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IN THE MATTER OF A MEDIATION
BETWEEN
HOTEL DEVELOPERS (LANKA) LTD.
AND
MR. NIHAL SRI AMERESKERE, DIRECTOR, HDL

BY HAND/REGISTERED POST

ICLP Arbitration Centre,
North Wing, Hotel Taj Samudra,
25, Galle Face Center Road,
Colombo 3.

Before:

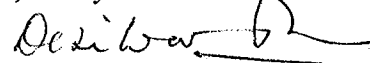
Mediator: Hon. Walter Laduwahetty

WHEREAS when this matter came up on 26.1.2000, it was agreed that the Affidavit of Mr. Nihal Sri Ameresekere will be sent to the ICLP Arbitration Centre on or before 29.2.2000 and that the Affidavit of Hotel Developers (Lanka) Ltd. will be sent on or before 31.03.2000; the date for the next Meeting was fixed for 26.4.2000 at 5.00 p.m.

AND WHEREAS due to illness and pressure of professional work, Mr. Ameresekere having not been able to complete the preparation of his said Affidavit to be submitted on or before 29.2.2000, we by Motion dated 28.2.2000 respectfully MOVED that he be granted time till 10.3.2000 to furnish the requisite Affidavit and likewise, Hotel Developers (Lanka) Ltd. be granted extension of time till 10.4.2000

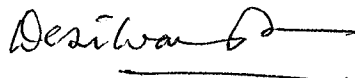
AND NOW WHEREFORE, we tender herewith the said requisite Affidavit of Mr. Ameresekere and respectfully MOVE that the same be accepted.

Colombo, 9th day of March 2000



Attorneys-at-Law for
Mr. Nihal Sri Ameresekere

Copy hereof, together with the Affidavit, has been }
sent by Hand & Registered Post to M/s F.J & G De }
Saram, Registered Instructing Attorneys of Hotel }
Developers (Lanka) Ltd. }



Attorneys-at-Law for
Mr. Nihal Sri Ameresekere

IN THE MATTER OF A MEDIATION

BETWEEN

HOTEL DEVELOPERS (LANKA) LTD.

AND

MR. NIHAL SRI AMERESEKERE, DIRECTOR, HDL

**ICLP Arbitration Centre,
North Wing, Hotel Taj Samudra,
25, Galle Face Center Road,
Colombo 3.**

Before:

Mediator: Hon. Walter Laduwahetty

I, **NIHAL SRI AMERESEKERE** of 167/4, Sri Vipulasena Mawatha, Colombo 10, being a Buddhist, do hereby solemnly, sincerely and truly declare and affirm as follows:

1. I am the affirmant abovenamed and affirm to the facts herein contained from my own personal knowledge and belief and from documents that would be produced before the Hon. Mediator.
2. a) I had my education at S. Thomas' College, Mt. Lavinia and obtained 6 Distinctions at the G.C.E. Ordinary Level Examination. I was a College Prefect and participated in a number of extra-curricular activities: 1955 - '66.
- b) I am a Fellow Member of the Institute of Chartered Accountants of Sri Lanka, having been a Council Member thereof during 1976/'77.

I received the Best Performance Award at the Preliminary Examination and a Certificate of Merit at the Intermediate Examination.

I was the President of the Chartered Accountants' Student Society in 1969 and received commendation as per Letter dated 12.4.'70 from the then Auditor General, late Mr. B.L.W. Fernando.

- c) I am also a Fellow Member of the Institute of Chartered Management Accountants of the United Kingdom.
- d) I served my articles at M/s Turquand Youngs & Co., Chartered Accountants, now known as Ernst & Young. During my article-clerkship, I was sent to India for exposure to large manufacturing organisations and computerisation: 1967 - '70.
- e) I was awarded the Top-Ten Outstanding Young Persons Award for Business Management in 1983/'84.

3. a) I commenced my own professional practice in auditing, and business and management consultancy, in 1974 and transferred my audit practice to M/s Ford, Rhodes, Thronton & Co., Chartered Accountants in 1982, to enable me to concentrate only on my business and management consultancy practice.
- b) Thereafter, I continued only with the business and management consultancy practice, under the corporate name, Comindtax Management Service Ltd.
- c) In my business and management consultancy practice, over the years, I have serviced prestigious clientele, both local and foreign, particulars of which, I shall make known to the Hon. Mediator.
- d) I have also held positions as Director/Actg. Chairman State Pharmaceutical Corporation: 1977 - '81, Director Finance/Actg. Chairman, Sri Lanka Central Transport Board: 1981 - '83, Actg. Chairman, North Regional Transport Board in 1982, Council Member, Sri Jayawardenepura University - 1984 and Director, Co-operative Wholesale Establishment - 1985.
- e) I have received commendations in Parliament on my professional work from the then Minister of Transport, Hon. M.H. Mohamed reported in Hansard dated 19.12.'81.
- f) As part time Director Finance, Sri Lanka Central Transport Board, I handled a World Bank funded Project, receiving commendations on my professional work from international visiting Missions 1981 - '83 - Quoted in Letter dated 8.6.'83 from the General Treasury.
4. a) I have also functioned, as the Lead Consultant on the Bus Transport Restructuring Project of the Government of Sri Lanka, funded by the World Bank, servicing as a Consultant to the Ministry of Transport and Ministry of Finance & Planning and have been commended on my professional work by the Secretary, Ministry of Finance & Planning by his Letter dated 26.10.'92.

