The fund finance market in Asia

(Fifth edition)

CAREY OLSEN

Overview of the Asia-Pacific private capital market

Fundraising

A lot has happened in Asia over the last few years.

Total private market investor exposure to Asia has tripled over the past 10 years, and – notwithstanding difficult market conditions – there is scope for an upward trend to continue, given that Asia still represents less than 10% of global exposure. A recent forecast suggests that Asia-Pacific's private market, AUM, will grow from US$1.62 trillion in 2019 to US$4.97 trillion in 2025, which would be a faster growth rate than any other region.[1] Asia's markets have arguably been underweighted in investors' global allocations and, if regional economies can swiftly rebound from the coronavirus pandemic and trade conflicts and avoid deep recession, there is the potential for local markets to generate investment on a similar scale to that of Europe over the next five to 10 years.[2]

By the end of 2018, the Asia-Pacific private equity market boasted US$883 billion in total assets under management, representing 26% of the global private equity industry. Private equity funds operating in the Asia market held dry powder totalling US$317 billion, equating to three years of future supply at the current pace of investment.[3] By 2019, dry powder had risen to US$388 billion.[4]

The year 2017 had been a record-breaking one for fundraising, with 593 Asia-Pacific-focused fund closings. Momentum started to slow throughout 2018, with fewer new fund launches that year (256), which has been partly attributed to global trade disputes and pressure on China-based funds, lenders and investors to tighten leverage. However, those funds that did manage successful fundraising achieved a higher average size (US$294 million) than the previous year. Despite the relative decline in 2018 fundraisings compared to 2017, it seemed that larger, established funds with a strong track record were still able to raise funds successfully, whereas it was more of a struggle for smaller or newer funds.[5]

As expected, fundraising in 2019 and 2020 was lower than previous record highs. However, there is evidence that larger funds with established reputations and a strong track record have still been successful, with new ASEAN-focused private equity and venture capital funds averaging a 117% target fundraising success rate.[6]

Investment activity

Fund investment strategies in Asia-Pacific tend to focus on buyout, growth equity and venture capital in the more developed economies (e.g. Australia, Japan and South Korea). Growth and venture capital are the focus of funds in developing economies (e.g. China, India and South East Asia), although buyouts do occur in these regions, too, and have become more prevalent as their economies further develop (in particular, in China and India).[7]

Unsurprisingly, the coronavirus pandemic contributed to a slow-down in deal activity in 2020, although regional statistics were bolstered in May 2020 by KKR, Vista Equity Partners, General Atlantic and Silver Lake Management making investments in Jio Platforms aggregating US$4.6 billion. This follows on from a slight decrease in deal activity in 2019, with Asia-Pacific cdeal value dropping 16% to US$150 billion; however, this was still 9% higher than the previous fiveyear average. The average deal size was US$122 million.[8]

This compares to an average private equity deal size in 2018 of US$213 million, with almost 75% of total regional deal value relating to investments in China and India. Investments into internet and technology companies made up 50% of those deals.[9]

Asia key legal updates and market trends

New Cayman regulation

The vast majority of Asia-focused private equity fund vehicles are Cayman Islands exempted limited partnerships ("ELPs"), which consist of at least one general partner ("GP") and investors who hold limited partner ("LP") interests. ELPs are extremely familiar to Asian and North American sponsors and investors, and are viewed as attractive and fit tfor purpose, not least due to flexible underlying legislation and tax neutrality.

Private funds regime

On 7 February 2020, in order to implement governance principles laid out by the EU, the Organisation for Economic Co-operation and Development ("OECD") and other international organisations, the Cayman Islands enacted the Private Funds Law, 2020 (the "Private Funds Law"), which establishes a regime for the registration and ongoing regulation of closed-ended funds.

