

## SECOND DIVISION

[ G.R. No. 205007, September 16, 2019 ]

**THE MERCANTILE INSURANCE CO., INC., PETITIONER, VS. DMCI-LAING CONSTRUCTION, INC.,<sup>o</sup> RESPONDENT.**

### DECISION

**CAGUIOA, J:**

This is a petition for review on *certiorari*<sup>[1]</sup> (Petition) under Rule 45 of the Rules of Court assailing the Decision<sup>[2]</sup> dated July 30, 2012 (Assailed Decision) and Resolution<sup>[3]</sup> 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 Decision<sup>[4]</sup> 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).

### *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.**<sup>[5]</sup> (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 Letter<sup>[6]</sup> 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]

	<b>Total</b>		<b>Actual</b>	<b>Actual</b>	
	<b>Planned</b>	<b>Planned</b>			
	<b>Panels</b>	<b>%</b>	<b>No</b>	<b>%</b>	<b>No</b>
Hidalgo	4623	75%	3406	14%	664
Rizal	4830	60%	2919	5%	264
Luna	3100	36%	1110	NIL	NIL
Amorsolo [east and west]	3500	35%	1235	NIL	NIL
<b>Project Total</b>		<b>54%</b>	<b>8670</b>	<b>6%</b>	<b>928</b>
	<b>16,053</b>				

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.<sup>[7]</sup>

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.<sup>[8]</sup>

**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).**<sup>[9]</sup> DLCI's First Call was reiterated in its subsequent letters dated September 30, 1999,<sup>[10]</sup> October 18, 1999, <sup>[11]</sup> and March 3, 2000. <sup>[12]</sup> 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.<sup>[13]</sup>

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

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 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].**<sup>[16]</sup> (Emphasis supplied)

Subsequently, Mercantile advised DLCI that it had referred its demand to Altech for appropriate action through its Letter<sup>[17]</sup> 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."<sup>[18]</sup>

After negotiations between DLCI and Altech fell through, DLCI reiterated its demand for liquidation on November 28, 2000.<sup>[19]</sup>

Mercantile denied DLCI's claim on February 26, 2001 on the ground that the Performance Bond expired on March 5, 2000.<sup>[20]</sup>

Aggrieved, DLCI filed a complaint against Altech and Mercantile before the CIAC (CIAC Complaint) on May 29, 2003,<sup>[21]</sup> 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.<sup>[22]</sup>

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.<sup>[23]</sup>

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.<sup>[24]</sup> 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.<sup>[25]</sup>

### ***CIAC Ruling***

In a Decision promulgated on November 7, 2003, the Tribunal dismissed DLCI's Complaint.<sup>[26]</sup>

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.<sup>[27]</sup> (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.<sup>[28]</sup> According to the Tribunal, DLCI's delay amounts to a violation of the Sub-Contract, and triggers the application of laches.<sup>[29]</sup>

Moreover, the Tribunal held that Mercantile should be released from its obligations under the Performance Bond pursuant to Article 2080 of the Civil Code,<sup>[30]</sup> since DLCI's delay had deprived it of the opportunity to exercise its right of subrogation against Altech.<sup>[31]</sup> 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 Article 2080 x x x [Mercantile] is "released from its obligation" under the [P]erformance [B]ond.<sup>[32]</sup>

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.<sup>[33]</sup> 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.<sup>[34]</sup>

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.<sup>[35]</sup>

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."<sup>[36]</sup>

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