

**Luohan Academy**  
**Conference on Privacy Protection and Data Governance**  
**18-20 March 2019 | Hangzhou**

# Cross Border/ Boundary Data Transfer in Hong Kong

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1

# Common models (legal bases) for cross-border / boundary data transfer

Examples:

- EU's adequacy decisions

White list

Certifications

Examples:

- APEC CBPRs
- Privacy Shield
- Certification under GDPR

Examples:

- Model contract clauses
- Binding corporate rules

Safeguards

Consent

Necessity

Including necessity for conclusion or performance of contract, etc.

2

# Updates on the International Arrangements for Transfer of Personal Data

## EU adequacy decisions

- 12 countries obtained adequacy decisions (*e.g. Canada, New Zealand and Japan*)
- Discussion in progress with South Korea
- Chinese Taipei filed a self-evaluation report to EU in 2018

## APEC CBPRs

- 8 APEC economies joined (*i.e. Australia, Canada, Chinese Taipei, Japan, Mexico, Singapore, South Korea and the USA*)
- 27 companies certified (mostly U.S. companies)

## EU-US Privacy Shield

- 4,000+ companies certified
- European Commission conducted second review – required U.S. to nominate a permanent Ombudsperson to handle complaints on access of personal data by U.S. authorities by Feb 2019



# Present Status in Hong Kong

## Section 33 of Personal Data Privacy Ordinance (PDPO) [Not yet in force]

- Transfer of personal data outside HK is prohibited except under any one of the following specified circumstances:-

