

China Newsletter | Q4 2023/Issue No. 59



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Compliance

Four Authorities Launch Pilot Program for ICV Introduction and Road Testing

四部门启动智能网联汽车准入和上路通行试点

On Nov. 17, 2023, the Ministry of Industry and Information Technology (MIIT) and three other departments released the Circular on Launching the Pilot Program for the Entry and Road Testing of Intelligent Connected Vehicles (ICVs) (the Circular). Before the Circular, certain cities had already launched regional pilot programs to allow select ICVs to conduct on-road trials within specified areas. The Circular expands the road trials program nationwide.

Under the Circular, automobile manufacturers and users may form a consortium to apply for participation in the pilot program. The four departments then examine the qualifications and conditions of the manufacturers and users and select some ICV models equipped with L3/L4 autonomous driving functions, capable of being mass-produced, to grant market access and test the selected vehicles on designated roads. After obtaining approval to conduct road trials, the participating entities must purchase insurance for the vehicles, apply for vehicle registration, and monitor the operational status of the vehicles in accordance with the Circular.

Two Departments Revise the Catalog of Technology Prohibited or Restricted from Export by China

两部门修订《中国禁止出口限制出口技术目录》

The Ministry of Commerce (MOFCOM) and the Ministry of Science and Technology (MOST) have jointly released the revised Catalog of Technology Prohibited or Restricted from Export by China (the Catalog). The revised Catalog reduces the number of controlled items from 164 to 134, with 34 deleted, 4 added, and 37 modified. Specifically, key revisions include the following:

1. Cell cloning and gene editing technology for human use were added to the Catalog;
2. Crop hybrid advantage utilization technology, bulk material loading and conveying technology, and lidar system were added to the Catalog;
3. Manufacturing technology of green plant growth regulator, meat processing technology, beverage production technology, nonferrous metals metallurgical technology, agricultural machinery manufacturing technology, and China's special species resources technology were removed from the Catalog;
4. Twenty-eight restricted technologies, including medical diagnostic devices and equipment manufacturing technology and target feature extraction and identification technology, were removed from the Catalog; and
5. The control points and technical parameters of 37 technologies, involving six prohibited technologies, such as Chinese herbal medicine resources and production, and 31 restricted technologies, such as economic crop cultivation and breeding technology and non-ferrous metal metallurgical technology, were adjusted.

Data Privacy & Cybersecurity

China Proposes Easing Stringent Regulation on Data Export

国家网信办就规范和促进数据跨境流动规定征求意见

With the publication of China's Standard Contractual Clause (China SCC) in February 2023 (see [Issue No. 56](#)), the final piece of China's data export regulatory framework was completed. Under the current framework, enterprises exporting China-originating data are subject to one of the three following mechanisms depending on the identity of the data exporter and the nature and volume of the data to be exported: (i) mandatory security assessment led by the Cyberspace Administration of China (CAC), (ii) China SCC or (iii) Personal Information Protection Certification (PIP Certification, see [Issue No. 55](#)) (collectively referred to as the "data export mechanisms").

However, the ambiguous requirements, low trigger threshold, slow administrative procedures, consequences for non-compliance, and assorted practical challenges encountered by multinational businesses in regulatory practices have created compliance burdens for small and medium-sized enterprises (SMEs), and also discouraged foreign enterprises and investors from conducting business in China.

To address the concerns of the SMEs, foreign investors, and multinational businesses, the CAC published a draft of the *Provisions on Regulating and Promoting Cross-border Data Transfer* (Draft Provisions) for public consultation Sept. 28, 2023. The Draft Provisions propose a series of measures to ease the stringent regulatory requirements for data export under the current laws and regulations, including to

- Exempt many companies exporting data from China in certain common business scenarios from otherwise obligatory data export requirements;
- Increase the threshold for triggering the mandatory CAC security assessment;
- Narrow the scope of important data to only include that which is explicitly designated by the authorities; and
- Empower free trade zones (FTZs) to determine the categories of data subject to the mandatory data export procedures.

1. **Exempted Data Export Activities**

The Draft Provisions propose the following data export activities be exempted from all three data export mechanisms:

- **Less than 10,000:** If an organization anticipates exporting personal information of less than 10,000 individuals from the PRC within one year, the data export mechanisms would not apply. This would not only benefit the SMEs that struggle to afford compliance with the existing rules, but also the investors, manufacturers, and financial institutions which deal solely with commercial and institutional counterparties in mainland China. Please note, this exemption does not relieve organizations from obtaining the individual's consent if the cross-border transfer is based on consent.
- **Contractual Necessity:** Exports due to an international services contract where the individual is a party to the contract, such as for cross-border e-commerce, cross-border payments, plane ticket purchases and hotel bookings, and visa applications, would also be exempted.

