



SOME THOUGHTS ON THE PIPL

On August 20, 2021, the People’s Republic of China (in this article references to the “**PRC**” shall mean mainland China excluding Hong Kong, Taiwan and Macau) passed the Personal Information Protection Law (“**PIPL**”) to take effect on November 1, 2021.

The PIPL is primarily designed to regulate PRC-based technology companies holding personal data. However, as will be seen, it will affect non-PRC persons who deal with PRC persons. This piece focuses on trustees of trusts with PRC settlors, beneficiaries and protectors. However some of the analysis will also apply to non-PRC service providers with PRC clients.

Firstly 3 caveats: (1) The author is not a PRC qualified lawyer. The author can assist with obtaining necessary PRC advice. (2) The author has only reviewed an unofficial translation of the PIPL – not the original text. (3) Further regulations are expected and, in certain cases, are needed to complete the full scope of the PIPL. See for example update from Linklaters on 23 August 2021.[\[1\]](#)

The most relevant provisions of the PIPL[2] as far as trustees are concerned are discussed below.

There are 74 articles – of particular note:

Article 1 – the PIPL is designed to protect rights and information in personal information.

Article 3 (1)– **the PIPL is [also] applicable to [persons carrying out[3]] activities outside of the mainland PRC that handle the personal information of natural persons within the territory of the PRC for the purpose of providing products or services to natural persons within the territory.**

Article 4 – defines personal information as any type of information that identifies or can identify natural persons.

Article 6- the handling of personal information shall have a clear and reasonable purpose, shall be directly related to that purpose and employ the means with the smallest impact on individuals’ rights and interests.

Article 8 – information should be as accurate as possible.

Article 9 – personal information handlers shall be responsible for their personal information handling activities.

Article 13 – **personal information handlers can only handle personal information where one of 7 circumstances are present. These include:**

- (1) the individual’s consent is obtained;**
- (2) as necessary to conclude or perform on a contract to which the individual is a party;**
- (3) as necessary for the performance of legally-prescribed duties or obligations.**

Articles 14-16 relate to the consent process.

Article 17 states that the personal information handlers shall notify individuals of certain matters relating to the handling and storage of the personal information.

Article 18 states that article 17 does not apply where there are circumstances that laws and regulations provide that confidentiality shall be maintained.

Article 21 requires undertakings to be obtained from delegates who use data. The scope of this is not clear but could cover service providers engaged by the trustee or counterparties to transactions.

Articles 23 is relevant where information is being shared. Additional consent is required.

Article 28 relates to sensitive information such as health. This will be relevant to trustees. Sensitive personal information is subject to increased regulation. The definition of sensitive information is also of note and refers to a person's "dignity".

Articles 29-30 require additional notification to the data subject.

Article 31 refers to minors under 14 whereby the consent of parent/guardian is required and special rules shall be designed.

Article 38 states that where personal information handlers need to provide personal information overseas then additional requirements must be met – including a safety assessment.

Article 39 sets out additional requirements where personal information handlers provide personal information overseas.

Article 42 allows the PRC to sanction persons outside the PRC where PRC citizens' rights and interests have been harmed.

Article 45 allows individuals the right to access and reproduce the information held except where laws and regulations determine otherwise.

Article 46 gives individuals the right to request that inaccurate or incomplete information be corrected or supplemented.

Article 47 requires a deletion policy and process. Individuals may request that information be deleted but subject to any retention period provided by laws and regulations.

Articles 51 and 52 set out the procedures to be implemented. A trustee would be expected to be fully aware of what is required and the necessary protocols to be followed. It is unlikely that trustees would meet the threshold in Article 52 which would necessitate a person in charge to be designated.

Article 53 relates to overseas personal information handlers who must “establish special institutions or designated representatives within the PRC who are responsible for handling matters relating to the protection of personal information.

Articles 54 requires there to be periodic audits of the personal information handling activities.

Article 55 requires an impact assessment to be made and recording of circumstances relating to sensitive personal information and providing personal information abroad.

