

# IGAB NEWS



*Newsletter of the Chartered Institute of Arbitrators, Malaysia*



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## Editor's Note

*by Serene Hiew*

Welcome to IGAB's (CI Arb Malaysia) very 1st e-newsletter for which I have been given the privilege of being the editor. In this uncertain season, things seem to shift and change by the day and before we know it, we have already gone through one and a half months of lockdown. COVID-19 presents many challenges and most of us may not know what to do. There is no well-worn path, no lamp posts to light the way, no GPS to guide us.

Whilst we are all striving to maintain stability or trying to find ways to adapt to our "new normal", we also believe many people are starting to ask the question "What's Next?"

Someone once told me that whilst a crisis creates unexpected problems, a crisis also creates unexpected opportunities. In fact, the Chinese word for "crisis" includes two characters signifying "danger" and "opportunity". One of the by-products of this new framework that we are in is the creation of this e-newsletter for our IGAB members. Social distancing will last for quite a while, probably into the new year, but that doesn't mean we cannot connect digitally and maintain our community.

It is our hope that this e-newsletter would become a platform for the publication of various dispute resolution related materials. The sharing of knowledge has never been easier! If you are interested to feature your written work in our future publications, please email your article to [igab.ciarb@gmail.com](mailto:igab.ciarb@gmail.com) and we will be in touch with you. We hope you will enjoy our newsletter!

## MESSAGE FROM THE CHAIRMAN

*by Foo Joon Liang*

Welcome to the first issue of the IGAB Newsletter of 2020.

A new norm is upon us. Almost 7 weeks of strict movement controls later, old habits at work have all but vanished. Desk work now proceeds quite seamlessly away from the office. Meetings have gone virtual, across different time zones, and are accessible from the comfort of home. Trainings and seminars too, have migrated onto a virtual platform. Perhaps this movement control was the shock that the system needed, to force upon us a change for the better.

The Chartered Institute of Arbitrators has moved quickly to embrace this new norm. On 8 April 2020, whilst domestic courts in some jurisdictions were grappling with whether hearings and trials should proceed virtually, the CIArb launched its New Guidance Note on Remote Dispute Resolution Proceedings. A huge step towards recognising a new norm. Virtual hearings in arbitration is the way forward. This Guidance Note is designed to equip the participants of a dispute hearing, including the tribunal, with the necessary tools and techniques for conducting dispute proceedings in compliance with social distance regulations.



Arbitration, as a concept, is well-equipped for virtual hearings. It has the flexibility and agility to legislate around it. In international arbitrations for example, the IBA Rules on the Taking of Evidence in International Arbitrations defines an Evidential Hearing as any hearing for the taking of evidence, including by teleconferencing or videoconferencing. With technology, the time and costs spent on converging in one place for hearing, whether it is from Kuala Lumpur to London, or from Petaling Jaya to the AIAC, can be obviated. The time ordinarily spent travelling can be better utilised.

As a further step towards a virtual platform, CIArb migrated its assessments online by integrating its virtual learning experience onto the BigBlueButton platform. The BigBlueButton is a dedicated web-based platform that enables tutors and candidates to connect remotely via video, using a wide range of tools such as screen share, videos, polls and break out rooms to facilitate learning and teaching. You will read more about the BigBlueButton in this issue of the newsletter.

Before I conclude, I must thank Serene Hiew, our director and Secretary of CIArb Malaysia Branch, and her team, as well as the contributors, for putting together this issue. Next, I would like to thank the Young Members' Group of our Branch, led by Loshini. They have stepped up to every request and exceeded them, and are instrumental in keeping us current. I also extend my gratitude to the committee members of the Malaysian Branch on the board of the International Group of Arbitrators (IGAB) for supporting this endeavour. As your committee, we are resolute in our commitment to continuously providing value to our members.

I wish you happy reading!

