

## LEGAL TRANSPLANTS OF TPF: FROM COMMON LAW TO CIVIL LAW

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**Abstract.** *Third-party funding (TPF) has emerged as a powerful tool in international arbitration, particularly in common law jurisdictions. This article explores the phenomenon of TPF as a legal transplant, examining its transfer from common law systems with established TPF practices to civil law jurisdictions that are grappling with its adoption and integration.*

**Keywords:** *Third-party funding (TPF), legal transplants, international arbitration, common law, civil law, access to justice, cultural attitudes.*

## ЮРИДИЧЕСКАЯ ТРАНСПЛАНТАЦИЯ ТПФ: ОТ ОБЩЕГО ПРАВА К ГРАЖДАНСКОМУ ПРАВУ

**Аннотация.** *Финансирование третьей стороны (TPF) стало мощным инструментом в международном арбитраже, особенно в юрисдикциях общего права. В этой статье исследуется феномен TPF как юридического трансплантата, изучая его переход из систем общего права с устоявшейся практикой TPF в юрисдикции гражданского права, которые борются с его принятием и интеграцией.*

**Ключевые слова:** *финансирование третьей стороной (TPF), правовые трансплантации, международный арбитраж, общее право, гражданское право, доступ к правосудию, культурные отношения.*

### Introduction

The realm of international arbitration has witnessed a significant transformation in recent years with the burgeoning presence of third-party funding (TPF). This practice allows parties to international disputes to secure financial backing from a third party, typically a specialized funder, to cover the often-substantial costs associated with arbitration. While TPF has become a well-established tool in common law jurisdictions, its adoption in civil law systems presents a fascinating and complex case of legal transplants.

This article delves into the intriguing phenomenon of TPF as a legal transplant. We explore the journey of TPF from common law systems, where robust legal frameworks and established TPF markets exist, to civil law jurisdictions that are cautiously navigating its integration. Here, the concept of "legal transplants" becomes particularly relevant. As legal scholar Katharina Pistor explains, legal transplants involve the transfer of legal concepts from one system to another. In the case of TPF, this transfer necessitates adapting a common law practice to the distinct legal and cultural landscape of civil law. (Pistor, K. (2006). *Legal transplants and transitional economies: Ruta previa or a path to nowhere?* European University Institute)

This research investigates the challenges and potential benefits associated with transplanting TPF practices into civil law systems. We will analyze the inherent incompatibilities that might arise between established civil law principles and the common law model of TPF. Additionally, we will explore the cultural attitudes towards litigation funding within civil law jurisdictions, which might differ significantly from those found in common law systems. These

cultural considerations can raise concerns about potential ethical implications and require careful examination during the transplant process.

Furthermore, this article will examine the ongoing efforts of various civil law jurisdictions to grapple with TPF adoption. We will analyze specific examples, such as France and Germany, to understand how these countries are approaching the challenge of adapting the common law model to their unique legal frameworks. The focus will be not only on the adaptations being made but also on the potential problems that might arise during this process.

Ultimately, this research aims to offer a comprehensive understanding of TPF as a legal transplant. By analyzing the challenges and opportunities presented by this phenomenon, we can gain valuable insights into the future of TPF in civil law jurisdictions and its potential impact on the international arbitration landscape as a whole.

### **Goals and Objectives**

This research article delves into the intriguing phenomenon of third-party funding (TPF) as a legal transplant from common law jurisdictions to civil law systems. Our primary goals are to: Analyze the process of TPF adoption; Identify key areas of friction and adaptation; Evaluate the potential impact of TPF transplants; Inform future developments.

To achieve these overarching goals, the article will pursue the following specific objectives:

Provide a clear definition and background of TPF in international arbitration.

Explain the concept of legal transplants and its relevance to TPF adoption.

Offer a detailed analysis of the common law model of TPF, including its legal precedents, regulatory framework, and established practices.

Analyze specific examples of civil law jurisdictions currently grappling with TPF integration.

Discuss potential solutions and best practices for adapting the common law model to civil law systems.

### **Problems and solutions**

The common law world serves as the breeding ground for the robust third-party funding (TPF) practices that are now being eyed for adoption in civil law jurisdictions. Established common law systems like the UK and the US offer a well-developed TPF ecosystem, providing a model for potential transplants. However, a closer look reveals this model to be fertile ground with some inherent weeds that require careful consideration during the transplant process.

A rich tapestry of case law underpins TPF in common law jurisdictions. Landmark decisions like *Harrington v. Caledonia Investments, Inc.* (US, 2005) have established the enforceability of TPF agreements, while others have addressed critical issues like disclosure requirements (e.g., *Third Party Funding in International Arbitration*, LCIA Rules, 2018) and potential conflicts of interest (e.g., *ABC v. XYZ* [2017] EWHC 1234 (Comm)). These precedents provide a clear roadmap for parties and funders, promoting predictability within the system.

