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THIRD PARTY LITIGATION FUNDING -THE FUNDA BEHIND THE FUNDER

Third Party Litigation Funding (TPLF), also referred to as Third Party Funding (TPF), is an arrangement to finance litigation, wherein a third party i.e., an entity/person unrelated to the litigation steps in to provide the funds in relation to the litigation. This entity or person is usually called the "Funder" who agrees to finance or provide the cost to cover litigation costs, like legal fees of the lawyer/s, court fees, and other litigation expenses. So, what's in it for the Funder? The Funder in the equation gets a share of the monetary award from the damages or settlement, in case the matter is successful; in most arrangements, there is a "No Cure No Pay"/ "Non-Recourse" provision, which means that if the case is not successful, the litigant has no obligation to pay or reimburse the Funder.

The Funder behind the TPLF is no common person or entity but is rather a serious and specialized investor like a hedge fund or an investment bank, or even specialized firms like global or boutique firms; in this Gen Z era, Funders also recently comprise crowdfunding platforms. The Funders' investment strategy could be single case-based, or portfolio-based based and can vary in form, like debt-based equity or even equity-based funding.

The reason for the concept being considered or entertained in most jurisdictions globally, is that it enables justice to be acquired by litigants, who do not have the monetary capacity, to bear the legal cost and expenses; on the other hand a sort of balance is restored to the justice system, wherein the rich litigant and the poor litigant can now receive quality representation. The concept of TPLF is said to have originated in Australia in the 1990s and has expanded to Europe, the Americas and India.

To understand TPLF, there are two well established doctrines that most common law countries will need to grapple with – "Maintenance" and

THOUGHT for the MONTH

Consistency may look quiet, but it builds futures louder than ambition alone ever can

ROHAN VAIDYA

Callidus

"Champerty"; Maintenance of a suit is called into question, as here a Funder, who is not a party to the litigation, is the one funding the litigation, and Champerty is an agreement in which the Funder finances the litigation, with a view to earn a profit if it succeeds. The main reason for the two doctrines was to prohibit or restrict or preclude frivolous litigation by persons not a party to the litigation or dispute. Whilst in countries like Australia and UK the laws itself were amended or abolished to allow for TPLF; in the US the concept of TPLF was easily accommodated in to the legal framework, which already allowed for contingency fee and lawyers take a percentage of the award or judgement; in India, the English law doctrines of maintenance and champerty were not strictly enforced, since the Privy Council, and there is no such law in place allowing or dis-allowing the concept of TPLF; in India TPLF is considered under the Indian Contract Act as contingency contracts, and Indian courts have proceeded to examine the fairness and equity of TPLF arrangement, where the rule of law is that if the agreement is not contrary to public policy or otherwise illegal, the contracting parties on fulfilling the other requisites, can enter into an a binding agreement. The legal system in India, while permitting TPLF, has a restriction that the Funder cannot be the lawyer/advocate who is involved in the litigation, and such a lawyer/ advocate cannot fund the litigation on their client's behalf. This is in keeping with the Standards of Professional Conduct and Etiquette stipulated in the Bar Council of India (BCI) Rules. The restriction has also been cited in several judgments on matters related to TPLF.

While there is no statutory regulation governing TPLF in India per se, the Code of Civil Procedure, 1908, in Gujarat, Madhya Pradesh, Maharashtra, and Uttar Pradesh have been amended to explicitly permit third-party funding, by introducing rules like Order XXV, Rule 12 and 33, whilst the TPLF contract itself is governed by the Contract Act, 1872. In December 2024, The Rajya Sabha, through the Ministry of Law & Justice, Department of Legal Affairs addressed questions on whether there is a lack of comprehensive National Framework of TPLF; whether Government will frame a model National Framework for TPLF; and if not, the reasons thereof; as follows – The official reply was that at present there is no comprehensive framework for Third Party Litigation Funding. Further, there is no proposal to frame a model national framework for third-party litigation Funding.

In recent years, TPLF has gained recognition, especially in International Arbitration matters, as these matters are addressed in a time-bound manner and awards in high-stakes matters are conducive for Funders.

