THIS IS EXHIBIT "6" REFERRED TO IN THE AFFIDAVIT OF STANLEY H. MEADOWS, SWORN BEFORE ME THIS 29TH DAY OF SEPTEMBER, 2006.

Jessica M Frederick

A NOTARY PUBLIC

"OFFICIAL SEAL"
JESSICA M. FREDERICK
Notary Public, State of Illinois
My Commission Expires Aug. 18, 2009

File No. 05-CL-5876

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

BETWEEN:

IVACO INC. and 1039028 ONTARIO INC.

Applicants

- and -

III CANADA ACQUISITION COMPANY,
SIVACO WIRE GROUP 2004 L.P.,
HEICO HOLDING, INC. and
THE HEICO COMPANIES, L.L.C.

Respondents

SUPPLEMENTARY FACTUM OF THE APPLICANTS
(RETURNABLE AUGUST 4, 2005)

1. The Application before this Honourable Court is a straightforward interpretation of Article 2.12 of the APAs. The Applicants rely upon the Factum previously filed and the two decisions of the Honourable Justice Farley on matters addressed on June 2, 2005. The two draft typed endorsements are attached as Schedule "A" to this Supplementary Factum.

2. The position of the Applicants is also straightforward. Article 2.12 is unambiguous. Extrinsic evidence is neither required nor admissible. In Article 2.12, there are six references to Exhibit "C" and none to Exhibit "B". Under Article 2.12, Heico may dispute the calculation of the Adjustments "<u>as reflected on Exhibit "C"</u>" by an Objection Notice. That Objection Notice is required to set out "<u>the basis for the dispute of the Adjustments to Exhibit "C"</u>". If Ivaco as Seller did not dispute Heico's position, then the calculations of Heico "<u>set out in Exhibit "C"</u>" would have been deemed to be conclusive. There was such a dispute. In that circumstance, under Article 2.12, KPMG is to act as an Expert and prepare a report with respect to that dispute. In

the event there is agreement or KPMG makes its report then according to Article 2.12 "such amendments shall promptly be made to Exhibit "C" to reflect either the agreement or report of the Expert and thereafter any references in the APA are to be taken to mean to Exhibit "C" as agreed or adjusted by the Expert.

3. It could not be plainer that the task of the Expert is to adjust Exhibit "C" which are actual financial statements and only to adjust Exhibit "C".

4. Ivaco seeks to have the APAs interpreted and the Expert directed to perform the task mandated by the APA. This declaration is necessary as Heico has sought to have the Expert make determinations about Exhibit "B", something that is clearly not within the purview of the Expert under the APAs and for the reasons developed further herein not capable of determination by an expert in light of the issues and controversy that Heico seeks to raise. Ivaco will ask this Honourable Court to draw an inference that the reason for Heico taking the position is not that it considers Article 2.12 to be unclear, but rather that by so doing, it delays the date where it can be sued for breach of contract for non-payment.

Application Record, Affidavit of Jocelyn Hannah dated April 26, 2005

Cross-examination of Randall Benson, pp. 10-12

5. Heico has taken the position as set out in its various letters that are part of the record that Exhibit "B" should also be changed in ways that Heico suggests. It suggests that Exhibit "B" – a forecast – was not prepared appropriately, was not correct and that, in a nutshell, there was no reasonable basis for Exhibit "B" at the time that it was incorporated into the APAs. If these issues are to be entertained for adjudication, the Affidavits of Yadron and Benson set out very clearly that there would have to be *viva voce* evidence and a trier of fact who would either accept the evidence of Ivaco or not as well as issues to the effect of execution of the APAs on November 30, 2004 without amendment, Heico's actual knowledge and a number of other matters. The previous ruling determined that this is not the role of the Expert under the APA.