Warm wishes,



Foo Joon Liang

Chairman

Chartered Institute of Arbitrators, Malaysia Branch

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## Directors of IGAB (Year 2019 - 2020)



Foo Joon Liang  
Chairman



Choon Hon Leng  
Deputy Chairman



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Serene Hiew



Shanti Abraham



Ranjeeta Kaur



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(Crystal)

# COURT RULED ON THE CHALLENGES TO THE AIAC AND STATUTORY ADJUDICATION

by Foo Joon Liang & Kang Mei Yee

This is the first decision of a constitutional challenge on the legitimacy of statutory adjudication under the Construction Industry Payment and Adjudication Act 2012 (“CIPAA”). In this case, the High Court was also confronted with a challenge on the appointment of the late Mr. Vinayak Pradhan as the then Director of the Asian International Arbitration Centre (AIAC), and the immunity asserted by the AIAC, Mr. Pradhan and the adjudicator.

## INTRODUCTION

The legal action was taken out by way of an originating summons. Other than the late Director and the AIAC, Kinta Bakti Sdn Bhd (“Kinta Bakti”) and Soh Lieh Seng (“Soh”) were named as the 1st and the 2nd Defendants in the action. The Minister of Works, the Minister of Law and the Government of Malaysia were subsequently brought in as the 5th to the 7th Defendants after the commencement of the action.

The action arose from an adjudication under CIPAA between Mega Sasa Sdn Bhd (“Mega Sasa”) and Kinta Bakti. Soh was appointed by the late Director as the adjudicator in that adjudication. A typical adjudication setting. Mega Sasa sought for, among others, the following relief:

- (a) a declaration that the statutory adjudication scheme under the CIPAA is unconstitutional;
- (b) a declaration that the adjudicator’s fees and expenses, and the AIAC administrative fees chargeable for adjudication proceedings, are unconstitutional; and
- (c) a declaration that the appointment of Soh as the adjudicator in the adjudication proceeding between Mega Sasa and Kinta Bakti is invalid due to the invalidity of the late Mr Pradhan’s directorship.

By the time the Originating Summons came to be heard, given the numerous interlocutory applications filed, the adjudication decision had been delivered.



## COURT RULED ON THE CHALLENGES TO THE AIAC AND STATUTORY ADJUDICATION

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- (a) whether the Originating Summons was rendered academic by the adjudication decision which was delivered before the disposal of the action;
- (b) whether the CIPAA statutory adjudication scheme is unconstitutional;
- (c) whether the adjudicator's fees and expenses and the AIAC administrative fees chargeable for adjudication proceedings, are unconstitutional and illegal;
- (d) whether the late Mr Pradhan's directorship was invalid;
- (e) whether Soh and the late Director enjoy immunity from the action.



### DECISION OF THE HIGH COURT: PUBLIC LAW EXCEPTION

The Learned High Court Judge acknowledged that the necessity of making a determination on the pleas of Mega Sasa in the action can be perceived or considered academic due to the prior making of the adjudication decision by Soh.

Nevertheless, the Learned High Court Judge held that the Originating Summons came within the narrow public law exception and thus ought to be determined notwithstanding that it may have been academic.

### CIPAA STATUTORY ADJUDICATION SCHEME IS CONSTITUTIONAL

The Learned High Court Judge held that statutory adjudication under CIPAA does not violate Article 8(1) of the Federal Constitution on the premise that:

- (a) CIPAA is discriminatory only in the sense that it does not affect everyone but only disputants pursuant to a construction contract;
- (b) such classification is allowed and has a rationale in relation to the object of CIPAA;
- (c) the disputants are treated equally and in the same way under CIPAA.

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The Learned High Court Judge also held against Mega Sasa's challenge that the adjudication proceedings under CIPAA is an usurpation of the judicial power of the court and thus a violation of Article 121 of the Federal Constitution. This is because the statutory adjudication under CIPAA is a judicial function, but not a replacement of the courts' judicial power under Article 121 of the Federal Constitution. Further, the adjudication under CIPAA is only binding but does not provide finality as the courts maintain the power to make final judgments and orders.

### **ADJUDICATOR'S FEES AND EXPENSES, AND THE AIAC ADMINISTRATIVE FEES ARE CONSTITUTIONAL**

In this regard, the Learned High Court Judge found that CIPAA does not discriminate between the parties to the adjudication in terms of adjudication fees and expenses, and the AIAC administrative fees. The principle of 'costs follow the event' that penalises the losing party is also applied in the court proceedings and is reasonable.