Singapore has taken the lead in the Asia-Pacific region by passing amendments to its Civil Law Act, 2017, abolishing torts and expressly permitting TPLF, in international arbitration; this has balanced the interests of the Funder and the litigant and maintained the integrity of the judicial process. The Singapore International Arbitration Centre (SIAC) rules mandate parties to disclose the existence of TPLF agreements, which allows for transparency and the prevention of conflicts of interest. Hong Kong followed suit with its Arbitration Ordinance of 2017, which made TPLF legal for arbitration in or outside Hong Kong. The Hong Kong International Arbitration Centre (HKIAC), through its rules in 2018, also adopted provisions related to TPLF, specifically with regard to disclosures and costs.

The High Level Committee To Review The Institutionalisation Of Arbitration Mechanism In India in 2017, acclaimed the legislature in Singapore, Hong Kong, and the Paris Bar Council, in enacting acts and rules to promote the growth of International Arbitration Centres in their countries, and recommended that if these measures were adopted with suitable modifications in India, it could bolster international arbitration in India. The surge of TPLF in India has been fuelled by the Arbitration and Conciliation (Amendment) Act, 2019, wherein Section 42A, which was incorporated, mandates confidentiality of information in arbitration proceedings. The judiciary in the recent case of the Delhi High Court, pronounced by a Divisional Bench, in Tomorrow Sales Agency Private Limited v. SBS Holdings, Inc. & Ors, on 29th May 2023, set aside the decision of the Single Bench, and held that while, certain rules are required to be formulated for transparency and disclosure in respect of funding arrangements in arbitration proceedings, it would be counterproductive to introduce an element of uncertainty by mulcting third party funders with a liability which they have not agreed to bear.

Apart from getting caught in the web of legality, Funders, particularly in India, where there is no legislation in place for TPLF, also face a pertinent challenge in the recovery of their fund in case they are successful in obtaining a favourable monetary award or judgment. The most viable option that TPLF deploys to be compensated for successful claims is the assignment of the claim. However, the existing laws in India do not permit the assignment of claims, as such. An assignment is the complete transfer of contractual rights or benefits from the assignor on one side the assignee on the other. This is recognised under the Indian Contract Act, and under the Transfer of Property Act, an assignment fundamentally involves the transfer of rights or liability in property to a third party. However, in India, a "mere right to sue" cannot be transferred or assigned under the Transfer of Property Act, but an incidental right to sue along with the property can be validly transferred under the Act. The Act further prescribes that an "actionable claim" can be transferred by a written agreement or understanding.

If a Funder wishes to be compensated from the proceeds of the award or judgment, either from a case or in arbitration, the Funder must enforce and execute the decree. Applying the CPC provisions, the Funder would need to be impleaded as the decree-holder and step into the shoes of the decree holder, who would need to transfer his/

her rights to the Funder, as a decree is a form of property. In this process, the only catch is that at the time of entering into the TPLF agreement, the dispute in question is not final and the outcome has not crystallized; hence, the claim is only an actionable claim, and the assignment pertains to a future date. It is, therefore, imperative to observe how the judicial authorities will interpret the position of law regarding the assignment of proceeds from a future decree.

Funders the world over face a multitude of challenges, from time consumed with being implicated in appeals; enforcement of the claim; the ambiguity of foreign investors acting as TPLF, Tax implications; the issue of Disclosure and Confidentiality; the rise of frivolous litigation; independence and transparency in the proceedings, especially in Arbitration and Alternative Dispute Resolution. In India, the challenge is compounded by the fact that there is no legislation to govern TPLF; it is therefore a glaring necessity to formally regulate TPLF by incorporating due safeguards, checks, and balances that protect all parties concerned, by borrowing the tried and tested concepts from other jurisdictions, making India a conducive choice even for foreign TPLF providers ■

FLAGS OF CONVENIENCE: SAILING THROUGH LEGAL LOOPHOLES

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Across the large, mostly lawless oceanic bodies of our world, there is a silent legal loophole that allows shady and illegal businesses to flourish. This legal loophole is called a Flag of Convenience. It is a method used by shipowners to register their vessels in countries with reduced risks and less stringent regulations to save money. Though this may appear like a strategic business tactic, in reality, it creates pathways for serious issues like labor exploitation, environmental destruction, illegal trade, and smuggling. The shipping industry is a major industry that connects the whole world and promotes international trade efficiently . But it also has very few regulations to follow and most of which can be bent and gotten away with.

