International Group of P&I Clubs

RECOGNISING ESCROW AS A MODE OF EXECUTING THE JUDGMENT AWARD OF THE NLRC

We, the International Group Personal Injury Subcommittee – Philippine Working Group ("IG PISC-PWG" for brevity), write on behalf of the International Group of P&I Clubs ("IG" for brevity) further to the kind invitation to address the En Banc session held in November 2012, when we highlighted the concerns of our shipowner Members (shipowners are known as Members of their respective Club and will be referred to as "Members" for brevity) with respect to the significant prejudice caused to employers, by Garnishment (enforcement of the NLRC's "final & executory" decision). Following that address and the discussion held thereafter, we were invited to submit a formal Position Paper, for the En Banc's further consideration, in the strong belief that there is a desire to find an equitable solution which addresses our Members' significant concerns and frustrations, to the mutual benefit of all stakeholders concerned.

INTRODUCTION

The IG is comprised of thirteen (13) internationally recognised P&I Clubs, who between them provide protection and indemnity liability cover for approximately 90% of the world's ocean-going merchant shipping fleet.

Each IG P&I Club is an independent, non-profit making mutual insurance association, providing cover for its shipowner and charterer members against third party liabilities relating to the use and operation of ships. Each Club is controlled by its Members through a Board of Directors or Committee elected from the membership.

The IG is certainly known to the NLRC. In fact, we were grateful to the NLRC, when acting through its Commissioners sitting En Banc, it adopted on 10th October 2008, *En Banc Resolution No. 25-08*, recognising the acceptability of Club Letters of Undertaking (Guarantees) as valid collateral for the surety bond posted, provided the Letter of Undertaking is issued by one of the thirteen (13) P&I Clubs listed in said Resolution.

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FACTUAL ANTECEDENTS

It has been said that Filipino seafarers comprise a third of global mariners, making the Philippines the "crewing capital of the world" and with good reason; for they are highly respected by our Members and are valued employees.

We are reliably informed that Filipino seafarers contributed a staggering USD 4.8B (about 22%) of the aggregate annual OFW remittance in 2012 to the Philippine economy. It is therefore clear that the resilience of Overseas Filipino remittances continues to support Philippine economic growth and development.

However, the immense contribution of Filipino seafarers in terms of remittances to the Philippine economy and in particular their significant role in manning the world's ocean-going merchant shipping fleet, is substantially overshadowed by the daily frustrations encountered within the Philippine legal system, due to the relatively small number of seafarers who pursue "unmeritorious and unfounded" claims against their employers, before the NLRC and to a lesser extent the NCMB, many of which unfortunately find favour with the NLRC and NCMB.

During the last 3 years, the Philippine Court of Appeals and the Supreme Court have been consistent in upholding the defences raised by our Members in denying "unmeritorious and unfounded" claims of seafarers, to wit:

(a) failure of a medically-repatriated seafarer to report within 3 working days to the manning agent for referral to the company designated physicians to undergo the necessary medical treatment;

(b) disability benefits based on the Schedule of Disability under Section 32 of the POEA Standard Employment Contract ("POEA SEC", for brevity), or overriding Collective Bargaining Agreement ("CBA", for brevity);

(c) opinions or disability assessments of company-designated physicians shall prevail over the one-off examination report of seafarer's doctors;

(d) death occurring outside the term of the employment contract is not compensable;

(e) non work-related illness/injury/death is not compensable; and

(f) premature filing of complaints prior to the end of the 240-day period is dismissible (i.e. whilst the employer is still meeting their contractual obligations);

Considering this important development in the decisions rendered by the Philippine appellate courts, not least how the Supreme Court has consistently ruled in favour of the "240 day" jurisprudence, for nearly 12 months, it can be reasonably expected that NLRC decisions which do not conform to the above doctrines enunciated by the Court of Appeals and the Supreme Court will continue to be reversed or modified accordingly.

FACTUAL ANTECEDENTS
(THE PREJUDICE CAUSED TO SHIPOWNER EMPLOYERS)

It will be recalled that for a number of years, the NLRC and the IGPISC-PWG, representing the views of our Members, have engaged in constructive discussions on a regular basis, regarding issues and concerns affecting the maritime industry. For this we are most grateful.