My company, Comindtax Management Service Ltd., put together a team of Consultants to handle the above Project: 1989 - '94.

- b) I have also functioned, as the Consultant/Senior-Counterpart Director of the Public/Private Economic Infrastructure Development Project of the Government of Sri Lanka, funded by USAID, servicing as a Consultant to the Ministry of Policy Planning & Implementation and the Ministry of Finance & Planning.

This Project identified and promoted economic infrastructure projects on the basis of Build Operate & Transfer [BOT] and Build Operate & Own [BOO] schemes, and set-up the Secretariat for Infrastructure Development & Investment [SIDI, now known as BII]. This Project also promoted the setting-up of the Private Sector Infrastructure Development Fund [PSIDC].

My company, Comindtax Management Service Ltd., was the Sub-contractor to the US Company from Washington that was the Main Contractor engaged by USAID to implement this Project: 1992 -'94.

- c) I have also functioned as the Advisor, Ministry of Finance & Planning on formulation of privatisation policy and on privatisation transactions - 1994/'95.

5. a) From about 1979, I was involved in the promotion of the Hilton Hotel Project [hereinafter referred to as the "Hotel"] of Hotel Developers (Lanka) Ltd., [hereinafter referred to as "HDL"] and a Subscriber to its Memorandum & Articles of Association in 1983 and one of its first Directors and Shareholders and a Signatory to its Prospectus in 1984.
 - b) The Japanese Collaborators of HDL had contracted to construct and deliver the Hotel on a fixed price turn-key basis. They were also Shareholders and Directors of HDL and payments to them for the construction and delivery of the Hotel were guaranteed by the Government.
 - c) The construction of the Hotel commenced in 1984 and the Hotel operations commenced in 1987.
6. a) Having pointed out a material discrepancy in the number of Hotel rooms as the Hotel commenced operations in 1987, subsequently in 1989, I queried the Japanese Architects' Certifications that were not supported by Bills of Quantities and Final Measurements.
 - b) Consequently, I discovered in 1990, that the original Architectural Plans of the Hotel had been surreptitiously substituted at the UDA, without the knowledge and/or approval of the Board of Directors of HDL and that there were no copies of the original UDA approved Architectural Plans of the Hotel. HDL's copy thereof was alleged to have been destroyed in a fire.
 - c) Furthermore, the Schedule to the Supplies Contract that defined the Furnishings, Fixtures and Equipment to the Hotel was also reported to be missing.
 - d) Though I brought, inter-alia, the aforesaid irregularities and discrepancies to the notice of the then Board of Directors of HDL and urged that action be taken, no action as warranted was taken thereon.
7. a) In the given circumstances, on 13.9.'90, I instituted D.C. Colombo Case No. 3155/Spl against HDL's Japanese Collaborators, as a derivative action in law, on behalf and in the right of HDL, in its interest and for its benefit, on the premise of fraud perpetrated on HDL, in the circumstances of *wrong-doer control* by the then Directors of HDL, who were also made Defendants in the said Case.
 - b) Enjoining Orders were issued on 17.9.'90 in the said Case preventing any payments, either by HDL or by the Government in terms of the Guarantees given to the Japanese Collaborators, on the construction of and supplies made to the Hotel.
 - c) Subsequently, disregarding my objections, the then HDL Directors acting together with M/s Ford, Rhodes, Thornton & Co., Auditors of HDL, on or about 26.11.'90 endeavoured to adopt HDL's Annual Accounts to 31.3.'90, suppressing the facts pertaining to the aforesaid fraud perpetrated on HDL, on which the aforesaid Case had been previously instituted and Enjoining Orders issued by Court.
 - d) In the aforesaid circumstances, on 22.12.'90 I was removed as a Director of HDL.
 - e) Consequently, on 11.1.'91, I instituted D.C. Colombo Case No. 3231/Spl against HDL, also as a derivative action in law, and Court issued Enjoining Order preventing the adoption of the said HDL Annual Accounts to 31.3.'90.
 - f) In the context of HDL being unable to answer Interrogatories, on 14.2.'94 an Application was made to add the Partners of M/s Ford, Rhodes, Thornton & Co., Chartered Accounts, Auditors of HDL, as parties in the said D.C. Colombo Case No. 3231/Spl, and Court thereupon issued notices on them.

8. In D.C. Colombo Case No. 3155/Spl., HDL and its local Directors, though Defendants, did not file Objections, even though one of the Interim Injunctions prayed for was against HDL. Only the Japanese Directors of HDL and the Japanese Collaborators of HDL filed Objections. Furthermore, HDL's local Directors also did not file Answer in the said Case.
9. In D.C. Colombo Case No. 3155/Spl., the District Court on 28.10.'91 issued Interim Injunctions. The Learned District Judge in his Order, inter-alia, observed;

