



**Arbitration CAS 96/161 International Triathlon Union (ITU) / Pacific Sports Corp. Inc.,
award of 4 August 1999**

Panel: Mr. Sharad Rao (Kenya), President; Mr. Richard W. Pound (Canada); Mr. Christopher Campbell (USA)

Triathlon

Contract related to the organization of World Championships

Breach of such contract

Punitive damages

Joinder of a third party in the arbitration

1. **CAS rules do not contemplate a joinder of third parties who have not agreed to be bound by the outcome of a CAS arbitration.**
2. **An individual is not liable for a company's obligations except in very exceptional circumstances under the principle of piercing the corporate veil. Pursuant to the principle of good faith, to pierce the corporate veil a shareholder must have abusively used the company to defraud the law in one of the following manner: bad faith conduct evidencing an intention to evade contractual obligations, commingling of corporate and shareholders assets, under capitalization, or conducting business with lack of corporate formalities.**
3. **Punitive damages may only be awarded if they were agreed upon by the parties unless the breach was of such malicious nature as to give rise to a separate tort. It is a general principle that an injured party cannot recover damages for breach of contract beyond the amount that is established with reasonable certainty. Damages granted to an aggrieved party are those resulting from non-fulfillment of the contract. The purpose of the damages that might be awarded is to put the party in the position it would have been but for the breach.**

On 3 November, 1993, the International Triathlon Union (ITU), the sole International governing body for the Sport of Triathlon, and Pacific Sports Corporation Inc. (PSC), an Ohio corporation, signed an agreement whereby PSC was granted certain rights to host and conduct the Triathlon World championships to be held in Cleveland (USA) on August 25, 1996. The agreement was signed by Les McDonald, President and Michael Gilmore, Treasurer on behalf of ITU and on behalf of PSC by its President, Jack C.

Under the agreement, ITU granted PSC rights, privileges, licenses and permission to host and conduct the Triathlon World Championships and in consideration of the granting of such rights

PSC agreed *inter alia* to provide a minimum of US\$ 100,000 to be paid as prize money to be distributed to the winners. The amount was to be paid 120 days prior to the event.

The parties agreed that any dispute, controversy or claim arising out of or in connection with the agreement would be referred to CAS.

On December 8, 1996, ITU lodged a request for arbitration with CAS following a dispute arising from PSC's alleged failure to provide the prize money to the athletes pursuant to the agreement.

On October 31, 1997, ITU filed a motion to add Jack C., the President of PSC as a co-respondent. The motion requested that Jack C. be held personally liable for any decision that the CAS might make against PSC.

The hearing on merits took place on February 18 and 19, 1999 in Denver, Colorado.

LAW

1. In its motion ITU stated that while PSC may have stopped exercising any commercial activity for the past months Jack C. was pursuing such activity under a corporate name that was identical to PSC, and cited further and other reasons in support of its motion. In a statement filed in support of its motion, ITU requested the Panel to invoke the Swiss law doctrine of piercing the corporate veil.
2. In its reply, PSC submitted that Jack C. had signed the agreement in his capacity as President of PSC and not in his individual capacity and that the new corporate entity was formed as a result of an agreement between Jack C. and another individual, Mr. Michael Bone, to jointly engage in business which was a proper purpose for forming and operating an entity. PSC submitted that to pierce the corporate veil there had to be (i) an element of bad faith on the part of C. to evade his personal contractual obligations, or (ii) evidence that C. under capitalised his assets or commingled his assets with the assets of PSC or (iii) that he conducted PSC operations with no corporate formalities.
3. CAS rules do not contemplate a joinder of third parties who have not agreed to be bound by the outcome of CAS arbitration. Although the rules contemplate the possibility of a Respondent seeking to add a third party, they do not contemplate the reverse (see Code of Sports-related Arbitration, Art. 41.2 of the Special Provision applicable to the Ordinary Arbitration Proceedings). The Panel ruled that general references to Swiss law were not sufficiently convincing (either substantially or procedurally) to enable it to add a third party as a respondent in this matter.