It is well known that the area of significant concern to our Members is the "final & executory" nature of the NLRC Commissioner's decisions and the considerable prejudice this causes to employers as a consequence, in a manner which is neither balanced nor equitable. We also hold the strong view that the "final & executory" nature of the NLRC's decisions significantly prejudices what is at the core of any healthy legal system, namely an active Supreme Court, the very court to which the NLRC looks, or should look, when considering current jurisprudence. We would add that this concern also applies to the NCMB, where the experience of our Members is limited, but significantly less favourable.

The IGPISC-PWG began looking specifically at the prejudice caused to our Members, by "Garnishment", in 2008/9, when we observed both a significant increase in the number of unfavourable decisions, predominantly based upon the "120 day" jurisprudence - which fails to recognise the negotiated terms of POEA SEC and/or CBA;

and a significant increase in the number of our Members who were no longer willing to enter into a settlement "under duress" at the point of "Garnishment", preferring instead to elevate the case to the Court of Appeals, notwithstanding the "Conditional Satisfaction" of the NLRC's "final & executory" decision and the significant difficulties that would be faced in seeking to enforce a recovery from the Complainant, in the event the Court of Appeals or Supreme Court overturns or modifies the NLRC's decision.

In November 2009, the IG Clubs recorded a total of twenty three (23) cases which had either been reversed or modified by the Court of Appeals and/or the Supreme Court. The total value of these reversed or modified NLRC decisions equated to a little over USD 1.2M being due to be returned to our Members.

Another eighteen (18) cases were added to the list of reversed or modified NLRC decisions as of February 2011, with a value of more than USD 2.5M.

One year later (February 2012), the list of reversed or modified NLRC decisions evidenced a total of fifty nine (59) cases, with a value in excess of USD 4M. In April 2013, the total had soared to eighty seven (87) cases with a value of USD 5,628,772.

As at September 2013, only some 5 months later, a further **eleven (11) new cases** have been added to the list of NLRC decisions which have either been reversed or modified by the Court of Appeals and/or the Supreme Court. As a consequence, there are presently **ninety eight (98) reversed or modified NLRC decisions** which translates to the significant amount of **USD 6,253,485 (SIX MILLION TWO HUNDRED FIFTY THREE THOUSAND FOUR HUNDRED EIGHTY FIVE UNITED STATES DOLLARS)** being due to be returned to our Members.

Sixty three (63) of the ninety eight (98) cases have been decided with Finality, amounting to USD 3,892,769, or an average of USD 63,812 per case. The remaining Thirty five (35) cases are pending Finality before the Court of Appeals and/or Supreme Court, and total USD 2,360,716, or an average of USD 67,450 per case. The increased average value per case no doubt reflects the increases in CBA benefits and will continue to be reflected in the foreseeable future, unless an equitable solution can be found to address the prejudice caused to our Members.

It bears emphasising that the frustrations held by our Members, are not specific to any particular Division of the NLRC Commission. As the statistical data collated highlights, this is a problem which, to a large extent, encompasses ALL Divisions of the NLRC Commission. For your information only, we highlight how the ninety eight (98) recorded cases, which have been overturned or modified, are spread across the NLRC (and NCMB).

Division 1 – 12 cases overturned or modified; Division 2 – 18 cases; Division 3 – 24 cases; Division 4 – 14 cases; Division 5 – 2 cases; Division 6 – 22 cases; Division 7 – 1 case; NCMB – 5 cases.

We would again highlight that our Members experience before the NCMB is poor, in contrast to the NLRC. However, the reason only 5 cases are recorded against the NCMB, is for the simple fact that; (a) fortunately most cases are progressed before the NLRC; and (b) it is extremely rare for our Members to receive a balanced or favourable decision from the NCMB and for that reason, these cases are generally settled on the best available terms (this rarely translates into what can be described as an "amicable" settlement), at an early stage, or as with those cases before the NLRC, they are settled "under duress" once the NCMB's unfavourable decision has been rendered.

