented through DLCI's Letters dated November 21, 1998, November 23, 1998, January 13, 1999, April 15, 1999, June 4, 1999, August 24, 1999, September 20, 1999, September 16, 1999 and December 7, 1998; *rollo*, pp. 231-236, 239, 247, 249-250 and 253-254.

⁹ *Rollo*, p. 283.

¹⁰ Id. at 284-285.

¹¹ Id. at 286.

¹² Id. at 288.

¹³ See id. at 92.

¹⁴ Id. at 296.

¹⁵ Id.

us, [Altech has] failed to proceed with the sub-contract works with due diligence and [has] consistently failed to meet the required quality standards. Furthermore, [Altech has], by [its] own admission, entered into a deed of arrangement with its creditors in which it surrendered its major assets to the latter. The aforementioned acts are clearly events of default falling under [Paragraph] 17 of the [Sub-Contract] which justify [its] immediate termination x x x.

For purposes of record, we will conduct an assessment and evaluation of the sub-contract works on Wednesday[,] [February 23, 2000] before we formally take-over the same. We invite you to send your representatives to witness the assessment.

We reserve the right to claim from [Altech] reimbursement of all costs, as well as compensation for all damages, arising from [Altech's] default, including but not limited to costs of both direct and consequential delays. Likewise, we reserve the right to claim the refund of any payment which, after a review of your accomplishment and records, may be found to have been not due or wrongly paid to [Altech].¹⁶ (Emphasis supplied)

Subsequently, Mercantile advised DLCI that it had referred its demand to Altech for appropriate action through its Letter¹⁷ dated March 13, 2000. On March 28, 2000, Mercantile advised DLCI that since Altech had informed them that negotiations were underway for an amicable settlement, they would hold further evaluation of DLCI's claim in abeyance "to give enough elbow room to [Altech] to settle [the claim] on [its] own."¹⁸

After negotiations between DLCI and Altech fell through, DLCI reiterated its demand for liquidation on November 28, 2000.¹⁹

Mercantile denied DLCI's claim on February 26, 2001 on the ground that the Performance Bond expired on March 5, 2000.²⁰

Aggrieved, DLCI filed a complaint against Altech and Mercantile before the CIAC (CIAC Complaint) on May 29, 2003,²¹ seeking to collect the sum of Php31,618,494.81 representing the costs it allegedly incurred to complete the sub-contracted works, with interest and costs of litigation.²²

Despite earnest efforts to serve the CIAC Complaint upon Altech, DLCI was unable to do so since Altech was no longer holding office at its registered principal address. Its corporate officers refused to respond to the CIAC Complaint.²³

¹⁶ Id. at 287.

¹⁷ Id. at 289.

¹⁸ Id. at 290.

¹⁹ Id. at 53, 291.

²⁰ Id. at 53, 82.

²¹ Id. at 85.

²² Id. at 75.

²³ Id. at 76.



For its part, Mercantile argued that DLCI failed to file the CIAC Complaint within a “reasonable period of time” as required by the Sub-Contract.²⁴ In addition, Mercantile challenged the validity of the termination of the Sub-Contract, as well as DLCI’s right to claim against the Performance Bond.²⁵

CIAC Ruling

In a Decision promulgated on November 7, 2003, the Tribunal dismissed DLCI’s Complaint.²⁶

The Tribunal ruled that DLCI did not file the CIAC Complaint within a reasonable period, as required by Section 2, Paragraph 25 of the Sub-Contract, which states:

x x x Notice of the demand for arbitration of a dispute shall be filed in writing with the other party to the Sub-Contractor. The demand for arbitration shall be made within a reasonable time after the dispute has arisen and attempts to settle amicably have failed. In no case, however, shall the demand be made later than the time of final payment, except as otherwise stipulated in the Sub-Contract.²⁷ (*Italics omitted*)

According to the Tribunal, DLCI was unable to justify why it waited for more than three (3) years and three (3) months after termination of the Sub-Contract before filing the CIAC Complaint.²⁸ According to the Tribunal, DLCI’s delay amounts to a violation of the Sub-Contract, and triggers the application of laches.²⁹

Moreover, the Tribunal held that Mercantile should be released from its obligations under the Performance Bond pursuant to Article 2080 of the Civil Code,³⁰ since DLCI’s delay had deprived it of the opportunity to exercise its right of subrogation against Altech.³¹ It held:

It is not controverted that when [DLCI] filed its claim with CIAC on [May 29, 2003], [Altech] could no longer be found and efforts to serve it with the letter request for arbitration proved futile. As already held x x x [DLCI] is found guilty of inexcusable delay in filing this claim for arbitration. The consequence of this delay is to deprive [Mercantile] of its right to go after [Altech] on a cross-claim in this suit. This surely deprives [Mercantile] of its right of subrogation against Altech as [i]ndemnitor in the Performance Bond. x x x [I]n accordance with the provisions of

²⁴ Id. at 85-86.

²⁵ See id. at 92-97.

²⁶ Id. at 100.

²⁷ Id. at 80.

²⁸ Id. at 86.

²⁹ See id. at 86-89.

³⁰ Id. at 91.

³¹ Id.

