

**NAFTA Arbitration under the UNCITRAL Arbitration Rules**

**INTERNATIONAL THUNDERBIRD GAMING CORPORATION**

Claimant

*versus*

**THE UNITED MEXICAN STATES**

Respondent

**PROCEDURAL ORDER NO. 2**

**(31 July 2003)**

**CONSIDERING:**

- (A) Articles 12.1, 12.2 and 12.3 of Procedural Order No.1 dated 27 June 2003;
- (B) Claimant's Request for Production of Documents of 29 May 2003 submitted pursuant to Sections 7.1 (a) and 12.1 of Procedural Order No.1;
- (C) Respondent's Objections to Claimant's Request for Production of Documents, submitted on 27 June 2003 pursuant to Sections 7.1 (b) and 12.3 of Procedural Order No.1;
- (D) Claimant's Position on Respondent's Objections to Claimant's Request for Production of Documents, dated 12 July 2003, as directed by the Chairman of the Arbitral Tribunal by letter of 9 July 2003;
- (E) Respondent's response to Claimant's Position on Respondent's Objections to Claimant's Request for Production of Documents, dated 18 July 2003;
- (F) The withdrawal by Claimant of its Requests 2; 5; 14; 32; 33; 34; 35 and 39;
- (G) Respondent's response to Claimant's Position, dated 18 July 2003;

- (H) Article 1.2 of Procedural Order No.1, which provides that “[t]he IBA Rules on the Taking of Evidence in International Commercial Arbitration of 1999 (“IBA Rules”) shall be followed as a guideline”;
- (I) Articles 3 and 9 of the “IBA Rules on the Taking of Evidence in International Commercial Arbitration” ( the “IBA Rules”);
- (J) That the present arbitration, which is between parties having differing legal systems, is an international arbitration procedure, in which the Tribunal must apply generally accepted international standards to questions such as the compulsory production of documents subject to the applicable legal requirements;
- (K) That the underlying rationale for the use of discovery mechanisms such as document production in international arbitration is to assist the Arbitral Tribunal in its fact-finding mission in respect of matters at issue in the arbitration;
- (L) That a balance must be struck between the interest of the Arbitral Tribunal in uncovering the truth of the matters at issue in the arbitration, and the efficiency of the arbitral proceedings;

**THE ARBITRAL TRIBUNAL HEREBY DECIDES AS FOLLOWS:**

1. The IBA Rules shall act as a guideline for the production of documents in this case, in particular Article 3(3) thereof, which reads as follows:
  3. A Request to Produce shall contain:
    - (a) (i) a description of a requested document sufficient to identify it, or  
(ii) a description in sufficient detail (including subject matter) of a narrow and specific requested category of documents that are reasonably believed to exist;
    - (b) a description of how the documents requested are relevant and material to the outcome of the case; and

(c) a statement that the documents requested are not in the possession, custody or control of the requesting Party, and of the reason why that Party assumes the documents requested to be in the possession, custody or control of the other Party.

2. In applying the IBA Rules to Claimant's Requests as a guideline, the Tribunal will employ the following general rules:
  - (i) The definition of "documents" or "documentation" to be produced shall include all written communications of whatever kind and in whatever form, including but not limited to correspondence, minutes of meetings, internal memoranda and electronic mail.
  - (ii) In accordance with Article 3(3)(a) of the IBA Rules, the categories of documents to be produced shall be "narrow and specific", which the Tribunal interprets to mean narrowly tailored, i.e., reasonably limited in time and subject-matter in view of the nature of the claims and defences advanced in the case. Any contention made by a party in its Request for Production of Documents is taken into account only to the extent that it is in support of showing relevance and materiality.
  - (iii) Pursuant to Article 9(2)(b) of the IBA Rules, documents may be excluded from production, or – as the case may be – redacted, to the extent to which they reflect the seeking or rendering of legal advice by internal or external legal counsel.
  - (iv) Documents of any kind that show on their face that they have already been copied to the other party need not be produced.
3. The Tribunal shall now proceed to exercise its discretion within the limits set out above with regard to the production of documents, and apply the foregoing principles to Claimant's document production requests seriatim.
4. Pursuant to Article 12.3 of Procedural Order No.1, and subject to the limitations set out in paragraph 2 above, the Arbitral Tribunal hereby orders Respondent to

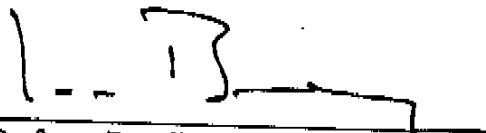
produce to Claimant by 15 August 2003 the documents or categories of documents identified in the following requests by Claimant:

- (i) Request 11;
- (ii) Request 12;
- (iii) Request 15 (except for NOMS as they are publicly available);
- (iv) Request 16;
- (v) Request 17;
- (vi) Request 18 (to the extent presented at the hearing);
- (vii) Request 19;
- (viii) Request 20;
- (ix) Request 22;
- (x) Request 24;
- (xi) Request 27;
- (xii) Request 28 (limited to the time period 1999 to date);
- (xiii) Request 29 (limited to the time period 1999 to date);
- (xiv) Request 36;
- (xv) Request 37;
- (xvi) Request 38.

5. All other Requests are hereby rejected.

6. Claimant is at liberty to submit timely a renewed request that comports with Sections 1 and 2 of this Order.

On behalf of the Arbitral Tribunal,



Professor Dr. Albert Jan van den Berg,  
Presiding Arbitrator