However, these statistics only reflect the quantifiable damage caused to our Members and can best be described as merely representing the **"tip of the iceberg"**, for the most significant, but unquantifiable damage, is caused to our Members who feel compelled to settle cases "under duress" once the Complainant moves to enforce the NLRC's "final and executory" decision. This is due to the fact that many of our Members are understandably reluctant to pursue a pyrrhic victory (paper victory) before the Court of Appeals and/or Supreme Court. It is extremely difficult for our Members to accept that their case
merits being elevated to the Court of Appeals, but they can nevertheless expect:

(a) the Complainant to enforce the NLRC's decision, in full, even if they too have elevated the case to the Court of Appeals;

(b) that even if the NLRC's decision is overturned or modified, they have little hope of recovering anything from the Complainant through Restitution;

(c) that they will continue to incur legal costs / expenses in pursuing the case through the appellate courts and Restitution, in the event the NLRC's decision is overturned or modified.

Ultimately, an increasing number of our Members now hold the view that, notwithstanding the prejudice that will be suffered, they will pursue cases where they are advised that there are merits in doing so, and then collectively evidence the significant prejudice and damage caused to employers, through "Garnishment". Hence this paper, following on from the work the IGPISC-PWG has been undertaking for a number of years, to draw attention to this issue and other matters of concern.

However, it is a fact that a significant number of cases elevated to the Court of Appeals are discontinued, on the basis that our Members have, for the reasons highlighted above, felt compelled to enter in to a settlement "under duress", when faced with the imminent prospect of the Complainant enforcing the NLRC's decision. Clearly this cannot be considered an "amicable" settlement, as our Members enter into settlement discussions in the knowledge the case has been elevated, on the grounds there are genuine reasons to believe the case will be overturned or favourably modified, whilst the Complainant enters the settlement discussion in the knowledge they will very soon be able to enforce the NLRC's decision, in full.

There is very rarely sufficient time for the Court of Appeals to resolve our Members' Motion seeking the Issuance of a Temporary Restraining Order and/or Writ of Preliminary Injunction, accompanying their Petition for Certiorari, and on the few occasions the Court of Appeals does rule, it does not resolve the Motion in favour of our Members, for failure to evidence that the employer will suffer any "irreparable damage" as a consequence of the NLRC's decision being enforced. Indeed, we have even seen resolutions suggesting our Members will simply have to ask the Complainant to return the "Garnished" funds, with interest.

We would strongly suggest that even the quantifiable damage caused to our Members **(USD 6,253,485)**, is significant enough to highlight the "irreparable damage"

caused, giving consideration to the fact that of this amount, **only USD 19,701.50 (Nineteen Thousand Seven Hundred One 50/100 United States Dollars) has been recovered, in respect of 3 cases, where the total amount due back to our shipowner Members, totalled USD 177,791.50 (One Hundred Seventy Seven Thousand Seven Hundred Ninety One 50/100 United States Dollars)**.

As our records clearly demonstrate, of the thirty five (35) cases which have been overturned or modified by the Court of Appeals and/or Supreme Court, but which have yet to be decided with Finality, the Complainant's concerned have obtained a Writ of Execution in thirty four (34) of those cases between 2006 and 2012. So between 1 to 7 years later, can there really be an expectation that the Complainant will still have available to him/her, the funds needed to return anything to our Members, not least when we understand up to 40% will have been paid to their lawyer, at the point of "Garnishment"?

Ultimately, what causes our Members the most significant concern, is the evidence supporting the long held view that the "final and executory" nature of the NLRC's decisions, has been and continues to be exploited by the significantly increasing number of claimant lawyers who are active within the sea-based sector, claimant lawyers who have diverse backgrounds and seemingly no apparent interest in representing those within the land-based sector.

Not only are these lawyers pursuing "unmeritorious and unfounded" cases, often prematurely, i.e. whilst our Members are still fulfilling their contractual obligations in accordance with the POEA SEC and/or overriding CBA; which has seen a significant deterioration in how these cases are ultimately resolved, but it is also clear that their clients are rarely made aware that our Members have the ability to pursue a recovery against them, in the event the NLRC's decision is overturned or modified. However, the Complainant's lawyer is permitted to hide behind their client when Restitution proceedings are commenced, despite the fact that they too have been unfairly rewarded, giving consideration to how the case has ultimately been decided, with Finality.