Article 2080 x x x [Mercantile] is “released from its obligation” under the [P]erformance [B]ond.³²

The Tribunal also ruled that DLCI’s First Call was not a valid demand since it did not indicate the specific amount DLCI sought to recover from Mercantile.³³ Consequently, the Tribunal concluded that DLCI’s claim is already barred, since the Performance Bond had already expired two (2) years before DLCI finally ascertained the total amount of its claim.³⁴

In addition, the Tribunal found the termination of the Sub-Contract unjustified, as DLCI’s own Project Financial Manager John O’Connor admitted that Altech achieved 95% accomplishment as of the month of termination. According to the Tribunal, 95% work accomplishment qualifies as substantial completion under the Uniform General Conditions of Contract for Private Construction prescribed by the Construction Industry Authority of the Philippines (CIAP) in CIAP Document 102.³⁵

In any case, the Tribunal held that DLCI is not entitled to reimbursement for costs it had incurred in order to complete the Project, since its claims consist of expenses incurred *after* the unilateral termination of the Sub-Contract; it emphasized that the term “cost to complete” assumes a definite meaning in the construction industry, and relates to “the right of the owner (or in this case, the main contractor) to collect damages against the contractor (in this case, the sub-contractor) for the latter’s failure to complete the work as stipulated, prompting the former to take-over the project and complete the work by administration or by a different contractor.”³⁶

Aggrieved, DLCI filed a petition for review before the CA, insisting on its right to claim against the Performance Bond.

CA Ruling

The CA granted DLCI’s petition for review through the Assailed Decision, the dispositive portion of which reads:

WHEREFORE, the instant petition is GRANTED. The [CIAC Decision] is REVERSED and SET ASIDE. [Altech] and [Mercantile] are jointly and solidarily liable to pay [DLCI] the amount of Php31,618,494.81 representing the costs incurred by [DLCI] in completing the project and an interest at the rate of 2% per month on the said amount due from September 3, 1999 until the amount of Php31,618,494.81 is fully paid. Furthermore, a 12% interest *per annum* shall be imposed on the award upon the finality of this Decision until the payment thereof.³⁷ (Emphasis supplied; emphasis in the original omitted)

³² Id.

³³ Id. at 92.

³⁴ Id.

³⁵ Id. at 93-95.

³⁶ Id. at 96.

³⁷ Id. at 73.

The CA observed that negotiations between and among DLCI, Altech and Mercantile continued after the termination of the Sub-Contract, and that DLCI served its final written demand³⁸ upon Altech and Mercantile on January 20, 2003. **A meeting between DLCI and Mercantile's representatives followed on January 27, 2003, where said parties mutually agreed that attempts to arrive at an amicable settlement have failed.**³⁹

Considering the foregoing, the CA ruled that the filing of the CIAC Complaint four (4) months later, or on May 29, 2003, was done within a reasonable time.⁴⁰

The CA further held that Mercantile cannot invoke laches to evade liability in this case since the CIAC Complaint was brought within the prescriptive period of ten (10) years for filing an action upon a written contract (*i.e.*, the Performance Bond),⁴¹ inasmuch as DLCI's right of action only arose on January 27, 2003, when negotiations between the parties ceased.

Ultimately, the CA found Mercantile liable under the Performance Bond. Citing Article 2047 of the Civil Code governing suretyship, it held:

By executing the [P]erformance [B]ond, Mercantile, as surety, guaranteed the performance and completion by Altech of its sub-contracted works, and in case of Altech's failure to complete the [P]roject according to the terms of the Sub-Contract x x x, Mercantile's liability, as surety, sets in.

A careful review of the record[s] of the case revealed that Altech has reneged on its undertaking under the Sub-Contract before DLCI asked Mercantile for the liquidation of the [P]erformance [B]ond on September 3, 1999. On various dates, DLCI sent letters to Altech concerning the latter's continued poor performance and delays which seriously affected the progress of DLCI's programmed work. DLCI mentioned that it may have no other alternative but to seek recourse through the terms of the Sub-Contract and that repair works, as well as, associated costs as a result of damage to other contractors' works due to Altech's delay shall be charged to Altech's account.

Apparently, Altech had already been in default even prior to DLCI's call on the [P]erformance [B]ond. By reason of said default, liability attached to Altech and as a consequence, the liability of Mercantile as surety had arisen. By the language of the bond issued by Mercantile, it guaranteed the full and faithful compliance by Altech of its obligations set forth in its Sub-Contract with DLCI. This guarantee made by Mercantile gave DLCI the right to proceed against the former following Altech's default or non-compliance with its obligation.⁴² (Emphasis supplied)

³⁸ Id. at 292-294.

³⁹ Id. at 295.

⁴⁰ Id. at 59.

⁴¹ See id.

⁴² Id. at 62-63.