1. *Preqin, Future of Alternatives 2025: The Great Awakening in Asia.*
2. *Hamilton Lane, Private Markets in Asia: A Country-by-Country Guide.*
3. *Bain & Company, Asia-Pacific Private Equity Report 2019.*
4. *Bain & Company, Asia-Pacific Private Equity Report 2020.*
5. *Bain & Company, Asia-Pacific cPrivate Equity Report 2019.*
6. *Preqin as at September 2019.*
7. *Hamilton Lane, Private Markets in Asia: A Country-by-Country Guide.*
8. *Bain & Company, Asia-Pacific cPrivate Equity Report 2020.*
9. *Bain & Company, Asia-Pacific cPrivate Equity Report 2019.*

A detailed summary of the Private Funds Law is outside the scope of this chapter; however, some headline points are:

- a private fund must submit its registration application to the Cayman Islands Monetary Authority ("CIMA") within 21 days after acceptance of capital commitments from investors for the purposes of investment and pay an annual registration fee;
- audited financial lstatements signed off by a Cayman Islands auditor must be submitted to CIMA within six months of a private fund's financial year-end. The Private Funds Law provides broad scope for private funds to select theaccounting standards to be applied in the preparation of their financial statements; and
- private funds must adopt appropriate and consistent procedures for proper valuation of assets, with valuations to be carried out at least annually.

The regime introduced under the Private Funds Law seeks to modernise regulation of closed-ended funds in the Cayman Islands. The changes will provide additional surety and transparency for investors and managers of Cayman Islands investment funds, while better aligning with best market practices, enhanced anti-money laundering and other global regulatory standards.

Economic substance requirements

The Cayman Islands, along with many other jurisdictions, have been required by the OECD to introduce economic substance requirements. Framework legislation to meet the requirements is found in the International Tax Co-Operation (Economic Substance) Law (2020 Revision) as amended, together with relevant regulations and guidance (the "Cayman ES Law").[10]

As a result, 2019 and 2020 saw sponsors and managers taking advice on whether any changes or modifications were needed to their existing structures and/or fund documentation in order to comply with these economic substance requirements.

If a "relevant entity" is carrying on a "relevant activity", the requirements for compliance include carrying on core income-generating activities in the Cayman Islands, being directed and managed in an appropriate manner in the Cayman Islands, and having an adequate physical presence and an adequate number of employees or other personnel with appropriate qualifications in the Cayman Islands.

A more detailed discussion of the economic substance legislation is beyond the scope of this chapter; however, some relevant headline points are:

- "investment funds" (as defined d in the Cayman ES Law) including vehicles through which they directly or indirectly invest or operate (but not an entity that is itself the ultimate investment held) are excluded and are not viewed as "relevant entities" for the purposes of the Cayman ES Law;
- entities that are tax-resident outside of the Cayman Islands are carved out of the Cayman ES Law;[11] and
- "fund management business", which involves discretionary management of securities (as defined in the Cayman ES Law), is a relevant activity, in relation to which relevant entities will be required to satisfy economic substance requirements.

So, while investment funds and their GPs would generally be excluded from the provisions of the Cayman ES Law, managers are now seeking advice in relation to whether Cayman-incorporated investment managers, investment advisor entities, portfolio companies or upper tier carry vehicles are subject to any requirements. There are a number of restructuring options available (some of which are more simple than others) in order to ensure compliance with the Cayman ES Law; however, it is important to note that there is no universally correct approach, and managers will need to strike a balance between various competing onshore and offshore considerations.

Revamp of the Hong Kong Limited Partnership Regime

Hong Kong has a strong reputation as a global and regional hub for the asset management and funds industry and is looking to maintain and improve its competitiveness in this sector. In the recent 2020–2021 Budget, and particularly in the current political and economic climate, the Hong Kong government has been keen to promote economic growth initiatives, one of which is promoting the local private equity fund industry (including venture capital, real estate, infrastructure, etc. funds).

The Budget foreshadowed progress in two areas under consultation with industry: a specific Hong Kong limited partnership vehicle designed for private equity funds; and the clarification of carried interest tax treatment for private equity funds. While the government continues to consult with industry on potential tax concessions in respect of carried interest, it took a major step toward the creation of a more suitable local private equity fund vehicle by introducing a "Limited Partnership Fund" ("LPF") regime in August 2020. The LPF is significantly improved from the outdated limited partnership that could be formed under the previous funds regime, the Limited Partnership Ordinance ("LPO").