- HR Management Necessity: Employee data transfers necessary for HR management would be exempted. However, the Draft Provisions also specify that HR data exports would only be exempted if the HR management is conducted in accordance with legally established internal labor policies and collective contracts that are legally signed. The Draft Provisions state that internal HR documents must demonstrate the necessity for data export, but they do not specify what qualifies as “necessity.”
- Vital Interest: Data necessary for safeguarding the health and property of a natural person in an emergency may be transferred without completing one of the mechanisms, which would facilitate international health care services, faster disaster and pandemic response, as well as bilateral law enforcement.
- Non-Personal Data or Important Data: Exporting data, as part of activities relating to international trade, academic cooperation, cross-border manufacturing and production, and marketing activities, that does not involve personal information or important data would not trigger the data export mechanisms.

Compared with the broadly defined “important data” under the current regulations, which refers to “any data that, once tampered with, destroyed, leaked, illegally obtained or illegally used, may endanger national security, economic operation, social stability, public health and safety, and so forth,” the Draft Provisions clarify that data exporters would not need to treat data as important data unless specifically categorized as such by the Chinese government through notification or announcement.

Thus, businesses may presume they are not processing important data (and therefore are not obligated to complete a mandatory CAC security assessment), unless informed otherwise by regulators or if public notice has been issued categorizing the type of data in their possession as important data.

If the exported data does include “important data,” the business must complete the CAC security assessment.

- Non-China-Originating Personal Data: Exporting personal data not generated within the territory of the PRC is exempted from the data export mechanisms. This echoes the 2017 draft data export security assessment guidelines, although that draft was never finalized.

2. Streamlined Scope of Mandatory Security Assessment

The current triggers for a mandatory security assessment include: (i) any data handler exports personal information of over one million individuals, or (ii) any data handler has exported personal information of more than 100,000 individuals or sensitive personal information of over 10,000 individuals since Jan. 1 of the previous year.

The Draft Provisions adopt a more lenient approach, providing that only enterprises that expect to export personal information of more than one million individuals within the following calendar year need to undergo the security assessment, while those that do not exceed the threshold may utilize other mechanisms such as China SCC or PIP Certification.

If the Draft Provisions are enacted, many firms may be exempted from the CAC security assessment procedure, thus saving time and costs. However, for applications and filings already lodged with the CAC, the Draft Provisions do not provide an express mechanism for withdrawing an organization’s paperwork.

3. FTZ Negative List for Data Export

The Draft Provisions also entitle each FTZ to formulate its own “Negative List” for data export, determining what types of cross-border data transfers are subject to the data export mechanisms. Any data exports not on the “Negative List” would be exempted.

Companies operating within any FTZ should pay attention to the unique data transfer regulations applicable to that zone, especially considering the possibility of future competition among FTZs to attract businesses to their respective regions.

4. What’s Next?

The Draft Provisions demonstrate Chinese regulators’ willingness to alleviate some of the burdensome data privacy and administrative requirements currently imposed on both domestic and international businesses. If enacted, the Draft Provisions may ultimately lead to reduced operational and compliance costs for companies operating in China or with Chinese partners.

However, the timing of the potential implementation of the finalized rules is still unclear. As the submission deadline for China SCC filing expired Nov. 30, 2023, the anticipated efficacy of the Draft Provisions in alleviating businesses’ compliance burdens has been somewhat compromised.

Businesses should adhere to the existing regulatory framework by submitting China SCC for filing or undergoing security assessments according to their own situations. Although the deadline initially set by Chinese regulators has passed, submitting a China SCC filing or security assessment application is still acceptable.

China Streamlines Cross-Border Data Transfers between Mainland and Hong Kong

国家网信办发布大湾区个人信息跨境流动标准合同实施指引

In June 2023, Hong Kong and mainland China signed the Memorandum of Cooperation on Cross-border Data Flow in the Guangdong-Hong Kong-Macao Greater Bay Area (GBA), proposing the establishment of a cross-border data transfer mechanism specified for the area.

As the first action under the Memorandum, the CAC and the Innovation, Technology and Industry Bureau of Hong Kong (ITIB) jointly issued new guidelines on the implementation of standard contracts in the GBA (GBA SCC Guidelines) and the GBA version of the SCC (GBA SCC) Dec. 10, 2023, with immediate effect.