Affidavits of Daniel Yadron dated June 20, 2005 and July 15, 2005

Affidavit of Randall Benson dated July 7, 2005

6. An example is perhaps in order. Heico seeks one approximately $10 million change to Exhibit "B" on the basis that numbers in a draft of Exhibit "B" were changed by senior management at Ivaco after they were sent up from the divisions in draft and that there was no reasonable basis for the changes. Benson has filed an Affidavit indicating the process followed by Ivaco as a normal practice for Exhibit "B" in past periods that was followed in this instance and that senior management of Ivaco exercised their judgement in particular areas. Heico apparently will ask a trier of fact to disbelieve Benson and other members of senior management as to the exercise of that judgement. If that issue were to be addressed, it patently could not be addressed by the Expert but rather by a court. Issues of what Heico knew at the time are also germane. The questions sought to be posed to Mr. Benson make it plain that it is not an issue for an expert.

Cross-examination of Randall Benson, pp. 32-41

7. It also is a position that does not come well from Heico's mouth at this time. On December 23, 2004, the various Ivaco entities for the three APAs delivered working capital calculations that said in total Heico owed approximately $65 million under the APAs. In its Objection Notice in January, Heico itself said we don't owe $65 million, rather we owe two of the entities $17 million. Heico did <u>not</u> pay that amount at that time nor at any time thereafter. Heico wants to argue based on Article 2.11(a) that if there are adjustments to Exhibit "C", then there will be deemed adjustments to Exhibit "B". It does not follow as a matter of law or logic that simply because there are adjustments to actual financial statements, there then must be adjustments to a prior forecast and indeed the interpretation of Article 2.11(a) is not before the court. In addition, Heico makes adjustments to Exhibit "B" without reciprocal adjustments to Exhibit "C". These are issues for another day, if ever, but the point is Heico has not even paid what it says it owes.

8. The reality is that in order to be in a position to sue Heico for breach of contract for the payment Heico admits it owes, the Ivaco Applicants must get the report in Exhibit "C" from the Expert. Heico's economic interest is to spin out and delay the delivery of that report. It may well be that what will happen upon delivery of Exhibit "C" is that Heico will take the position that changes to Exhibit "B" are necessary and then not pay Ivaco the adjusted amount or indeed any amount and Ivaco will have to sue Heico for breach of contract. However, the interpretation of Article 2.11(a) on disputed facts and on the issues under dispute set out in the Yadron and Benson Affidavits is a complicated contractual dispute as to performance of an agreement, not before the court at present and clearly not for the Expert. That argument is, effectively, a collateral attack on the determination made previously that KPMG is an expert not an arbitrator.

9. Ivaco asks this Honourable Court to grant the declaration sought in paragraph (b) of its original Notice of Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Peter Howard

Peter F.C. Howard
of counsel for the Applicants

SCHEDULE "A"

Court File No. 05-CL-5916

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

III CANADA ACQUISITION COMPANY, et al.	)	*David Ward* for the Applicants
Applicants	)	
	)	*Peter F.C. Howard* for the Respondents
v.	)	
IVACO INC., et al.	)	
Respondents	)	

HEARD: JUNE 2, 2005

Heico requested a declaration that KPMG LLP (KPMG) appointed pursuant to Article 2.12 of the Asset Purchase Agreements (APAs) is in law performing a judicial, adjudicative and/or arbitral function and to the extent the parties have not otherwise specified, proceedings in respect of the Working Capital dispute which has been submitted to it for determination are properly subject to the procedures of the *International Commercial Arbitration Act*, R.S.O. 1990, c. I.9 and the UNCITRAL Model Law in respect thereof.

Article 2.12 is set forth below with the emphasis indicated in the Heico factum.