10. As at the date this chapter was written, the relevant provisions are: the International Tax Co-Operation (Economic Substance) Law (2020 Revision); the International Tax Co-Operation (Economic Substance) (Amendment) Law, 2020; the International Tax Co-Operation (Economic Substance) (Prescribed Dates) Regulations, 2018; the International Tax Co-Operation (Economic Substance) (Amendment of Schedule) Regulations, 2020; the International Tax Co-Operation (Economic Substance) Regulations, 2020; and the related guidance published on 13 July 2020. Please note that the Cayman ES Law is subject to change.

11. Such entities will be required to produce evidence to the Tax Information Authority of the Cayman Islands substantiating the exemption claimed, such as a Tax Identification Number or tax residence certificate as applicable.

A more detailed discussion of the new legislation is beyond the scope of this chapter; however, some key features are:

- in line with the limited partnership regimes of other key fund jurisdictions, the GP has unlimited liability for the debts and obligations of the fund, and generally each LP is not liable for the debts and obligations of the fund beyond the amount of the LP's agreed contribution unless it takes part in the management of the fund;
- a "white list" of permitted activities that will not be regarded as LPs taking part in the management of the fund is included and is broadly similar to other key fund jurisdictions;
- existing limited partnerships under the LPO that fulfil lthe eligibility requirements for an LPF may apply to migrate to become an LPF; and
- there is currently no prescribed mechanism for redomiciling offshore efunds to become an LPF, although there is a possibility that this may be introduced in the future.

These features put the LPF on substantially equal footing with limited partnerships in other key fund jurisdictions such as the Cayman Islands, Delaware, Luxembourg and (Hong Kong's long-time regional rival) Singapore (which is already a number of steps ahead in developing legal, tax and regulatory regimes to attract private fund managers).

Nonetheless, how the LPF regime will evolve and the level of uptake amongst private fund managers will undoubtedly also be impacted by other shifts taking place in Hong Kong. In recent months, the Securities and Futures Commission ("SFC") has been consulting with the local private equity industry on how Hong Kong licensing requirements apply to private equity firms sconducting business in Hong Kong, and it released a circular providing further guidance in January. Given the historically wide variance in practice of Hong Kong private fund managers in respect of SFC licensing, any decision whether to use the LPF will at least partly be informed by whether a manager is, or will become, licensed to carry out SFC-regulated activities in Hong Kong. Furthermore, the attractiveness of the LPF regime in practice will also likely depend on the extent of the Hong Kong government's tax concessions in respect of carried interest.

ESG

This year has seen continued visible growing public concern relating to the importance of environmental, social and corporate governance ("ESG") issues, e.g. climate change, diversity and equality. Awareness of and support for these concerns is being adopted by many international corporates and financial l institutions, and investors and GPs find themselves having to adapt to address these issues. Sixty-eight per cent of investors state that positive social or environmental impact is being sought alongside financial returns, and 87% state plans to increase focus on sustainability investing in the next five years.[12]

Although there are some global sponsors that now have impact investment funds that have been making investments in the Asia-Pacific region, Asia-Pacific has been somewhat slower than other regions in implementing ESG integration; often the focus has been on corporate governance rather than on the environmental or social aspects.

According to Preqin, 55% of Asian LPs do not have an ESG investing policy for private equity, and 60% of Asian private equity funds do not require their portfolio companies to report on ESG issues or responsible investment. Research undertaken by Bain & Company indicates that only 13% of Asia-Pacific GPs have fully integrated ESG considerations at investment committee level.

However, it is expected that pressure from international investors will drive uptake in due course and, accordingly, that this will be prioritised by GPs and lenders.