Mega Sasa also challenged the legality of the administrative fees charged by the AIAC pursuant to Rule 9(2)(b) of the AIAC Adjudication Rules and Procedures, on the ground that the rule and procedure is ultra vires of the statute. The Learned High Court Judge, having been satisfied with the evidence that the necessary consultative processes required under sections 33 and 39 of CIPAA have been complied with, was of the view that Mega Sasa's challenge ought to be commenced by way of judicial review and hence it is inappropriate and unnecessary to determine this issue of illegality.

### **DIRECTORSHIP OF THE LATE MR. PRADHAN IS VALID**

It was not disputed that the late Mr. Pradhan was initially and properly appointed as the acting director the AIAC jointly by the Government of Malaysia and Asian-African Legal Consultative Organization (AALCO). The dispute arose from the appointment of the late Mr. Pradhan as director of the AIAC on the ground that the appointment was purportedly made by the Government of Malaysia without consultation with AALCO.

## COURT RULED ON THE CHALLENGES TO THE AIAC AND STATUTORY ADJUDICATION

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On this issue, the Learned High Court Judge agreed with our submissions that:

- (a) this, if at all, is a dispute arising from the Host Country Agreement entered between AALCO and the Government of Malaysia;
- (b) the Host Country Agreement is an international treaty;
- (c) the parties to the Host Country Agreement had agreed on a dispute resolution procedure in Article IV therein, i.e. the parties are to consult and negotiate to resolve the disputes amicably between themselves without the intervention of any external third body;
- (d) it is neither competent nor desirable for municipal courts to adjudicate the dispute;
- (e) it is wrong for the Court to make a decision that may bind AALCO, which is not a party to the proceedings.

Further, the Learned High Court Judge also found in any event that the late Mr Pradhan was at the least then still the acting director, even if he was not the director of the AIAC. Even as an acting director, he had the power and duty to appoint Soh as the adjudicator.

### **AIAC, DIRECTOR OF AIAC AND THE ADJUDICATOR ENJOYED IMMUNITY FROM THE PROCEEDINGS**

The Learned High Court Judge held that section 34(1) of CIPAA confers immunity to both Soh and the late Director from being sued by Mega Sasa in the Originating Summons. The Learned High Court Judge further held that the late Director and the AIAC enjoyed immunity from the proceedings pursuant to the following provisions:

- (a) section 3(1) of the International Organisations (Privileges and Immunities) Act 1992; and
- (b) Regulations 3 and 3A of the Kuala Lumpur Regional Centre for Arbitration (Privileges and Immunities) Regulations 1996 and its amendment in 2011.

This is in line with a number of High Court decisions on the immunity of the AIAC and the adjudicator. See for example, *One Amerin Residence Sdn Bhd v Asian International Arbitration Centre & Ors* [2019] 1 LNS 904.



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## **SIGNIFICANCE OF THE DECISION**

There are at any given a large number of adjudications on foot, and numerous pending challenges in courts. Indeed, there is no time limit for a challenge on an adjudication decision for as long as they have not been enforced as a judgment under CIPAA. Thus, a finding that statutory adjudication under CIPAA is unconstitutional, or that the AIAC was incompetent to appoint adjudicators due to the lack of a capacity of the then Director, would have had far-reaching implications to statutory adjudication in Malaysia.

There continues to be a number of adjudications that are being challenged on the ground that the appointment of the adjudicator is invalid on the argument that the appointment of the late Director was invalid.

This was therefore a significant decision by the High Court. Do note that the Mega Sasa has appealed against the decision of the High Court.

*\*\*This article is for general information only and should not be relied upon as legal advice.*





## MESSAGE FROM THE CHAIRMAN OF THE YMG

**by Loshini Ramarmuty**

On behalf of the Young Members Group of the CIArb Malaysia Branch, I am happy to introduce YMG Malaysia and the events we have lined up for this year. Since its inception in July 2013, YMG has been organizing and participating in events with the intent of bringing the younger members together both professionally and socially.