Article 57 requires the adoption of a policy relating to data leaks and losses.

Article 66 sets out the fines for breaches of the law.

Article 72 states that the PIPL does not apply to natural persons handling personal information for personal or family affairs.

Issues for overseas trustees

An overseas trustee would be a personal information handler where they deal with settlors, beneficiaries and protectors in the PRC. Since the trustee is not based in the PRC, they would need to comply with Article 53 and appoint a PRC representative.

The PIPL is regarded as the PRC’s version of the European General Data Protection Regulation (“**GDPR**”) [or the equivalent in the United Kingdom post-Brexit]. A very useful resource is the STEP Guidance for Trusts and Estates^[4]. Whilst the PIPL is not the same as the GDPR there are some very helpful pointers. Likewise the complexity of this area has been highlighted in the *Dawson- Damer* litigation in the UK and Bahamas.^[5]

An overseas trustee could have information relating to a PRC settlor, protector^[6] (if any) and beneficiaries. The trustee could equally have information relating to PRC non-beneficiaries such as other family members, former and current spouses (including copies of pre-nups), partners and mistresses. They may also have information about service providers and other advisers resident in the PRC.

Such information will most likely include standard information (name etc.) and also sensitive information (for example relating to health, marital status etc.).

The trustee requires information both for compliance purposes (such as AML/CFT, beneficial ownership, CRS/FATCA/AEOI) but also such that the trustee is able to be fully informed as to the reasons for setting up the trust and to be informed to be best able to exercise (or not exercise) any powers it holds.

Letters of wishes can be highly personal with very sensitive information from the settlor relating to beneficiaries and other persons who are not. Information kept by the overseas trustee is subject to strict duties of confidentiality.

ISSUE 1

The overseas trustee will need to appoint a PRC resident representative. Such representative is responsible for handling matters “relating to the protection of personal information.” Further guidance is needed as to (a) who can be such representative; and (b) the full extent of said representative’s role. Are they only a point of contact or do they deal with disclosure and consent matters set out in the PIPL? Do they have the information?

Trustees in certain jurisdictions will need to be aware of any outsourcing or delegation policies to which they may be subject. They would need to ensure that said costs can be met out of the trust fund and ensure the trustee remains suitably exonerated.

ISSUE 2

As the trustee is overseas (perhaps with the information already) how do the provisions relating to transfer of data overseas apply?

ISSUE 3

Does the PIPL apply on a trustee-by-trustee basis or a trust-by-trust basis? [\[7\]](#)

ISSUE 4

The overseas trustee has / will receive personal information about various persons. Thus, the trustee needs to comply with the provisions of Article 13 in respect of each such person:

(a) The Settlor:

a. consent of the Settlor will most likely be the chosen route.

b. changes will need to be made to letters of engagement and terms of business.

(b) Other beneficiaries:

a. consent is an option and for the Settlor's children under 14 can be so given by the Settlor.

b. But what about others?

i. The Settlor may have provided the trustees with information about the other persons and may be keen to restrict such person's knowledge about the trust affairs.

ii. Beneficiaries access to trust information (including letters of wishes) is a sensitive issue and express consent from the beneficiary would not be attractive. Whereas a CRS self-declaration form is not in itself contentious (and the signatory could keep a copy), once the beneficiary is fully aware of the trust, under the PIPL, they are entitled to access and reproduce all of the information about them held by the trustee [Article 45] unless there are "laws and administrative regulations" which provide that it should be kept confidential. Under PRC trust law beneficiaries are entitled to full information about the trust.^[8] In other trust jurisdictions, the position is more complex. Would the PRC authorities accept that the law of the trust did so restrict that the information remains confidential? In this regard a Cayman STAR trust could be a useful tool^[9]. Certainly any access to trustee's decision making (which contained any personal information) could be very disruptive and this would usually be outside of any disclosure.