Below are some key takeaways:

1. Applicability and Pre-Conditions

The GBA SCC mechanism applies to both directions of cross-border flow of personal data between Hong Kong and nine mainland cities in the GBA. However, the following conditions must be met if the data handlers wish to adopt the GBA SCC regime:

- (i) Both data exporter and data recipient must be located in the GBA: The data exporter and the data recipient must be registered (in the case of organizations) or located (in the case of individuals) in one of nine mainland cities within the GBA¹ or Hong Kong;
- (ii) Data transfer does not involve important data: The GBA SCC Guidelines clarify that companies may consider their data non-important unless otherwise notified by regulators, echoing the sentiment expressed in the Draft Provisions discussed above.
- (iii) Onward transfer prohibited: Data exporter and data recipient cannot rely on the GBA SCC mechanism if the personal data will be further transferred to organizations or individuals outside the GBA for further processing. If the above conditions are met, data handlers can rely on the GBA SCC for data transfers between Hong Kong and the nine mainland cities, regardless of the data volume transferred, without triggering a mandatory security assessment as set out under China's national Cross-Border Data Transfer Regulations that are more complex and time consuming.

This would benefit businesses with interests solely within the GBA (such as PRC businesses with Hong Kong affiliates), and it may reduce compliance costs.

2. Streamlined Obligations Compared to the Nationwide SCC

The obligations for data exporters and data recipients are more streamlined under the GBA SCC than they are under the nationwide SCC.

For example, under the GBA SCC, data exporters are only required to focus on the following three points when conducting the personal information protection impact assessment (PIA) before filing the SCC:

- (i) the lawfulness, legitimacy, and necessity for processing personal information by the data exporter and the recipient;
- (ii) the impact on the rights and interests of the data subjects, as well as relevant security risks;
- (iii) the obligations assumed by the recipient, as well as the organizational and technical measures taken to safeguard the personal information.

Under the nationwide SCC, data exporters must account for the following additional factors: (i) the scale, scope, types, and sensitivity of personal information; (ii) the risks of personal information being tampered with, destroyed, leaked, lost, or unlawfully exploited; (iii) the availability of channels for data subjects' complaints; (iv) the impact of the laws and policies in the recipient's jurisdiction on the fulfillment of the China SCC.

The GBA SCC removes the data recipient's obligations regarding using personal information for automated decision-making.

¹ These include Guangzhou, Shenzhen, Zhuhai, Foshan, Huizhou, Dongguan, Zhongshan, Jiangmen and Zhaoqing of Guangdong Province.

3. More Flexibility in Choosing the Governing Law and Dispute Resolution

Chinese law governs transfers under the nationwide SCC, whereas the GBA SCC allows for the application of Hong Kong law when transferring data from Hong Kong to the GBA.

Dispute resolution in the nationwide SCC permits litigation or arbitration, but under the GBA SCC, arbitration must be conducted through one of the five arbitral institutions in mainland China and Hong Kong, excluding other institutions from member jurisdictions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Despite these differences, the GBA SCC shares some similarities with the nationwide SCC. Both SCCs have a fixed main body that cannot be altered, although parties are permitted to include additional terms and conditions in Appendix II as long as they do not conflict with the main body. Additionally, both SCC regimes necessitate supplemental filings in the event of any changes to the scope or category of transferred personal information, or if the data recipient alters its purpose or method of processing the personal information.

4. Filing Procedure

According to Article 8 of the GBA SCC Guidelines, the data exporter and data recipient should file the executed SCC within 10 working days with the Guangdong CAC or the Office of the Government Chief Information Officer (OGCIO) of Hong Kong, along with (i) a photocopy of the legal representative's ID card and (ii) a commitment letter on the authenticity and accuracy of the submitted documents.

Unlike under the nationwide SCC, the GBA SCC mechanism does not require the PIA report to be filed with regulators. Instead, the data exporter must include a representation in the commitment letter stating that the PIA report has been prepared within the preceding three months and that there have been no significant changes to its contents. Note that although filing the PIA report with regulators is not required, the PIA itself remains a mandatory requirement.

5. Conclusion

The GBA SCC Guidelines represent a substantial advancement in regional data governance, easing the movement of data between mainland China and Hong Kong. The Guidelines may foster digital economic innovation within the GBA and support Hong Kong's better integration into the overall development of China. This development marks a significant milestone in the data community, providing multinational corporations operating within the GBA expanded opportunities to optimize their data strategies.