We therefore question whether it is really reasonable to expect a Claimant, who may have enforced the NLRC's "final and executory" decision years earlier, to be in a position to return those funds, when in reality, we believe as much as 40% of the award will have

been paid to their lawyer under the terms of a Conditional Fee Agreement or Special Power of Attorney (or other such agreements), at the point of "Garnishment".

What we have been consistent in stating, is that it is extremely rare for our Members to fail to abide by the clear and negotiated terms of the POEA SEC and/or overriding CBA. Indeed, both we and our Members pride ourselves in dealing with claims in strict accordance with the defined contractual obligations mutually agreed upon. **It is not the seafarers who are to blame for the present situation; but the current legal system, which an increasing number of claimant lawyers, with diverse backgrounds, are able to exploit for their personal gain.**

Has the significant deterioration noted therefore been driven by the increasing number of active claimant lawyers, who are very rarely sanctioned for bringing "unmeritorious and unfounded" claims? We would strongly suggest this is certainly a significant factor, as the claimant lawyers are not discouraged from pursuing these cases and know that if they succeed, then within no more than 2 years, they will be able to assist their client in enforcing the NLRC's "final & executory" decision, and therefore receive up to 40% by way of a "fee".

To put this in perspective, if we are to assume that claimant lawyers receive at least 25% of any award, then of those cases that have been overturned or modified by the Court of Appeals and/or Supreme Court, these lawyers have collectively been unfairly rewarded in the amount of USD 1,563,372 (One Million Five Hundred Sixty Three Thousand Three Hundred Seventy Two United States Dollars). Our Members have recovered **only USD 19,701.50 (Nineteen Thousand Seven Hundred One 50/100 United States Dollars), in respect of 3 cases, where the total amount due back to our shipowner Members, totalled USD 177,791.50 (One Hundred Seventy Seven Thousand Seven Hundred Ninety One 50/100 United States Dollars)** and none of this has been recovered from the claimant's lawyer.

Statistical data highlights the prominence of one particular claimant lawyer who is the Counsel of record for 22.45%, or twenty two (22) of the ninety eight (98) cases recorded. The frequency of their involvement in such cases is clear also for cases with an incident date from July 2008 to May 2011 (presently the last recorded case to be overturned/modified). During this period, this lawyer is the Counsel of record for 51.61% of

the thirty one (31) cases recorded. In these sixteen (16) cases alone, they have been unfairly rewarded in the amount of at least USD 322,991 (Three Hundred Twenty Two Thousand Nine Hundred Ninety One United States Dollars), based upon the assumption they have received 25% of any amount awarded. If they were to receive as much as 40%, this unfair enrichment would be increased to USD 516,785 (Five Hundred Sixteen Thousand Seven Hundred Eighty Five United States Dollars).

It is worth noting that during this period, the average value of the sixteen (16) cases where this lawyer is the Counsel on record, amounts to USD 80,748 (Eighty Thousand Seven Hundred Forty Eight United States Dollars) per case, which is significantly higher than the average recorded in relation to the thirty five (35) cases which have yet to attain Finality (USD 67,450) and is substantially higher than the average for the remaining fifteen (15) cases recorded during the same period, which have an average value of USD 62,918 per case.

PERCEIVED BIAS AGAINST OUR MEMBERS

We have specifically and consistently referred to the desire to find an equitable solution, which addresses the significant concerns and frustrations of our Members', to the mutual benefit of all stakeholders concerned.

Whilst having a legal system that provides employees with a mechanism to pursue their grievances against an employer, is clearly fundamental to any legal system; that system nevertheless needs to be balanced in order to ensure the interests of **ALL** Parties to the dispute are protected.

There is no other jurisdiction with which we are familiar, where the decision of a labour court, can be enforced by a Complainant in full, despite the ability of both parties thereafter to elevate the case to the Court of Appeals and Supreme Court.