There is clear evidence that this has started to take place in the banking community. Prior to the coronavirus pandemic, companies around the globe had raised around US$275 billion of loans, with interest rates tied to sustainability performance.[13] In October 2019, ING announced it had made available a US$65 million revolving "sustainability improvement capital call facility" for Singapore-based Quadria Capital Management, being the first in the world to link the interest rate of a facility provided to a private equity fund to the sustainability performance of its portfolios. In response to growing demand, the Loan Market Association published a set of "Sustainability Linked Loan Principles" in March 2019, which are intended to promote the development and preserve the integrity of sustainability-linked loan products.

While the coronavirus pandemic has forced banking counterparties to focus on more immediate financing solutions, we expect that sustainability and ESG principles will continue to filter racross the range of financial products and will form increasingly important aspects of lender strategies.

Summary

The years 2017 and 2018 saw robust activity in respect of new launches, capital-raising and deals, although levels have declined throughout 2019 and 2020.

It is becoming ever harder to identify and win appropriate new investments and more limited exit opportunities. However, with plenty of dry powder in the region and a period of slow deal activity for most of 2020 given the coronavirus pandemic, and with many funds still early in their life cycles, there will soon be pressure on GPs to deploy that capital in order to generate returns for investors.

12. Bain & Company, Asia-Pacific cPrivate Equity Report 2020.
13. Bloomberg, ESG-Linked Loan Boom Hit by Pandemic Push for Short-Term Funds (20 October 2020).

Fund finance in Asia-Pacific

Overview of the fund finance market

There is a healthy level of debt available for fund-level financings in the Asia market. In recent years, Asia-based financial institutions have significantly ramped up the sizes of their teams as a direct response to the huge amounts of private capital being raised in the region, and non-bank lenders have also been entering the market. There has been significant growing interest and appetite among international, regional and local banks to offer a more diverse range of fund financing products.

Fund financings in the Asia market are typically carried out on a bilateral basis, but there have also been examples of financings completed on a club or syndicated lender basis, in cases where the size of the facility is too large for a single lender to underwrite on its own. This will likely become more common as larger funds are raised in the Asia market.

The majority of fund financings in the Asia market so far have been traditional subscription line (or "capital call") facilities, where security is taken over the GP's rights to call undrawn capital from LPs. The high volume of new fund launches in 2017 enabled the traditional subscription financing gproduct to quickly develop from being a bespoke relationship deal into a much more commoditised line. Terms and documentation are often derived from North American or European precedents.

However, in addition to these traditional subscription line financings the market has also seen an uptick in enquiries relating to the availability and/or use of more structured and bespoke facilities. These typically fall under the four categories below, although some lenders are able to offer tailor-made credit facilities for their fund clients:

- **Net Asset Value ("NAV") Facilities**: More commonly used in Europe, these facilities are raised against "concentrated NAV" (i.e. a small pool of the underlying investments of the fund), with recourse to the cashflows and distributions from the fund's underlying investments (as opposed to recourse against the GP's rights to call undrawn capital from LPs). These facilities are helpful during the later stages of a fund's life cycle when there may no longer be uncalled LP commitments to include in a lender's borrowing base.
- **Hybrid Facilities**: Hybrids involve a combination of capital call-style recourse to the GP's rights to uncalled LP commitments, and also NAV facility-style recourse to the underlying assets.
- **Management Fee and GP/Management Co-Invest Facilities**: These take a number of forms but typically involve lending to a GP or management company in its own capacity, with recourse to GP or management fee income, and may be supported by personal guarantees. These can be used to provide working capital to the GP or management company, pending receipt of GP profit share or management fee income. These facilities are also used to help fund capital calls made on the vehicle through which the GP or management team has invested (the latter being useful for larger funds where investors expect management to have significant skin in the game).
- **Preferred Equity Financings**: GPs have also been looking to raise finance at the fund level through preferred equity structures. Increasingly, lenders are helping preferred equity investors provide that equity funding through leverage to the investor, with security over the preferred equity investment.

There are a limited number of lenders in the market who have the appropriate internal resources to be able to offer the more structured fund finance efacilities. For the lenders who are able to do so, these types of facilities offer more attractive pricing than subscription line facilities, which tend to be at lower pricing levels given the competition between lenders for that product. This is also reflective of the higher risk of these facilities, given that lenders need to make an assessment of the potential for cashflows/distributions resulting from the fund's underlying assets and investments.