Dispute Resolution

NPC Passes Amendment to the Civil Procedure Law

全国人大通过《民事诉讼法》修正案

On Sept. 1, 2023, the Standing Committee of the National People's Congress (NPC) of the PRC passed an amendment to the Civil Procedure Law (2023 CPL), which took effect Jan. 1, 2024. The 2023 CPL marks the law's fifth amendment—the CPL of PRC was first adopted by the NPC April 9, 1991, and was revised Oct. 28, 2007, Aug. 31, 2012, June 27, 2017, Dec. 23, 2021, and Sept. 1, 2023.

Below are the key aspects of the amendment, particularly focusing on foreign-related civil litigation procedures.

1. Extend and Clarify the Scope of Jurisdiction over Foreign-Related Civil Cases

Disputes that have “Appropriate Connections” with the PRC

The 2023 CPL introduces the concept of “appropriate connection” in addition to the existing “actual connection” factor:

- In the 2023 CPL, if a lawsuit is initiated against a defendant without a domicile in the PRC due to a foreign-related civil dispute (identity-related disputes are not included), the People’s Court at the location where the contract was signed or performed, where the subject matter of the lawsuit is located, where the property can be seized, where the infringement was committed, or where the representative office is domiciled may have jurisdiction over such lawsuit; and
- Other appropriate connections with the PRC may also establish jurisdiction.

Exclusive Jurisdiction

Before the 2023 CPL, only litigation filed in response to conflicts related to the execution of Sino-foreign joint venture contracts, cooperative joint venture contracts, and cooperative agreements for natural resource exploration and development within the PRC fell in the scope of exclusive jurisdiction. The 2023 CPL adds two types of cases to exclusive jurisdiction:

- Litigation arising from disagreements regarding the establishment, dissolution, or liquidation of a legal entity or other organization within the PRC, as well as the validity of decisions made by such; and
- Legal proceedings initiated due to disputes concerning the assessment of the legitimacy of intellectual property rights granted within the territory of the PRC.

Free Choice of PRC Courts and Responding Jurisdiction

- Under the 2023 CPL, parties now have the right to choose a PRC court to resolve the disputes, even if the foreign-related dispute has no direct connection to China; and
- The 2023 CPL adds that if a party does not contest the court’s jurisdiction and actively participates in the legal proceedings by submitting a defense or filing a counterclaim, the PRC court will consider itself to have the necessary jurisdiction.

2. Facilitate Cross-Border Evidence Gathering in Foreign-Related Cases

- Before the 2023 CPL, the procedures for collecting such evidence were specified in international treaties entered into or jointly acceded to by the country where the evidence is situated and the PRC, or they can be carried out through diplomatic channels; and
- According to the 2023 CPL, a People’s Court may, upon a party’s application, investigate and collect evidence located outside the territory of the PRC if not prohibited by the law of the country where a party is located. Evidence may be gathered by engaging the Chinese embassy or consulate in that country for evidence collection or using real-time communication tools or other methods agreed upon by the parties.

3. Modify the Rules Regarding Service of Process in Foreign-Related Cases:

- The 2023 CPL adds that, when serving documents to a party outside the PRC, the court may service on (i) PRC counsel; (ii) PRC Wholly Foreign-Owned Enterprises, PRC representative offices, or PRC branches; (iii) PRC legal representatives or entities (if such foreign party is an individual and acts as a person in charge of the PRC entity, and the PRC entity is a co-defendant); and (iv) people in charge of the foreign parties (if the people in charge of the foreign parties are within the territory of the PRC);
- If documents are served by publication, the service must be completed 60 days (previously three months) after the statement is first published in designated newspapers or online platforms.

4. Complete the System of Recognition and Enforcement of Foreign Judgments

The 2023 CPL further clarifies the non-enforcement and non-recognition circumstances for judgement as follows:

Non-enforcement

- The foreign court acts without jurisdiction;
- The respondent either wasn't properly summoned or, if summoned, didn't receive a reasonable opportunity to present their case, or a party without the capacity to conduct litigation on their own was not properly represented;
- The judgment or ruling was obtained through fraudulent means; and
- A judgment or ruling related to the same dispute already exists in a Chinese court.

Non-jurisdiction

- The foreign court lacks jurisdiction under its own laws or has no proper connection to the dispute;
- The rules of exclusive jurisdiction of 2023 CPL are violated; and
- The agreement goes against the parties' free choice of jurisdiction.

The 2023 CPL also clarifies that the nationality of an arbitral award is determined based on the seat of arbitration. Consequently, if a foreign arbitration institution renders an award with the place of arbitration in China, it will be regarded as a "Chinese award" and the enforcement should follow the PRC laws.

** This GT Newsletter is limited to non-U.S. matters and law.*

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