**1** Transfer to places specified in “White List” [s.33(2)(a)]

**2** Adequate data protection regime in the destined jurisdiction [s.33(2)(b)]

**3** Written consent by data subjects [s.33(2)(c)]

**4** Transfer for avoidance and mitigation of adverse action against data subjects [s.33(2)(d)]

**5** Use of personal data is exempted from DPP 3 (use limitation) [s.33(2)(e)]

**6** Reasonable precautions and due diligence taken by data users (e.g. contract clauses) [s.33(2)(f)]

# Why is s.33 implementation deferred?

Concern from businesses about impact on operations



e.g. Impact on international trade and online sales



Concern from businesses about difficulties in compliance, especially SMEs



e.g. Lack of resources and legal knowledge



Businesses demanded guidance from PCPD

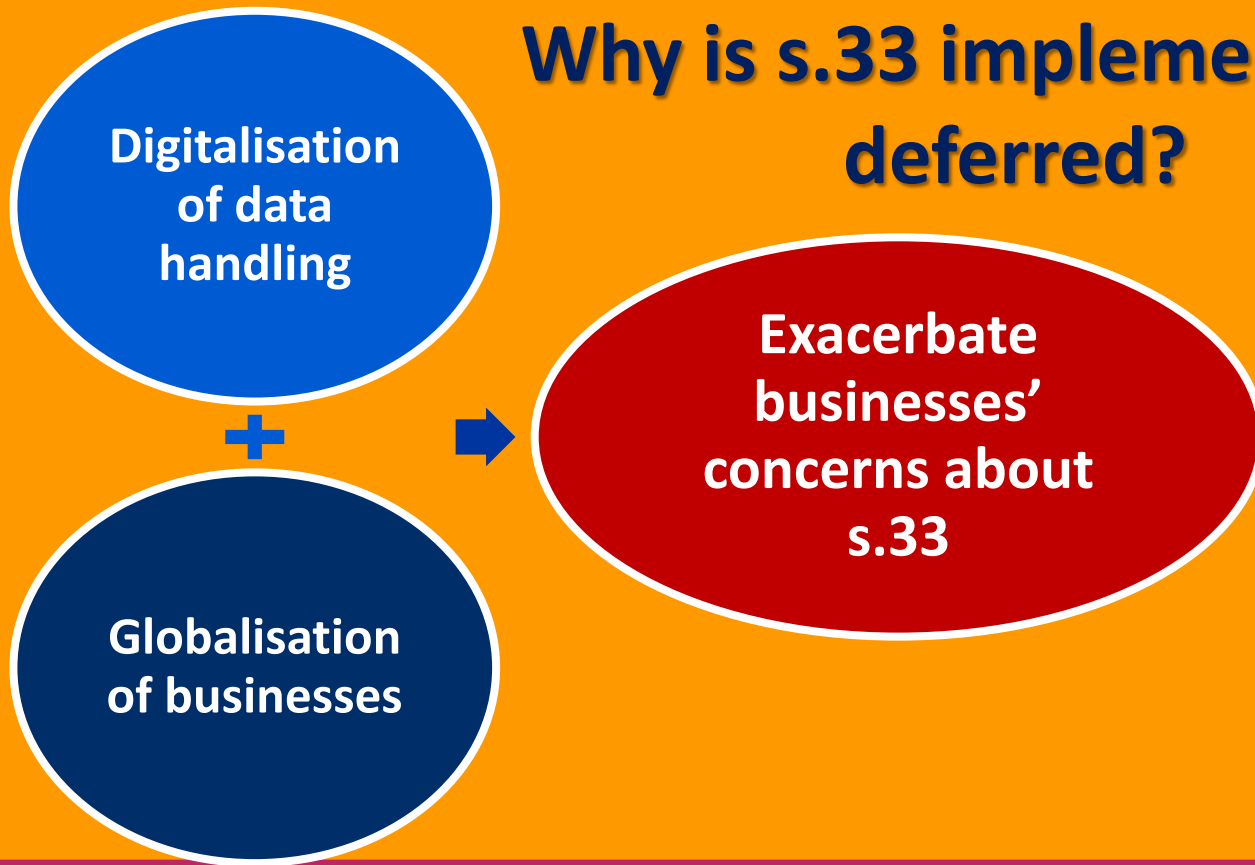


Guidance Note was issued by the PCPD in December 2014



Businesses demanded more time to implement measures to comply

# Why is s.33 implementation deferred?



## Existing protection under PDPO without s.33 in operation

**DPP 3** prohibits transfer of personal data for **new purposes** without consent

**S.65(2)** holds data users liable for the **acts of their agents**, including overseas service providers

**DPP 2(3)** requires data users to prevent their processors from **retaining** personal data longer than necessary

**DPP 4(2)** requires data users to ensure **security** of personal data transferred to their processors



## Existing protection under PDPO without s.33 in operation

Even if s.33 is not in force, for data transferred from other jurisdictions to Hong Kong, parties can impose ***contractual restrictions on onward transfer*** to places outside Hong Kong.

*(See also other Model Clauses attached)*

# Recent work by PCPD and HKSAR Government on s.33

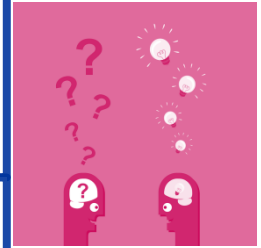
2014 -  
2015

To address businesses' demand for guidance, PCPD issued **Guidance Note** on compliance with requirements of s.33, with a set of **model contract clauses** recommended

**More concerns** raised by businesses in response to the **Guidance Note**

e.g.-

- Unclear about the definition of “**personal data**” and “**transfer**”
- Difficult for SMEs to impose **contract clauses** to services providers?
- What if a “White Listed” region is subsequently **delisted**?
- **Lack of resources** to monitor service providers abroad
- **Lack of information** about the location of cloud servers



10

# Recent work by PCPD and HKSAR Government on s.33

2015-  
2016

Government commissioned a consultant to conduct a **Business Impact Assessment (BIA) Study** on implementation of s.33

**PCPD rendered comments** to the consultant on the interpretation, application and compliance issues of s.33



11

# Recent work by PCPD and HKSAR Government on s.33

2018

**Seven issues of concerns** raised by Government's consultant in the BIA Study which require further studies

PCPD engaged a **consultant** to explore how restriction on cross-border data transfer may be implemented in light of these **seven issues of concerns**