It is therefore important to highlight how the interests of our Members are significantly prejudiced by the "final & executory" nature of the NLRC's decisions; in a manner Complainant's are not. It remains true to state that the IGPISC-PWG is not aware

of any case involving an IG Club, where a Complainant has not received or been unable to enforce a decision against their employer, in circumstances where the Court of Appeals and/or Supreme Court have overturned or modified the NLRC's decision, in favour of the Complainant. We would therefore question whether it is fair and equitable that a Complainant can challenge how the NLRC has resolved their case, whereas our Members are faced with "Garnishment" when they wish to elevate a case to the Court of Appeals?

This is particularly frustrating in cases where the Labor Arbiter of the NLRC has ruled in favour of our Members, but the decision is then overturned by the NLRC Commissioners. Similarly, it is equally frustrating in cases where the Complainant has also elevated the case to the Court of Appeals, yet still moves to enforce the NLRC's decision to which they also object.

With so many of our Members feeling compelled to enter into a settlement, "under duress", when faced with "Garnishment", it is the case that a considerable number of our aggrieved Members are constrained from elevating their case to the Philippine appellate courts, whereas a Complainant is not inhibited from doing so at all.

Unfortunately, a *Petition for Extraordinary Remedy* under Rule XII of the 2011 NLRC Rules of Procedure only serves to delay, rather than prevent claimants from executing the judgment award.

The concept of "*restitution*" of the previously executed judgment award under Rule XI of the same Rules is also unfortunately a token legal remedy, as it only increases legal costs, but fails to address the fundamental problems faced by our Members in enforcing the recovery of the executed judgment award.

Therefore, if no available legal remedy exists in the Philippines that can successfully thwart claimant lawyers from instituting "unmeritorious and unfounded" claims and if no amount of judicial precedent can discourage the NLRC from granting those claims, logic and justice dictate that the **judgment award be allowed to be executed but not paid to the claimants** during the pendency of the case before the Court of Appeals and the Supreme Court.

As such, we kindly request that the Commissioners sitting *en banc* give due consideration to adopting the concept of ***escrow*** as part of the NLRC Rules of Procedure.

RECOMMENDATION

The significant prejudice caused to our Members, through "Garnishment" and the significant frustrations thereafter realised, when seeking to recover "Garnished" funds, in line with how the Court of Appeals and/or Supreme Court have resolved a case, with Finality, have, we trust, been clearly stated.

The problem of Restitution has been squarely tackled by the Supreme Court in the recent case of ***Philippine Transmarine Carriers, Inc. v. Leandro Legaspi****, G.R. No. 202791, 10 June 2013*. In this case, the Court considered that when a seafarer receives the judgment award and the judgment was subsequently overturned upon a review by a higher court, the seafarer is under duty to return the money received as judgment award. Otherwise, this constitutes unjust enrichment, to wit:

> "Unjust enrichment is a term used to depict result or effect of failure to make remuneration of or for property or benefits received under circumstances that give rise to legal or equitable obligation to account for them. To be entitled to remuneration, one must confer benefit by mistake, fraud, coercion, or request. Unjust enrichment is not itself a theory of reconveyance. Rather, it is a prerequisite for the enforcement of the doctrine of restitution.
>
> There is unjust enrichment when:
>
> 1. A person is unjustly benefited; and
>
> 2. Such benefit is derived at the expense of or with damages to another.

In the case at bench, petitioner paid respondent US$81,320.00 in the pre-execution conference plus attorney's fees of US$8,132.00 pursuant to the writ of execution. The June 29, 2011 CA Decision, however, modified the final resolution of the NLRC and awarded only US$60,000.00 to respondent. If not allowed to return the excess, the respondent would have been unjustly benefited to the prejudice and expense of petitioner.

Petitioner's claim of excess payment is further buttressed by, and in line with, Section 14, Rule XI of the 2011 NLRC Rules of Procedure which provides:

> EFFECT OF REVERSAL OF EXECUTED JUDGMENT. - Where the executed judgment is **totally or partially reversed or annulled** by the **Court of Appeals or the Supreme Court**, the Labor Arbiter shall, on motion, issue such orders of **restitution of the executed award**, except wages paid during reinstatement pending appeal. [Emphases supplied]

Although the Court has, more often than not, been inclined towards the plight of the workers and has upheld their cause in their conflicts with the employers, such inclination has not blinded it to the rule that justice in every case for the deserving, to be dispensed in the light of established facts and applicable law and doctrine."

