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CONTENTS

Jurisdiction chapters

Comparing the European, U.S. and Asian fund finance markets

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Introduction

As the world enters an era of deglobalisation with increasing political separatist rhetoric, shifting conditions continued to drive distinctions among the markets of U.S., Europe, and Asia throughout 2023. This chapter considers the evolving differences between the European, U.S. and Asian approach to fund finance, both from a high-level market perspective and the contrasting nuances of transactions.

Market differences

Historically in Europe, the fund finance market originated with a few banks offering products on a bilateral basis to existing customers who required more liquidity, and the market was very much relationship driven. Because of the existing relationship between bank and borrower, the banks would try to structure the deals without the need for investor consents or amendments to the limited partnership agreements ("**LPAs**"), and often offered these facilities on an unsecured and/or uncommitted basis. The European banks carried out limited due diligence on the creditworthiness of, and potential enforceability against, investors.

Over the last 15 years, the European lender landscape has become saturated by the emergence of U.S., Australian, Asian, new fund finance market entrant European banks and alternative lenders all competing with the long-standing European bank players in the space, and it is estimated that there are now more than 55 lenders offering this product to the European market. This has resulted in larger facility sizes, necessitating more club deals and syndicated financings, given bank balance sheet restrictions and borrower appetite for a diverse lender base.

Whilst being the youngest market out of the three, Asia has attracted players from all three continents in addition to strong local banks historically dominating each of the respective sub-markets. Therefore, where "East meets West" is perhaps the most competitive market of all. The deeply rooted relationship-driven culture, coupled with a similar trend of growth in the market, resulted in corresponding pressure to push down pricing and terms not seen in the other two markets. In contrast, in the U.S., the current market is more lender friendly (as further explained in this chapter) and is mainly dominated by a few U.S. banks, although recently several European and Asian banks as well as alternative lenders have started to build up their presence in the U.S. A large portion of deals in the U.S. tend to be syndicated, as opposed to bilateral. For this reason, U.S. deals tend to be structured in a way that makes them easier to be rated by agencies.

Over the last few years, there has been a slight shift by certain banks in Europe to an approach more akin to that taken in the U.S. By comparison, the Asian market is still primarily relationship driven, both by lender relationships with fund sponsors and, in many instances, with investors. This results in more bespoke covenant structures and deal terms. However, indicators such as increased Asian players' participation in the Fund Finance Association ("**FFA**"), and other cross-border contact between the markets, would suggest that the future of the Asian markets will be more heterogeneous. Furthermore, the component parts of the market are quite distinct: firstly, there are the large European and U.S. managers looking to raise funds investing in Asia; secondly, there are the Asian-based sponsors raising funds in Asia with global investors; and thirdly, there is what some would describe as the Australian sub-market.

Traditionally, fund sizes in Asia were smaller than some of the funds being raised in Europe and the U.S., and relationship facilities were provided by lenders on a bilateral basis. Like Europe, the Asian market is changing, in part in response to the increase in fund sizes and a corresponding increase in facility sizes, which pushes the need for these facilities to be syndicated. The entrance of international banks from the U.S., Europe, the Middle East and Australia into the Asian market has created a uniquely diverse and colourful playground in the past few years. 2023 was a bruising year for Asian managers across the board. The deepening U.S.-China tension and resulting tit-for-tat restrictions and sanctions resulted in many U.S. and European limited partners taking a "wait and see" approach. Whilst many funds were still launching and successfully fundraising in the U.S. and Europe (albeit at a slower pace than in previous years), Asia has been a completely different picture – fundraising was down 60–70% compared to the prior year, with most funds, including the top-tier mega names, delaying fundraising until 2024. As a result, separately managed accounts ("**SMAs**") and concentrated continuation funds are on the rise as large institutional investors seek to negotiate an investment structure designed specifically for them, and correspondingly more lenders are looking at how they can get comfortable with lending against such a concentrated pool.

