

December 2023

New regulation: GBA standard contract for the cross-border flow of personal information - will it make Hong Kong unique under PIPL?



New regulation

On 13 December 2023, with the aim to promote the safe and orderly cross-border flow of personal information within the Guangdong-Hong Kong-Macao Greater Bay Area (GBA), the Cyberspace Administration of China (CAC) and the Innovation, Technology and Industry Bureau of the Government of the Hong Kong Special Administrative Region (ITIB) have jointly promulgated the Implementation Guidelines on the Standard Contract for Cross-boundary Flow of Personal Information Within the Guangdong-Hong Kong-Macao Greater Bay Area (Mainland, Hong Kong) (the "**Guidelines**") with immediate effect, to which a template standard contract (the "**GBA SCC**") formulated jointly by CAC, ITIB and also the Office of the Privacy Commissioner for Personal Data, Hong Kong (PCPD) is attached.

The GBA SCC is a facilitation measure to implement the Memorandum of Understanding on Facilitating Cross-boundary Data Flow Within the Guangdong-Hong Kong-Macao Greater Bay Area signed CAC and ITIB earlier on 29 June 2023.

Key developments

The Guidelines provide that data exporters and data importers registered (applicable to organisations) or located (applicable to individuals) in nine (9) cities located in Guangdong Province including Guangzhou, Shenzhen, Zhuhai, Foshan, Huizhou, Dongguan, Zhongshan, Jiangmen and Zhaoqing (the "**GBA-Mainland**") or the Hong Kong Special Administrative Region (Hong Kong) may, in accordance with the requirements

under the Guidelines, conduct cross-border flow of personal information between the GBA-Mainland and Hong Kong by virtue of entry into the GBA SCC and, upon the effectiveness of such GBA SCC.

The Guidelines do not apply to any personal information that has been informed or announced by the relevant authorities or regions as important data, but different from the Measures on the Standard Contract for Export of Personal Information (the "**SCC Measures**"), the Guidelines do not limit the application of the GBA SCC to the export of personal information under certain volume threshold, which seems to imply that when exporting personal information to Hong Kong, data exporters in the GBA-Mainland could be exempted from the relevant threshold requirements under the SCC Measures¹ as well as those under the Measures on the Security Assessment of Data Export (the "**DESA Measures**")².

Noting that the Guidelines are of a lower legal hierarchy than the SCC Measures and the DESA Measures, it remains uncertain whether CAC would further interpret the above exemption as still being subject to the SCC Measures and the DESA Measures.

Differences from the general SCC

The GBA SCC is in a form similar to the general SCC formulated by CAC under the SCC Measures with a few major differences:-

- (a) **PIPIA requirements** Under the GBA SCC, the personal information protection impact assessment (PIPIA) to be carried out by the data exporter in the GBA-Mainland is no longer required to cover certain matters as shown in the table below marked in red which are required to be covered in the general SCC:-

Matters required under the GBA SCC	Matters required under the general SCC
<ul style="list-style-type: none"> ▪ The legality, legitimacy and necessity of the purpose and method of handling of personal information by the data exporter and the data importer; ▪ The impact on and security risks to the rights and interests of the personal information subject; and ▪ The obligations to be undertaken by the data importer, and whether the management and technical measures and capabilities to perform the obligations can guarantee the 	<ul style="list-style-type: none"> ▪ The legality, legitimacy and necessity of the purpose, scope and method of handling of personal information by the data exporter and the data importer; ▪ The scale, scope, type and sensitivity of Personal Information to be exported, and the risks to the rights and interests of the personal information subject that may be caused by the export of Personal Information; ▪ The obligations to be undertaken by the data importer, and whether the management and technical measures and capabilities to

¹ Under the SCC Measures, a data exporter may conduct export of personal information by virtue of entry into the general SCC if all of the following criteria (the "**SCC Criteria**") has been met:-

- (a) The data exporter is not an operator of critical information infrastructure;
- (b) The data exporter has handled personal information of less than 1 million individuals;
- (c) The data exporter has exported personal information of less than 100,000 individuals (in aggregate) since 1 January of the preceding year; and
- (d) The data exporter has exported sensitive personal information of less than 10,000 individuals (in aggregate) since 1 January of the preceding year.

² The DESA Measures require a data exporter to carry out a compulsory data export security assessment (DESA) if any of the SCC Criteria is not met or, where the information to be exported is important data.

Matters required under the GBA SCC	Matters required under the general SCC
<p>security of the personal information to be exported.</p>	<p>perform the obligations can guarantee the security of the personal information to be exported;</p> <ul style="list-style-type: none"> ▪ The risk of the Personal Information being tampered with, destroyed, leaked, lost, illegally used, etc. after the export, and whether the channels to safeguard the rights and interests in the Personal Information are smooth; ▪ The impact of the local policies and regulations on the protection of Personal Information on the performance of the SCC; and ▪ Other matters that may affect the security for export of Personal Information.

The absence of the assessment requirement for 'the scale and scope of personal information to be exported' from the GBA SCC seems to corroborate that for data exporters in the GBA-Mainland, volume of data being exported will no longer be one of the decisive factors dictating the export procedure.