12



# The seven issues of concerns

1. How "transfer" under s.33 and "personal data" are to be defined

2. The mechanism for reviewing and updating the "white list" under s.33

3. Whether the adoption of existing rules and standards in highly regulated industries (e.g., financial industry) would allow a data user to be regarded as having met the requirements of s.33

# The seven issues of concerns



4. The ancillary measures or alternatives to facilitate the implementation of s.33

5. Enforcement issues of s.33 and means to tackle them

6. The criteria or yardsticks for deciding whether a data user has "*taken all reasonable precautions and exercised all due diligence*" under s.33

7. Suggestions on the forms of support or guidance from the PCPD to help businesses understand and comply with the requirements of s.33

11

PCPD



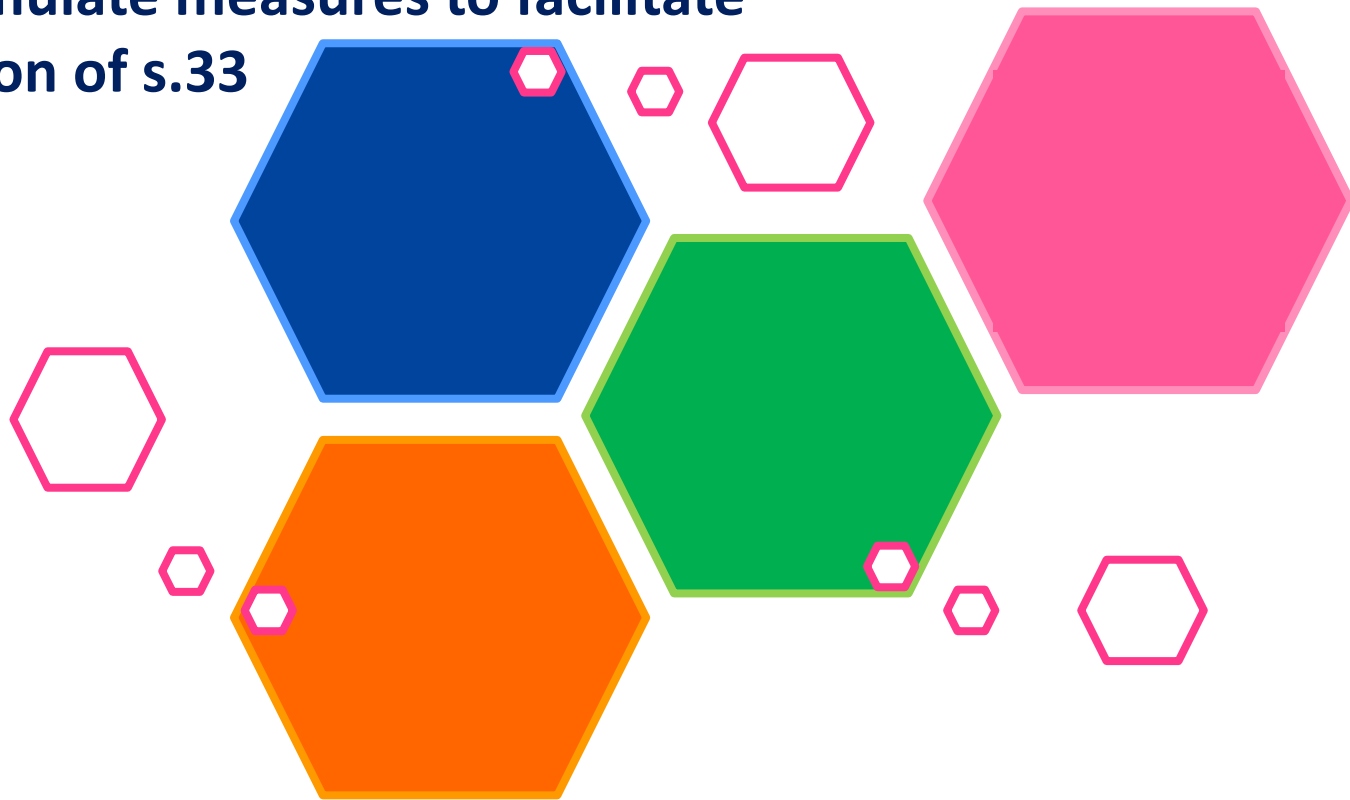
HK



PCPD.org.hk

香港個人資料私隱專員公署  
Privacy Commissioner  
for Personal Data, Hong Kong

# PCPD will formulate measures to facilitate implementation of s.33



# Model Contract Clauses Recommended by PCPD

Source: PCPD's "Guidance on Personal Data Protection in Cross-border Data Transfer"



## Section (I) Core Clauses

### 1. Obligations of the Transferor

- 1.1 The Transferor represents and warrants to the Transferee that the personal data (as set out in Schedule 1 to this agreement) is lawfully transferred to the Transferee and that in accordance with data protection principle ("DPP") 3 in Schedule 1 to the Personal Data (Privacy) Ordinance (the "Ordinance"):
  - 1.1.1 the personal data has been collected in accordance with DPP1 of the Ordinance;
  - 1.1.2 all reasonably practicable steps have been taken to ensure its accuracy in accordance with DPP2 of the Ordinance;



- 1.1.3 the personal data has not been retained longer than is necessary for the fulfillment of the purpose (including any directly related purpose) for which the data is to be used; and