In general, the use of fund finance facilities, whilst not as prevalent as in the U.S. and Europe, is on the rise in Asia. The demand for NAV lines (facilities secured against the underlying assets of a fund) increased significantly this year (particularly in Europe and the U.S.) as borrowers look to utilise any source of liquidity available to them, particularly in the low exit, slow deployment, and low DPI environment. The governing law for Asian deals varies in reflection of the market, often depending on the identity of lenders, funds and investors. In recent times, Asian facilities have been governed by U.S., English, Singapore, Hong Kong or Japanese law.

It is fair to say that the size of the fund finance market is largest in the U.S., followed by Europe and then Asia. The fund finance market remained buoyant particularly in Europe for the first three quarters of 2023, despite fundraising still proving challenging in some areas. Conversely, Asia has suffered its slowest year ever as a reflection of the market. APAC private capital fundraising in the first half of 2023 was only 22% of what was raised in 2022 (Preqin), which reflects the general shift in sentiment away from China-focused private capital funds, the most obvious being in private equity fundraising. On the other hand, according to Preqin's third quarter 2023 report, whilst the total number of funds closed declined 38% compared with the same period of 2022, these funds collectively raised $145.3bn, a 19% increase on the same period last year. The fact that fewer funds closed larger amounts of capital points to a continuation of the recent trend for consolidation and "flight to quality". The European and U.S. markets remain more innovative with products such as NAV facilities, hybrids, general partner ("**GP**") lines, SMAs and secondary structures. 2022 and 2023 also saw a rise in non-bank lenders stepping into the shoes of traditional bank lenders as they continue to offer an important source of funding.

The market is still managing the dramatic rise of inflation partially sparked by Russia's invasion of Ukraine in early 2022. In order to combat rising inflation, many central banks also raised interest rates as a response. This has inevitably led to higher costs of funding and as subscription line facilities are typically floating rate products, banks have needed to increase their pricing. Additionally, the U.S. regional crisis in March 2023 and the exit of some of the biggest players put further pressure on the supply-demand dynamic particularly in the U.S. and Europe, meaning a significant concentration of active lenders during 2023 and a shift from the normal appetite for the market in Europe. The ongoing uncertainty caused by the global disruption caused many borrowers to maximise as many liquidity options as possible, causing a liquidity crunch. In the U.S. and Europe, the rush for debt meant that many lenders had used up their balance sheet earlier in the year than they would have otherwise, leading to a quieter end of year than normal. This has also created an ideal space for non-bank lenders to operate in as they are not subject to the same capital adequacy regulations as bank lenders, and they do not face the same cost of funding issues. In order to gain benefit from lower capital adequacy requirements, there has also been an increase in fund finance facilities being rated. Asia, however, is a different picture. Due to the slow market, many banks struggled to meet their lending targets and sit on large unused balance sheets. There is great opportunity for innovation and alternative markets to take a piece of this supply and demand imbalance.

Due diligence

As the U.S. and European markets have developed in different ways, the due diligence process similarly differs between U.S. and European lenders. In Asia, although deals are much more relationship-driven, influencing covenant structures and deal terms, the level of due diligence is mainly driven by the governing law. The choice of governing law not only affects the issues necessary to address in the due diligence phase, but also tends to dictate either a U.S. or European cultural approach.

Since the fund finance market emerged in Europe and Asia originally as a relationship-driven product, the level of due diligence conducted by European and Asian lenders has historically been less extensive than that required by U.S. lenders.

Traditionally, U.S. lenders will require significant diligence on all a fund's constituent documents, including its LPA, subscription agreements and any side letters entered between the fund or its GP and any investor. Additionally, U.S. lenders will closely analyse the creditworthiness of borrowing base-eligible investors, including by receiving financial information in respect of investors, as well as guarantees or other credit linkage documents demonstrating the connection between any special purpose vehicle ("**SPV**") investor and its credit provider.