- # *the Contractors having performed a lesser volume of work, have attempted to obtain a larger sum of money... and the Plaintiff having raised the question concerning the basis for the payment of monies.*
- # *the other Defendants, [i.e. the Directors], as persons having connections concerning the said Hotel business, having intervened therein in such matter, acting to obtain the said monies, had not readily acted to conduct a correct examination.*
- # *they having prevented such correct examination, were attempting to, howsoever, effect the payment of monies.*
- # *they are exercising the influence, that they have gained in society, acting together with the Company, to prevent the raising of the questions concerning the matters of the work in connection with the Contracts, the Prospectus ...*
- # *their collaboration was adverse to the interest of the Shareholders of the Company, and that they were acting through such collaboration, in a manner amounting to defeat the interests of the Shareholders of the Company.*
- # *Accordingly, the present position is that the Defendants' statement, that they have performed their part of the Contracts and the willingness shown by the Company to accept the same, as set out by the Defendants, cannot be accepted as the basis for payment... in fact, whether, as stated by the Plaintiff, this is a devious method of siphoning out, a large scale of foreign exchange from this country... The significance, that is shown herein, is that generally, the Company which has to pay money, would be raising questions, in respect of such situation, and would not allow other parties to act arbitrarily... If the position, that explains this is correct, then this actually, is an instance of acting in fraudulent collusion.*

10. In D.C. Colombo Case No. 3155/Spl., subsequently, on 2.12.'92 the Supreme Court upheld the Interim Injunctions. Their Lordships in the Judgment, inter-alia, observed;

- # *the Plaintiff has succeeded in establishing that he has a legally enforceable right and that there is a serious question and prima-facie case and wrong-doer control, and that HDL is entitled to the reliefs claimed.*
- # *the Plaintiff has a reasonable and real prospect of success, even in the light of the defences raised in the pleadings, objections and submissions of the Defendants*
- # *the Plaintiff's prospect of success was real and not fanciful and that he had more than a merely arguable case*

- # *interim injunctions were granted to prevent the "syphoning out of money" from HDL and the Country*
- # *but for the interim injunctions, HDL, like Pyrrhus after the battle of Asculum in Apulia, might well be constrained to say, "One more such victory and we are lost".*
- # *it might be pointed out that it could not entirely be a matter of indifference to the Government the Government made itself eventually responsible for the repayment of the monies borrowed by HDL*

11. a) Though HDL is 64% owned by the Government and the Government had 6 Government Nominee Directors out of 11 Directors on HDL's Board of Directors since December '90, HDL did not take any action in its interest and that of its Shareholders, and nor in the interest of the Government as the Guarantor of HDL, notwithstanding the aforesaid Supreme Court Judgment.
- b) On the contrary, HDL and 3 of HDL's Directors namely, Mr. C.L. Perera, then Chairman & Managing Director of HDL and Mr. K.N. Choksy P.C., M.P. and Mr. F.G.N. Mendis (not Government Nominee Directors), had previously in the Court of Appeal, without filing any papers therein, endeavoured to support the Appeals that had been made by HDL's Japanese Collaborators, to have the Interim Injunctions obtained by me vacated, eventhough HDL and the said HDL Directors had not participated in the original District Court Inquiry. The Supreme Court, however, refused to hear them.
- c) HDL and its then Directors even opposed an Application made to Court by me on 3.3.'92 for an independent examination and verification of the Hotel construction and its fixed assets.
- d) Then Deputy Secretary to the Treasury, Mr. K. Shanmugalingam and then influential Government Member of Parliament Mr. K.N. Choksy P.C., were, amongst others, Directors of HDL and Defendants in D.C. Colombo Case No. 3155/Spl.
- e) i. Previously in 1988, Mr. K.N. Choksy P.C., M.P., prevented an independent examination and verification of the Hotel construction, that was prudently suggested by then Government Nominee Director, Mr. M.T.L. Fernando, Chartered Accountant, Precedent Partner, Ernst & Young, who stated that queries may be raised in such regard by the major Shareholder i.e. Ministry of Finance & Planning.
- ii. Subsequently in 1990, countermanding my objections to making payments without proper verification to HDL's Japanese Collaborators, Mr. K.N. Choksy P.C., M.P., by his Letter dated 28.2.'90 endorsed that HDL will be justified, in making the full payment to HDL's Japanese Collaborators.
- iii. In his said Letter, Mr. K.N. Choksy P.C., M.P. stated that the Japanese Architects' Certificates were adequate coverage that the Hotel construction was in conformity with all stipulations of the Contract. He so endorsed knowing that there were no Bills of Quantities and Final Measurements to support the said Japanese Architects' Certificates, which I had queried in such circumstances.
- iv. In the Court of Appeal, in supporting the Leave to Appeal Applications made by HDL's Japanese Collaborators, Mr. K.N. Choksy P.C., M.P., as a Defendant in the said Case, caused submissions to be made, that I had no right to bring a derivative action under the Sri Lankan Law. This was clearly with a view to having the said D.C. Colombo Case No. 3155/Spl that had been instituted in the interest of HDL, dismissed. However, the Supreme Court held otherwise.