It is our hope and vision to recruit all dispute resolution practitioners who are below 40 years old as well as any of those who are interested in the realm of alternative dispute resolution to join us in exploring, analysing and making our mark in the Malaysian ADR landscape. The first event we organized for 2020 was a webinar titled “Maneuvering through expert evidence in arbitration proceedings”. The panel comprised of delay and quantum expert Nick Powell, experienced arbitrator Chong Thaw Sing, learned counsel Thayananthan Baskaran and was moderated by the deputy chair of YMG, Raja Kumar Raja Kandan. The event was a resounding success with more than 100 registrants ranging from experienced practitioners to chambering students.

Next in line is our webinar in early June 2020 on “Developing your career in arbitration – How to become an accredited arbitrator and get appointed as an arbitrator” where we will be speaking to several young experienced practitioners about the processes involved in becoming an accredited arbitrator as well as receiving the views and statistics from the Asian International Arbitration Centre in relation to the appointment of young arbitrators in Malaysia.

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## MESSAGE FROM THE YMG CHAIRPERSON

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In line with the YMG's objective of promoting arbitration to young professionals and students, YMG will also be collaborating with local universities to organize talks and workshops. In mid- May, YMG will be partnering with Brickfields Asia College to host a webinar to its students on the ADR process as well as to provide information on becoming an accredited arbitrator with CIArb.

Be sure to follow the "YMG CIArb Malaysia Branch" Facebook page for updates on our events or to register your interest in joining us. We look forward to meeting you at our upcoming events. Thank you.

YMG Chairperson

Loshini Ramarmuty

## MEET OUR YMG COMMITTEE



Loshini  
Ramarmuty



Raja Kumar



Tatvaruban  
Subramaniam



James Ding



Serene Hiew



Janice Tay



Lim Tse Wei



Shaun Tan

## MALAYSIAN FEDERAL COURT CONFIRMS THAT ONLY DISPOSITIVE SECTIONS OF ARBITRAL AWARDS ARE TO BE REGISTERED

*Siemens Industry Software Gmbh & Co KG (Germany) (formerly known as Innotec Gmbh) v Jacob and Toralf Consulting Sdn Bhd (formerly known as Innotec Asia Pacific Sdn Bhd) (Malaysia) & Ors, Civil Appeal No: 02(f)-115-12/2018(W)*

**by Peter Godwin (Partner; Head of Disputes, Asia) and Lim Tse Wei (Associate), Herbert Smith Freehills**

The Malaysian Federal Court has resolved the recent debate about whether courts should recognise and enforce whole arbitral awards under Malaysian law. The Court clarified that only the dispositive sections of arbitral awards will be enforced by Malaysian courts under Section 38 of the Malaysian Arbitration Act 2005 (AA). Parties seeking to enforce arbitral awards before the Malaysian courts need no longer disclose any other section of their awards, including the tribunal's reasoning or summary of findings.

The Siemens decision widens the confidentiality of arbitral awards under Malaysian law, which carries practical implications for parties to Malaysian-seated arbitrations going forward. Parties intending to take advantage of this enhanced protection should also be mindful that their awards may not be afforded a similar degree of confidentiality by other rules connected to their arbitrations.

### **Background**

On 31 July 2008, the appellant and respondents concluded an agreement for the full and final settlement of all matters and certain legal proceedings between them (Settlement Agreement). The Settlement Agreement contained an arbitration clause requiring the resolution of any dispute arising from it through Singapore-seated arbitration under the arbitration rules of the International Chamber of Commerce (ICC).

A dispute subsequently arose between the parties in relation to the Settlement Agreement. This dispute was eventually referred to a panel of three arbitrators.

On 8 May 2015, the arbitral tribunal delivered its final award and dismissed the appellant's claim. In arriving at its decision, the tribunal made certain findings against the appellant and about the circumstances in which the Settlement Agreement was concluded. These findings were recorded in the tribunal's reasoning but not in the award's dispositive section. The "dispositive section" refers to the section of the award, usually at the very end, declaring which of the parties' claims/counterclaims succeed and the reliefs they are entitled to.