In recent years, European and Asian lenders have likewise started to focus more energy on investor diligence; now, lenders in all three markets will also review LPAs, side letters and subscription agreements (along with any other relevant fund documentation). In performing this diligence, lenders will look for comfort on a variety of issues. In addition to the obvious borrowing, guaranteeing and security checks, of particular concern to a lender will be any provisions that could potentially limit the amount that may be called from investors. In Asia, however, side letters containing sovereign immunity provisions are commonplace; this is since cornerstone investors in Asian funds are often sovereign wealth funds. Some lenders in Asia are comfortable lending to such sovereign investors if they have a track record of advancing capital commitments, whilst other Asian lenders may require such investors to waive their immunity or rely on the commercial transaction carve-out, as per the European and U.S. approach, if such investors are to be counted towards the borrowing base. This becomes even more important in an SMA deal where the sole investor is a sovereign wealth fund, and most lenders will require these rights to be waived in an investor letter.

As investors increasingly look for geographic diversity and opportunity, lenders increasingly leverage internal institutional market intelligence from their branches around the globe in making credit decisions with respect to investors. Having a branch with useful credit information in a jurisdiction where a particular investor is located can provide a competitive edge in other jurisdictions where the lender is structuring a loan where the market is seeing the said investor for the first time.

To facilitate this due diligence review, U.S. lenders will often require completion of due diligence checklists on all relevant fund documentation as part of their credit underwriting. This identifies the various issues of concern for the lender and addresses how such concerns are dealt with in the LPA and the credit facility documentation. In recent years, European and Asian lenders have also begun developing their own form of due diligence checklists, though the level of granularity on issues that could affect enforcement and interpretation of the LPA and investor documentation differs between U.S., European and Asian jurisdictions.

Further to the foregoing, U.S. and European banks typically have different expectations as to what provisions are included in LPAs or other constituent documents. Customarily, U.S. banks expect the borrower's LPA to include explicit language made for the benefit of the lender, including: (a) provisions authorising the credit facility and the pledge to the lender of the funds and GP's rights to call for and receive capital contributions; and (b) language whereby the investors agree to fund capital calls made by the lender without defence, setoff, or counterclaim.

To the extent that an LPA does not contain these lender-focused provisions, the lender will often require the investors to deliver investor letters including the desired language. Conversely, European lenders tend to get comfortable if the LPA permits security to be granted over the GP's/manager's right to issue call-down notices, without specific reference to the lender. A lender would then be able to rely on the contractual relationship created under any security document that, among other things, assigns the right to issue call-down notices to the lender (and the power of attorney included in the related security agreement to execute any notices on behalf of the GP/manager).

Often, English law-governed LPAs that relate to older vintages of funds do not include the "without defence, setoff or counterclaim" language, and typically they explicitly state that there is nothing in the LPA that confers any right on any person not a party to the LPA, and furthermore that any person not party has no right under the Contracts (Rights of Third Parties) Act 1999 to enforce any provision of the LPA. In contrast, many U.S. law-governed LPAs state that the lenders will be third-party beneficiaries under the LPA.

Anti-terrorism and sanctions due diligence is an ever-more prevalent part of all financial transactions, and the fund finance space is not immune. Asia, and Hong Kong in particular, has some of the most onerous regulatory requirements that can and do delay closings. The problem is more acute for U.S.-based funds that are not only unfamiliar with Asian procedures but are often put in difficult positions by conflicting laws across jurisdictions. For instance, the Hong Kong requirement that copies of passports for responsible officers be certified as true and correct by a certified public accountant or lawyer is at odds with liability-mitigating rules applicable to U.S.-based certified public accountants or lawyers. Reconciling these, and many other similar issues, can be time-consuming and costly. The relatively small nature of the Asian markets, coupled with the more recent emergence of both the Asian markets and Asian anti-terrorism and sanctions regulations, means that mechanisms for addressing these issues are just now evolving; however, lenders and lawyers alike are diligently working to develop cost-effective and efficient solutions.

Security

As the European fund finance market developed out of existing relationships between banks and customers, European banks have previously been willing to provide these facilities on an unsecured basis. However, as this product became more popular in Europe, European banks adopted the same approach as their U.S. counterparts in terms of security packages, and nearly all European deals now require the fund and its GP to pledge collateral to support the fund's obligations. In Asia, these transactions used to be mostly unsecured; however, owing to the trend towards a more syndicated market requiring multiple lenders, most deals are now being done on a secured basis. In general, the terms for Asian fund financings are beginning to converge with the terms in the U.S. and Europe; in particular, requiring robust security packages.