12. a) Consequently, the then Secretary, Ministry of Finance & Planning and Secretary to the Treasury, Mr. R. Paskaralingam intervened to bring about a Settlement and Settlement Agreements were finalised by the then Hon. Attorney General in June '93, after several rounds of discussions had in that regard.
- b) The Japanese Collaborators of HDL having agreed to write-off all accrued Interests from commencement in 1984 upto June '93 and 30% of the Capital allegedly claimed by them from HDL and to re-schedule the balance unwritten-off agreed debt of HDL for 13-years, nevertheless, insisted on receiving Promissory Notes from the Government for the balance unwritten-off agreed debt of HDL, in addition to the Guarantees they already had from the Government.
- c) As advised, I refused to conclude the Settlement Agreements insisting that the Promissory Notes for the balance unwritten-off agreed debt of HDL should be given by HDL and not by the Government.
13. a) Upon the new Government assuming office, I was re-appointed as a Director of HDL on 6.10.'94.
- b) As directed by the Secretary to the Treasury, on the instructions of the Hon. Minister of Finance, the same Settlement Agreements that were finalised in June '93 were concluded in June '95, with the Japanese Collaborators of HDL relenting and agreeing to receive Promissory Notes from HDL and not from the Government for the balance unwritten-off agreed debt of HDL and with further improvements to the financial terms with HDL's Japanese Collaborators.
- c) The Settlement Agreements concluded in June '95 resulted in 10-years' Interest and 30% of the Capital being written-off by the Japanese Collaborators of HDL from their alleged claims made from HDL.
- d) The balance unwritten-off agreed debt, after deducting funds accumulated in HDL as a consequence of the Interim Injunctions that had been obtained by me, was re-scheduled with reduced interest at 5.25% p.a. (*originally 6% p.a.*) for a further period of 15-years up to the year 2010 (originally fully repayable by 1999).
- e) The aforesaid total write-off amounting to Jap. Yen. 17,586 Million (SL Rs. 10,200 Million) on the alleged claims made from HDL and the further re-scheduling of HDL's balance unwritten-off agreed debt were of immense benefit to HDL and were achieved essentially through my the sole sustained efforts, amidst obstructions and undue influences and pressures from interested and affected parties.
- f) In fact, prior to my aforesaid legal actions, the then Secretary, Ministry of Finance by Letter dated 25.5.'90 had sought the advice of the Hon. Attorney General to wind-up HDL on grounds of bankruptcy.
14. a) Furthermore, in March '95, Her Excellency the President also warranted a Special Presidential Commission of Inquiry to inquire into the matter of the aforesaid fraud perpetrated on HDL, a government majority owned and controlled company, with Government Guarantees also having been given to HDL's Japanese Collaborators.
- b) After preliminary investigations, including the recording of evidence of 24 Witnesses and obtaining an Investigation Report from a Panel of 3 Chartered Architects, the Special Presidential Commission on 8.12.'95 issued Show Cause Notices, setting out several charges, on former HDL Chairman & Managing Director, Mr. C.L. Perera, and on former HDL Directors, Mr. K.N. Choksy P.C., M.P. and Mr. F.G.N. Mendis and on former Secretary, Ministry of Finance & Planning, Mr. R. Paskaralingam, on grounds of fraud, corruption, misuse and abuse of power.

- c) Among the Charges made against the said Directors of HDL, one charge was in relation to the aforesaid HDL's Annual Accounts to 31.3.'90 viz;

"(8) disregard the discrepancies, shortcomings and irregularities which were brought to the notice of the Board of Directors, and wrongfully attempt to approve as authentic the Annual Accounts of the said Company [reference being to HDL] for the year ended 31st March 1990 and endeavour to take action to adopt the Accounts with the object of suppressing the aforesaid fraudulent acts and omissions"

- d) It was, inter-alia, discovered at the Inquiry before the Special Presidential Commission that;

- i. the Elevations of the Floors denoted on the respective Floor Sheets were at variance with the corresponding Floor Elevations denoted on the Cross-sectional Sheets of the very same Architectural Plans of the Hotel, that had been surreptitiously substituted in September 1995 and approved in April 1996 by the UDA,
- ii. in the aforesaid Architectural Plans of the Hotel, the 3rd & 4th Floors had been given to be at the same Elevation of 24.5 meters and that the 19th Floor and the Roof of the 19th Floor had been given to be at Elevations of 72.7 meters and 72.5 meters, respectively,

and the Special Presidential Commission observed the above to be an inherent intrinsic impossibility, raising the question, as to how the UDA could ever have approved such an Architectural Plan ?

- e) The above Settlement Agreements prior to being signed in June '95 were placed by me in evidence before the Special Presidential Commission, through the Solicitor General, together with documents pertaining to the discussions that had been had in that regard.
- f) Consequently, the Solicitor General by his Letter dated 15.6.'95 addressed to the Secretary, Ministry of Finance & Planning approved the said Settlement Agreements, on behalf of the Hon. Attorney General, for signature.
15. a) In the circumstances that this Hotel fraud was made an issue by the then Opposition during the Elections at that time, the then President D.B. Wijetunga in June '94 intervened and invited me for a discussion, at which the then General Secretary, UNP, late Dr. Gamini C. Wijesekere, then Hon. Attorney General, Mr. T.J. Marapana P.C. and then Addl. Solicitor General, Mr. A.S.M. Perera were present.
- b) At the said discussion had at the President's House on 17.6.'94, President D.B. Wijetunga directed that the Settlement Agreements that had been finalised by the Hon. Attorney General in June '93 be signed, on the condition that the Promissory Notes to HDL's Japanese Collaborators, as insisted upon by me, being given by HDL and not by the Government for the balance unwritten-off agreed debt of HDL.
- c) Thereafter, however, President Wijetunga caused the then Deputy Secretary to the Treasury, Mr. K. Shanmugalingam and then Chairman Bank of Ceylon, Mr. Jehan Cassim to intercede with me, with endeavour to compromise on certain Conditions in the said Settlement Agreements that had affected Cornel & Co. Ltd.

