

Adoption of Recommended Model Contractual Clauses for Cross-border Transfer of Personal Data

就 跨 境 資 料 轉 移 採 用 建 議 合 約 條 文 範 本

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Practical Guidance

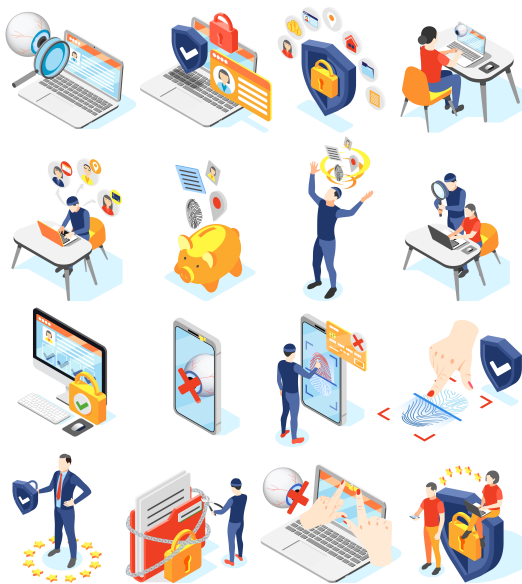
With the rapid increase in cross-border data transfers in globally connected business models, coupled with the whole new regulatory regime for cross-border flows of personal information out of the Mainland pursuant to the implementation of the Personal Information Protection Law in the Mainland in November 2021, there have been growing concerns among data users (including enterprises) in Hong Kong on the regulations governing cross-border transfers of personal data involving data users in Hong Kong.

It is against this backdrop that my office, the Office of the Privacy Commissioner for Personal Data, Hong Kong published the Guidance on Recommended Model Contractual Clauses for Cross-border Transfer of Personal Data (“Guidance”) in May 2022. The Guidance provides detailed elaborations as to the substantive effect of the Recommended Model Contractual Clauses (“RMCs”), and how adherence to the same ensures that adequate protection be given to the personal data as provided for under the Personal Data (Privacy) Ordinance (Cap. 486) (“the Ordinance”), as if the data concerned were not transferred outside Hong Kong. The Guidance also

recommends to data users, especially the small and medium-sized enterprises, the best practices to be adopted as part of their data governance responsibility to protect and respect the personal data privacy of data subjects.

In particular, the Guidance introduces two sets of RMCs, which may be incorporated into more general commercial agreements between data transferors and data transferees, in which other commercial considerations may also be addressed.

The Legal Requirements



Essentially, the protection should follow the data irrespective of the location of the data. Data Protection Principle (“DPP”) 3 of the Ordinance, which is directed against the misuse of personal data, specifies that personal data shall not, without the data subject’s express and voluntary consent, be used for a new purpose. Thus, transfer of personal data to a place outside Hong Kong would require the data subject’s prescribed

consent under DPP3 if it is for a new purpose, unless such transfer falls within the exemptions under Part 8 of the Ordinance.

Further, if a data user engages a data processor to process personal data outside Hong

Kong on behalf of the data user, the data user must adopt contractual or other means to, among other things, (i) prevent any personal data transferred to the data processor from being kept longer than is necessary for the processing of the data (under DPP2(3)), and (ii) prevent unauthorised or accidental access, processing, erasure, loss or use of the data transferred to the data processor for processing (under DPP4(2)). The data user remains liable for the act done by its agent with its authority under section 65 of the Ordinance.

To ensure compliance with the requirements imposed by the Ordinance notwithstanding the transfer of data outside Hong Kong, therefore, it is advisable for data users to incorporate the RMCs into agreements for cross-border data transfers. The adoption of the RMCs will also serve to illustrate that the data user has taken all reasonable precautions and exercised all due diligence to ensure that the data will not, in the jurisdiction of the transferee, be collected, held, processed, or used in any manner which, if that took place in Hong Kong, would be a contravention of a requirement under the Ordinance. All these factors will be taken into account when there is any suspected or alleged breach of the Ordinance, including the DPPs.

The RMCs

The two sets of RMCs set out the general obligations of the contracting parties in respect of the protection of personal data privacy and cater for two different scenarios in cross-border transfers of personal data, namely, (i) from one data user to another data user; and (ii) from data user to data processor. They are applicable to the transfer of

personal data from a Hong Kong entity to another entity outside Hong Kong; or between two entities both of which are outside Hong Kong when the transfer is controlled by a Hong Kong data user, with a view to facilitating the parties to cross-border transfers of personal data to take into account the relevant requirements of the Ordinance, including the DPPs under Schedule 1 thereof.


In the context of cross-border transfers of personal data outside Hong Kong, data users are advised to take all reasonable precautions and exercise all due diligence to ensure that the personal data transferred would not, in the destination jurisdictions, be handled in a manner which, if that took place in Hong Kong, would be a contravention of the requirements of the Ordinance. The RMCs provide, for instance, that a transferee should:

- (i) only use or process the personal data transferred for the specified purposes of transfer;
- (ii) adopt the agreed security measures in the use or processing of the personal data transferred;
- (iii) retain the personal data transferred only for a period which is necessary for the fulfilment of the defined purposes;
- (iv) take all practicable steps to erase the personal data transferred once the purposes of transfer have been achieved;
- (v) not make any onward transfer of personal data to any third party except as agreed by the parties; and ensure that parties to any onward transfer should be subject to the same (or substantially similar) RMCs; and

- (vi) comply with the data subjects' access and correction requests (only for a transferee acting as a data user).