(b) **Onward transfer** The GBA SCC provides less onerous conditions for any onward transfer by the data importer within the GBA-Mainland and Hong Kong as compared with the general SCC:-

Conditions under the GBA SCC	Conditions under the general SCC
<ul style="list-style-type: none"> ▪ There is a necessity from the business perspective; ▪ The data importer has informed the personal information subject of the name and contact information such third party, the purpose and method of handling, the type and retention period of the personal information, and the method and procedure for the personal information subject to exercise his/her rights. If notice is not required under the relevant laws and regulations of the jurisdiction of the data importer, such laws and regulations shall prevail; ▪ Where the handling of personal information is conducted based on the consent of the 	<ul style="list-style-type: none"> ▪ There is a necessity from the business perspective; ▪ The data importer has informed the personal information subject of the name and contact information such third party, the purpose and method of handling, the type and retention period of the personal information, and the method and procedure for the personal information subject to exercise his/her rights; where Sensitive Personal Information is provided to such third party, the data importer shall also inform the Personal Information Subject of the necessity of the provision of Sensitive Personal Information and the impact on the rights and interests of

Conditions under the GBA SCC	Conditions under the general SCC
<p>personal information subject, the consent of the personal information subject shall be obtained in accordance with the laws and regulations of the jurisdiction of the data importer; and</p> <ul style="list-style-type: none"> ▪ The personal information is provided to a third party in the same jurisdiction in accordance with the terms set out in Appendix I: "Description of the Export of Personal Information". 	<p>the Personal Information Subject; unless, in each case, it is not required by the laws and administrative regulations to inform the personal information subject;</p> <ul style="list-style-type: none"> ▪ Where the handling of personal information is conducted based on the consent of the personal information subject, the separate consent of the personal information subject shall be obtained; where the Personal Information of a minor under the age of 14 is involved, the separate consent of the minor's parents or any other guardian shall be obtained; the consent shall be in a written consent if so required by the laws and administrative regulations; ▪ Entering into a written agreement with the third party to ensure that the handling of Personal Information by the third party meets the standards for protection of Personal information required by the Relevant Laws and Regulations of the People's Republic of China and the data importer will assume the liability for the infringement of Personal Information Subject's rights due to the provision of Personal Information to the third party located outside the territory of the People's Republic of China; and ▪ Upon request by the Personal Information Subject, providing a copy of the above-mentioned written agreement to the Personal Information Subject. If trade secrets or other confidential business information are involved, the relevant contents of the written agreement may be redacted appropriately, provided that such redaction will not affect the Personal Information Subject's understanding of the written agreement.

(c) **Impact by extraterritorial law** Unlike the general SCC, the GBA SCC does not contain a section on the parties' representations and warranties in respect of the extraterritorial law as well as its impact on the performance of SCC, nor is the assessment on extraterritorial law required to be

carried out by the data exporter. This reflects the trust that both the Mainland and Hong Kong Governments have in each other's personal information protection law and its enforcement.

Parallel SCC Filing

The Guidelines require that the parties to a GBA SCC shall, within ten (10) working days from the effective date of the GBA SCC, file the GBA SCC as well as a photocopy of the identity document of legal representative and a standard-form letter of undertaking with the respective competent authorities (which for the GBA-Mainland, being the Guangdong branch of CAC and for Hong Kong, being ITIB). It is a different approach from that for the general SCC under which only the data exporter is required to carrying out the filing with the local CAC. We believe that such "parallel supervision" is the foundation for the various exemptions and simplifications in the Guidelines and the GBA SCC.

Another note is, the Guidelines do not require for the PIPIA report to be submitted in the filing.

Similar with the general SCC, re-filing with the authority is required for any supplemental to the GBA SCC or fresh GBA SCC in case of changes to the export of personal information in terms of the purpose, scope, categories, method, or the use by data importers and method of personal information handling, or any extension to the data retention period, or any other circumstances that affect or may affect the rights and interests in relation to personal information.

Advantage for Hong Kong

Any personal information having been exported to the GBA-Mainland or Hong Kong by virtue of entry into the GBA SCC is not allowed to be onward transferred to any entity or individual not registered or located in the GBA-Mainland or Hong Kong. Only the entities or individuals registered or located in the GBA-Mainland and Hong Kong could benefit from the convenience brought by the GBA SCC approach under the Guidelines. Apparently, this will make Hong Kong a unique jurisdiction for international business subject to the Personal Information Protection Law (PIPL) to deploy their IT infrastructure and data centre.

Contact us



Zoe Zhou

Managing partner – Wei Tu Law Firm*

T: +86 20 83880590 - 6022

E: zoe.zhou@shlegalworld.com



Shirley Lin

Associate – Wei Tu Law Firm*

T: +86 20 83880590 - 6043

E: geting.lin@shlegalworld.com

*Stephenson Harwood and Wei Tu Law Firm entered into an association under the name “Stephenson Harwood – Wei Tu (China)” with the approval of Guangdong Department of Justice. The association allows us to offer a ‘one stop service’ for Hong Kong, English and PRC law advice, with Wei Tu providing the PRC law advice and services.

Stephenson Harwood is a law firm of over 1300 people worldwide, including 200 partners. Our people are committed to achieving the goals of our clients – listed and private companies, institutions and individuals.

We assemble teams of bright thinkers to match our clients' needs and give the right advice from the right person at the right time. Dedicating the highest calibre of legal talent to overcome the most complex issues, we deliver pragmatic, expert advice that is set squarely in the real world.

Our headquarters are in London, with eight offices across Asia, Europe and the Middle East. In addition, we have forged close ties with other high quality law firms. This diverse mix of expertise and culture results in a combination of deep local insight and the capability to provide a seamless international service.