Whilst the actual assets a lender will look to secure are essentially the same in all three markets (i.e., the rights to call down from investors and any collateral account into which investor calls are paid), the methods around granting security, perfection and enforcement vary across jurisdictions. A few of the differences to be aware of are as follows:

1. *Deposit account control agreements ("**DACAs**")* – Under the Uniform Commercial Code ("**UCC**"), the statutory authority governing secured transactions in the U.S., for a lender to perfect its security interest in a deposit account, it is required to maintain "control" (as defined in the UCC) over the deposit account. The most common method of maintaining control is by the execution and delivery of a DACA, which is an agreement between the account bank, the fund and the lender, whereby the account bank will agree to honour instructions issued by the lender with respect to the account without the further consent of the fund. The DACA is usually in a form generated by the account bank, and account banks will typically not accept many changes to their preferred form.

   Though not required for control under the UCC, an account bank may insist on a DACA being in place in the U.S., even where the account bank and the secured party are the same entity, to set forth the relative rights and obligations of separate branches or divisions of the bank. This is most important in syndicated deals, where the lender syndicate has a vested interest in the agent bank clearly delineating its roles as agent and account bank. In England and Wales, and generally in Asia, it is usual for the terms of how any secured monies will be dealt with to be contained in the facility agreement and/or the account security agreement itself.

   In terms of account security in England and Wales, perfection is achieved by the receipt of a notice by the account bank, putting the account bank on notice that the monies they hold in that account are subject to a security interest, and to make the account bank aware of the secured party's signing rights. It is market standard for account banks to request that their own form of notice and acknowledgment be used, or to countersign the notice by way of acknowledgment.
2. *Notices* – In England and Wales, any security over the right to call down from investors will be perfected by notice being duly served on, and received by, the investors. Depending on the method of delivery of notice, a secured party may accept read receipts if notices are delivered to investors via email, or evidence that the notices have been uploaded to an investor portal.

In the U.S., notices are not required to perfect security over call-down rights, and are rarely, if ever, delivered. Rather, under the UCC, the right to call capital on the investors is classified as a "general intangible" (as defined in the UCC). Therefore, in order to perfect the lender's security interest in the right to call capital, the lender is required to file a UCC-1 financing statement naming the fund and the GP as debtors and the lender as the secured party. The UCC-1 financing statement must be filed in the "location" of the debtor (as set forth in the UCC) and serves to put third-party creditors on notice of the lender's security interest.

3. *Collateral waterfalls* – Funds and investors that participate in U.S. law-governed fund finance facilities must also be mindful of certain regulatory and statutory regimes that could govern the relationship between the lender and the fund or the investors. For example, if an investor is a pension or retirement fund (an "**ERISA Investor**") that is subject to the Employee Retirement Income Security Act 1974, as amended ("**ERISA**") and if the credit facility is determined to create contractual privity between the lender and the investor, then this could result in a "prohibited transaction" under ERISA. Failure to comply with ERISA could expose the investor and the fund to significant liability, or trigger excuse rights that would permit the ERISA Investor to avoid funding capital contributions.

   As further protection for ERISA Investors, funds will often require ERISA Investors to be limited partners in a feeder fund that will then feed into the main fund. In this instance, a "cascading collateral structure" is put in place whereby the feeder fund will pledge to the main fund its and its GP's rights to call capital on its investors, and the main fund will then on-pledge to the lender its rights under the security documents between the main fund and the feeder fund. This type of cascading collateral structure may also be utilised by funds that are sensitive to the tax implications or other legal or structural considerations that could be triggered by creating privity between the investors and the lender, or else by virtue of the loans provided under the credit facility.

   There are no similar instances where this type of security structuring is required in respect of English funds, as generally there is no issue with English entities contracting directly with a lender. However, given that many European financings involving other jurisdictions are project-managed out of England, alternative financing structures such as equity commitment letters and put and call options may be adopted, as opposed to typical financing and security structures, to accommodate any jurisdictional tax or regulatory concerns.