- d) The said Conditions in the Settlement Agreements had been included by the Hon. Attorney General in the background of discussions and correspondence the Secretary, Ministry of Finance & Planning had had with Cornel & Co. Ltd., and certain Cabinet Decisions that had been made in that regard.
- e) Letters were written to President D.B. Wijetunga regarding the said persons, who so intervened, urging that the matter should be dealt with by the Hon. Attorney General and the then Actg. Secretary, Ministry of Finance & Planning.
16. a) As a consequence, the then Actg. Secretary, Ministry of Finance & Planning, Mr. N.V.K.K. Weeragoda summoned me to attend a Meeting in this connection at the Ministry of Finance on 10.8.'94, i.e. just prior to the General Elections scheduled for 16.8.'94.
- b) I, being hospitalised at that time, my wife communicated with the Actg. Secretary, Ministry of Finance & Planning and President D.B. Wijetunga informing them of my inability to attend such Meeting.
- c) The said Settlement Agreements were thus not concluded.
17. a) At that very same time on 29.7.'94, Complaints against me on alleged grounds of professional negligence had been caused to be made through Attorneys-at-Law in the name of HDL to the Institute of Chartered Accountants of Sri Lanka and to the Institute of Chartered Management Accountants U.K., of which Institutes I am a Fellow Member, also having been a Member of the Council of the Institute of Chartered Accountants of Sri Lanka in 1976/77.
- b) Also at the very same time on 4.8.'94, D.C. Colombo Case No. 15322/MR had been caused to be instituted in the name of HDL against me on the same alleged grounds of professional negligence claiming damages of Rs. 26.6 Million.
18. a) i) Upon being written to, 2 Directors of HDL at that time, Mr. Asoka Gunasekera, Attorney-at-Law and Ms. Monica Fernando, by their Letters dated 28.6.'95 and 6.7.'95, respectively, stated that there was no HDL Board Decision to have taken such action against me.
- ii) Another Director, Mr. R.J. de Silva P.C., by his Letter dated 3.7.'95 stated that he had not caused such action to be taken against me.
- b) i) HDL's Japanese Collaborators have affirmed by their Affidavit dated 6.12.'96, that there had been no Board Resolution to have appointed the Registered Attorney-at-Law, Mr. Hussain Ahamed to have instituted the said action against me and hence that Mr. Hussain Ahamed had no legal authority to act as the Registered Attorney for HDL in the said Case.
- ii) Article 129 of the Articles of Association of HDL requires the affirmative vote of HDL's Japanese Collaborators to pass a Board Resolution - viz
- “Article 129 – Questions arising at any meeting shall be decided by a majority of votes, and in case of an equality of votes the Chairman shall have a second or casting vote.

Provided however that no resolution shall be deemed to be passed by the Directors unless a Director appointed by the Foreign Collaborators shall have voted in favour of such resolution.

Provided further that the above proviso shall cease to have effect upon the Loan being repaid by the Company.”

- c) The aforesaid Proxy of HDL to file D.C. Colombo Case No. 15322/MR against me on 4.8.'94 had been given to Mr. Hussain Ahamed, Attorney-at-Law, without the express approval and/or authority and/or decision of the Board of Directors of HDL, by Mr. C.L. Perera, then Chairman & Managing Director of HDL and Mr. S.G. Senaratne, Attorney-at-Law, Director, Corporate Advisory Services (Pvt) Ltd., the then Secretaries of HDL, who had been appointed from 5.5.'94.
19. a) The aforesaid Complaints caused to be made against me to professional Institutes and the aforesaid D.C. Colombo Case No. 15322/MR caused to be instituted against me had been on the same alleged grounds of professional negligence for purportedly causing loss and damage of Rs. 26.6 Million to HDL.
- b) Such alleged grounds of professional negligence had been baselessly attributed to the assessment of Income Tax on HDL, in relation to a purported payment of Interest on Loans given to HDL by its Japanese Collaborators.
20. a) Ironically, on the other hand, notwithstanding the Supreme Court Judgment upholding a prima-facie case of fraud, inter-alia, observing that the Government/Government's Nominee Directors of HDL cannot be indifferent, HDL and its then Directors had not take any action, whatsoever, on the fraud perpetrated on HDL, as disclosed in D.C. Colombo Cases Nos. 3155/Spl and 3231/Spl, that had been instituted by me in the right and interest of HDL.
- b) Whereas, the said legal actions of mine resulted in immense benefit to HDL, with a write-off of Jap.Yen 17,586 Million i.e. SL Rs. 10,200 Million from the alleged claims made from HDL by its Japanese Collaborators and the re-scheduling of the balance unwritten-off agreed debt of HDL upto the year 2010 (*previously fully repayable by 1999*) at a reduced rate of interest of 5.25% p.a. (*previously 6% p.a.*).
21. The background pertaining to the assessment of Income Tax in relation to a purported payment of Interest on Loans given to HDL by its Japanese Collaborators, based upon which professional negligence had been alleged against me, was as follows;
- a) Due to reasons best known to him, the then Minister of Finance did not grant HDL in 1984, Income Tax exemption on Interest Income on Loans given to HDL, derived by its Japanese Collaborators, even though HDL was approved for all other Income Tax concessions and Import Duty exemption, as a major foreign investment project approved by the Foreign Investment Advisory Committee.