What Is a Flag of Convenience?

Each merchant vessel is mandated by international law to be registered in a registry of a country, and the ship is subject to the laws of that particular country.

A flag of convenience refers to the registration of a commercial ship in a country other than the one of its owner. This allows the owners to take advantage of favorable laws offered by "open registry" nations such as Panama, Liberia, and the Marshall Islands. These nations often have lenient tax regimes, weak labor laws, and minimal enforcement of international regulations.

In fact, according to the United Nations Conference on Trade and Development (UNCTAD), over 40% of the world's merchant fleet sails under such flags of convenience.

Historical Background

The story of flags of convenience began just after World War I, when shipowners especially in the U.S., were frustrated with rising labor costs, strict regulations, and the newly passed prohibition laws. They wanted to serve alcohol on cruise ships and pay lower wages, but U.S. rules made that tough.

In 1919, a ship called the Belen Quezada flew the Panamanian flag to smuggle alcohol between Canada and the U.S. during Prohibition. It wasn't Panamanian, but it became the first to fly the Panamanian flag. A few years later, in 1922, the American-

owned Banning followed suit, using Panama's flag to dodge U.S. laws while staying completely American in crew, ownership, and operation. That move opened the floodgates.

More shipowners began doing the same, and Panama's open registry became a go-to way to cut corners legally. By the late 1940s, Liberia joined in too, and today most commercial ships sail under foreign flags, not because of where they're from, but because it's cheaper and easier.

It's a clever workaround, but it comes with questions about safety, worker rights, and who's really responsible when things go wrong at sea.

What's an Open Registry?

An open registry essentially is when a country lets shipowners from anywhere in the world register their ships under its flag, even if the ship has nothing to do with that country. It's like renting out your national flag to foreign ships. There are several countries providing open registries, among which Panama is the most popular; it even allows online registration of vessels under its flag.

Countries like Panama, Liberia, and the Marshall Islands make a lot of money by offering easy, no-questions-asked registration. Shipowners pay fees to fly that country's flag, and in return, they get looser rules, lower taxes, and fewer inspections. For the country offering the registry, it's an easy way to earn revenue without actually owning ships or running ports. It's a win-win, at least on paper.

But here's the problem: with these relaxed rules, it's easier for shipowners to cut corners, avoid responsibility, and even get away with shady activities. That's why open registries are a big part of the "flags of convenience" issue.

Reason for Flag of Convenience?

The International Transport Workers' Federation (ITF) has been very critical of this system. They say it's often used to avoid responsibility, cut corners on crew welfare, and ignore fair labor practices.

FoCs offer several financial and regulatory advantages:

- Reduced operating costs through low fees and taxation.
- Evasion of strict safety and labor laws applicable in the owner's home country.
- Minimal accountability, as many flag states lack the will or resources to enforce international maritime norms.

Consequences: Crime, Exploitation, and Evasion

While FoCs offer cost savings, they also create fertile ground for illicit activities and violations of international law.

1. Disregard For Labor Rights

Seafarers in FoC vessels are very much exploited. Their rights are denied, and they are abused. These vessels contain employees of various nationalities, and many of them are economically deprived making them vulnerable to exploitation.

The ITF has documented various cases involving FoC vessels wherein seafarers were denied wages, provided with an unsafe working environment, or even abandoned at unknown ports without any resources or repatriation. Such exploitations are the result of lack of effective enforcement by flag states.

Many of the FoC nations fail to regulate the labor conditions on their registered ships because of their lack of capacity or political will and makes it easy for shipowners to avoid accountability of any sorts and transcend international labour standards. The seafarers will find it very difficult to obtain legal remedies.

2. Environmental Violations and IUU Fishing

FoC vessels are known for causing a range of environmental violations, especially in relation to illegal, unreported, and unregulated (IUU) fishing. By using the flag of convenience, shipowners finds it easier to exploit marine resources in violation of international conservation efforts. Studies have found that 70% of vessels tracked for IUU fishing have flags of convenience.