Additionally, choice of governing law remains an important consideration for investors and lenders for the credit facility and the LPA and other investor documents. Typically, transactions governed by the laws of a U.S. jurisdiction tend to see more Cayman or Delaware organised borrowers, as such jurisdictions offer preferable tax and corporate governance laws for a fund and its investors. Likewise, U.S. lenders are comfortable that the laws of such jurisdictions will enable enforcement by the fund or GP (or the lender, under the security documents) of the investor's obligations to fund their capital contributions. For similar reasons, in European deals, it is more common to see Luxembourg, Channel Island, Scottish, Irish, English, Nordic, Netherlands or Cayman structures, whereas in Asia, investors have historically favoured Cayman, British Virgin Island and Australian vehicles. Traditionally, Asian fund sponsors have used Cayman Island fund vehicles, typically formed as limited partnerships. Some sponsors have introduced Singapore and Hong Kong vehicles in recent years thanks to these governments' introduction of new structures, regulatory reforms and incentives to attract fund managers to move over. The Asian fund finance market also sees Luxembourg, Delaware and Australian vehicles. Increasingly, the governing law for Asian deals is Singapore or Hong Kong law, following the APLMA standards given its similarity to the LMA that many international banks are familiar with. It is also noted that the governing law is also driven by where the underwriting team of these facilities is based, hence their preference for one over another.

In certain jurisdictions (particularly those in Europe that are subject to the Rome Convention), the governing law of where the borrower's assets are *situs* will dictate how security is taken in that jurisdiction; for example, if an LPA is governed by the laws of England and Wales, then the call-right security will be taken under the laws of England and Wales as the investors' obligation to meet a call-down notice is governed under an English law contract. Conversely, this is not strictly the case in non-EU jurisdictions, including New York, Delaware and the Cayman Islands, where the governing law of a security agreement might not necessarily be the same jurisdiction as where that asset is based.

Most U.S.-based fund finance facilities are governed by New York law, as lenders are comfortable that the laws of New York contain favourable provisions for the interpretation of the credit documents and enforcement of remedies against the fund. Therefore, the law governing the security agreement, and the creation and attachment of a security interest in the collateral, would be New York law. However, under the UCC, security filings are required under the law of the debtor's location (as defined in the UCC) to perfect the security interest in the collateral. Consequently, if a fund is organised under the laws of Delaware, the UCC would specify that Delaware is the "location" of the debtor, and perfection of the collateral would be made by the filing of a UCC-1 financing statement in Delaware. This would be the case regardless of what governing law is included under the LPA and investor documents (though such governing law typically corresponds to the fund's jurisdiction of organisation).

Covenants

Historically, U.S. deals have sought comfort from lending against a borrowing base (looking at each investor on an individual basis by applying individual advance rates, haircuts, and concentration limits before aggregating results) and granular due diligence of fund documentation, including any side letters entered by the fund or GP for the benefit of investors. By contrast, European deals have taken a more holistic view on the financial covenants (looking at the investor base as a whole and applying one advance rate), and sought comfort through covenants in the facilities agreement – for example, through a repeating representation that no side letter, or other agreement between an investor and the fund or GP, contains terms that are materially averse to the rights of a finance party under the finance documents or, if taken one step further, would affect the ability of the fund or GP to require investors to make capital contributions to the fund.

Historically, in Asia, deals were structured with a coverage ratio at the smaller end, driven largely by the preference of the banks operating in that space, and the relationship-driven nature of those facilities. Nowadays, facilities may be sized on a borrowing base calculation or coverage test, but the borrowing base approach is more prominent in the larger funds' facilities.

The reporting obligations of the borrower tend to be more frequent, onerous and administratively burdensome in U.S. deals. U.S. lenders usually require more visibility regarding the amount and frequency of any distributions made to investors, financial information on the investor base and more-frequent monitoring of the borrowing base threshold.

Conditions precedent

As mentioned above, one of the key differences, when it comes to security conditions precedent, will be delivery and receipt of perfection notices (in England and Wales) and UCC-1 financing statements (in the U.S.).