Contrary to the Tribunal's findings, the CA held that DLCI's First Call was valid despite its failure to reflect the specific amount claimed. While DLCI's exact monetary claim was still undetermined at the time of the First Call, it was already understood, by the terms of the Performance Bond, that such amount would not exceed Php90,448,941.60.⁴³ In addition, the CA ruled that Mercantile cannot escape its liability under the Performance Bond due to its alleged expiration, considering that it was Mercantile's own inaction which delayed the evaluation of DLCI's claim.⁴⁴

Further, the CA ruled that the termination of the Sub-Contract was justified by Altech's consistent delay and poor workmanship, regardless of the level of its accomplishment at the time of termination.⁴⁵ As a result, Mercantile is liable for the costs of completion claimed by DLCI having guaranteed the full and faithful compliance of Altech's obligations under the Sub-Contract.⁴⁶

Finally, while the CA found Mercantile liable to pay DLCI's claim, it found no basis to hold it liable for costs of litigation and attorney's fees there being no evidence that the former acted in bad faith.⁴⁷

Mercantile's motion for reconsideration was denied by the CA through the Assailed Resolution, which Mercantile received on January 10, 2013.⁴⁸

On January 17, 2013, Mercantile filed a Motion for Extension of Time⁴⁹ praying that it be granted a period of thirty (30) days, or until February 24, 2013⁵⁰ to file its Petition, which the Court granted.⁵¹

Mercantile filed the present Petition on February 20, 2013.⁵²

The Court directed DLCI to file its comment on the Petition in its Resolution⁵³ dated March 18, 2013.

DLCI filed its Comment⁵⁴ on July 2, 2013, to which Mercantile filed its Reply.⁵⁵

⁴³ Id. at 52, 63-64.

⁴⁴ Id. at 65.

⁴⁵ Id. at 69-70.

⁴⁶ Id. at 70.

⁴⁷ Id. at 72.

⁴⁸ Id. at 10.

⁴⁹ Id. at 3-7.

⁵⁰ See id. at 8.

⁵¹ See Resolution dated March 18, 2013, id. at 157.

⁵² Id. at 8, 9.

⁵³ Id. at 157.

⁵⁴ Id. at 168-218.

⁵⁵ Id. at 303-315.

The Issue

The Court is called upon to determine whether the CA erred when it directed Mercantile to pay DLCI the sum of Php31,618,494.81 on the basis of the Performance Bond, with stipulated interest at the rate of 2% per month.

The Court's Ruling

The Petition is denied for lack of merit. The Assailed Decision and Resolution are affirmed, with modification.

The CIAC Complaint was timely filed.

Foremost, Mercantile insists that the CIAC Complaint should have been dismissed outright since DLCI failed to file it within a reasonable time. A plain reading of Section 2, Paragraph 25 of the Sub-Contract belies this claim.

Section 2, Paragraph 25 of the Sub-Contract requires that any demand for arbitration between and among the parties shall be made within a reasonable time after the dispute has arisen and **attempts to settle amicably have failed.**⁵⁶

Mercantile does not dispute that all efforts to arrive at an amicable settlement proved futile on January 27, 2003,⁵⁷ following its refusal to heed DLCI's final demand for payment. Verily, the filing of the CIAC Complaint four (4) months later, that is, on May 29, 2003, was done within a reasonable time from the reckoning date set by Section 2, Paragraph 25 of the Sub-Contract.

DLCI's demand for liquidation through the First Call was valid.

It is a well-established rule that a contract stands as the law between the parties for as long as it is not contrary to law, morals, good customs, public order, or public policy.⁵⁸ Hence, to determine the validity of DLCI's demand for liquidation, reference to the conditions of the Performance Bond is proper.

On the conditions for recovery, the Performance Bond states:

[T]his bond is conditioned x x x upon the OBLIGEE's [DLCI's] first demand, the SURETY [(Mercantile)] shall immediately indemnify [DLCI] notwithstanding any dispute to the effect that the principal has fulfilled its contractual obligation, the amount demanded; PROVIDED however, that the liability of [Mercantile] under this bond shall in no case

⁵⁶ Id. at 80.

⁵⁷ Id. at 58.

⁵⁸ See CIVIL CODE, Arts. 1159, 1305-1306. See also *Enriquez v. The Mercantile Insurance Co., Inc.*, G.R. No. 210950, August 15, 2018, accessed at <<http://elibrary.judiciary.gov.ph/thebookshelf/shodowcs/1/64474>>.

exceed the x x x sum [of Php90,448,941.60]. [Mercantile] further agrees to pay [DLCI] interest at the rate of 2% per month on the amount due **from the date of rece[i]pt by [Mercantile] of [DLCI's] first demand letter up to the date of actual payment.**⁵⁹ (Emphasis supplied; italics omitted)

By these terms, Mercantile obligated itself to pay DLCI *immediately* upon demand, notwithstanding any dispute as to the fulfillment of Altech's obligations under the Sub-Contract. The Performance Bond thus stands as a contract of surety contemplated under Article 2047 of the Civil Code which states:

ART. 2047. By guaranty a person, called the guarantor, binds himself to the creditor to fulfill the obligation of the principal debtor in case the latter should fail to do so.