> 2.12 Determination of Working Capital and Adjustments
>
> **The Purchaser may dispute the calculation of the Adjustments**, as reflected on Exhibit C **by notice (the "Objection Notice") in writing given to the Seller within 10 Business Days** following the delivery of such exhibit to the Purchaser. **Such Objection Notice shall specify, in detail, the basis for the dispute of the Adjustments** to Exhibit C. If the Purchaser does not delivery the

Objection Notice within the aforementioned 10 Business Day period, then the calculations of the Seller set out in Exhibit C shall be deemed to be conclusive and binding on the parties. **If the dispute is not resolved promptly by agreement, and in any event within 20 days of the delivery of the Objection Notice, either party may request KPMG LLP or its successor firm (the "Expert")** to designate a senior partner in its Hamilton office, with unrestricted access to KPMG LLP's professional practice department located in its Toronto office, **to promptly review this Agreement and the disputed items or amounts for the purpose of calculating the Adjustments,** acting as an expert and not as an arbitrator. In accepting such appointment, **the Expert shall be deemed to have been instructed to deliver to the Seller and the Purchaser, as promptly as practicable and in any event within 15 Business Days of being appointed, a report setting forth any required calculations, including the Adjustments as determined by the Expert.** Such **report shall be final and binding upon the Seller and the Purchaser**. Upon agreement with respect to the matters in dispute, such amendments shall promptly be made to Exhibit C as may be necessary to reflect such agreement or such decision, as the case may be. In such event references in this Agreement to Exhibit C shall mean Exhibit C, as so agreed or decided, as the case may be and **the Adjustments as decided by the Expert or as agreed by the parties shall be deemed to be the final Adjustments for the purposes of this Agreement**." (Emphasis added)

It will be observed that the words "acting as an expert and not as an arbitrator" were not emphasized, though Mr. Ward volunteered in his opening remarks and overview that the phrase is important but he went on to say that neither side could find a case that says these words are determinative.

Both sides agree that the issue here is one of contractual interpretation within the context of the APA as a whole to determine what the functionality of KPMG's audit role is to be. Mr. Ward submitted that what the parties should be taken as intending was to institute a procedure so as to avoid litigation. I pause to note that if that were the situation, then that would of course be negative to an arbitral function since that is a litigious procedure as indicated in *Sport Maska Inc. v. Zittrer*, [1988] 1 S.C.R. 564 at ppl 603-4 is greatly similar to the court judicial process.

One should observe the difference between an arbitrator on the one hand and an expert such as a valuator or appraiser concerning the timing of the expert being invoked, but to keep in mind that an expert selected in an agreement may be called in to work and reach a determination at perhaps two distinctly different times. An expert may be directed to establish a value or other award (as a similar equivalent determination of non-monetary matters) on what I would describe as a first call basis as there would have been no previous determination. In that case, for example, the parties to the contract would leave it to the expert to determine, say, the value of a machine. However an expert may be called in on an after the fact basis to deal with whether a previous determination is appropriate and, if not, what is the appropriate determination.

L'Heureux-Dubé at pp. 603-5 of *Sport Maska* reviewed various criteria which may be considered in an issue such as this. She stated:

> I will review **some** of these criteria, which though useful are **neither exhaustive nor conclusive**, by may serve as a guide in determining an intent which is **often far from easy to identify**. The language used by the parties may indicate their intent to submit a dispute either to arbitration or to an expert opinion. For example, the title given to the contract, the fact that the same word is used uniformly in various documents or the absence of any reference to one procedure rather than another may be taken into consideration in deciding the nature of the process contemplated by the parties. However, the courts are not bound by the terms chosen deliberately or otherwise by the parties, as these terms may well not correspond to the true intent appearing from other criteria.
>
> One of the principal aspects that emerges from an analysis of the Code of Civil Procedure, academic opinion and the case law is the similarity that must exist between arbitration and the judicial process. The greater the similarity, the greater the likelihood that reference to a third party will be characterized as arbitration. The facts that the parties have the right to be heard, to argue, to present testimonial or documentary evidence, that lawyers are present at the hearing and that the third party delivers an arbitration, award with reasons establish a closer likeness to the adversarial process than the expert opinion and tend to establish that the parties meant to submit to arbitration. The fact that the decision is final and binding is also indicative of an arbitration, but contrary to what was argued by the respondents, that criterion is not exclusive to arbitration.
>
> The function assigned to the third party is indicative of the status conferred on him by the parties. If the third party has to decide between opposing arguments presented by the parties on a given point, we are much closer to arbitration. If, however, the parties call on a third party solely to supply a necessary component of the contract, it is less certain that they intended to submit a present dispute to the third party, but rather tried to ensure that such a dispute did not arise, unless there are other criteria to the contrary. In the same vein, is