Because of this increasingly alarming situation and the unresolved problem of Restitution, it is proposed that an escrow arrangement between parties be established in order to effectively address the problem.

ESCROW AGREEMENT

Obligations are extinguished by payment of the judgment debt. To constitute as a valid payment, such payment must be made to the person in whose favour the obligation

has been constituted, or his successor in interest, or any person authorised to receive it.[1] Thus, payment made by the judgment debtor to an agent of the judgment creditor, who has the authority to receive such payment, shall extinguish the former's obligations. Also, payment of debt is to be made in the currency stipulated in the judgment or in legal tender. Nevertheless, payment made in any other scheme, be in the manner of delivering cheques or other mercantile documents is recognised in this jurisdiction. However, they shall only produce the effect of payment when they have been cashed or when they have been impaired due to the fault of the creditor.[2]

In *Philippine Airlines, Inc. v. Court of Appeals,* G.R. No. 49188, January 30, 1990, the Court upheld the delivery of cheques as a mode of payment after a writ of execution has been issued and served on the judgment creditor. It held that "payment in checks is precisely intended to avoid the possibility of the money going to the wrong party." It has also ruled, in passing, that **escrow agreements may be resorted to by the parties in satisfying the judgment**:

> "As a protective measure, therefore, the courts encourage the practice of payments by check provided adequate controls are instituted to prevent wrongful payment and illegal withdrawal or disbursement of funds. **If particularly big amounts are involved, escrow arrangements with a bank and carefully supervised by the court would be the safer procedure. Actual transfer of funds takes place within the safety of bank premises. These practices are perfectly legal.** The object is always the safe and incorrupt execution of the judgment." (Emphasis supplied)

An escrow agreement, in simplest terms, may be described as an agreement between two parties where an escrow agent (or independent third party) receives money in trust and disburses such amount to one of the parties after the other fulfils the conditions of the agreement.

An escrow is a written instrument which by its terms imports a legal obligation and which is deposited by the grantor, promiser, or obligor, or his agent with a stranger or third

[1] Art. 1240, New Civil Code
[2] Art. 1249, New Civil Code

party, to be kept by the depositary until the performance of a condition or the happening of a certain event, and then to be delivered over to the grantee, promisee or obligee.[3]

The delivery of a deed to a third person in escrow is, generally speaking sufficient, if the grantor by his act of delivery loses all control over the instrument and by it the grantee is to become possessed of the estate upon the happening of a contingency or fulfilment of a condition.[4] Further, in order to constitute an instrument in escrow, it is essential that the deposit of such instrument be in the meantime irrevocable—that is, when the instrument is placed in the hands of the depositary, it should be intended to pass beyond the control of the depositor and the depositor should actually part with all present or temporary right of possession and control over it.[5]

The deposit of a deed in escrow creates in the grantee such an equitable interest in the property that upon full performance of the conditions according to the escrow agreement, the title will vest at once in him.[6] Pending the full performance of the conditions, the legal title remains in the grantor and is subject to attachment or the lien of a judgment against him to the extent of his interest therein.[7]

The depositary/escrow agent agrees to accept the custody of the instrument upon the terms specified in the agreement of the parties. In a broad sense, he is an agent of both parties. He is empowered to aid neither but may be regarded as a special agent of both, with powers limited only to those stipulated in the escrow agreement. His authority must be strictly construed. It has also been said that the depositary is the agent or trustee for both parties until the performance of the condition, but thereafter the dual agency changes to an agency not for both, but for each of the parties to the transaction in respect to those things placed in escrow to which each has thus become completely entitled.[8]

[3] 28 AmJur 2d 1
[4] 28 AmJur 2d 7
[5] 28 AmJur 2d 8
[6] 28 AmJur 2d 10
[7] Ibid.
[8] 28 AmJur 2d 11

International Group of P&I Clubs

SATISFACTION OF JUDGMENT THROUGH AN ESCROW AGREEMENT

To illustrate, a judgment creditor and judgment debtor may enter into an escrow agreement, where they will appoint a bank as the escrow agent. Said escrow agent may be a bank designated by the NLRC. The judgment debtor shall deposit the amount in the bank and the bank shall safely keep the money until the judgment creditor presents all the requirements in order to obtain the judgment award, *e.g.* the decision has attained its finality.