- 1.1.4 the transfer of the personal data is permitted by DPP3 of the Ordinance, as it is in line with the purpose for which the data was to be used at the time of the collection of the data, and where the data is to be used for a new purpose, the prescribed consent of the data subject has been obtained.

## 2. Obligations of the Transferee

- 2.1 The Transferee represents, warrants and undertakes the following:
  - 2.1.1 The Transferee shall process or use the personal data for the purpose(s) as set out in Schedule 1 to this agreement to the exclusion of any other purpose. Where the transferred data is used for a new purpose, the Transferee shall obtain the prescribed consent of the data subject under the Ordinance.
  - 2.1.2 The Transferee shall hold the personal data securely in accordance with the requirements of DPP4 of the Ordinance. It will have in place appropriate technical and organisational measures and standards as set out in Schedule 1 to this agreement to protect the personal data against unauthorised or accidental access, processing, erasure, loss or use.

- 2.1.3 The Transferee shall not retain the personal data longer than is necessary for the fulfillment of the purpose(s) (including any directly related purpose(s)) for which the personal data is to be used.
- 2.1.4 The Transferee shall use the personal data exclusively for the purposes set out in this agreement and shall not transfer or disclose, either free of charge or in return for any benefits, the personal data to any other person, except when it is compelled to do so under the applicable laws.
- 2.1.5 The Transferee shall immediately rectify, erase or return the personal data on receiving instructions to this effect from the Transferor. The Transferee undertakes in particular to rectify, erase or return all or part of the personal data if it appears that such measures are required by the requirements of the Ordinance.
- 2.1.6 The Transferee has and shall at all times have in place accessible documents which clearly specify its policies and practices in relation to personal data.