If a person binds himself solidarily with the principal debtor, the provisions of Section 4, Chapter 3, Title I of this Book⁶⁰ shall be observed. In such case the contract is called a suretyship. (Emphasis supplied)

Through a contract of suretyship, one party called the surety, guarantees the performance by another party, called the principal or obligor, of an obligation or undertaking in favor of another party, called the obligee.⁶¹ As a result, the surety is considered in law as being the same party as the debtor in relation to whatever is adjudged touching upon the obligation of the latter, and their liabilities are interwoven as to be inseparable.⁶²

While the contract of surety stands secondary to the principal obligation, the surety's liability is direct, primary and absolute, albeit limited to the amount for which the contract of surety is issued.⁶³ The surety's liability attaches the moment a demand for payment is made by the creditor. The Court's ruling in *Trade and Investment Development Corporation of the Philippines v. Asia Paces Corporation*⁶⁴ lends guidance:

x x x [S]ince the surety is a solidary debtor, it is not necessary that the original debtor first failed to pay before the surety could be made liable; it is enough that a demand for payment is made by the creditor for the surety's liability to attach. Article 1216 of the Civil Code provides that:

Article 1216. The creditor may proceed against any one of the solidary debtors or some or all of them simultaneously.

⁵⁹ *Rollo*, pp. 80-81.

⁶⁰ Section 4, Chapter 3, Title I of Book IV to which Article 2047 refers contains the provisions on joint and solidary obligations.

⁶¹ *People's Trans-East Asia Insurance Corp. v. Doctors of New Millennium Holdings, Inc.*, 741 Phil. 149, 161 (2014), citing *Stronghold Insurance Company v. Tokyu Construction Company, Ltd.*, 606 Phil. 400, 411 (2009).

⁶² *Trade and Investment Development Corporation of the Philippines v. Asia Paces Corporation*, 726 Phil. 555, 565 (2014).

⁶³ See *People's Trans-East Asia Insurance Corp. v. Doctors of New Millennium Holdings, Inc.*, supra note 61, at 161, citing *American Home Insurance Co. of New York v. F.F. Cruz & Co., Inc.*, 671 Phil. 1, 14 (2011).

⁶⁴ Supra note 62.

The demand made against one of them shall not be an obstacle to those which may subsequently be directed against the others, so long as the debt has not been fully collected.⁶⁵ (Emphasis supplied)

While the Performance Bond in this case is “conditioned” upon DLCI’s first demand, a close reading of its terms unequivocally indicates that Mercantile’s liability thereunder consists of a *pure* obligation since such liability attaches *immediately* upon demand, and is neither dependent upon any future or uncertain event, nor a past event unknown to the parties.⁶⁶ Thus, the Performance Bond is one that is callable on demand, wherein mere demand triggers Mercantile’s obligation (as surety) to indemnify DLCI (the obligee) the amount for which said bond was issued, that is, Php90,448,941.60.⁶⁷

Accordingly, the requirement of “first demand” in this case should be understood in light of Article 1169,⁶⁸ wherein the obligee is deemed to be in delay upon judicial or extra-judicial demand. Clearly, Mercantile’s liability became due upon its receipt of the First Call.

In this respect, DLCI’s alleged failure to state the value of its claim is of no moment. As astutely observed by the CA:

x x x [The Tribunal] makes much out of DLCI’s failure to state the specific amount that it is claiming. It must be emphasized that at the time of the call on the bond, Mercantile’s obligation guaranteeing project

⁶⁵ Id. at 565.

⁶⁶ See CIVIL CODE, Art. 1179.

⁶⁷ In *Philippine Charter Insurance Corp. v. Central Colleges of the Philippines*, 682 Phil. 507, 523-524 (2012), the surety and performance bonds bearing the following terms were characterized as being callable on demand:

The liability of [the surety] under this bond will expire on x x x; Furthermore, it is hereby agreed and understood that [the surety] will not be liable for any claim not presented to it in writing within FIFTEEN (15) DAYS from the expiration of this bond, and that the Obligee hereby waives its right to claim or file any court action against the surety after the termination of FIFTEEN (15) DAYS from the time its cause of action accrues.

x x x x

The liability of [the surety] under this bond will expire on x x x; Furthermore, it is hereby agreed and understood that [the surety] will not be liable for any claim not presented to it in writing within TEN (10) DAYS from the expiration of this bond or from the occurrence of the default or failure of the Principal, whichever is the earliest, and the Obligee hereby waives its right to file any claims against the Surety after termination of the period of ten (10) DAYS above mentioned after which time this bond shall definitely terminate and be deemed absolutely cancelled. Id. at 521-522.

⁶⁸ CIVIL CODE, Article 1169 provides:

ART. 1169. Those obliged to deliver or to do something incur in delay from the time the obligee judicially or extrajudicially demands from them the fulfillment of their obligation.

However, the demand by the creditor shall not be necessary in order that delay may exist:

- (1) When the obligation or the law expressly so declares; or
- (2) When from the nature and the circumstances of the obligation it appears that the designation of the time when the thing is to be delivered or the service is to be rendered was a controlling motive for the establishment of the contract; or
- (3) When demand would be useless, as when the obligor has rendered it beyond his power to perform.

In reciprocal obligations, neither party incurs in delay if the other does not comply or is not ready to comply in a proper manner with what is incumbent upon him. From the moment one of the parties fulfills his obligation, delay by the other begins.

completion already arose and it is understood that the exact amount, while still undetermined, shall not exceed the amount of the bond [Php90,448,941.60].⁶⁹

The Tribunal appears to have overlooked the fact that the First Call demanded for the *liquidation* of the Performance Bond, that is, the payment of the entire amount for which it was issued. Payments made in response to DLCI's demand for liquidation would have then been subject to *subsequent* adjustment following the final settlement of Altech and DLCI's respective accounts. This much is clear from the terms of the Performance Bond.⁷⁰

The Performance Bond itself provides that Mercantile's liability is not contingent upon the determination of the actual amount for which Altech is liable. In the event of an overpayment, Mercantile can proceed against DLCI based on the principle of unjust enrichment.⁷¹ Any amount subject to reimbursement would then assume the nature of a forbearance of money, subject to legal interest.