In this example, the bank, as the escrow agent, is authorised by the judgment creditor, as the principal, to receive the judgment award in its favour. **In legal contemplation, therefore, payment has been made by the judgment debtor to the judgment creditor; thus the obligation of the debtor under the judgment has already been extinguished.** The question as to whether the judgment has been satisfied is a completely different matter since it shall now depend on the presentation of the necessary documents by the judgment creditor to the bank.

By analogy, an escrow agreement shall be entered into by the shipowner/employer, and the seafarer/beneficiary, with an independent bank as the escrow agent. Upon issuance of a writ of execution by the Labor Arbiter, the employer, as the judgment debtor, shall deliver the amount adjudged to the escrow agent. The escrow agent shall hold the amount until the Finality of judgment. Thereafter, upon the Finality, the escrow agent shall deliver the amount to the prevailing party.

Upon the delivery of the amount by the judgment debtor, the employer's obligation under the writ of execution is extinguished. Thus, although it may take time before the seafarer/beneficiary receives the award, he is nevertheless guaranteed to receive it. This situation is different from what has been contemplated before the insertion of the provision under the 2002 amendment. In this case, the employee is entitled to execute after the promulgation of the decision by the Commission; previously, there was no such entitlement. Hence, in the past, execution usually comes after the finality of judgment as rendered by the Supreme Court. However, **under the proposed escrow agreement, the judgment has already been executed; only its satisfaction is being awaited**.

International Group of P&I Clubs

ESCROW AGREEMENTS AND RESTITUTION

Under Section 14, Rule XI of the 2011 NLRC Rules of Procedure, it is provided that:

> SECTION 14. EFFECT OF REVERSAL OF EXECUTED JUDGMENT. – Where the executed judgment is totally or partially reversed or annulled by the Court of Appeals or the Supreme Court, the Labor Arbiter shall, on motion, issue such **orders of restitution of the executed award**, except wages paid during reinstatement pending appeal.

Although the NLRC Rules of Procedure provides a mechanism for restitution, more often than not, our Members are finding it extremely difficult to execute the orders of restitution. It appears that the seafarer would have used up all or a substantial portion of the amount paid via execution and as a consequence, our Members are significantly prejudiced by the premature execution of the NLRC's decision.

Thus, to address the problem, we, on behalf of our Members, hereby propose that escrow agreements be recognised and adopted in the NLRC Rules of Procedure when an order of execution is issued by the Labor Arbiter.

A third party/escrow agent shall be appointed by both parties and shall act as a depositary of the judgment award. Our Members shall deposit the judgment award to the escrow agent; thereby, fulfilling their obligation under the judgment. At this point, the legal title to the money still rests with the shipowner but the claimant holds beneficial title thereto.

Meanwhile, both Parties to the dispute may proceed to file a Petition for Certiorari with the Court of Appeals and thereafter, elevate the case to the Supreme Court. If the reviewing court upholds the finding of the NLRC, with Finality, the escrow deposit will be released to the claimant; otherwise, if the reviewing court reverses the judgment, the

deposit is released to the shipowner/employer. In this manner, the judgment award remains intact.

One significant benefit to this proposal is the fact that it will enable and encourage both Parties to the dispute, to enter into sensible / amicable settlement negotiations, during the life of the case. Indeed, this is something that is encouraged within the Labor Court and Court of Appeals, but in reality, settlement expectations are usually unrealistic before the Labor Arbiter's decision has been issued, and thereafter become entrenched, as the successful party believes the decision will be upheld, and in the case of the Complainant, that decision will thereafter become enforceable. The "final & executory" nature of the NLRC's decision also frustrates the Court of Appeals attempts to have the Parties mediate the case, before acting upon the Petition for Certiorari filed. As can be imagined, no Complainant is going to enter into mediation before the Court of Appeals, having already enforced the NLRC's decision, unless they are willing to return some of the money already enforced / "Garnished"