- 2.1.7 The Transferee shall ensure that data subjects have rights of access to and correction of their personal data in the same way as they would have had under the Ordinance.
- 2.1.8 The Transferee shall not disclose, transfer or allow access to the personal data to a third party data user or data processor (“Sub-transferee”) located outside Hong Kong unless it has notified the Transferor and:
- 2.1.8.1 the sub-transfer is made to a place that has in force any law which is substantially similar to, or serves the same purposes as the Ordinance;
  - 2.1.8.2 such Sub-transferee becomes a signatory to this agreement or another written data transfer agreement which imposes the same obligations on it as are imposed on the Transferee under this clause 2; or

- 2.1.8.3 adopted all reasonable non-contractual measures and auditing mechanisms to the reasonable satisfaction of the Transferor to monitor the Sub-transferee's compliance with the obligations under this clause 2 as if they are applicable to that Sub-transferee.
- 2.1.9 Upon the Transferor's request, the Transferee shall submit its data processing facilities, policies and procedures, data files, documentation and any other relevant information for reviewing, auditing and/or certifying by the Transferor or an inspection body composed of independent members and in possession of the required professional qualifications bound by a duty of confidentiality, selected by the Transferor, to ascertain compliance with its warranties and undertakings in this agreement.

### 3. Liability and indemnity

- 3.1 The Transferor and the Transferee shall be jointly and severally liable for any damage to the data subject arising out of or in connection with the transfer and any sub-transfer thereof of his/her personal data pursuant to this agreement.
- 3.2 Each party, to the extent to which it is liable, undertakes to hold harmless and indemnify the other party for any costs, charges, damages, payments, expenses or loss suffered or incurred for any breach resulting from its obligations under this agreement and for any fault or negligence arisen from the execution of this agreement.
- 3.3 The Transferee specifically undertakes to hold harmless and indemnify the Transferor for any costs, charges, damages, payments, expenses or loss suffered or incurred arising out of or in connection with the Transferee's engagement of any Sub-transferee and for any breach resulting from the obligations of any Sub-transferee under such data transfer agreement between the Transferee and that Sub-transferee.

## 4. Settlement of disputes

- 4.1 This agreement shall be governed, construed, and enforced in accordance with the laws of Hong Kong.
- 4.2 In the event of a dispute or claim brought by a data subject or the privacy enforcement authority concerning the processing of the personal data against either or both of the parties, the parties shall inform each other about any such disputes or claims, and will cooperate with a view to settling them amicably in a timely fashion.

## 5. Termination

- 5.1 Should the Transferee breach any of its obligations under this agreement, the Transferor may, without prejudice to any rights which it may have against the Transferee, terminate this agreement by serving a written notice to the Transferee.
- 5.2 The parties agree that on the termination of this agreement, the Transferee shall, upon the Transferor's request, return all the personal data transferred and the copies thereof to the Transferor or shall destroy all the personal data and certify to the Transferor that it has done so, unless applicable laws imposed upon the Transferee prevents it from returning or destroying all or part of the personal data transferred. In that case, the Transferee shall immediately so notify the Transferor and shall warrant that it will guarantee the confidentiality and integrity of the personal data transferred and will not process the personal data transferred anymore.



## Section (II) Additional Clauses

Set out below is a list of additional clauses which may be incorporated to assist data users to further enforce this agreement, but absence of which does not render the data transfer agreement inadequate to satisfy section 33(2)(f) of the Ordinance.

(i) Clauses relating to data subjects' third party rights under the Contracts (Rights of Third Parties) Ordinance

## 6. Third Party Rights

- 6.1 The Transferor will make available, upon request, a copy of this agreement to data subjects unless the agreement contains confidential information, in which case the Transferor may remove such information.
- 6.2 The parties expressly agree that, pursuant to the Contracts (Rights of Third Parties) Ordinance, they intend to confer third party rights on the data subjects and the data subjects shall be entitled to enforce this clause 6, clause 1.1.2, 1.1.3, 1.1.4, 2.1.1, 2.1.2, 2.1.3, 2.1.4, 2.1.5, 2.1.6, 2.1.7, 2.1.8, 3.1 and 4 of this agreement as if it was a party to this agreement in its own right. A data subject, who has suffered damage as a result of any breach of the obligations by the Transferee or any Sub-transferee under this agreement, or any breach of the obligations by any Sub-transferee under such data transfer agreement between the Transferee and that Sub-transferee, is entitled to receive compensation from the parties for the damage suffered. Notwithstanding the foregoing, the rights of both parties to this agreement to terminate, rescind or agree any variation, waiver or settlement under the agreement are not subject to the consent of the data subjects or any other person.