The above was notwithstanding the Conditions in the Investment Agreement signed by the Government on this Hotel Project, inter-alia, committing to grant Income Tax exemption on Interest Income on Loans given to HDL, derived by its Japanese Collaborators.

- b) Accordingly, exemption from Income Tax on Interest Income on the Loans given to HDL, derived by its Japanese Collaborators, had been an essential pre-requisite to implement the Hotel Project with the Public Issue of Shares scheduled for 6.3.'84.
- c) In the given circumstances, written representations were made by HDL in February '84 to the Commissioner General of Inland Revenue on the structuring of the Loans from HDL's Japanese Collaborators, as discussed and decided upon by HDL's Directors, that then included Mr. M. Radhakrishnan, Attorney-at-Law, Precedent Partner, M/s D.N. Thurairajah & Co.

On 6.3.'84, Mr. M.T.L. Fernando, Chartered Accountant, Precedent Partner, Ernst & Young and Dr. S. Rajalingam, Director, Economic Affairs, Ministry of Finance & Planning were appointed as Directors of HDL by the Government.

- d) I, as a then Director of HDL, actively involved in the finalisation of HDL's Prospectus for the Public Issue of Shares scheduled for 6.3.'84 signed HDL's Letters, as a Director of HDL, addressed to the Commissioner General of Inland Revenue, making HDL's aforesaid representations, as decided upon by the then Directors of HDL.
 - e) Upon such written representations, the Commissioner General of Inland Revenue, on the basis of the structuring of the Loans given to HDL by its Japanese Collaborators, as had been represented by them, issued a Letter of Ruling dated 1.3.'84 stating that in such circumstances the Interest Income derived by HDL's Japanese Collaborators would not be subject to Income Tax, but stipulated that the relevant informations be furnished at the time of implementation of the Hotel Project – i.e. with the Relevant Income Tax Returns.
 - f) With the commencement of the implementation of the Hotel Project, the Income Tax matters of HDL were handled by its Auditors, M/s Ford, Rhodes, Thornton & Co., Chartered Accountants, who, however, had failed to follow-up on the aforesaid matter, as had been stipulated in the said Letter of Ruling that had been given by the Commissioner General of Inland Revenue.
22. The correct facts pertaining to the circumstances, that had led to the assessment of Income Tax on Interest purportedly paid on the Loans given to HDL by its Japanese Collaborators, made an issue of, in the said Complaints on alleged grounds of professional negligence made against me to professional Institutes and in the said D.C. Colombo Case No. 15322/MR instituted against me on the same said alleged grounds are as follows;
- a) HDL had earned substantial Interest Income on bank deposits, as a result of funds that had accumulated in HDL, consequent to the said Interim Injunctions that had been obtained by me in D.C. Colombo Case No. 3155/Spl.
 - b) Such Interest Income, not being Profits from Hotel Operations, which were exempted for 10-years, was subject to Income Tax, as is the normal practice and legal position and ought to have been known to HDL's Auditors, M/s Ford, Rhodes, Thornton & Co.
 - c) Confronted with Income Tax incidence on such Interest Income so received, M/s Ford, Rhodes, Thornton & Co., who had handled the Income Tax matters of HDL, acting together with HDL's General Manager, Mr. S. R. Sudharshan, had knowingly made wrong and false representations to the Inland Revenue Department, with a view to reducing such Income Tax incidence on the said Interest Income of HDL.
 - d) Such wrong and false representations had been made in respect of a payment of US \$ 2 Million i.e. SL Rs. 79.8 Million, that HDL had paid HDL's Japanese Collaborators in March '90.
 - e) However, such payment had been held in suspense to the credit of HDL by HDL's Japanese Collaborators, consequent to the Enjoining Orders issued on 18.9.'90 in D.C. Colombo Case No. 3155/Spl that had been instituted by me.
 - f) Consequently, the said US \$ 2 Million payment i.e. SL Rs. 79.8 Million had been shown as a Current Asset of HDL in HDL's Audited Annual Accounts as at 31.3.'90, certified by M/s Ford, Rhodes, Thornton & Co., themselves on 28.11.'90. i.e. HDL's Japanese Collaborators had confirmed that they held the said payment of US \$ 2 Million i.e. SL Rs. 79.8 Million to the credit of HDL and accordingly, the same had been shown and so certified as a Current Asset of HDL.