In any case, it bears stressing that Mercantile made no mention of the purported defect in DLCI's First Call at any time prior to the CIAC proceedings. To recall, Mercantile premised its refusal to evaluate DLCI's claim *solely* on the pending negotiations between DLCI and Altech. Mercantile's objection regarding the validity and completeness of the First Call, which it belatedly raised during the CIAC proceedings, appears to have been an afterthought.

For these reasons, the Court finds Mercantile's refusal to evaluate DLCI's claim unjustified.

DLCI is entitled to claim the costs it incurred as a consequence of Altech's delay and poor workmanship.

Under the Performance Bond, Altech and Mercantile jointly and severally bound themselves "for the payment of the [Performance] Bond in the event that Altech [should] fail to fully and faithfully undertake and complete its scope of work in strict compliance with the general conditions, plans and specifications, bill of quantities and other documents, which were [furnished to] Altech x x x and which [were] incorporated in said Performance Bond x x x by reference."⁷²

⁶⁹ *Rollo*, pp. 63-64.

⁷⁰ The relevant proviso states:

x x x [T]he SURETY [(Mercantile)] shall immediately indemnify the OBLIGEE [(DLCI)] notwithstanding any dispute to the effect that the principal has fulfilled its contractual obligation, the amount demanded[.] *Rollo*, p. 80.

⁷¹ See CIVIL CODE, Art. 22.

⁷² *Rollo*, p. 81.

In turn, the general conditions of the Sub-Contract between DLCI and Altech provide:

6. Commencement [and] Completion

x x x x

(12) **Time is an essential feature of the [Sub-Contract]. If [Altech] shall fail to complete the Sub-Contract Works within the time or times required by its obligations hereunder[, Altech] shall indemnify [DLCI] for any costs, losses or expenses caused by such delay, including but not limited to any liquidated damages or penalties for which [DLCI] may become liable under the Main Contract as a result wholly or partly of [Altech's] default** x x x.

x x x x

17. [Altech's] Default

x x x x

(f) **[If Altech] fails to execute the Sub-Contract works or to perform his other obligations in accordance with the Sub-Contract after being required in writing so to do by [DLCI];** x x x

x x x x

(3) [DLCI] may in lieu of giving a notice of termination x x x take part only of the Sub-Contract Works out of the hands of [Altech] and may[,] by himself, his servants or agents execute such part and in such event [DLCI] may recover his reasonable costs of so doing from [Altech], or deduct such costs from monies otherwise becoming due to [Altech].⁷³ (Emphasis supplied; italics omitted)

The records show that Altech failed to accomplish its work in a timely and satisfactory manner. This is apparent from the correspondences,⁷⁴ which DLCI submitted as evidence. Mercantile had the full opportunity to contest the truthfulness and veracity of these correspondences and the matters to which they pertain. Instead of doing so, Mercantile merely argued that DLCI's failure to "pray for Liquidated Damages and Cost for Rectification of work" belies its claim of delay and poor workmanship.⁷⁵

Mercantile's undue reliance on nomenclature does not support its cause. To recall, the CIAC Complaint prayed for the payment of costs incurred to complete the sub-contract works.⁷⁶ These costs represent those incurred as a consequence of Altech's delay and poor workmanship. Verily, these costs are

⁷³ Id. at 66-68.

⁷⁴ See id. at 223-275.

⁷⁵ Id. at 38.

⁷⁶ Id. at 75.

chargeable against the Performance Bond, inasmuch as the latter stands as a guarantee for Altech's full and faithful compliance with the Sub-Contract.

Mercantile further attempts to evade liability on the Performance Bond by drawing a distinction between *first*, costs incurred before *and* after termination of the Sub-Contract and *also*, between costs incurred to complete the project and those which are claimed due to overpayment. However, these distinctions are irrelevant to Mercantile's liability under the Performance Bond.

At the risk of being repetitive, Mercantile's Performance Bond guarantees Altech's full and faithful compliance with the Sub-Contract. Accordingly, the scope of the Performance Bond should be understood to cover all costs incurred by DLCI as a result of Altech's failure to comply with its obligations under said agreement. To limit the scope of the Performance Bond only to costs incurred *before* termination of the Sub-Contract would be to create an additional condition for recovery which does not appear on the face of the Performance Bond. To stress, Mercantile's liability is conditioned only upon DLCI's first demand, "notwithstanding any dispute to the effect that the principal has fulfilled its contractual obligation [or] the amount demanded."⁷⁷

It is likewise erroneous for Mercantile to argue that DLCI's claim is a mere request for reimbursement for overpayment which falls outside of the scope of the Performance Bond.