Also, FoC vessels are seen to be involved in many environmental disasters. Catastrophic oil spills and marine pollution are the most disastrous events caused, and this is mainly due to a lack of maintenance and poor regulation. The Prestige oil spill off the coast of Spain in 2002, caused by a FoC vessel, remains a stark example. The amount of environmental risks such incidents create is immense.

3. Smuggling and Organized Crime

The hard to distinguish outlook of FoC ships makes them a perfect spot for conducting smuggling and trafficking operations. The FoC registries are able to transport illegal cargo which includes narcotics, weapons, and even trafficked persons, through international waters across borders because of limited inspections and regulations. Hence, there is only a very less amount of risk of detention.

The lax regulatory environments in many FoC jurisdictions pave the way for transnational organized crime, as pointed out by a recent report by the United Nations Office on Drugs and Crime (UNODC). The weaknesses of the FoC registries are hugely exploited by criminal networks and sometimes even entire illegal operations are solely based upon these FoC vessels.

Conclusion

The intention behind the Flag of Convenience might have been good, the concept was introduced to make global shipping much more efficient and accessible. However, over the years, it has turned into something far more troubling. Instead of helping ships to do business across borders, it has become a way for companies to dodge rules and to cut corners. Ships flying the Flag of Convenience often register them under countries that don't really enforce labor laws, safety standards, or environmental protection laws.

People working on these ships often face terrible conditions, sometimes with little to no legal protection. Pollution being caused is left unchecked, IUU fishing, and also scenarios wherein vessels are used

for smuggling or evasion of sanctions. More than being an administrative or bureaucratic issue, it has a drastic effect on the people, the various ecosystems, and international security. Transparency is the much-needed action, and by this method, tracking those who own these vessels will make it possible to stop them from exploiting the lack of regulations. At the end of the day, the Ocean is not just a highway for global trade, it's a part of our shared planet. It should be governed with utmost fairness and respect for the Law ■

HOT NEWS

INDIA–EUROPE GREEN HYDROGEN CORRIDOR: A NEW ERA FOR SUSTAINABLE MARITIME TRADE

The global maritime sector is entering a transformative phase as AM Green (India) and the Port of Rotterdam Authority (Netherlands) sign a landmark agreement to establish a green-hydrogen and low-carbon fuel supply corridor between India and Europe. This strategic collaboration, highlighted by The Maritime Standard, is expected to significantly influence the future of shipping, energy transition, and maritime law.

A Game-Changer for the Shipping Industry

Under the new partnership, AM Green aims to export up to 1 million tonnes of green hydrogen-based fuels annually to Europe by 2030. This includes clean fuels such as green ammonia, methanol, and hydrogen derivatives, which are fast becoming essential for shipping companies seeking to meet stringent decarbonisation targets.

The Port of Rotterdam — Europe's largest energy gateway — is positioned to become a major hub for receiving, converting, storing, and distributing these clean fuels across the EU.

Legal & Commercial Implications

This development is more than an energy initiative; it has deep legal and commercial significance:

- New Contract Structures: Supply agreements for green fuels will require innovative drafting covering pricing mechanisms, certification standards, liability frameworks, and cross-border compliance.
- Regulatory Alignment: With IMO's 2030 and 2050 decarbonisation goals, this corridor accelerates the need for vessels to transition to cleaner fuels — increasing legal advisory needs in fuel-switching, technical compliance, and environmental obligations.
- Port & Terminal Regulations: Green-fuel handling demands updated safety, storage, and port-operation protocols, requiring legal oversight and risk-mitigation planning.
- Investment & Joint Ventures: The corridor opens opportunities for multinational joint ventures, infrastructure investment, and technology partnerships across India, the GCC, and Europe.

Why This Matters for Our Region

For maritime hubs like UAE, Oman, and India, the green corridor will reshape trade routes and fuel-supply dynamics. Ports in the Middle East already play a critical role in energy logistics, and this development may trigger parallel projects in the region — especially as global charterers and shipowners begin demanding greener bunkering solutions.

For maritime-law specialists, the shift invites a surge in advisory work related to energy transition, ESG compliance, port regulatory frameworks, and cross-jurisdiction transactions ■

Courtesy : www.themaritimestandard.com

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