THIS IS EXHIBIT "8" REFERRED TO IN THE AFFIDAVIT OF STANLEY H. MEADOWS, SWORN BEFORE ME THIS 29TH DAY OF SEPTEMBER, 2006.

A NOTARY PUBLIC

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

Court File No. 05-CL-5916

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

BETWEEN:

III CANADA ACQUISITION COMPANY,
SIVACO WIRE GROUP 2004 L.P.,
HEICO HOLDING, INC. and
THE HEICO COMPANIES, L.L.C. and the other Applicants listed in Schedule "A"

Applicants

- and -

IVACO INC.
and the other Respondents listed in Schedule "B"

Respondents

FACTUM OF THE APPLICANTS*** MOTION RE: ARBITRATION CLAUSE (RETURNABLE JUNE 2, 2005)

CASSELS BROCK & BLACKWELL LLP
2100 Scotia Plaza
40 King Street West
Toronto, Ontario
M5H 3C2

E. Bruce Leonard LSUC#: 12015D
Tel: (416) 869-5757
Fax: (416) 640-3027

David S. Ward LSUC#: 33541W
Tel: (416) 869-5960
Fax: (416) 360-8877

Solicitors for the Applicants

PART I – OVERVIEW

1. This application concerns the Interpretation of the dispute resolution provisions of three asset purchase agreements (the "APAs") entered into in August 2004 by the applicants ("Heico" or "Purchasers") for the purchase of the businesses formerly maintained by Ivaco Rolling Mills Limited Partnership, Ifastegroupe and Company Limited Partnership and Ivaco Inc (collectively, "Ivaco" or "Sellers").

2. The Purchasers respectfully request a declaration that the "Expert" appointed under Article 2.12 of the 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 dispute which has been submitted to the Expert for determination are properly subject to the procedures of the *International Commercial Arbitration Act*, R.S.O. 1990, c. I.9 ("ICCA") and the *UNCITRAL Model Law on Commercial Arbitration* ("Model Law").

PART II – FACTS

3. The facts are not contentious. By agreement of counsel, the relief described in paragraph 2 of this factum, above, will be heard on June 2, 2005 with reference to the evidence filed by Ivaco Inc. and 1039028 Ontario Inc. in a related application bearing court file no. 05-CL-58876. The evidence, specifically, consists of the affidavit of Joceyln Hannah sworn April 26, 2005 and annexing nine exhibits.

4. The dispute resolution provisions of the APAs read:

2.10 <u>Delivery of Exhibit A: Calculation of Exhibits A and C</u>

> (a) Three Business Days prior to the Closing Date, the Seller will cause to be prepared and delivered to the Purchaser, Exhibit A reflecting the Assumed Liabilities, Capex Expenditures and other line items in the form of Exhibit A annexed hereto estimated as at the Effective Time of Closing, prepared in accordance with either (i) Canadian GAAP, and, to the extent consistent with Canadian GAAP, on a basis consistent with the past practice of the Seller and each other Selling Party or (ii) as otherwise specifically provided in this Agreement. Concurrent with the delivery of Exhibit A, the Seller will cause to be delivered to the Purchaser a copy of all valuations

prepared in support thereof. To the extent that a valuation is available prior to such date, the Seller will, acting reasonably, provide a copy of such report to the Purchaser.

(b) For purposes of preparing Exhibits A and C:

(i) the valuation of Post-Retirement Benefits will be performed based on:

(A) current membership data as of the Valuation Date;

(B) the discount rate determined in accordance with CICA handbook Section 3461 as of the Valuation Date;

(C) the valuation method as prescribed by the CICA handbook Section 3461;

(D) a per capita claim cost based on claims experience up to June 30, 2004 using the methodology described on page 8 of Appendix III of the Mercer Report; and

(E) all other assumptions will be the same as those described in the Mercer Report for the valuation of Post-Retirement Benefits.