4. The Panel likewise felt that even if Swiss law were to take precedence over the CAS provisions, an individual is not liable for a Company's obligations except in very exceptional circumstances under the principle of piercing the corporate veil, which derives its basis from Article 2 of the Swiss Civil Code (CC).
5. Article 2 provides that one must exercise rights and execute obligations in good faith. Evident abuse of one's rights is not protected by law. The principle has been developed in numerous cases by the Swiss Federal Court and is widely accepted as applicable among the doctrines. To pierce the corporate veil a shareholder must have abusively used the company to defraud the law in one of the following manner: bad faith conduct evidencing an intention to evade contractual obligations, commingling of corporate and shareholders assets, under capitalization, or conducting business with lack of corporate formalities.
6. The Panel ruled that mere reference to information recently received was too vague to constitute evidence of PSC's present status. At that stage of these proceedings none of the conditions enabling the piercing of the corporate veil had, in the Panel's view, been established to enable the Panel to hold Jack C. personally responsible.
7. PSC raised the issue as to the law to be applied. It argues that Article R45 of the Code of Sports related Arbitration states in relevant part: "*The Panel shall decide the dispute according to the rules chosen by the parties or in the absence of such choice according to Swiss law*".
8. PSC argues that under Swiss Law Article 187 of Chapter 12 of the Swiss Federal Code on Private International Law, the Panel should rule according to the law chosen by the parties or, in the absence of such choice, according to the law with which the action is most closely connected. It argues that taking the two sections together, Ohio law should apply because the Triathlon World Championships were held in Cleveland, Ohio. Furthermore it alleges all relevant events, facts and breaches occurred in Ohio, moreover, the title sponsor was from Ohio and that PSC was an Ohio corporation. As such Ohio law would arguably be the most closely connected to the dispute.
9. Article R45 of the Code of Sports related Arbitration provides that the Panel shall decide the dispute according to the rules of law chosen by the parties, or in the absence of such a choice, according to Swiss law. When the parties agreed that the present dispute be settled by CAS it must be assumed that they were aware of this provision. They had the opportunity to make a choice that might have been more appropriate in the circumstances, but they did not. The Panel has not been directed to any aspect of Swiss law that would have created any prejudice to the parties. Consequently the Panel decides that Article R45 of the Code of Sports related Arbitration would apply.
10. The parties called the following witnesses in support of their respective cases: Mr. Michael Gilmore and M/s Loren Barnett on behalf of ITU and Mr. Jack C. on behalf of PSC.
11. A number of ITU claims are for damages and/or punitive damages. The Panel pointed out that Punitive damages may only be awarded if they were agreed upon by the parties unless

the breach was of such a malicious nature as to give rise to a separate tort. As a general rule an injured party cannot recover damages for breach of contract beyond the amount that is established with reasonable certainty. The Panel noted that damages granted to an aggrieved party are those resulting from non-fulfillment of the contract. The purpose of the damages that might be awarded is to put the party in the position it would have been but for the breach.

12. One of the issues raised in these proceedings was the matter of alleged loss of sponsorship revenues to the Claimant by reason of the conduct of the Respondent. The Claimant proposed to call a witness, whom it would have tendered as an expert in matters of sponsorship. The panel did not agree to hear the witness, due in part to the lack of sufficient notice of intention to call him. It would not have been fair to the Respondent in the circumstances to have had to deal with such a witness with no prior notice and no chance to call rebuttal evidence. The panel did, however, express considerable reservation as to whether the proposed witness would have been of material assistance to the Claimant or to the Court.
13. It is clear that, as the Court matures, the issue of economic loss may well become the subject matter of disputes brought before the Court. Such issues are important for the litigants and may well be proper matters for determination by the Court. The Panel wishes to draw to the attention of the parties to this matter and for the benefit of others for whom such issues may be important the following points.