- g) It is this payment of US \$ 2 Million i.e. SL Rs. 79.8 Million that had been so held and so certified as a Current Asset of HDL, that had been subsequently wrongly and falsely represented to the Inland Revenue Department by M/s Ford, Rhodes, Thornton & Co., purporting the same to be an Interest payment on the Loans given to HDL by its Japanese Collaborators.
- h) This had been done with a view to deducting the said payment of US \$ 2 Million i.e. SL Rs. 79.8 Million as an Interest payment from the aforesaid Interest Income received on bank deposits that had accumulated in HDL as above, so as show the balance as the net Interest Income, thereby reducing the Income Tax incidence on the Interest Income of HDL.
- i) Upon the HDL Secretaries, as directed by the HDL Board of Directors, writing on 1.9.'98 on the said matter to M/s Ford, Rhodes, Thornton & Co. and to the General Manager of HDL, Mr. S.R. Sudharshan, they have both admitted to the above – as per their Letters dated 8.9.'98 and 9.10.'98, respectively.
23. a) As per the Settlement Agreements signed in June '95, HDL's Japanese Collaborators wrote-off all Interests on their Loans given to HDL for 10-years from the commencement in 1984 and the said payment of US \$ 2 Million i.e. SL Rs. 79.6 Million that had been held by HDL's Japanese Collaborators to the credit of HDL, was in fact deducted essentially against the unwritten-off balance agreed Capital, after the write-off of 10-years' Interest and 30% of the Capital.
- b) The Ministry of Finance and I made representations to the Commissioner General of Inland Revenue of the facts as aforesaid and the Commissioner General of Inland Revenue consequently issued Letter dated 22.10.'96 canceling the Income Tax Assessments issued and confirmed that Interest Income on the Loans given to HDL, derived by its Japanese Collaborators, will be exempt from Income Tax, as approved by the Hon. Minister of Finance & Planning.
- c) Even in June '93, HDL's Japanese Collaborators had agreed to write-off all Interest claims made from HDL from the commencement in 1984 up to June 1993. Accordingly, the question of Interest on such Loans to HDL from its Japanese Collaborators and Income Tax thereon could not have arisen in such circumstances for such period.
- d) The factually correct position ought not to have been suppressed from the Inland Revenue Department and in any case, no Interest payment had been made by HDL to its Japanese Collaborators during such intervening period, though wrongfully and falsely represented otherwise, as aforesaid.
- e) The said wrong and false representations had been knowingly made to the Inland Revenue Department, with a view to reducing the Income Tax incidence on Interest Income earned by HDL and the assessment of Income Tax on the said payment of US \$ 2 Million i.e. SL Rs. 79.8 Million to HDL's Japanese Collaborators had arisen, consequent to such wrong and false representations, knowingly made in that regard by M/s Ford, Rhodes, Thornton & Co. and the General Manager of HDL, Mr. S.R. Sudharshan, as aforesaid.
24. The above Complaints caused to be made on alleged grounds of professional negligence against me to professional Institutes, of which Institutes I am a Fellow Member and the said D.C. Colombo Case No. 15322/MR caused to be instituted against me on the same said alleged grounds have been;
- a) given exposure in Parliament,
- b) cited in Letters to Her Excellency the President, Hon. Ministers and Officials,

c) given wide publicity in Newspapers

d) pleaded in several Cases instituted by and/or caused to be instituted by Cornel & Co. Ltd./Mr. C.L. Perera against HDL and its present Directors, including me;

thereby causing grave prejudice and irreparable damage and irremediable mischief of detriment to me, a reputed professional of standing.

25. a) Upon the aforesaid Complaint made against me on alleged grounds of professional negligence, the Institute of Chartered Accountants of Sri Lanka, summoned me to meet the Professional Conduct Committee for preliminary discussions and consequently, issued its Letter dated 23.6.'95 stating that, having considered the Complaint and the evidence, the Institute's Council had decided not to pursue the said Complaint.

b) The Chartered Institute of Management Accountants U.K. did not even take up with me the matter of the said Complaint made to it against me on alleged grounds of professional negligence.

26. Notwithstanding the aforesaid, the following conduct and actions would be further significant;

a) D.C. Colombo Case No. 15322/MR had been caused to be instituted in the name of HDL against me on 4.8.'94, just prior to the General Elections held on 16.8.'94, by the Registered Attorney-at-Law, Mr. Hussain Ahamed, without express approval and/or authority of the Board of Directors of HDL.

b) On 6.10.'94, the new Government appointed me as a Director of HDL, including 5 others, thereby re-constituting HDL's Board of Directors with effect from October '94.

c) On 18.11.'94, I filed Answer, together with a Claim in Reconvention against HDL, in the said D.C. Colombo Case No. 15322/MR.

d) On 15.12.'94, the Registered Attorney, Mr. Hussain Ahamed had filed Replication, without the knowledge and/or consideration and/or approval of the new Board of Directors of HDL at that time.

e) In October '96, HDL notified the said Registered Attorney-at-Law, Mr. Hussain Ahamed, of the Revocation of his Proxy by which he had instituted the said D.C. Colombo Case No. 15322/MR against me.

f) The said Registered Attorney-at-Law, Mr. Hussain Ahamed, having in writing consented on 7.10.'96 to the said Revocation of his Proxy, subsequently, however, appeared in Court and sought to have his said revocation withdrawn.

g) The said Registered Attorney-at-Law, Mr. Hussain Ahamed paid no heed to the lawful instructions given to him as per the Decisions made by the Board of Directors of HDL, eventhough the same were communicated to him by the Secretaries of HDL, with certified copies of the relevant Board Minutes of HDL and further communications made to him by HDL's Company Lawyers, M/s F.J. & G De Saram..

h) The said Registered Attorney-at-Law, Mr. Hussain Ahamed, had acted on the instructions of Mr. C.L. Perera, notwithstanding the aforesaid communications, countermanding the Decisions made by the Board of Directors of HDL and failed to answer questions of HDL, eventhough he had been notified as aforesaid that Mr. C.L. Perera had no authority, whatsoever, to act countermanding and contravening HDL Board Decisions.