Reference to DLCI's breakdown of claims is proper, thus:

1. Total sub-contract amount		
Aluminum works	361,451,520.00	
Glazing works	90,793,188.00	
		452,244,708.00
2. Adjustment		
Additional works/dollar fluctuation	107,532,754.60	
Less: [Rockwell Debit Memo] ⁷⁸	(168,773,746.89)	
		(61,240,992.29)
		391,003,715.71
3. DLCI's liabilities to date		
Payment on Altech's letter of credit and telegraphic transfers ⁷⁹	36,930,126.62	
Payment in favor of Altech's local suppliers	5,485,386.43	
Interest expense ⁸⁰	240,709.94	
Payment to Fuji Reynolds ⁸¹	1,763,819.91	

⁷⁷ Id. at 80.

⁷⁸ See id. at 126.

⁷⁹ Advances made by DLCI to Altech's foreign suppliers, see *rollo*, p. 127.

⁸⁰ Interest expense incurred on advances made in favor of Altech, see id.

⁸¹ Supplementary sub-contractor employed by DLCI, see id. at 123, 127.

Payment to J.A. Shillinglaw ⁸²	80,000.00	
Contra-charges ⁸³	1,236,609.26	
		(45,736,652.16)
4. Total amount paid by DLCI to Altech		
Measured works less charges	297,125,482.52	
Additional works/dollar fluctuation	74,221,471.20	
		(371,346,953.72)
Balance currently remaining on Altech's estimated final account		(26,079,890.17)
5. Future support/DLCI liabilities ⁸⁴		(28,150,840.04)
Retention amount earlier withheld from Altech ⁸⁵		22,612,235.40
Altech's Liability		(31,618,494.81) ⁸⁶

Based on DLCI's breakdown of claims, the sub-contract price, after due adjustment,⁸⁷ amounts to Php391,003,715.71.

Due to Altech's delay and poor workmanship, DLCI was constrained to incur additional expenses to complete the sub-contract works, which, in turn, amounted to Php73,887,492.20.⁸⁸ These expenses, when charged against Altech's account, bring down the total sub-contract price to Php317,116,223.51.

It appears, however, that Altech was able to previously bill and receive payment for accomplished work in the amount of Php371,346,953.72⁸⁹ — an amount evidently more than what Altech is entitled to after taking DLCI's additional expenses for completion into account.

Thus, DLCI's claim of Php31,618,494.81 represents the difference between the adjusted sub-contract price of Php317,116,223.51 and DLCI's previous payments of Php371,346,953.72, less the retention amount which remains with DLCI. The fact that DLCI paid in excess of what Altech is now entitled to under the Sub-Contract does not place the claim beyond the scope of the Performance Bond, inasmuch as the claim results from additional expenses incurred by DLCI to complete the sub-contract works — expenses which DLCI would not have otherwise incurred had Altech fully and faithfully complied with its obligations under the Sub-Contract.

⁸² Supplementary sub-contractor employed by DLCI, see *id.* at 127.

⁸³ Represents charges against Altech's account for maintenance, administrative and power charges, as well as penalties for violations of safety rules, see *id.*

⁸⁴ Represents other expenses incurred by DLCI for and in behalf of Altech, including advances made to Altech's suppliers, payments made in favor of supplementary sub-contractors, and cost of replacement materials, see *id.*

⁸⁵ See *rollo*, p. 128.

⁸⁶ See *id.* at 282. Emphasis supplied.

⁸⁷ For dollar fluctuation, inclusion of additional works, and deduction on account of owner-incurred damage, see *rollo*, pp. 126-127.

⁸⁸ Php45,736,652.16 + Php28,150,840.04 = Php73,887,492.20.

⁸⁹ See *rollo*, p. 127.

Altech's obligation to perform the specified works under the Sub-Contract constitutes an obligation to do. Obligations to do have as their object a prestation consisting of a performance of a certain activity which, in turn, cannot be exacted without exercising violence against the person of the debtor.⁹⁰ Accordingly, the debtor's failure to fulfill the prestation gives rise to the creditor's right to obtain from the latter's assets the satisfaction of the money value of the prestation.⁹¹

As Altech's surety, Mercantile is bound to answer for the costs incurred by DLCI as a consequence of the latter's non-fulfillment, pursuant to Article 1167 of the Civil Code:

ART. 1167. If a person obliged to do something fails to do it, the same shall be executed at his cost.

This same rule shall be observed if he does it in contravention of the tenor of the obligation. Furthermore, it may be decreed that what has been poorly done be undone.

It is well to note that Mercantile had the opportunity to contest the costs claimed by DLCI, but again, did not do so. Accordingly, the sum payable, as computed by DLCI, stands.

Article 2080 of the Civil Code does not apply.

In a last ditch effort to escape liability, Mercantile maintains that it should be deemed released from its obligations under the Performance Bond as it had been deprived of the opportunity to exercise its right of subrogation against Altech due to DLCI's "inexcusable delay" in filing the CIAC Complaint. Mercantile bases this assertion on Article 2080 of the Civil Code.

It has already been settled that no delay may be attributed to DLCI with respect to the filing of the CIAC Complaint. Nevertheless, even if it is assumed, for the sake of argument, that DLCI was in fact guilty of inexcusable delay, Mercantile's argument still fails.

A plain reading of Article 2080 indicates that the article applies to guarantors. Mercantile's position that the provision applies with equal force to sureties fails to appreciate the fundamental distinctions between the respective liabilities of a guarantor and a surety.