There must be a sound evidentiary foundation laid to support any claim for economic loss. No such foundation was established in the matter now under consideration. The Panel does not purport to lay down an exhaustive set of criteria for such matters, since the facts and circumstances of cases will necessarily vary, but the evidence before the Court must establish, as a minimum:

- the amount of income previously enjoyed;
- the specifics of the conduct of the Respondent which led to the alleged diminution of income;
- quantification of the economic loss;
- demonstrable causality between the conduct complained of and the economic loss;
- the nature of the evidence must be left to the parties and the rulings of the panel hearing the particular case, but parties should be generally aware that some element of confirmatory third party evidence will likely be more persuasive than evidence emanating from the aggrieved party itself;
- where a witness is tendered as an expert, for purposes of giving opinion evidence, the qualifications of the witness should be provided in advance, together with a statement of the substance of the evidence, which will be given by the witness. A *voir-dire* will normally be required to determine whether the Court will accept the witness as an expert, unless the adverse party accepts that the witness is an expert;

- the legal basis for the claim for economic loss must be clearly pleaded and supported. Special attention should be given from the outset as to whether the claim is founded in contract or in tort or delict. It will be important for the parties to know whether the Court will have jurisdiction to determine the full extent of the claim. The agreement to submit the full ambit of the dispute for decision by the Court must be clear.
14. In the case before the Court on this occasion, none of the required elements had been established, either by agreement or through the evidence presented. It was not necessary, therefore, to express a concluded opinion on the matter of economic loss alleged by the Claimant and the Panel expressly refrains from so doing.
 15. Following the observations by the Panel on the matter of punitive damages and the proof of economic loss generally, ITU chose not to pursue its claims for punitive damages and the same are dismissed. Of the remaining claims the main claim relates to prize money.
 16. ITU claims that PSC failed to pay prize money that PSC was obliged to pay under the agreement and did not deposit the minimum of US\$ 100,000, 120 days prior to the event in a Trust account as it was required to although ITU provided US\$ 50,000 on 12 August 1993. PSC paid some athletes on the day of the event even though the Agreement provided that the money should not be paid until after the doping control results had been received. Some of the athletes were paid several months after the event and some have not been paid to date. ITU claims this has brought enormous discredit to ITU. ITU also claims that it was entitled to interest on the money it paid and claims US\$ 15,833.33 as interest, computed at 10% per annum.
 17. PSC denies that it in any way defaulted in the way in which it held or distributed prize money to athletes. PSC and ITU had agreed that the prize money would be held in a joint account rather than an interest bearing trust account and that ITU's Michael Gilmore was a signatory to that account. PSC contends that it had deposited the prize money in the account before the 120 days due date and that ITU funds were received twelve days before the event and only after numerous calls, faxes and e-mails. PSC claims that subsequent to the event it mailed checks to all athletes in accordance with the contract and had not had to date any notification from any athletes that they had not received the prize money.
 18. Towards the end of the hearing, the counsel for PSC asked for permission to make a statement on behalf of Jack. C. He stated that following the comments and observations by the Panel, Jack C., while not admitting liability, nevertheless offered personally to pay those athletes who had not been paid prize money due to them. Jack C., who was in Court, confirmed this.
 19. A consent was recorded to the following effect:
 - a. Mr. Jack C. would within 30 days from the conclusion of the hearing deposit in the Trust account of the law firm of the counsel for PSC the sum of US\$ 19,850 plus US\$ 2,382 as interest for a period of 2 years at 6% per annum.