- i) Upon Inquiry, the Court made Order on 21.5.'98 revoking HDL's Proxy that had been given without the express approval and authority of HDL's Board of Directors to the said Registered Attorney-at-Law, Mr. Hussain Ahamed and the Court accepted the Proxy filed on behalf of HDL by the Hon. Attorney General in the said D.C. Colombo Case No. 15322/MR.
- j) Such Order on the matter of Mr. Hussain Ahamed, Attorney-at-Law, seeking to withdraw the written consent given for the Revocation of Proxy was pending since October '96 and was delivered only on 21.5.'98, upon complaint of delay having been made to the Chief Justice by HDL's Company Lawyers, M/s F.J. & G De Saram.
27. The Court subsequently has been informed that a Settlement is being pursued through a process of Mediation, as per the Settlement Agreement entered into on 28.6.'95 between HDL and me, a copy of which Settlement Agreement has been filed in Court by HDL.
28. a) On 28.6.'95, in addition to the other Settlement Agreements signed by HDL to settle D.C. Colombo Cases Nos. 3155/Spl and 3231/Spl that had been instituted by me on behalf of HDL and in its right, HDL further entered into the aforesaid Settlement Agreement with me, as per the separate Board Minute No. 9 of 28.6.'95.
- b) By the said separate Settlement Agreement, HDL has admitted that the said Complaints on alleged grounds of professional negligence made against me to professional Institutes of which I am a Fellow Member and the said D.C. Colombo Case No. 15322/MR instituted against me on the same said alleged grounds, were baseless, mala-fide and malicious.
- c) As per Conditions in the aforesaid Settlement Agreement, HDL has issued Letters of Apology dated 21.10.'96 to me, with Letters of Explanation dated 21.10.'96 to the relevant professional Institutes and to the Secretary, Ministry of Finance & Planning, signed by Dr. P.B. Jayasundera of the Government and Mr. T. Ishibashi of HDL's Japanese Collaborators, the Government and HDL's Japanese Collaborators owning in total, 92% of the Shareholdings of HDL.
- d) The said Letters of Apology and Explanation were tabled and noted at the Meeting of the HDL Board of Directors on 25.10.'96.
- e) However, no publication of the aforesaid Letters of Apology and Letters of Explanation had been made, whereas on the contrary, the aforesaid Complaints made against me on alleged grounds of professional negligence to professional Institutes of which I am a Fellow Member, and the aforesaid D.C. Colombo Case No. 15322/MR instituted against me on the same said alleged grounds have been given wide publicity as aforesaid, causing me grave prejudice and irreparable damage and irremediable mischief to my detriment.
29. a) In the Claim in Reconvention filed by me in the aforesaid D.C. Colombo Case No. 15322/MR, I have claimed damages in a sum of Rupees Fifty Million (Rs. 50,000,000/-) for the embarrassment, pain of mind and injury caused to me and damage and defamation caused to my name, reputation and professional standing by the institution of the said baseless, mala-fide and malicious Action against me on alleged grounds of professional negligence.
- b) In like manner, the aforesaid baseless, mala-fide and malicious Complaints made against on alleged grounds of professional negligence to professional Institutes of which I am a Fellow Member, have further caused me great embarrassment, humiliation, pain of mind, injury, damage and defamation to my name and reputation and professional standing, which damages I assess in a sum of Rupees Fifty Million (Rs. 50,000,000/-).

30. a) The aforesaid baseless, mala-fide and malicious wrongful actions have been gravely prejudicial, injurious and damaging to me and defamatory and detrimental to my name, reputation and professional standing, exposing me to ridicule and/or contempt and/or to be shunned and/or avoided by right thinking members of society generally, causing me directly and/or by innuendo, irreparable damage and irremediable mischief and in addition, causing me great embarrassment, humiliation and pain of mind, bringing me into grave public scandal, odium and contempt.
- b) The aforesaid was ironically notwithstanding my legal actions in the right and interest of HDL, that had immensely benefited HDL with a write-off of Jap. Yen 17,586 Million i.e. SL Rs. 10,200 Million from the alleged claims made from HDL by its Japanese Collaborators and the re-scheduling of the balance unwritten-off agreed debt of HDL upto the year 2010 (*previously fully repayable by 1999*) at a reduced rate of interest of 5.25% p.a. (*previously 6% p.a.*), which were achieved essentially through my the sole sustained efforts, amidst obstructions and undue influences and pressures from interested and/or affected parties.
- c) The aforesaid Complaints made against me to professional Institutes of which I am a Fellow Member and the institution of the said D.C. Colombo Case No. 15322/MR against me had been out of malice and spite, in the context of the aforesaid, at the behest of interested and/or affected parties.
31. In the foregoing premises, I reckon the total damages to be in a sum of Rupees One Hundred Million (Rs. 100,000,000/-)

The foregoing Affidavit having }
 been duly read over and }
 explained by me to the }
 affirmant within named and he }
 having understood the contents }
 thereof signed and affirmed to }
 at Colombo on this 9th day of }
 March 2000. }



BEFORE ME

Handwritten signature: H.A.S. Jayawarna

JAYAWARNA S.A.S.
 Commissioner of Oath
 Attorney - at - Law
 102, Hill Street