6.3 The parties agree that the data subject's rights pursuant to this agreement will not prejudice his substantive or procedural rights to seek remedies in accordance with other provisions of national or international law.

The clauses above are drafted for adaptation or adoption by parties who wish to confer third party rights on the data subjects after the commencement of the Contracts (Rights of Third Parties) Ordinance<sup>5</sup>.

In conferring a right on the data subjects to enforce terms of the contract, the data subjects should be able to obtain a copy of the contract between the Transferor and the Transferee. The clauses should expressly provide that data subjects' rights under the agreement will not prejudice his/her substantive and procedural rights to seek remedies under other national or international law, for example, the Ordinance.

## (ii) Additional obligations of the Transferee (to be inserted under clause 2 of the Recommended Model Clauses)

- 2.1.10 The Transferee has no reason to believe that there are currently in force any local laws that would have adverse effect on its warranties and/or undertakings as provided for under this agreement, and the Transferee shall notify the Transferor if it becomes aware of any such laws.
- 2.1.11 The Transferee has the legal capacity and the authority to give the warranties and/or undertaking in this agreement.
- 2.1.12 The Transferee shall inform promptly the Transferor of its inability to fulfill any of his obligations in this agreement.

- 2.1.13 The Transferee shall promptly notify the Transferor about any abnormalities or any loss, accidental or unauthorised access or processing, erasure or other use of the personal data.
- 2.1.14 The Transferee shall deal with promptly and properly all reasonable inquiries from the Transferor relating to the fulfillment of its obligations hereunder and the Transferee shall abide by the reasonable instructions or advice (if any) of the Transferor or any supervisory authority in this regard.
- 2.1.15 The Transferee shall ensure its staff who handle the personal data will carry out the security measures and obligations herein specified.
- 2.1.16 The Transferee shall identify a contact point within its organisation authorised to respond to the enquiries relating to the handling of the personal data, and shall cooperate with the Transferor, data subjects and relevant authorities concerning all enquiries within reasonable time.

**Schedule 1: Description of the Transfer**  
*(To be completed by the parties as part of the agreement)*

**Transferor**

The Transferor is (please specify briefly your activity relevant to the transfer):

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**Transferee**

The Transferee is (please specify briefly your activity relevant to the transfer):

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**Data subjects**

The personal data transferred concerns the following categories of data subjects:

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**Purposes of the transfer**

The transfer is made for the following purposes:

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### Categories of data

The personal data transferred concerns the following categories of data:

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### Recipients

The personal data transferred may be disclosed only to the following recipients or categories of recipients (including Sub-transferees):

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### Security measures to be adopted by the Transferee

Please insert descriptions of the technical and organisational measures and standards to be adopted by the Transferee in relation to the security of the personal data:

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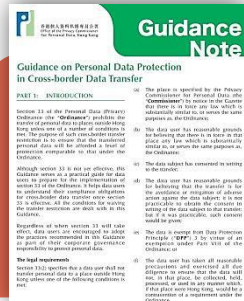
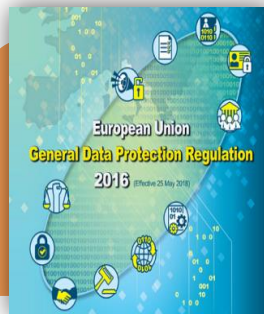
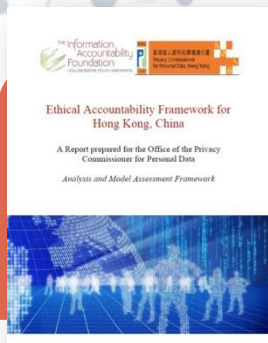
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### Non-contractual measures and audit mechanisms to be adopted by the Transferee

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