As GPs look for additional ways to increase returns to investors and as more lenders seek to diversify their fund finance loan portfolios beyond subscription line finance in order to continue to execute new deals, it will be interesting to monitor the extent to which these products get used.

Asian fund structures and fund documentation for fund facilities: Key issues

From a basic structuring and formation perspective, it is now much more common that new Asian fund documents contain provisions that specifically permit the fund (or a portfolio company) to incur subscription line finance debt, create security and grant guarantees. There is now often language that seeks to facilitate the taking of security over uncalled capital commitments and reduce the potential for further steps needing to be taken with their LPs in connection with any fund-level financing. Making sure that a fund has the legal capacity to enter into the transaction and grant security forms the core of lender legal due diligence for this product. Parties are becoming more familiar with lender due diligence requirements, and there are now fewer examples of fund documents containing problematic restrictions in respect of basic capacity.

However, thinking ahead to the opportunity to put in place the more structured financings noted above, fund sponsors should consider ensuring that: (i) the GP entity and management company are set up as separate entities (this has not always been the case for local/regional funds); (ii) there is an SPV in any structure set up for a portfolio investment in respect of which share security can be granted and/or which can itself grant security to support any potential NAV financing and (iii) there are no restrictions on assignments of rights to management fees, or any other rights to distributions by the fund or the GP.

In addition, when parties negotiate a subscription line facility, it may also be worth considering including a permission to grant second-ranking security over and recourse to undrawn LP commitments, to allow this to be provided to any hybrid/NAV facility lender in the future, to the extent that subscription line facility is still in place at that time.

Key legal due diligence points for funds and lenders in the Asia market

There are, of course, a number of points that both funds and their lenders will need to consider for any fund-level financing. However, we think funds and lenders in the Asia market will be particularly focused on the following legal due diligence issues:

- Do the fund documents facilitate different types of fund financing transactions other than subscription line financings (e.g. GP management fee financings)?
- What ability does the GP have to issue drawdown notices and use capital to repay newly incurred bank debt following expiration of a fund's commitment period?
- What are the circumstances in which investor commitments could be cancelled or reduced?
- What happens if a fund unilaterally releases or waives the commitments of its investors without lender consent and what contractual protections (if any) could be deployed to mitigate this risk?
- Are there restrictions around the transferability of LP interests (at least for those LPs who have been included in the borrowing base)?
- Will investor consent letters or other further deliverables be required from any LP to put in place the financing (e.g. acknowledgments or courier delivery receipts in respect of LP notices)? GPs are particularly sensitive in Asia to further interactions or detailed information requests being required with their investors. In some cases, GPs have even tried to resist providing copies of side letters to their lenders to avoid disclosing commercial terms agreed with investors. In an environment where lenders are focused on ensuring that security notices are delivered to LPs (especially in the context of potential office lockdowns due to the coronavirus pandemic), this can be a key area for negotiation.
- Is the permitted use of proceeds of the facility wide enough such that, in addition to being available to bridge capital calls to make investments, it can also be used to fund distributions to LPs as a bridge to receiving disposal proceeds, or to bridge any timing delay caused by currency conversions (e.g. when RMB proceeds are received onshore and will be subject to lengthy PRC regulatory approvals before they can be remitted offshore to the fund)?
- Has the fund registered under the Private Funds Law?

Given current market conditions, we think it is essential that both lenders and GPs have a comprehensive understanding of these types of legal due diligence issues. This will permit a wider range of financing deals and ensure that sufficient protections or flexibilities are included in the finance documents.

Outlook for 2021

Increasing competition and uncertainty brings opportunities

There is growing competition to raise funds and, at a time when there is a large amount of dry powder in the region, there is also a huge amount of competition over the best deals to deploy those funds. GPs will face the challenge to identify attractive new investments in what is now a relatively mature market, against the backdrop of uncertain market conditions and disruption caused by the coronavirus pandemic. The performance of funds operating in the Asia market will be closely monitored by investors, who are increasingly looking to consolidate and reduce the number of their GP relationships.