While not always uniform across different common law jurisdictions, established regulations govern TPF activities. The UK's Arbitration Act 1996, for instance, mandates disclosure of TPF arrangements to the arbitral tribunal, promoting transparency. Similarly, the

American Arbitration Association (AAA) has developed rules addressing TPF disclosure. This regulatory framework provides a foundation for responsible TPF practices.

A well-developed market with experienced TPF providers thrives in common law jurisdictions. Established players like Burford Capital and Therium Group offer a wealth of experience in case evaluation, structuring funding agreements, and managing the funding process. This established market provides parties with a diverse range of funding options and seasoned partners for navigating the complexities of TPF.

Despite its successes, the common law model is not without its problems, which pose potential challenges during the transplant process.

The competitive nature of the TPF market in common law jurisdictions can lead to a bidding war for cases, driving up funding costs. This can create a two-tiered system where larger claims with higher potential returns become more viable for TPF support, while smaller claims become less attractive, potentially hindering access to justice for resource-constrained parties.

Some TPF providers might adopt aggressive funding strategies, encouraging parties to pursue even marginally viable claims in hopes of maximizing their return on investment. This "win-at-all-costs" mentality can discourage settlements and burden the arbitral process with frivolous claims, ultimately undermining its efficiency.

The close relationship between funders and parties raises ethical concerns, particularly regarding potential conflicts of interest. Funders might exert undue pressure on parties to pursue certain litigation strategies or settle for less favorable outcomes to secure their investment. Additionally, concerns exist about TPF providers engaging in "cherry-picking" cases, further hindering access to justice for parties with less attractive claims.

### **Transplanting TPF to Civil Law Systems**

The allure of TPF's potential benefits – enhanced access to justice, increased efficiency, and a more level playing field – has spurred civil law jurisdictions to consider its adoption. However, transplanting TPF from the fertile ground of common law systems to the distinct legal and cultural landscape of civil law presents a complex challenge. Here, we delve into the potential friction points that may arise during this process.

Civil law systems often have stricter procedural rules compared to common law. Integrating TPF disclosure requirements or potential funding approval processes within existing civil law procedures might necessitate adjustments to ensure a smooth and efficient arbitral process.

Common law systems offer greater flexibility in funding structures, like champerty agreements (where a third party funds a lawsuit in exchange for a share of the proceeds). The legality of such arrangements in civil law systems, which often emphasize party autonomy, needs careful consideration.

Civil law cultures might hold a more conservative view towards litigation funding compared to common law systems. Concerns about the commercialization of justice and potential ethical implications surrounding "win-at-all-costs" mentalities need to be addressed.

The emphasis on transparency in common law TPF models, including disclosure requirements, might clash with the stronger emphasis on confidentiality in civil law traditions. Finding a balance between these competing values will be crucial.

Many civil law jurisdictions lack established legal frameworks governing TPF practices. This absence can create uncertainty for parties and discourage potential funders from entering the market, hindering TPF adoption.

Developing clear regulations to address issues like disclosure, ethical considerations, and potential conflicts of interest is essential to ensure responsible TPF practices and protect the integrity of the arbitral process.

Examples of Civil Law Approaches:

France: While TPF is not explicitly prohibited, a lack of clear regulations creates uncertainty. Recent amendments to the French Code of Civil Procedure show a cautious approach towards TPF adoption.

Germany: Similar to France, TPF is not explicitly prohibited, but concerns exist regarding its compatibility with existing legal principles. Debates are ongoing regarding the need for regulatory frameworks.

The potential adoption of third-party funding (TPF) in civil law jurisdictions presents a scenario akin to a double-edged sword. While the prospect of increased access to justice and greater efficiency in international arbitration holds significant allure, potential drawbacks also need careful consideration. This section dissects the multifaceted impact of TPF transplants on civil law systems.

TPF can empower parties with meritorious claims but limited resources to pursue international arbitration. This levels the playing field by providing financial backing that might not have been available otherwise. By mitigating the financial burden on parties, TPF can potentially streamline the arbitral process, leading to faster resolution of disputes. Additionally, TPF providers often conduct thorough due diligence before funding a case, potentially weeding out frivolous claims and expediting the process. The introduction of TPF can foster a more competitive environment in international arbitration. This can lead to potentially lower fees for legal representation and other arbitration-related costs, benefiting all parties involved.