The actuarial liability calculated on the Valuation Date will be adjusted to the Closing Date by adding interest based upon the discount rate used in the valuation, and current service cost for benefit accrual, reduced by expected benefits paid in respect of that period and, for purposes of preparing Exhibit A, the projection of actuarial liability will be made to October 31, 2004 instead of the Closing Date;

(ii) the Pension Deficit as at the Closing Date shall be calculated based on actuarial estimates made on a going-concern basis, giving effect to the following:

(A) the actuarial liability based on a valuation as at the Valuation Date based on current membership data as at the Valuation Date and giving effect to all negotiated amendments to an Assumed Pension Plan, and using the 1994 Group Annuity Mortality (Static) Table and a discount rate of 6.75% per annum with all other assumptions being the same as those used in the last valuation of each

Assumed Pension Plan prepared by Mercer Human Resource Consulting Limited as listed on Schedule 2.10(b)(ii);

The actuarial liability of each Assumed Pension Plan calculated on the Valuation Date will be adjusted to the Closing Date by adding interest at the rate of 6.75% per annum and current service cost for benefit accrual in respect of that period, without making any adjustment for gains (losses) arising from retirements, terminations or deaths occurring between the Valuation Date and the Closing Date;

(B) the asset value as of the Closing Date determined with the methodology used in the last valuation of each Assumed Pension Plan prepared by Mercer Human Resource Consulting Limited for going-concern valuation purposes as listed on Schedule 2.10(b)(ii), that is an adjusted market value method or a market value method as was used in such last valuation of an Assumed Pension Plan, and based on the market value of the assets as reported by the custodian of the Assumed Pension Plan, reduced by the amount of benefits due but unpaid. For greater certainty, the asset value will not include the Pension Missed Payments;

(C) in calculating the Pension Deficit attributable to the Mixed Pension Plan, the Pension Deficit of the Mixed Pension Plan calculated on the Closing Date will be adjusted to reflect the fact that the Purchaser is assuming liabilities only in respect of a portion of the plan relating to the transferred members (active and inactive) that are assumed by the Purchaser; and

(D) for purposes of preparing Exhibit A, the projection of actuarial liability will be made to October 31, 2004 instead of the Closing Date and the asset value will be an estimate of the asset value as at October 31, 2004 instead of the Closing Date, determined using the same methodology as described in paragraph 2.10(b)(i)(B).

2.11 Delivery of Exhibit C

(a) As promptly as practicable following the Closing Date, and in any event within 23 days from the Closing Date, the Seller will cause to be prepared and delivered to the Purchaser (i) Exhibit C reflecting the Assumed Liabilities. Working Capital and Capex Expenditures and other line items on the form of Exhibit C annexed hereto as at the Effective Time of Closing, prepared in accordance with Canadian GAAP and, to the extent consistent with Canadian GAAP, applied on a basis consistent with the past practice of the Seller and each other Selling Party and prepared, to the extent Section 2.10 applies, in accordance with Section 2.10 and, in the case of Inventory, based on a physical count of Inventory performed on the Closing Date jointly by the Seller and the Purchaser in accordance with the Selling Parties' past practices and a calculation of the Adjustments based thereon and (ii) a copy of the valuation prepared in support thereof. The amount (each an "Adjustment" and collectively the "Adjustments") by which:

(i) the Working Capital as shown on Exhibit C exceeds the Estimated Working Capital shown on Exhibit B will be a positive Adjustment (and any shortfall a negative Adjustment); and

(ii) the Cash Amount as shown on Exhibit C exceeds the Estimated Cash Amount reflected on Exhibit A will be a positive Adjustment (and any shortfall a negative Adjustment.

If as a result of the process specified in this Section 2.11 or in Section 2.12, the basis for calculation and preparation of Exhibit C differs from the basis on which Exhibits A and B were calculated and prepared, then Exhibits A and B shall be deemed to be amended so as to reflect an identical basis for calculation as Exhibit C. Notwithstanding any change to Exhibit A made in accordance with the foregoing sentence, the Purchaser shall receive credit for all amounts actually paid as the Estimated Cash Amount as shown on the original version of Exhibit A prepared and delivered hereunder, which amounts will be taken into consideration when calculating an amount to be paid to or by the Purchaser in connection with Section 2.14.

(b) In order to permit the Seller to prepare such statements and to perform such Inventory count, the Purchaser shall provide the Seller and its accountants, representatives and advisors access to the Business and the Purchased Assets, including all working papers, computer records, systems and other information technology, and access to the Purchaser's employees, agents, external accountant and auditors, during normal business hours as reasonably requested and, in the case of the Inventory count, at such other times outside of normal business hours as requested by the Seller and in order to minimize disruption to the Purchaser's operation of the Business. The Purchaser shall instruct its employees, agents, external accountant and auditors to provide all assistance requested by the Seller to allow the Seller to prepare such statements and to perform such Inventory count.

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 deliver 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)

5. The APA transactions closed on December 1, 2004. Pursuant to Article 2.11, the Sellers prepared and delivered documents in the form of Exhibit C to the Purchasers on December 23, 2004.