In addition to the recent issues caused by the coronavirus pandemic, the past couple of years have seen significant regional geopolitical events, which have hindered new private equity downstream deal opportunities and limited exit opportunities. Pressures caused by the US–China trade war have disrupted new mandates, rendering clients hesitant to commit to new deals in an uncertain economic landscape.

Looking ahead, it remains to be seen what impact the 2020 US elections will have on the global and regional economies.

Despite any uncertainties, private capital takes comfort from its reputation for outperforming during downturns. While the extent of any downturn is to be determined, it seems likely that, in the first tinstance, going into 2021, there will be a transitional period where participants react to market conditions and seek to identify new opportunities.

Although GPs may exercise caution during this period, wary that rushing to deploy capital early in a new fund's life cycle could prove costly, we also see this as being a period where GPs can take advantage of opportunities brought to them by uncertain market conditions and increasing competition.

As GPs grow more mature and competition increases, GPs are diversifying their strategies in order to widen their nets and are becoming more specialised by sector or theme. There has been a notable trend towards infrastructure-focused strategies, aimed to target opportunities relating to regional infrastructure development needs (e.g. the Belt and Road Initiative) and any related funding gaps. There has also been a notable uptick in enquiries relating to debt-focused strategies, reflective eof increasingly tough market conditions.

Increased focus on debt to manage liquidity and increase returns

The amount of existing dry powder, combined with the decline in the volume of new private equity fund launches, may result in a slower pipeline of new traditional subscription line financings as we head into 2021.

However, at the same time, there is increasing pressure on GPs to raise debt to manage liquidity and potentially help increase investor returns, especially in later-life funds.

A new fund's primary concerns may be bridging capital calls or utilising leverage to increase liquidity and boost return on new investments – which can be served by the traditional subscription line facility. On the other hand, a later-life fund's commitment period may have expired and the GP may not be able to draw capital commitments in order to repay newly incurred debt. A GP may also manage multiple funds with illiquid assets.

If available, bank debt can provide effective erelief to these types of funds. Bank debt could consist of simple working capital facilities, NAV facilities, hybrid facilities, or loans to the GP itself. Lenders will consider the liquidity of any remaining assets and the availability of remaining commitments, and will need to have a full understanding of the fund's business and cashflows. Until relatively recently, this has really only been the territory of a few bespoke lenders as well as direct lenders and credit funds.

We expect to see greater use of NAV, hybrid, GP management fee or other, more bespoke facilities. This would create new opportunities for lenders to diversify their books, expand fund relationships and offer rpotentially more lucrative financing products.

Another way in which investors and managers have both sought to manage their liquidity profiles or fund further growth has been via secondary market trading. Secondary fund market activity grew in 2019, with deals worth US$42.1 billion completed globally in the first half of the year; however, activity has subsequently slowed in 2020.[14] Although there is currently little precedent in Asia in respect of lenders financing large secondary market portfolio transactions, this is an area where we may see debt financings sbecoming more widely used in the future.

Summary

Current economic and market conditions, combined with uncertainty around recovery from the coronavirus pandemic and increased competition and increasing demands from investors, will require participants to balance conservatism against a need to diversify their strategies, find new opportunities, and achieve additional liquidity in order to generate higher returns to investors. At the same time, many of the more mature GPs will be looking to raise ever-larger funds which, in turn, will need increasingly larger debt facilities.

The fund finance market in Asia-Pacific looks well placed to assist GPs throughout these processes and ensure they can manage liquidity throughout all phases of a fund's life cycle.

14. FT, Private equity secondary deals soar (16 September 2019).

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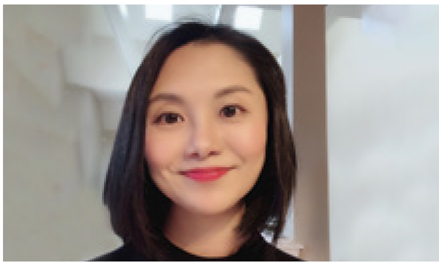

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