Good Data Ethics

Last but not least, the Guidance advocates that data users should adhere to the principles of good data ethics which, put simply, is about doing what is reasonably expected by data subjects and being transparent about data processing activities. A perceived lack of transparency around data processing activities can engender a sense of distrust between the data user and data subjects. By adopting the RMCs and observing the principles of transparency and accountability, it will be conducive not only to maximising the value of data but also to developing and sustaining the trust of data subjects.

The Guidance is available in hard copy and accessible at https://www.pcpd.org.hk/english/resources_centre/publications/files/guidance_model_contractual_clauses.pdf. 

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實務指引

在全球化營運模式的帶動下，跨境資料轉移正迅速地增長。隨著內地於2021年11月實施的《個人信息保護法》所帶來的一套全新監管制度，亦令香港的資料使用者（包括企業）對跨境資料轉移的規管更表關注。

有鑒於此，香港個人資料私隱專員公署在2022年5月發出《跨境資料轉移指引：建議合約條文範本》（「《指引》」）。《指引》就建議合約條文範本（「建議條文範本」）的實際效果提供詳細說明，並闡述如何藉採

納建議條文範本以提供《個人資料（私隱）條例》（第486章）（「《私隱條例》」）下的足夠保障予個人資料，尤如相關個人資料沒有被轉移至香港境外。《指引》亦建議資料使用者，尤其中小企業，採取最佳行事方式作為其資料管治責任的一部份，以保障及尊重資料當事人的個人資料私隱。

《指引》介紹兩套可被納入資料轉移者與資料接收者之間的一般性商業協議的建議條文範本，而該些商業協議亦可能涵蓋其他商業上的考量。

法律規定

基本上，無論資料在哪地方，資料應一直受保障。《私隱條例》的保障資料第3原則旨在針對不當使用個人資料的情況。該原則訂明，除非獲得資料當事人明確及自願的同意，否則個人資料不得用於新目的。因此，如為新目的而把個人資料轉移至香港以外的地方，除非有關轉移是屬於《私隱條例》第8部下的豁免範疇，否則保障資料第3原則規定需要就有關轉移獲得資料當事人的訂明同意。

此外，如資料使用者聘用資料處理者在香港境外代為處理個人資料，該資料使用者須採取合約規範方法或其他方法以保障個人資料，其中包括（i）防止轉移予該資料處理者的個人資料被保存超過處理該資料所需的時間（保障資料第2（3）原則），及（ii）防止該等資料受未獲准許或意外的查閱、處理、刪除、喪失或使用所影響（保障資料第4（2）原則）。根據《私隱條例》第65條，資料使用者仍須就其授權的代理所作出的行為負上法律責任。

資料使用者在轉移資料到香港境外的同時亦需要確保符合《私隱條例》的規定，因此資料使用者宜在跨境資料轉移協議中引入建議條文範本。採用建議條文範本有助顯示資料使用者已採取所有合理的預防措施及作出所有應作出的努力，以確保有關資料不會在獲轉移資料一方所屬的司法管轄區，假設該些

活動在香港發生，以違反《私隱條例》規定的方式收集、持有、處理或使用。當有懷疑或聲稱違反《私隱條例》要求（包括保障資料原則）的情況出現時，該等因素將會全被納入考慮當中。

建議條文範本

兩套建議條文範本列舉立約各方在保障個人資料私隱方面的一般責任，分別供兩種不同的跨境資料轉移的情況應用，即（i）由一名資料使用者轉移予另一名資料使用者；及（ii）由資料使用者轉移予資料處理者。它們適用於由一香港機構轉移個人資料至另一境外機構；或由一香港資料使用者所控制兩個均屬香港境外機構之間的個人資料轉移，藉以讓跨境資料轉移的各方能考慮《私隱條例》的相關規管要求，包括附表1的保障資料原則。

在跨境轉移個人資料至香港境外的情況下，資料使用者應採取所有合理的預防措施及作出所有應作出的努力，以確保被轉移的個人資料，不會在受轉移的地方，假設該些活動在香港發生，以違反《私隱條例》規定的方式處理。舉例來說，建議條文範本要求資料接收者：

- (i) 應只為指明的轉移目的使用或處理轉移的個人資料；
- (ii) 應採用協議的保安措施使用或處理轉移的個人資料；
- (iii) 保留轉移的個人資料的時間應只是達致已被確定的目的所需要的時間；
- (iv) 應採取所有切實可行的步驟，在達到轉移目的後刪除轉移的個人資料；
- (v) 除非雙方同意，不會繼續轉移個人資料予任何第三方；並應確保繼續轉移個人資料的各方受相同的（或大體上相似的）建議條文範本所規限；及
- (vi) 應遵從資料當事人查閱及改正資料的要求（只適用於作為資料使用者的資料接收者）。

良好的數據道德標準

最後，《指引》主張資料使用者應恪守良好的數據道德標準。簡單而言，就是指做資料當事人合理地期望的事以及資料處理工作需具透明度。資料處理工作欠缺透明度可以令資料使用者與資料當事人之間產生不信任。採納建議條文範本及堅守透明和問責的原則，不但有助資料使用者獲得數據的最大價值，亦可以取得資料當事人的持續信任。

《指引》備有印刷版和網上版（https://www.pcpd.org.hk/tc_chi/resources_centre/publications/files/guidance_model_contractual_clauses.pdf）可供瀏覽。 

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