- b. The deposit would be held in the Trust account through 30th November 1999 to pay any athlete who had not been paid prize money due to him or her, and also to reimburse ITU for any payment that the ITU may have made directly to an athlete.
 - c. The counsel for PSC would pay out from the Trust account any money due to an athlete on the signing of a release and disclosure form the terms and contents of which would be agreed by the parties within the said 30 days. In the event the parties fail to agree, the same will be submitted to the Court for it to decide on the form and content of the said release and disclosure form.
20. Jack C. failed to fulfil the undertaking to deposit US\$ 19,850 plus interest thereon in the amount of US\$ 2,382 as agreed by Counsel and confirmed by him in Court, and the parties failed to agree as to form and content of the release. The Court, therefore, on 12 May 1999, issued an order that Jack C. deposit the amount that he undertook to deposit namely US\$ 19,850 plus US\$ 2,382 as interest for a period of two years at the rate of 6% per annum by 28 May 1999. Furthermore, the Panel ordered the parties to agree on the form of the release and disclosure form to be signed by the athletes by 28 May 1999 and should the parties fail to reach agreement they should submit the same to the Court to decide.
 21. Despite the Court order, to date, Jack C. has failed to comply with his undertaking and the parties have not agreed on the form of release and disclosure form.
 22. Under the circumstances the Panel has decided to settle the form of the release and disclosure form and the same is attached hereto and forms part of this award. The Court directs that the parties comply with their respective obligations to enable the outstanding prize money to be paid to the athletes who have not been paid within 30 days of this award.
 23. As to the other claims, the counsel for ITU in his final submissions said that ITU would restrict its claim to a claim relating to accommodation and a claim for US\$ 1049.70 for reimbursement relating to transportation.
 24. Thus the Court is left with only two issues to deal with apart from the matter of costs.
 25. ITU claims that PSC had undertaken to provide at PSC's expense 300 hotel room nights (double occupancy) as well as an Administrative person to assist the ITU in the distribution of the room night privileges, and was required to confirm the same 120 days before the event. ITU complains that on 16 August 1996 PSC withdrew its offer as is evidenced by Jack C.'s letter addressed to Diane Halligan of the Sheraton Cleveland Hotel and that as a result ITU was forced to incur charges for the said accommodation. ITU claims US\$ 29,581.11 as reimbursement.
 26. PSC states that it withdrew its engagement to provide accommodation to ITU delegates only after ITU failed to perform certain necessary obligations under the contract. Specifically that despite the fact that it submitted invoices to ITU, ITU failed to provide funds or reimburse PSC for items such as T-shirts, water bottles and refreshments. Moreover ITU failed to provide a minimum of 60 minutes coverage for the event on ESPN

or an equivalent network contrary to its contractual obligations, which resulted in diminished coverage for the event and caused contractual breaches by PSC where Television coverage was guaranteed to sponsors. PSC states that this resulted in financial hardship on PSC and caused it to withdraw the complimentary rooms.

27. If PSC wished to take issue on ITU's failure to pay for certain items such as T- shirts, water bottles, etc., as alleged the remedy lay in it invoking the default clause namely Clause 9 of the contract which was available to both parties in the event of a breach. The clause reads as follows:

DEFAULT

In the event that either party shall materially default in the performance of such party's obligations under this Agreement and fails or refuses to cure such default for thirty (30) days following a written notice of default delivered by the non defaulting party, or such shorter period of time as may be necessary in order to comply with any requirement of the ITU or deadlines set by the ITU as necessary in order to avoid defeating the purpose of this Agreement or any substantial part thereof, or if PACIFIC SPORTS shall fail to pay any amounts due under paragraph 6(b) (13) herein, without demand or notice, there shall be the following remedies:

- (A) *Default by PACIFIC SPORTS: In the event that PACIFIC SPORTS shall so materially default, ITU may, at its option, but shall not be obligated to, perform such obligations and PACIFIC SPORTS shall promptly reimburse ITU for the costs of performance of the same, and, in addition, ITU may, at its option, terminate the rights of PACIFIC SPORTS and obligations of ITU under this Agreement, and shall be entitled to all of PACIFIC SPORTS's rights and remedies as a result of such breach of default.*
- (B) *Default by ITU: In the event that ITU shall so materially default, PACIFIC SPORTS may, at its option, but shall not be obligated to, perform such obligations and ITU shall promptly reimburse PACIFIC SPORTS for the cost of performance of the same, or PACIFIC SPORTS may, at its option, terminate this Agreement, and all rights and obligations hereunder, and ITU shall pay to PACIFIC SPORTS, as liquidated damages, all amounts therefore expended by PACIFIC SPORTS under the terms of this Agreement, in anticipation of hosting TWC, plus any reasonable attorney fees and costs associated with enforcing this provision.*