iii. In the GDPR there is an exemption where trustees can process special category data to the extent necessary for them to perform their fiduciary duties^[10]. However, the trustee must determine the condition they are relying on before they begin the processing.

c. The PIPL gives an exemption from consent:

i. **As necessary to conclude or perform on a contract to which the individual is a party.** Trusts governed by the laws of the vast majority of trust jurisdictions are not contracts and thus beneficiaries are not "parties". However, under PRC law, PRC trusts are regarded as contracts. To quote from Ho, Lee and

Jinping[11]... “the Chinese Trust Law has, as will be seen, reinforced the perception that even after its establishment, the trust is a three-party contract involving the settlor, the trustee and the beneficiary.”[12] So would it be possible for an offshore trustee to apply this analysis?

ii. **where the information is “necessary for the performance of legally-prescribed duties or obligations”**[13]. Again, would it be possible to argue that the overseas trustees need to process such personal data [about beneficiaries and others] such that they can comply with their fiduciary duties?

iii. The exemptions would need to apply both to the right to access information and to avoid the need for consent for holding said information.

d. Therefore, clarity is needed that references to “laws”, “regulations” and “legally-prescribed duties or obligations” are those attaching to the trustee and not those of the PRC.

ISSUE 5

The trustee will need to update their policies and procedures relating to client take-on and data security to include PRC issues. For example, the Cayman Islands has a Statement of Guidance – Cybersecurity for Regulated Entities[14] requiring a data protection policy for regulated trustees.

ISSUE 6

Will the designated representative be in possession of any of the information? Will there be an increased risk of information being obtained by persons and authorities in the PRC? Discretionary beneficiaries are only reported under CRS when distributions are made. However, trustees are likely to hold much information about them before any distribution.

ISSUE 7

How would a document covering a number of persons be dealt with? Would it be redacted on a per person (data subject) basis? A letter of wishes could contain a lot of sensitive information about the personal lives of many people - not just the specific person.

Future updates, regulations and commentary are to be welcomed.

Please contact the author for additional information.

[1] <https://techinsights.linklaters.com/post/102h58o/chinas-new-privacy-law-passed-the-wait-is-over#:~:text=Similar%20to%20the%20GDPR's%20approach%20that%20overseas%20data,area%20on%20the%20scope%20of%20limitations%20to%20this%20extraterritoriality.>

[2] A translation is available at <https://www.chinalawtranslate.com/个人信息保护法/>

[3] Author's edit

[4] https://www.step.org/system/files/media/files/2021-03/step_data_protection_guidance_updated_15032021.pdf (the "STEP Guidance")

[5] <https://xxiv.co.uk/joint-privilege-a-matter-of-procedure-or-substantive-trust-law-dawson-damer-v-taylor-wessing-llp-2020-ewca-civ-352/>

[6] PRC protectors are not universal due to "management and control" type concerns.

[7] See discussion in the STEP Guidance paras 1.2-1.5.

[8] Articles 43 and 20 of the Chinese Trust Law. Whether this applies to letter of wishes is open to debate.

[9] It being possible to validly deny all information rights to beneficiaries.

[10] See the STEP Guidance.

[11] Trust Law in China: a critical evaluation of its conceptual foundation – Lusina Ho, Rebecca Lee and Jin Jinping (in Trust Law in Asian Civil Jurisdictions).

[12] At p83

[13] Quoting from the translation.

[14] https://www.cima.ky/upimages/regulatorymeasures/StatementofGuidance-CybersecurityforRegulatedEntities_15910216052_1599570748.pdf

For further information please contact:

Richard Grasby

RDG Fiduciary Services Limited¹, Hong Kong

E: rdg@rdgfiduciary.com

T: 852 6596 7517

www.rdgfiduciary.com

<https://www.linkedin.com/in/richard-grasby>

<https://twitter.com/GrasbyRD>

Wechat: grazza73

¹ RDG Fiduciary Services Limited is licensed as a Trust and Company Service Provider in Hong Kong. RDG Fiduciary Services Limited does not provide legal, tax or investment advice.