A surety is an insurer of the debt, whereas a guarantor is an insurer of the solvency of the debtor. A suretyship is an undertaking that the debt shall be paid; a guaranty, an undertaking that the debtor shall pay. Stated differently, a surety promises to pay the principal's debt if the principal will not pay, while a guarantor agrees that the creditor, after proceeding against the principal, may proceed against the guarantor if the principal is

⁹⁰ IV Eduardo P. Caguioa, COMMENTS AND CASES ON CIVIL LAW 84-85 (2nd Rev. Ed. 1983).

⁹¹ Id. at 49-50.

unable to pay. **A surety binds himself to perform if the principal does not, without regard to his ability to do so.** A guarantor, on the other hand, does not contract that the principal will pay, but simply that he is able to do so. **In other words, a surety undertakes directly for the payment and is so responsible at once if the principal debtor makes default, while a guarantor contracts to pay if, by the use of due diligence, the debt cannot be made out of the principal debtor.** x x x⁹²
(Emphasis supplied; emphasis and underscoring in the original omitted)

In *Bicol Savings & Loan Association v. Guinhawa*,⁹³ the Court unequivocally ruled that Article 2080 applies only with respect to the liability of a guarantor. The Court reiterated this ruling in the subsequent case of *Ang v. Associated Bank*,⁹⁴ where it held:

As petitioner acknowledged it to be, the relation between an accommodation party and the accommodated party is one of principal and surety — the accommodation party being the surety. As such, he is deemed an original promisor and debtor from the beginning; he is considered in law as the same party as the debtor in relation to whatever is adjudged touching the obligation of the latter since their liabilities are interwoven as to be inseparable. Although a contract of suretyship is in essence accessory or collateral to a valid principal obligation, the surety's liability to the creditor is *immediate, primary and absolute*; he is *directly and equally* bound with the principal. **As an equivalent of a regular party to the undertaking, a surety becomes liable to the debt and duty of the principal obligor even without possessing a direct or personal interest in the obligations nor does he receive any benefit therefrom.**

Contrary to petitioner's adamant stand, however, Article 2080 of the Civil Code does not apply in a contract of suretyship. [Article] 2047 of the Civil Code states that if a person binds himself solidarily with the principal debtor, the provisions of Section 4, Chapter 3, Title I, Book IV of the Civil Code must be observed. Accordingly, Articles 1207 up to 1222 of the Code (on joint and solidary obligations) shall govern the relationship of petitioner[-surety] with the bank.⁹⁵ (Emphasis supplied; italics in the original and citations omitted)

Verily, a surety's liability stands without regard to the debtor's ability to perform his obligations under the contract subject of the suretyship. Mercantile's reliance on Article 2080 is thus misplaced.

DLCI is entitled to reimbursement for litigation expenses.

The records show that DLCI claimed the amount of Php200,000.00 representing litigation expenses incurred in connection with the present case. The Tribunal denied the claim, Mercantile being the prevailing party therein.⁹⁶

⁹² *Trade and Investment Development Corp. of the Phils. v. Asia Paces Corp.*, supra note 62, at 566, citing *Palmares v. Court of Appeals*, 351 Phil. 664, 680-681 (1998).

⁹³ 266 Phil. 703, 709 (1990).

⁹⁴ 559 Phil. 29 (2007).

⁹⁵ Id. at 57-58.

⁹⁶ *Rollo*, pp. 99-100.

The CA also denied DLCI's claim for reimbursement, as it found Mercantile's position "not so untenable as to amount to gross and evident bad faith."⁹⁷

The Court disagrees.

Article 2208 of the Civil Code entitles the plaintiff to an award of attorney's fees and expenses of litigation when "the defendant acted in gross and evident bad faith in refusing to satisfy the plaintiff's plainly valid, just and demandable claim."⁹⁸

To recall, the Performance Bond explicitly required Mercantile to **immediately indemnify DLCI notwithstanding any dispute as to Altech's fulfillment of its contractual obligations under the Sub-Contract.**⁹⁹ Mercantile's refusal to heed DLCI's demand for liquidation to purportedly await Altech's action thereon despite the clear and unequivocal terms of the Performance Bond defeated the very purpose for which the said bond had been procured. Mercantile's unjust refusal to evaluate DLCI's claim appears to have been a deliberate attempt to delay action thereon until the expiration of the Performance Bond. Such gross and evident bad faith on the part of Mercantile warrants the award of litigation expenses in DLCI's favor.

Only Mercantile may be held liable in this case.

It is a well-settled rule that a judgment binds only those who were made parties to the case, thus:

In relation to the rules of civil procedure, it is elementary that a judgment of a court is conclusive and binding only upon the parties and their successors-in-interest after the commencement of the action in court. A decision rendered on a complaint in a civil action or proceeding does not bind or prejudice a person not impleaded therein, for no person shall be adversely affected by the outcome of a civil action or proceeding in which he is not a party. The principle that a person cannot be prejudiced by a ruling rendered in an action or proceeding in which he has not been made a party conforms to the constitutional guarantee of due process of law.¹⁰⁰

While the CA petition was docketed as "*DMCI Laing Construction, Inc. v. Construction Industry Arbitration Commission, Altech Fabrication Industries, Inc. and Mercantile Insurance, Co., Inc.*"¹⁰¹ the records do not

⁹⁷ Id. at 72.