the third party called on to make a decision in light of his personal knowledge or must he choose among the various positions put forward by the parties concerned? In the first case, the situation will probably be one of an expert opinion, while in the second it will probably be an arbitration.

Moreover, if the third party is to be an arbitrator, he cannot act as the mandatory of one of the parties. For example, the fact that he has a special connection with one of them or that he is paid by only one of them seems inconsistent with the concept of impartiality, a fundamental characteristic of arbitration. Compliance by the parties with the mandatory provisions of the code is an essential condition of arbitration. At the time the submission had, inter alia, to be in writing and contain the requirements set out in the old art. 941 of the Code of Civil Procedure (now art. 1926.3 C.C.L.C.); there had to be one or three arbitrators (art. 941 C.C.P.); the parties could not undertake to arbitrate the matters listed in art. 940 of the Code of Civil Procedure (now art. 1926.2 C.C.L.C.); the arbitral award had to be supported by reasons and signed (art. 948 C.C.P., now art. 945.2 C.C.P.)

All these criteria are means of determining the true intent of the parties. However, a caveat is necessary at this point. The foregoing criteria are not necessarily exhaustive, nor are they mutually exclusive, in the sense that they may occur together and even merge into one another. They do not all have to be existing, still less be unanimously in favour of one position or another. The criteria, as their name suggests, are in fact only tools used to determine the intention disclosed by the documents and other instruments, in order to establish the function the parties actually meant to assign to the third party chosen by them. (Emphasis added)

J. Kenneth McEwan, Q.C. & Ludmila B. Herbst Commercial Arbitration in Canada (Canada Law Book, Toronto; 2004) at s. 1:60.20 state:

Whether the parties have provided for arbitration or appraisal/valuation depends on a proper interpretation of their agreement. To determine whether a written document provides for arbitration or valuation, "the intention must be ascertained from the whole document and permissible facts", with each case to be decided according to its particular circumstances.

The terminology employed by the parties to the submission or agreement, while of importance in construing their agreement, is not conclusive; the terms used may not correspond to the true intent appearing from other criteria.[71] [[71]*Sport Maska Inc. v. Zittrer,* [1988] 1 S.C.R. 564 at p. 603] In determining the status of a person appointed under the terms of an agreement, the function of the person appointed is more important than his or her title. A person described as an appraiser or valuator may nevertheless qualify as an arbitrator. Failure to refer to the word "arbitrator" is also not determinative.[74] [[74]*Precision Drilling Corp. v. Matthews Equipment Ltd.,* [2000] 10 W.W.R. 498 (Alta. Q.B.) at p. 509] **That being said, the terminology should not be ignored**. For example, the title given to the contract, the fact that the same word is used uniformly in various documents, and the absence of any reference to on e procedure rather than another, may be taken into consideration in deciding the nature of the process contemplated by the parties. Further, where a solicitor who knows the difference between arbitration and valuation prepares an agreement, the use of the term "valuer" may signify that evaluation was intended.[77] [[77]*Laidlaw v. Campbellford Lake Ontario & Western Railway* (1914), 31 O.L.R. 209 at p. 218, aff'd 50 S.C.R. 422n, *per* Meredith C.J.O.] Consistent use of the word "appraiser" throughout a lease may indicate that what was intended by the parties was that the persons were appointed to act as valuators and not to conduct an arbitration, particularly where there is no suggestion that evidence would be taken and no reference to arbitration legislation.[78] [[78]*Premier Trust Co. v. Hoyt* (1969) , 3 D.L.R. (3d) 417 (Ont. C.A.) at p. 419] (Emphasis added)

Mr. Ward submitted that there were 6 elements of the process set out in Art. 212 which support an arbitral role for KPMG.