Hannah Affidavit, Exhibit "B"

6. As set out (and bolded) above, the APAs contain provisions permitting the Purchasers to dispute the calculation of any Adjustments by providing an Objection Notice, which "shall specify, in detail, the basis for the dispute" of the Adjustments.

7. As the issues identified in the Purchasers' Objection Notices were not resolved in accordance with the Article 2.12 time requirements, the Purchasers invoked the Article 2.12 dispute resolution procedures ("Dispute Resolution Process") on April 14, 2005. Specifically, KPMG was asked to designate a Senior Partner in its Hamilton Office (i.e.- the Expert") to "promptly review [the APAs] and the disputed items or amounts" for the purposes of determination of the Adjustments in a final and binding manner in accordance with the APAs.

Hannah Affidavit, Exhibit "G"

9. The Sellers wrote to the Expert on April 18, 2005 asking, among other things, that the Expert "take no steps to resolve the disputes that exist between Ivaco and Heico under the APAs".

Hannah Affidavit, Exhibit "H"

10. The Sellers' correspondence to the Expert of April 18, 2005 did not question the Expert's jurisdiction to resolve disputes having to do with Exhibit "C". Rather, it was and remains the Sellers' submission simply that the Expert did not have jurisdiction to make adjustments to the calculation set out in Exhibit "B".

Hannah Affidavit, Exhibit "H"

11. Since then, certain of the Sellers have commenced an application asking this Honourable Court to rule, as a preliminary matter, on the narrow issue of whether or not the Expert is authorized or directed to make certain types of "adjustments or Adjustments" in the context of the Dispute Resolution Process that has been commenced. A pending motion within the application seeks to strike portions of the evidence filed by the Purchasers in opposition to the relief sought on the application.

PART III – THE ISSUE

12. The issue is as follows:

(a) does the "Expert" appointed under Article 2.12 of the APAs perform a judicial, adjudicative and /or arbitral function and, to the extent the parties have not specified, are proceedings in respect of the dispute which has been submitted to the Expert for determination subject to the *International Commercial Arbitration Act*, R.S.O. 1990, c. I.9 ("ICAA") and the *UNCITRAL Model Law on Commercial Arbitration* ("Model Law")?

PART IV – LAW.

13. The initial question is whether a determination under s. 2.12 of the APA involves an arbitration or an expert opinion on a matter about which the parties are in some doubt. The distinction is critical in terms of the rights of the parties with respect to the manner in which Adjustments to the Working Capital are determined. In broad terms, an arbitration is a proceeding in which the arbitrator makes a decision based on the evidence and submissions of the parties, and a valuation is a report on a matter by a person specially skilled in it based on his skill, training and expertise. The distinction is usually expressed by saying that an arbitrator is appointed to determine a particular matter, such as the price of goods, for the purpose of settling a dispute which has arisen between the parties, whereas an Expert is appointed to assist in the resolution of a matter before any dispute has arisen and with the object of preventing a dispute.

***Montgomery Agencies Ltd. v. Krischke* (1989), 76 Sask. R. 143, at para. 8**

14. An arbitration therefore presupposes a controversy or difference to be ruled upon, and the arbitrator proceeds in a judicial manner. On the other hand, an expert opinion is generally a mere auxiliary feature of a contract, the purpose of which is not to adjudicate a controversy, but to avoid one.

***Montgomery Agencies Ltd. v. Krischke, supra.*, at para. 9.**

15. The following criteria constitute a process as an arbitration:

> 1. A formulated or defined dispute must exist between the parties, not just an unresolved problem or matter about which they disagree;
>
> 2. The parties must intend to make submissions of their respective arguments about the existing dispute to a decision-maker whom they, by the terms of their agreement, have entrusted to make a decision;
>
> 3. The decision-maker must be a third party neutral, *i.e.*, a person or persons who are impartial and who have the decision on the submissions (including evidence or not).

***Zittrer v. Sport Maska Inc.*, [1988] 1 S.C.R. 564 (S.C.C.), at para. 204.**

***Precision Drilling Corp. v. Matthews Equipment Ltd.*, [2000] 10 W.W.R. 498 (Alta. Q.B.), at para. 22.**

16. In short, a process by which parties submit a defined dispute to a binding ruling by an independent third party is, on a functional analysis, an adjudicative or arbitral process. An expert utilizes his own expertise and knowledge to provide an opinion on a particular topic which does not depend on evidence and argument presented by the parties, but an arbitrator conducts an inquiry in which he hears the respective cases of the parties and reaches a decision on evidence before him. An arbitral function exists where the parties are provided with an opportunity to make submissions to an independent third party in support of their respective positions and they agree to accept the third party's decision as binding.