⁹⁸ CIVIL CODE, Art. 2208(5).

⁹⁹ *Rollo*, p. 80.

¹⁰⁰ *KT Construction Supply, Inc. v. Philippine Savings Bank*, 811 Phil. 626, 634-635 (2017), citing *Guy v. Gacott*, 778 Phil. 308, 320 (2016).

¹⁰¹ As indicated by the case title docketed before the CA; see *rollo*, p. 50.

show that the CA had in fact acquired jurisdiction over Altech either by service of summons or voluntary participation.¹⁰²

Accordingly, the CA erred when it rendered judgment against Altech which, for all intents and purposes, stands as a non-party to the present case. Nevertheless, the Court deems it necessary to stress that Mercantile retains the right to seek full reimbursement from Altech on the basis of Article 2066¹⁰³ of the Civil Code in a *separate* case filed for the purpose.

WHEREFORE, premises considered, the petition for review on *certiorari* is **DENIED**. The Decision dated July 30, 2012 and Resolution dated January 7, 2013 rendered by the Court of Appeals in CA-G.R. SP. No. 80705 are **AFFIRMED WITH MODIFICATION**.

Petitioner The Mercantile Insurance, Co. Inc. is liable to pay respondent DMCI-Laing Construction, Inc. the following amounts as surety, pursuant to the terms of Performance Bond No. G (13)-1500/97 dated September 5, 1997:

1. Php31,618,494.81, representing the costs incurred by respondent as a result of the delay and poor workmanship of petitioner's principal, Altech Fabrication Industries, Inc. (Principal Award);
2. Interest applied on the Principal Award, at the rate of two percent (2%) per month as stipulated under Performance Bond No. G (13)-1500/97, reckoned from September 3, 1999, the date petitioner received respondent's first demand (Stipulated Interest) until full payment;
3. Litigation expenses amounting to Php200,000.00.

This pronouncement shall be without prejudice to all legal remedies which petitioner The Mercantile Insurance, Co., Inc. may pursue against its principal, Altech Fabrication Industries, Inc.

¹⁰² On acquisition of jurisdiction in civil cases, see *Guy v. Gacott*, supra note 100, at 318-319.

¹⁰³ Article 2066 states:

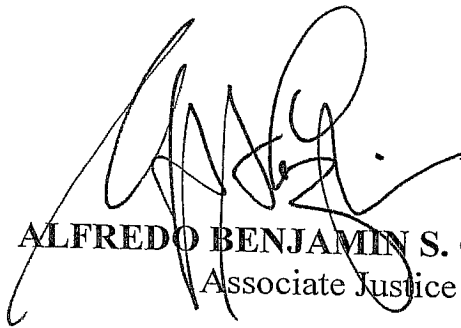
ART. 2066. The guarantor who pays for a debtor must be indemnified by the latter.

The indemnity comprises:

- (1) The total amount of the debt;
- (2) The legal interests thereon from the time the payment was made known to the debtor, even though it did not earn interest for the creditor;
- (3) The expenses incurred by the guarantor after having notified the debtor that payment had been demanded of him;
- (4) Damages, if they are due.

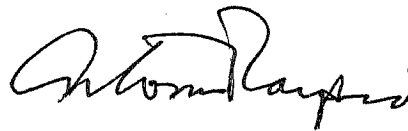
In *Escaño v. Ortigas, Jr.*, 553 Phil. 24, 43-44 (2007), the Court held that the rights to indemnification as established and granted to the guarantor by Article 2066 extends as well to sureties as defined under Article 2047.

SO ORDERED.

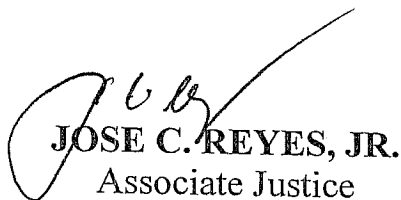


ALFREDO BENJAMIN S. CAGUIOA
Associate Justice

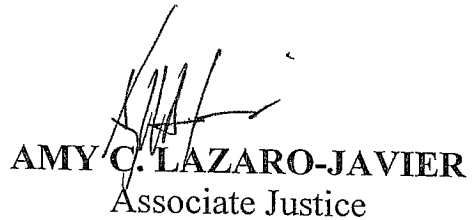
WE CONCUR:



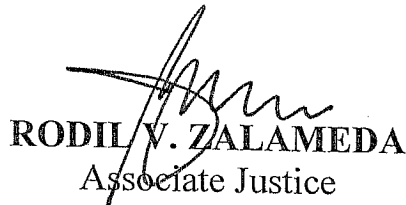
ANTONIO T. CARPIO
Acting Chief Justice
Chairperson



JOSE C. REYES, JR.
Associate Justice



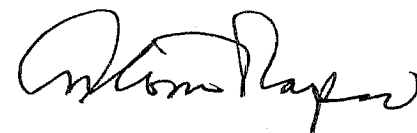
AMY C. LAZARO-JAVIER
Associate Justice



RODIL V. ZALAMEDA
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, I certify that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.



ANTONIO T. CARPIO
Acting Chief Justice