1. What ● the process is a dispute - however see above where I have discussed that an expert may come in to resolve the correct determination on an after the fact basis - which would presume a dispute.

2. There is an Objection Notice which specifies in detail the basis for the dispute in the objections; it is said that this notice defines the dispute which is not just an unresolved problem.

3. The decision maker is a third party neutral. However one would normally expect an expert to be neutral, reasonable and objective - even in s situation where, say, the auditor of the firm is asked to given an opinion.

4. The expert is to promptly review the disputed accounts. It was suggested that this must imply a consideration of the evidence, namely the Objection Notice and Ex. C. However it seems to me that what KPMG was to do was "to promptly review this agreement and the disputed items or audits for the purpose of calculating the adjustments"; there was no such ● of the Objection

Notice. Rather it would seem that given the choice of wording and the scheme set up, that the detailed basis for objection would be to facilitate the discussion between the parties - Heico and Ivaco - to see if the dispute could be resolved by agreement. Further there does not appear to be any facility for Ivaco to make any counter-submissions (to the Objection Notice) to KPMG, at least as set out in the wording of Art. 2.12. This would be contrary to the rules of natural justice. Mr. Ward submits that if the matter is determined by me to be arbitral, then the UNCITRAL Model Law would apply and allow Ivaco to make counter submissions. While that is true, it would seem to me to be contrary to the very tight time lines envisaged by Art. 2.12 and particularly it does not specify the true period within which Ivaco would make such counter-submissions.

5. The report is to be final and binding. However, it is acknowledged that an expert's report (with expert acting ● expert) may also be final and binding.

6. There is a structured process with fine timelines. It would not seem to me that the structured process is inconsistent with an expert's determination; rather it would seem more consistent with an expert's determination than an arbitrator's determination. See above in (4) regarding the time lines. Indeed it appears that both parties wished to have a sooner, rather than later, report from KPMG - namely 15 business days after appointment.

It is not disputed that the parties here are to be taken as sophisticated commercial parties which have had the assistance of counsel in drafting Art. 2.12, See *Laidlaw* at p. 485.

One should also consider that it appears that these parties ● to have someone make the determination who had expertise in the subject area. See also Art. 2.13 where there is a similar provision regarding the appointment of an expert in the environmental field.

In *Taylor v Seldey* (1912), 56 Sol. Jo. 253 (KB) it was stated by Neville J. at p. 253:

> The parties, in my opinion, intended to take advantage of the procedure under the Arbitration Act. The cases are quite clear that you cannot make a valuer an arbitrator by calling him so or *vice versa;* but, in my opinion, this is an agreement for an arbitration in the events which have happened as to value.

I agree that you cannot make a camel into a duck by merely calling the camel a duck.

However what we have here is that the parties have agreed that KPMG is to be "acting as an expert and not as an arbitrator." Thus, KPMG is not merely called an "expert", it is to act as an expert, but furthermore it is not to act as an arbitrator. In *Palacath Ltd. v. Flanagan* [1985] 2 All E.R. 161 (QBD) Mars-Jones J. was dealing with a clause which used the same wording in essence:

> 8. For this purpose the surveyor: (1) will act as an expert and not as an arbitrator (2) will consider any statement of reasons or valuation or report submitted to him as aforesaid but will not be in any way limited or fettered thereby (3) will be entitled to rely on his own judgement and opinion (4) will within two months after his appointment or within such extended period as the Landlord and the Tenant may agree give to the Landlord and to the Tenant written notice of the amount of the rent as determined by him and his determination will be final and binding on the Landlord and on the Tenant.