***Concord Pacific Developments Ltd. v. British Columbia Pavilion Corp.* (1991), 85 D.L.R. (4th) 402 (B.C.C.A.), at para. 27.**

17. In determining the status of a person appointed under the terms of an agreement, function is more important than title. Whether the term "arbitrator", "valuator" or "expert" is used is therefore only of minimal relevance. Thus, a person described as a "valuator" or "expert" may nevertheless qualify as an arbitrator.

***Taylor v. Yielding* (1912), 56 Sol. Jo. 253.**

McEwan and Herbst, <u>Commercial Arbitration in Canada</u> (2004), at pp. 1-16 to 1-17.

***Concord Pacific v. B.C. Pavilion, supra.*, at para. 20.**

18. In the circumstances herein, notwithstanding the statement that the Expert acts "as an expert and not as an arbitrator", the nature of the function under s. 2.12 of the APA is arbitral. More particularly, the Expert is independent of both parties and is called upon to determine a "dispute" which has arisen with respect to the calculation of the Adjustments. The parties are entitled to put before him material which specifies "in detail, the basis for the dispute of the Adjustments", and the Expert is to make a report which is "final and binding" on the parties. These aspects distinguish the role of the Expert from that of a mere valuator, as they involve decision making and go well beyond the simple application of personal expertise.

***Precision Drilling v. Matthews Equipment, supra.*, at para. 27.**

19. The ICCA is applicable because the parties to the APAs have their places of business in different countries. This being the case, and to the extent not otherwise specified, the Model Law provides for procedures applicable to the resolution of the dispute submitted to the Expert. Most importantly, under Article 16 of the Model Law, which is incorporated by reference into the statute, the arbitration tribunal is entitled to rule on its own jurisdiction.

***International Commercial Arbitration Act*, R.S.O. 1990, c. I.9, Art. 16.**

20. The relief sought by Ivaco in its application for a declaration that the Expert has the "jurisdiction to adjust Schedule "C" but not Schedule "B" is misconceived and premature. The Expert has not yet made any ruling as to the matters which he will consider in making his determination under s. 2.12 of the APA and, in any event, it is not until he issues his report that it would be open to Ivaco to attack it on the basis that the Expert exceeded his jurisdiction.

***Rio Algom Ltd. v. Sammi Steel Co.* (1991), 47 C.P.C. (2d) 251 (Ont. Gen. Div.), at paras. 13-15.**

***International Commercial Arbitration Act*, R.S.O. 1990, c. I.9, Art. 16.**

PART V – RELIEF REQUESTED

21. Heico respectfully requests a declaration that the Expert appointed under Article 2.12 of the 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 him for determination are properly subject to the procedures of the *International Commercial Arbitration Act*, R.S.O. 1990, c. I.9 and the Model Law.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

David S. Ward

CASSELS BROCK & BLACKWELL LLP
2100 Scotia Plaza
40 King Street West
Toronto, Ontario
M5H 3C2

E. Bruce Leonard LSUC#: 12015D
Tel: (416) 869-5757
Fax: (416) 640-3027

David S. Ward LSUC#: 33541W
Tel: (416) 869-5960
Fax: (416) 360-8877

Solicitors for the Applicants

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Montgomery Agencies Ltd. v. Krischke* (1989), 76 Sask. R. 143.

2. *Zittrer v. Sport Maska Inc.*, [1988] 1 S.C.R. 564 (S.C.C.).

3. *Precision Drilling Corp. v. Matthews Equipment Ltd.*, [2000] 10 W.W.R. 498 (Alta. Q.B.).

4. *Concord Pacific Developments Ltd. v. British Columbia Pavilion Corp.* (1991), 85 D.L.R. (4th) 402 (B.C.C.A.).

5. *Taylor v. Yielding* (1912), 56 Sol. Jo. 253.

6. McEwan and Herbst, *Commercial Arbitration in Canada* (2004).

7. *Rio Algom Ltd. v. Sammi Steel Co.* (1991), 47 C.P.C. (2d) 251 (Ont. Gen. Div.).

8. *International Commercial Arbitration Act*, R.S.O. 1990, c. I.9, Art. 16.