28. Under Clause 9 (B) above, in the event of a material default by ITU, PSC could perform such obligations and require ITU to reimburse it for the same or terminate the agreement and claim its remedies there under. It did not. PSC was not entitled on the grounds of ITU's failure to deliver the said items to avoid its contractual obligation to provide the rooms.
29. The Panel awards ITU US\$ 29,581.11 which ITU dispersed as a direct result of PSC's failure to provide the rooms, plus interest thereon at 6% from, as requested, the date of filing the request for Arbitration i.e.8 December 1996 until the date that payment is made.
30. ITU claims that PSC was obligated to provide return transportation from the airport to the event site and return transportation between hotels and Congress activities for all Congress attendees. ITU alleges that PSC failed to provide transportation as per contract and that ITU incurred costs in respect of transportation in the sum of US\$ 1049.70.

31. PSC denies that transportation was not provided from the airport as alleged as it did issue complimentary passes on the Rapid Transit Transport system. Further, the proximity of the hotels and the Congress activities enabled Congress attendees to walk between hotels and meeting sites. Further, PSC states that ITU offered, without consultation, complimentary airport pick up for delegations separate and independent from the transportation provided by PSC.
32. The Panel finds that by providing complementary passes to participants of the event on the Rapid Transit system did not discharge PSC from its contractual responsibility to provide transportation to the attendees. In the panel's view the means employed by PSC fell quite short of what PSC was obligated to provide under the Contract in respect of an event of that status.
33. Accordingly the Panel awards ITU US\$ 1049.70 claimed by it and interest thereon at the rate of 6% from the date of filing the request for arbitration until the date that payment is made.
34. Both parties to this dispute acknowledge that the dispute be settled by CAS. Whereas ITU paid its share of the advance of costs under Rule 64.2 the PSC did not, and the same was paid by ITU. Therefore, in accordance with Rule 64.2 the CAS decided that a counter claim filed by PSC be deemed as withdrawn.
35. Thereafter the CAS after a number of interlocutory motions filed by the parties decided that the parties be required to pay additional costs towards advance of costs. Once again whereas ITU paid its due share PSC did not, and ITU once again paid PSC's share of the additional costs. Yet PSC remains a party to the suit and has been given a full and fair hearing.
36. In light of this and applying the principle in Rule 64.2, this Panel, while giving full effect to the evidence and arguments advanced by and on behalf of PSC, is not willing to allow PSC to claim any set off against ITU. In any event, as pointed out by the Panel during the hearing, PSC did not exercise such rights as were available to it under the Default clause referred to in Paragraph 22 c) above nor did it, in the Panel's view, establish all of the elements necessary to establish a valid set off against the ITU.
37. In considering costs, the Panel applying the principles of Rule 64.5 of the Code, takes into consideration the overall conduct of PSC in not complying with the essential provisions of CAS rules and awards ITU full costs on the amount awarded to them, to which must be added the amount paid by ITU towards CAS costs (administrative costs plus arbitrators costs and fees) on behalf of itself and on behalf of PSC. Further as a contribution towards the expenses of ITU in connection with this arbitration, the Panel awards to ITU an amount of US\$ 10'000.-.

38. The Parties indicated that they had no objection to the award being published. In view of Article R43 of the Code, the Panel is of the opinion that it is in the interest of the parties and generally that the award be made public, and the Panel so provides.

The Court of Arbitration for Sport hereby rules:

1. The Respondent PSC shall forthwith pay the Claimant ITU the following amounts:
 - US\$ 19'850 plus interest at the rate of 6% from December 8, 1996 until the date of payment (Prize money);
 - US\$ 29'581,11 plus interest at the rate of 6% from December 8, 1996 until the date of payment (Accommodation costs)
 - US\$ 1'049,70 plus interest at the rate of 6% from December 8, 1996 until the date of payment (Transportation costs).
2. The Respondent PSC shall pay all costs related of the present arbitration (including the CAS fee and the costs and fees of the arbitrators) to be fixed by the CAS Court Office at a later date in a separate award;
3. The Respondent PSC shall pay to the Claimant ITU the amount of US\$ 10'000 as a contribution towards ITU's costs.
4. The remainder of the claims are dismissed.
5. The present award shall be made public.