The following wordings are hereby proposed for the adoption of the Commissioners sitting *en banc*, to wit:

> "EXECUTION BY DEPOSITING THE JUDGMENT AWARD IN ESCROW. Proceeds of execution shall be deposited in an escrow account with the escrow agent, whether a bank mutually agreed upon by the parties or a bank designated by the NLRC, and shall remain in escrow until such time that the case is finally resolved by the Court of Appeals or the Supreme Court. The above proceeds shall only be released upon proper motion by the party after issuance by the Court of Appeals or by the Supreme Court of an Entry of Judgment and upon issuance by the NLRC of an Order authorizing the release of the proceeds of execution. The Order of the NLRC authorizing the release of the amount deposited in escrow is not appealable.

It is true that the labourers must be looked upon with kindness and compassion by the Courts; but it is equally true that the Courts should likewise uphold the rights of the employers. Under Section 3 of Article XIII of the 1987 Philippine Constitution, it states that:

> "The State shall promote the principle of shared responsibility between workers and employers and the preferential use of voluntary modes in settling disputes, including conciliation, and shall enforce their mutual compliance therewith to foster industrial peace.
>
> The State shall regulate the relations between workers and employers, recognising the right of labour to its just share in the fruits of production and the right of enterprises to reasonable returns to investments, and to expansion and growth."

Hence, the State, in defending the rights of the labourer to their just share in the fruits of production, also saw it necessary to support and uphold the rights of the management/employers to reasonable returns to investments and to expansion and growth. **It must be remembered that justice is in every case for the deserving, to be dispensed with in the light of established facts, the applicable law, and existing jurisprudence.**[9]

Lastly, the undersigned representatives of the IGPISC-PWG have been grateful for the opportunity to discuss the above and other issues of significant concern in an open manner. We are very appreciative to the Commission for the positive changes that have been introduced in addressing areas of concern to our Members, including the acceptance of a Club Letter of Undertaking (Guarantee); the requirement that complainant must personally appear during hearings; changes to how cases are raffled, including ensuring that dismissed cases, specifically those that are dismissed for failure to attend the mandatory conferences and then re-filed are raffled to the same Labor Arbiter; and the amendments to the NLRC Rules of Procedure, in relation to Restitution and Petition for Extraordinary Remedies.

On a final note, the IGPISC-PWG very much hopes that the above proposition of escrow will be favourably considered as an equitable solution to finally address the issue of "Garnishment".

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[9] *Edgardo M. Panganiban v. Tara Trading Ship Management, Inc. and Shinline SDN BHD* (G.R. No. 187032. October 18, 2010.)

We remain determined to find an equitable solution, which serves the interests of all stakeholders, in a positive manner. Whilst we would prefer to see the judgement award held in escrow until the case is decided with Finality, if necessary, we would be prepared to recommend to our Members that the judgement award is held in escrow until the Court of Appeals resolve the Petition for Certiorari (including any Motion for Reconsideration filed) and should the Court of Appeals Affirm the NLRC's decision, without Modification, then the funds held in escrow can be released to the Complainant, provided the Complainant has not elevated the case to the Supreme Court. We firmly believe this concession would be accepted by our Members, as our records note that only three (3) of the ninety eight (98) cases recorded, have been Affirmed by the Court of Appeals, but then overturned or modified by the Supreme Court.

However, we will need to continue to closely monitor how cases are resolved by the Court of Appeals and Supreme Court, to ensure such a concession does not see our Members interests unduly prejudiced, should there be a significant change to the position presently observed.

Yours sincerely,

Mr. Martin Turner
Chairman of the IG Personal Injury Subcommittee

Mr. Tony Nicholson
IG PISC-PWG

International Group of P&I Clubs

Mr. Paul Johnson
IG PISC-PWG

Mrs. Marion Carlmar
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P.P.

Thursday, 3rd October 2013

To : NLRC Chairman, Gerardo C. Nograles

CC: DOLE - Labor Secretary, Rosalinda Baldoz

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