He stated at p. 165:

> The parties expressly stipulated in cl 8 of the second schedule that the surveyor appointed 'will act as an expert and not as an arbitrator'. Counsel for the plaintiff submitted that those words demonstrated (1) that the parties were aware of the difference between an arbitrator and an expert, (2) that they did not want to appoint an arbitrator and (3) that they did not want him to act as an expert. I must confess that I, too, consider it would be fanciful to imagine the parties intended the surveyor to act as an arbitrator or quasi-arbitrator despite such a clear and unambiguous stipulation to the contrary.
>
> Counsel for the defendant on the other hand has contended and countered that argument by submitting that these words alone are not conclusive of the matter, as Greer J stated in *Taylor v. Yielding* (1912) 25 SJ 253: 'Youd cannot make a valuer an arbitrator by calling him so, or vice versa.' Clause 8 is not conclusive of the matter. However, it is a matter which I must take into account, and it is in my judgment a very potent one.

I note in this respect that it does not appear that instructions (2) and (3) played any factor in that decision. It would however seem to me that they may have implicitly bolstered the non-arbitral determination.

Further there is no reference in Art. 2.12 to any arbitration legislation (and none specifically to the UNCITRAL Model Law) nor to arbitration; indeed as discussed above the parties did not wish KPMG to act as an arbitrator.

While there may be certain elements in Art. 2.12 which may be said to be supportive of an arbitral function for KPMG, when one takes into account all the factors and criteria as discussed above, in my view the balance heavily favours a non-arbitrarily role. The application is therefore dismissed.

Order accordingly.

J.M. Farley

Court File No. 05-CL-5876

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IVACO INC. and 1039028 ONTARIO INC. Applicants	)	*Peter F.C. Howard* for the Applicants
v.	)	*David Ward* for the Respondents
III CANADA ACQUISITION COMPANY, SIVACO WORE GROUP 2004 L.P., HEICO HOLDING INC. and THE HEICO COMPANIES, L.L.C. Respondents	)	

HEARD: JUNE 2, 2005

Ivaco moved to strike various portions of the Yadron affidavit as inadmissible.

I find the cases of *Reardon Smith Line Ltd. v. Hansen-Tangen*, [1976] 1 W.L.R. 989 (H.L.) at pp. 995-6; *Prenn v. Simmonds*, [1971] 1 W.L.R. 1381 (H.L) at pp. 1384-5; *Toronto-Dominion Bank v. Leigh Instruments Ltd. (Trustee of)* (1998), 40 B.L.R. (2d) (Ont. Gen. Div. [Commercial List]) at paras. 411 and 415, affirmed (1999), 45 O.R. (30) 417 (C.A.), leave to appeal refused (2000), 139 O.A.C. 399 (note) (S.C.C.); and *Edper Brascan Corp. v. 177373 Canada Ltd.* (2000), 50 O.R. (3d) 525 (S.C.J.) at p. 434, affirmed (2002, 22 B.L.R. (3d) 42 (Ont. C.A.) persuasive, as well it's inappropriate for an affiant in essence to argue the case and make submissions regarding the law prevailing in Ontario. (That should be reserved for the legal argument in the factums and by counsel at the hearing). See *Ontario Hydro Networks Co. v. Haldimand Hydro-Electric Commission* (2001), 2001 CarswellOnt 2407 (SCJ) at para. 23.

Mr. Howard indicated that he would have no objection to a resworn streamlined affidavit from Yadron. Paragraphs 23-25 were taken off the table based on previous agreement that there were three Ivaco companies in question, but I would observe that Yadron may well wish to reflect upon some of the language – eg. "most egregious example" in para. 24. Mr. Howard also indicated that he could live with paras. 4, 12, 13, 27, 28, but I would similarly observe that Yadron may wish to revoke these paragraphs as well. Otherwise, the shaded portions of the other paragraphs are to be struck, but as discussed appropriate elements of those paragraphs may be reworded in a resworn streamlined affidavit.

Order accordingly.

J.M. Farley