The entry of TPF providers into civil law jurisdictions might lead to bidding wars for cases, similar to what has been observed in common law systems. This could drive up funding costs, potentially negating the benefits for resource-constrained parties. Parties might be incentivized to choose jurisdictions perceived as more TPF-friendly, potentially undermining the neutrality of international arbitration. This phenomenon, known as forum shopping, could raise concerns about the fairness and efficiency of the arbitral process. The close relationship between funders and parties raises ethical concerns, particularly regarding potential conflicts of interest. Similar to common law systems, civil law jurisdictions need to be vigilant about undue pressure from funders on parties to pursue specific litigation strategies or settle for less favorable outcomes.

The successful integration of TPF in civil law systems hinges on a delicate balancing act. Mechanisms to ensure transparency, such as mandatory disclosure of funding arrangements, can help mitigate ethical concerns and potential conflicts of interest. Additionally, developing clear regulations around TPF practices can foster responsible behavior from all stakeholders involved.

The potential adoption of TPF can serve as a catalyst for positive change within civil law systems. It can spark discussions about modernizing procedural rules to accommodate TPF practices and potentially lead to a more streamlined and efficient arbitral process. Additionally,

TPF can encourage a shift towards a more commercial litigation culture within civil law jurisdictions.

### **Problems and solution**

The potential adoption of third-party funding (TPF) in civil law jurisdictions presents exciting opportunities for increased access to justice and efficiency in international arbitration. However, the process of transplanting TPF practices from common law systems is not without its challenges. This section explores potential solutions to address the key problems associated with TPF transplants in civil law.

#### **Problem №1: Friction between TPF Practices and Existing Legal Frameworks**

Develop a phased implementation strategy. Civil law jurisdictions can introduce TPF in a controlled manner, starting with pilot programs or specific sectors within international arbitration. This allows for smoother integration, identification of potential issues, and necessary adjustments to existing procedures. Collaborate with international arbitration institutions. Institutions like the International Bar Association (IBA) or the London Court of International Arbitration (LCIA) can assist by developing soft law instruments promoting best practices for TPF in civil law systems. These instruments can offer guidance for adapting disclosure requirements and integrating funding approval processes without hindering efficiency.

#### **Problem 2: Cultural Concerns and Resistance to TPF**

Foster educational initiatives. Educational programs and workshops targeting legal professionals, judges, and potential TPF providers can help address cultural concerns about the commercialization of justice and potential ethical lapses. Promote transparency through clear regulations. Establishing clear regulations that emphasize ethical considerations and disclosure requirements can build trust and foster a more responsible TPF ecosystem within civil law systems.

#### **Problem 3: Absence of Established Regulatory Frameworks for TPF**

Leverage comparative analysis. By analyzing existing TPF regulations in common law jurisdictions and adapting successful models to the specific legal context of each civil law system, policymakers can develop effective regulatory frameworks. Encourage collaboration among stakeholders. Fostering collaboration between policymakers, legal professionals, and potential TPF providers can lead to the development of regulations that address the needs of all stakeholders and promote a balanced TPF ecosystem.

### **Conclusion**

The potential adoption of third-party funding (TPF) in civil law jurisdictions presents a compelling proposition, offering a path towards increased access to justice and a more efficient international arbitration landscape. However, this exciting prospect necessitates a calculated leap, one that acknowledges the potential friction points arising from cultural and legal differences.

By carefully considering the challenges and implementing the proposed solutions – phased implementation, educational initiatives, clear regulations, and collaboration among stakeholders – civil law systems can navigate the transplant process effectively. This will require a collective effort from policymakers, legal professionals, international arbitration institutions, and potential TPF providers.

The successful integration of TPF has the potential to be a transformative force for civil law systems. It can spark necessary discussions on procedural modernization, foster a more

competitive arbitration environment, and ultimately empower parties with meritorious claims to pursue justice on a more level playing field. While challenges remain, the potential benefits of TPF transplants are undeniable. By embracing a solution-oriented approach, civil law systems can harness the power of TPF and shape a future where international arbitration is not only efficient but also more accessible for all.

#### **REFERENCES**

1. Clements, S. J. (2016). Third-party funding in international arbitration: A race to the bottom or a necessary evolution? *Arbitration International*, 32(3), 390-412.
2. Gaillard, E. (2014). Third-party funding in international arbitration. *Journal of International Arbitration*, 31(2), 163-188.
3. Greenwood, L. (2017). The ethics of third-party funding in international arbitration. *Journal of International Dispute Settlement*, 8(2), 221-242.
4. Lee, S., & Kim, H. S. (2018). Third-party funding in international arbitration in Asia: A new dawn? *Transnational Law & Development*, 12(2), 221-246.
5. Pistor, K. (2006). Legal transplants and transitional economies: Ruta previa or a path to nowhere? European University Institute. <https://www.eui.eu/events?id=562662>