The respondent subsequently applied to the Malaysian High Court for the recognition and enforcement of the arbitral award pursuant to Section 38 AA. Where enforcement was granted, the entire arbitral award would be registered as if it were a judgment of the High Court. The appellant did not resist the recognition and enforcement application on any of the grounds under Section 39 AA, which largely mirror Article 36 of the UNCITRAL Model Law.



## MALAYSIAN FEDERAL COURT CONFIRMS THAT ONLY DISPOSITIVE SECTIONS OF ARBITRAL AWARDS ARE TO BE REGISTERED

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However, the appellant challenged the extent to which the High Court should register the award, arguing that the award should not be registered in its entirety, but confined to the award's dispositive section only. The appellant argued that a bifurcated registration would fit the statutory enforcement scheme and protect the arbitration's confidentiality.

The High Court accepted the appellant's challenge and held that only the dispositive section of the award was capable of being registered and enforced as a judgment of the High Court under Section 38 AA. This was subsequently overturned on appeal to the Malaysian Court of Appeal. Dissatisfied with the Court of Appeal's decision, the appellants raised an appeal to the Federal Court.

#### **Federal Court decision**

The Federal Court allowed the appeal, and agreed with the High Court that only the dispositive section of an arbitral award was capable of being registered and enforced under Section 38 AA. In so deciding, the Federal Court drew an analogy between arbitral awards and judicial decisions, which comprise two separate parts, namely the:

- order or judgment, which sets out the reliefs or prayers granted by the court. The Federal Court considered that the dispositive section of an arbitral award was equivalent to an order/judgment; and
- Grounds of judgment, which refer to the court's reasoning and findings that form the basis of the order/judgment. The Federal Court found that this was akin to the reasoning and findings of an arbitral tribunal.

Emphasising this distinction, the Federal Court noted that, as a matter of law and practice, a successful party to a court action would only file and rely upon an order/judgment for execution, and not the grounds of judgment. Arbitral awards, which the Federal Court viewed as analogous to court decisions, should therefore be given similar treatment for the purposes of recognition and enforcement. The court considered that this was consistent with the approach of Malaysian courts when enforcing foreign judgments under the Reciprocal Enforcement of Judgments Act 1958 (REJA), which could be adopted for the purposes of enforcing arbitral awards. Under REJA, Malaysian courts are concerned only with the registration of the operative part of the judgment and not with the foreign court's findings or reasoning underlying its decision. Accordingly, this meant that the ambit of Section 38 AA should be confined to the dispositive section of an arbitral award only, which the Federal Court found reflected the practice of other jurisdictions.

A further reason for the Federal Court's decision was that the bifurcation of awards functioned to protect the confidentiality of the arbitration. The court found that the registration of the entire arbitral award would have undermined its confidentiality. Further, as Malaysian courts are not required to assess the merits of the tribunal's award when enforcing it under Section 38 AA, the registration of the entire award was unnecessary.

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## MALAYSIAN FEDERAL COURT CONFIRMS THAT ONLY DISPOSITIVE SECTIONS OF ARBITRAL AWARDS ARE TO BE REGISTERED

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Another point of interest was the Federal Court's view that the wording of the relevant AA provisions supported the bifurcation of awards, notably the court's view on the statutory definition of "award" under the AA:

*"[I]f the intention is to register the findings as part of the decision of an arbitral tribunal, the definition of "award" in section 2 of the AA 2005 ought to be "a decision of the arbitral tribunal and the substance of the dispute..." rather than the present definition "a decision of the arbitral tribunal on the substance of the dispute".*

While this definition was interpreted within the context of recognition and enforcement of arbitral award, the Federal Court did not expressly limit its discussion to this part of the AA. It will be interesting to see how this aspect of the Federal Court's decision will be interpreted in the future.

#### **Implications for Malaysian-seated arbitrations**

The Federal Court decision in Siemens strengthens the confidentiality of arbitrations in Malaysia. It was not uncommon for parties to produce entire arbitral awards when seeking enforcement under Section 38 AA, making the award publicly accessible. Siemens makes it clear that parties should dispense with this practice.

However, parties intending to rely on this enhanced confidentiality should note that different confidentiality regimes may apply to their arbitral awards under the rules applicable to their arbitration.