Completion searches differ between jurisdictions, with lien searches under the applicable UCC and tax laws being carried out where a borrower is located under the UCC in the U.S., and in some cases in the U.S. jurisdiction where its chief executive officer is located. The purpose of a UCC lien search is to determine whether any other creditors hold existing liens against the collateral that would take priority over the liens to be created by the credit documents. Likewise, under U.S. law, any tax lien filed against the fund by a governmental authority would hold higher priority than the liens created by the security agreement.

Whilst similar security searches are carried out at the relevant Companies House in the UK for corporate entities and limited liability partnerships, there is no security searches register for limited partnerships, which is the typical private equity fund structure in the UK. Therefore, any security granted by a limited partnership fund over its assets will not be noted at the registry (unless there is a corporate GP that is an English entity and party to the security, in which case the security can be registered against such entity), and so priority liens in respect of such a fund cannot be searched for. Depending on the type of security being granted, different filing obligations will also apply in the UK as security filings can only be made in respect of security interests granted by corporate vehicles or limited liability partnerships over their assets, not limited partnerships.

Legal opinions are a requirement for lenders in all three markets. However, although the content and substance will be largely the same, the market expectation as to who provides which opinions differs greatly. In Europe, it is expected that lender's counsel will provide the enforceability of security opinion and that borrower's counsel will provide the capacity and authority opinions and any ranking opinion (if required). In the U.S., it is expected that borrower's counsel will provide all legal opinions, though the fund's main counsel might provide only the enforceability opinions and rely on local counsel that is licensed in the jurisdiction of the fund's organisation to deliver corporate opinions on capacity and authority. Regarding cross-border transactions, it should be agreed between all parties, as soon as possible, who is providing which opinions, so as to have an accurate indicator of costs and to avoid last-minute delays.

Execution of documents/completion mechanics

The signing process in England and Wales is very strict in the wake of *R (on the application of Mercury Tax Group and another) v HMRC* [2008] EWHC 2721 ("***Mercury Case***"). Following the findings in the *Mercury Case*, English counsel follow best practice guidance when it comes to virtual signings and closings. Hong Kong practice is in large part following the same path. The method of signing will depend on whether the document in question is a deed, but in summary the best practice for execution of a deed virtually is as follows (and it is worth noting that the English market often follows this same approach for documents that are not deeds, albeit not strictly necessary):

1. the final version of the deed to be circulated to all parties;
2. the signatories to print the entire deed (or the signature page);
3. a scanned copy of the entire deed (or the signature page) to be sent back to the lawyer who circulated the deed, together with the final form deed; and
4. the signatories to confirm whether the deed is deemed to be delivered and/or when it is deemed to be delivered.

In respect of executing documents in England and Wales that are not deeds, the guidance following the *Mercury Case* is as follows:

1. the final version of the document to be circulated to all parties;
2. the signatories to print and sign the signature page; and
3. a scanned copy of the signature page to be sent back to the lawyer who circulated the document, together with written authority of the relevant signatory to attach that signature page to the final form document.

Where the document in question is not a real estate contract, the signature page may be circulated and signed whilst the document is still being negotiated. The signature page would then be held to order and released once the relevant signatories have confirmed that their signature page can be attached to the final form document.

Conversely, in the U.S. there is no requirement to circulate a final form of the document prior to execution of signature pages. Signature pages to documents that are still subject to negotiation can be circulated, signed and returned in escrow separately to the complete agreement. The parties will then each agree that their pre-signed signature pages can be attached to the final version of the document once it is in the agreed form and released once all conditions to closing have been met.

Summary

Looking ahead, the disruption that the economy felt in 2023 due to the continued impact of the Russia-Ukraine war, higher interest rates, differing central banks' policy, historic high inflation, and most recently the Israel-Hamas war, will continue into 2024 with more uncertainty than we have faced in recent years. The tough exit market for private equity and write-down in valuations have affected some asset classes more than others, with infrastructure and private debt remaining strong. As in any downturn there is also opportunity, and fund finance products can assist with a borrower's ability to manage its portfolio during tougher times; for example, NAV facilities can be used to facilitate "synthetic exits" by unlocking value in a fund's investments and making returns to investors if a full exit is not possible at that time due to market conditions. It is also likely that fundraising and deal closing will continue to take longer than it has in previous years, with the market hopeful that 2024 will see some improvement.

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