

**ICC Arbitration Case 8213 of March 1995**  
**[Digest of presentation at ICAB, Vol. 11/No. 2 (Fall 2000) 49-52]**

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*Facts.* The parties entered into two agreements for the supply of steel billets. Upon delivery, the goods were shipped to buyer's customer who encountered problems when processing them. Claimant buyer alleged that the goods were defective and not suitable for hot rolling, as required by the agreements. Respondent seller filed a counterclaim ascribing the fault to the customer's installation.

*Applicable law.* The Terms of Reference of the arbitration stipulates:

"(a) the Purchase Agreement dated . . . was governed by the law of the State of New Jersey, including the New Jersey version of the Uniform Commercial Code ('NJUCC'); and

"(b) the Purchase Agreement dated . . . was governed by the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) ('UNISG')." **[page 50]**

*Burden of proof.* The Arbitrator ruled: "The buyer, under each legal system, who claims goods delivered are defective bears the burden of proving both the existence of an express specification or an implied warranty and the breach by the seller of that specification or warranty. Neither of these codified commercial laws contains any provision which affects the general provisions of law placing the burden of proof on the claiming party. For the claims based on breach of the Purchase Agreements, the Arbitrator has considered the burden of proof to be on Claimant [buyer] and for the counterclaim, the burden is on Respondent [seller]. **[page 50-51]**

*Conformity of goods* [express and implied warranties]. Citing counterpart provisions of the CISG and the UCC (CISG Article 35(1), 35(2)(a), 35(2)(b); UCC Sections 2-313, 2-314, 2-315), the Arbitrator stated:

- *Express warranties.* "Under each of the applicable laws, Respondent [seller] had the obligation to deliver billets which conformed to the description in the Purchase Agreements, i.e., the expressly warranted quality. . . . Claimant [buyer] failed to prove Respondent [seller's] billets did not meet the express specifications in the Purchase Agreements, either as to the content of the steel or as to the capacity of the billets to be hot-rolled to plain bar."
- *Implied warranties.* "The governing laws place additional implied warranty burdens on Respondent, as the seller of goods, insofar as the Purchase Agreements have not expressly excluded such implied warranties. These are statutory as opposed to contractual warranties, which the buyer has the right to rely upon, if not excluded in the contract.
  - *Fitness for the purpose for which the goods would normally be used.* "The Arbitrator has considered that the phrase in the Purchase Agreements 'For production of HR plain bar in coil' is the expression of an express warranty of fitness for use. The evidence establishes that one of the ordinary uses for the quality of billets purchased by Claimant [buyer] under the Purchase Agreements was for hot-rolling into plain bar. Respondent [seller] is fully

bound by the express warranty, which effectively matches the statutory implied warranty under each legal system."

- *Fitness for a particular use.* "A more difficult question arises, however, with respect to th[is] second implied warranty . . . As expressed in each of the relevant laws, this implied warranty comes into effect (assuming it is not excluded, which it is not in the Purchase Agreements) only if two conditions are met: (i) that the seller knows or has reason to know of the particular purpose intended by the buyer (i.e. a particular purpose expressly or impliedly made known to the seller, and (ii) that the buyer has relied upon the sellers' skill or judgment in providing the goods in question to meet that particular purpose.

- "The particular purpose which was not met and on which the Claimant [buyer's] claim . . . is based, is the hot-rolling into plain bar at [Claimant's customer's] mill . . . Since the Arbitrator has found, above, that Respondent [seller] was not aware at the time of entering into the Purchase Agreements of the identity of the end-user, he must conclude that Respondent, as seller, did not know or have reason to know of such a particular purpose intended by Claimant, as buyer. Hence this implied warranty cannot come into play.

- "If Claimant [buyer] had proposed a further express specification that the steel billets would be capable of being hot-rolled in [Claimant's customer's] mill, and such a term had been accepted by Respondent [seller] (the evidence suggests it might not have been), the failure of the billets to pass successfully through that mill could well have constituted a breach of the Purchase Agreements. But no such specification was proposed or accepted. [page 51] Or if Claimant [buyer] had purchased the billets for rolling in their own mill, which mill was known to Respondent [seller], the case on an implied warranty of fitness for a particular purpose would have been much closer. Here, the billets were purchased for rolling in the mill of an unnamed customer of Claimant [buyer], whose identity at the time of contracting was intentionally kept from Respondent [seller] for commercial reasons . . ." [page 52]

*Usages and practices* [Art. 9] / *Intent* [Art. 8]. The Arbitrator points out: "A further legal question is presented as to whether Respondent [seller] is obligated, under either or both governing laws, to comply with alleged steel industry standards and/or practices, that no billets should be delivered with such a high level of 'inclusions', even though no such express requirement on this [was] included in the Purchase Agreements.

- "Claimant [buyer] argues, in effect, they contracted to purchase billets meeting industry standards or inclusions, which according to them, if met would have made the billets suited for hot rolling at [Claimant buyer's customer]. Respondent [seller] denies it had any separate contract obligation under either governing law relating to the level of 'inclusions'. The evidence supports Respondent [seller's] view that the billets, whatever their inclusion content *were* suited for the contractually-specified intended purpose of 'producing hot-rolled plain bar in coil', as that term is used generically.
- "Since such a requirement is not expressly stated in the Purchase Agreements to be binding on Respondent [seller], the Arbitrator finds it would have to constitute an implied term of the Purchase Agreements, or to be the subject of an implied warranty under the governing laws . . .

- "To find there is an implied term of a contract for sale of goods under either applicable law, Claimant [buyer] would have had to demonstrate by the preponderance of the evidence that the parties had agreed to such term. That evidence can be derived from the conduct of the parties or any other factual element which proves the parties' mutual agreement on the unwritten term (NJUCC 2-204 and 2-207(3), UNISG Art. 18(1)).
- "The evidence in the record does not support a finding that there was any mutual agreement or hence any implied term as to the level of inclusions. Respondent [seller] made no promises or representations to Claimant [buyer] at the time of entering into the Purchase Agreements, or at a later time, related to the inclusion content. Neither is there evidence to support a finding of an implied warranty under the criteria noted above relating to the inclusions in steel billets used for hot-rolling of plain bar.
- "Moreover, Respondent [seller's] evidence is accepted, in this sale to Claimant [buyer] as a 'middle- man', Respondent [seller] -- as a matter of company policy -- sold the steel billets only on the basis of the size, chemistry and the other specifications expressly set forth in the Agreements. The Arbitrator found that this was accepted by Claimant [buyer] in their pre-delivery correspondence to Respondent [seller] where Claimant [buyer] confirmed they had not guaranteed to [their customer] the tensile and other mechanical properties of the billets.
- "In these circumstances, the Arbitrator rules Claimant [buyer] ha[s] not met the burden to prove Respondent [seller] failed under the governing substantive laws to comply with applicable steel industry standards or practices as to the level of inclusions in the delivered billets and no responsibility can be placed on Respondent [seller] on such a ground."**[page 52]**