This is particularly relevant in ICC-administered arbitrations, where awards made as from 1 January 2019 may be published in their entirety, unless parties object to publication or restrict this by agreement. Therefore, a party intending to keep the tribunal's findings confidential must make sure to take such steps. Failure to do so can result in the award's unintended publication by the ICC.

A further discrepancy may arise where a party seeks to enforce awards in investor-state arbitrations under the UNCITRAL Rules in the Malaysian courts. Such awards may be published in whole under the UNCITRAL Transparency Rules, which apply by default to investment treaties concluded after 1 April 2014 or, in the case of earlier investment treaties, where Contracting States or disputing parties have agreed to their application. While there are exceptions to this publication requirement, it remains to be seen how they will interact with Malaysian law and the Siemens decision.

Parties intending to take advantage of the Siemens decision should, therefore, revisit the rules applicable to their arbitration and ensure that confidentiality standards are consistent across the whole arbitration regime chosen by parties.

#### **Disclaimer**

Herbert Smith Freehills LLP is licensed to operate as a Qualified Foreign Law Firm in Malaysia. Where advice on Malaysian law is required, we will refer the matter to and work with licensed Malaysian law practices where necessary.





Young  
Members  
Group

**CIARB**



**BRICKFIELDS  
ASIA COLLEGE**

IN COLLABORATION WITH THE YMG  
CIARB (MALAYSIA), BAC, & THE BAC  
MOOT SOCIETY

# ADR IN PRACTICE

UNDERSTANDING THE TRADE AND  
PRACTICE

DAY: THURSDAY, 14 MAY 2020

TIME: 3PM

VENUE: ZOOM WEBINAR (OPEN TO PUBLIC)

# THE BIG BLUE BUTTON

by **Ranjeeta Kaur**

CIArb delivers 19 courses across the world that lead to membership of the Institute at different grades. These courses cover several ADR disciplines, including international arbitration, domestic arbitration, construction adjudication and mediation. The training on the majority of these courses includes face to face tuition, and they are also assessed by way of a physical assessments at assessment centres. Owing to the COVID-19 pandemic, many of the countries in which CIArb's branches are based have implemented measures that restrict face to face training. As a result, the Department of Professional Services UK submitted a request to CIArb's Education and Membership Committee and Exam Board to deliver training and assessments online and this was approved in March 2020.

The name of the software that the Department of Professional Services has integrated into its virtual learning platform to enable training to be now delivered online is called 'BigBlueButton'. BigBlueButton is a popular, open source web conferencing system that is used by many educational institutions around the world for on-line learning. It allows for the real-time sharing of audio, video, presentations and screens and also has collaborative tools such as multi-user whiteboard, shared notes, polling, public/private chat, emojis and breakout rooms. BigBlueButton can also record sessions for later playback.

Moving forward almost all training/tutorials in Malaysia too will be by way of this software/platform and all Approved Faculty who are to conduct these courses will have to complete a through training of this software in order to be able to conduct any future courses in Malaysia.

This software has been successfully tested with staff and many AFLs across the globe and has received positive feedback. In fact 6 of our colleagues in Malaysia including myself have successfully completed this training and we look forward to bringing to you future trainings via BigBlueButton.

Thank you.

Ranjeeta Kaur  
Director of Professional  
Development and Training, IGAB Malaysia





## UPCOMING COURSES

Our upcoming courses are:

- Accelerated Route to Membership (ARM) – International Arbitration (13 & 14 July 2020)
- Module 3 - Evidence, Decision Making & Award Writing International Arbitration (course start date: 3 September 2020)
- Module 2 - Law of Obligations (course start date: 24 October 2020)
- Accelerated Route to Fellowship (ARF) – International Arbitration (16 – 18 December 2020)

For more information regarding our upcoming courses, please visit our website at <http://www.ciarb.org.my/news-events/>



### **Directors of International Group of Arbitrators Berhad (IGAB).**

Foo Joon Liang  
Choon Hon Leng  
Ir. Ang Kok Heng  
Serene Hiew  
Ranjeeta Kaur  
David Cheah  
Shanti Abraham  
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### **Contact Us**

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