

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term, 2006

4 (Argued: October 6, 2006

Decided: February 5, 2007

5 Errata filed: February 21, 2007)

6 Docket No. 06-1080-cv

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8 AON FINANCIAL PRODUCTS, INC., a Delaware Corporation, and AON  
9 CORPORATION, a Delaware Corporation,

10 Plaintiffs-Appellees,

11 - v -

12 SOCIÉTÉ GÉNÉRALE, a French Banking Institution,

13 Defendant-Appellant.

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15 Before: FEINBERG, CABRANES, and SACK, Circuit Judges.

16 The plaintiffs, Aon Corp. and its subsidiary Aon  
17 Financial Products, Inc., brought this suit for alleged breach of  
18 contract against the defendant, Société Générale, in the United  
19 States District Court for the Southern District of New York. The  
20 district court (George B. Daniels, Judge) denied the defendant's  
21 motion for judgment on the pleadings and granted summary judgment  
22 to the plaintiffs.

23 REVERSED.

24 DAVID M. LINDLEY, Pillsbury Winthrop  
25 Shaw Pittman LLP (Eric Fishman, of  
26 counsel), New York, NY, for Defendant-  
27 Appellant.

28 CHRISTOPHER LANDAU, Kirkland & Ellis LLP  
29 (Jeffrey B. Wall, of counsel),  
30 Washington, DC, for Plaintiffs-  
31 Appellees.

1 Joan A. Stumpf, Cadwalader, Wickersham &  
2 Taft LLP, New York, NY, for amicus  
3 curiae The International Swaps and  
4 Derivatives Association, Inc.

5 SACK, Circuit Judge:

6 On August 8, 2000, the plaintiffs, Aon Corp. and its  
7 subsidiary, Aon Financial Products, Inc. ("AFP", together "Aon"),  
8 brought suit in the United States District Court for the Southern  
9 District of New York seeking recovery in breach of contract  
10 against Société Générale ("SG") under a \$10 million credit  
11 default swap agreement<sup>1</sup> between them dated March 8, 1999 (the  
12 "Aon/SG CDS contract").

13 The Aon/SG CDS contract provides that if a "Credit  
14 Event" occurs before the defined "Termination Date" of the  
15 agreement and Aon notifies SG of that Credit Event, then SG must  
16 pay Aon \$10 million. Aon contends that a Credit Event occurred  
17 when the Government Service Insurance System ("GSIS"), an agency  
18 of the Philippine Government, defaulted on a surety bond that  
19 GSIS had issued to cover investments in a project with respect to  
20 which Bear Stearns International Limited ("BSIL") later made a  
21 loan. BSIL, in an effort to protect itself against the risk of  
22 GSIS defaulting on the bond, entered into a Credit Default Swap

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<sup>1</sup> "A credit default swap is the most common form of credit derivative, i.e., a contract which transfers credit risk from a protection buyer to a credit protection seller." Eternity Global Master Fund Ltd. v. Morgan Guar. Trust Co. of N.Y., 375 F.3d 168, 171-72 (2d Cir. 2004) (internal quotation marks, footnote, and brackets omitted). See also id. at 171-74 (discussing credit default swap terminology and documentation).

1 Agreement with Aon (the "BSIL/Aon CDS contract"). In a separate  
2 suit, the district court determined that a Credit Event occurred  
3 under the BSIL/Aon CDS contract when GSIS defaulted on the surety  
4 bond. See Ursa Minor Ltd. v. Aon Financial Products, Inc., 2000  
5 WL 1010278, at \*6, 2000 U.S. Dist. LEXIS 10166, \*19-\*20 (S.D.N.Y.  
6 July 21, 2000) ("Ursa Minor") (Allen G. Schwartz, Judge), aff'd,  
7 7 Fed. Appx. 129 (2d Cir. 2001). Aon argues that if a Credit  
8 Event occurred under the BSIL/Aon CDS contract, then a Credit  
9 Event also must have occurred under the Aon/SG CDS contract that  
10 is the subject of this suit, and that Aon therefore was entitled  
11 to payment thereunder. The issue on this appeal is whether a  
12 Credit Event occurred under any of the definitions set forth in  
13 the Aon/SG CDS contract such that SG's refusal to pay Aon  
14 constituted breach of contract. We disagree with the  
15 determination by the district court (George B. Daniels, Judge)  
16 that a Credit Event occurred within the meaning of that term in  
17 the Aon/SG CDS contract, which prompted the court to grant the  
18 plaintiffs' motion for summary judgment and deny the defendant's  
19 motion for judgment on the pleadings. We therefore reverse the  
20 judgment of the district court and enter judgment in favor of SG.

#### 21 **BACKGROUND**

22 This case arises out of one of a series of transactions  
23 related to the financing of a condominium complex in the  
24 Philippines. In 1999, BSIL agreed to loan Ecobel Land, Inc.  
25 ("Ecobel") \$9.3 million to build the condominiums. Ecobel was  
26 obligated under this agreement to repay BSIL \$10 million on

1 March 7, 2000. As a condition precedent to that loan, BSIL  
2 required that Ecobel procure a surety bond from GSIS that  
3 guaranteed repayment of the full \$10 million in the event that  
4 Ecobel defaulted on its loan. GSIS then purportedly transferred  
5 to BSIL as obligee a \$10 million GSIS surety bond covering  
6 Ecobel's borrowings for the condominium project dated March 11,  
7 1998, but apparently issued on February 5, 1999 (the "Surety  
8 Bond"), which listed Ecobel as principal and Philippine Veterans  
9 Bank as obligee. See Ursa Minor, 2000 WL 1010278, at \*1, 2000  
10 U.S. Dist. LEXIS 10166, at \*4-\*5.<sup>2</sup> Section 9 of the statute  
11 establishing GSIS states that "the government of the Republic of  
12 the Philippines . . . guarantees the fulfillment of the  
13 obligations of [GSIS] when and as they shall become due." An Act  
14 to Create and Establish a "Property Insurance Fund" and to  
15 Provide for Its Administration and for Other Purposes, Rep. Act  
16 No. 656, § 9 (1951) (Phil.).

17 In order to protect itself against the risk of GSIS  
18 defaulting on the Surety Bond, BSIL entered into the BSIL/Aon CDS  
19 contract on February 4, 1999.<sup>3</sup> According to the agreement, Aon  
20 promised to pay BSIL \$10 million upon the occurrence of a "Credit

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<sup>2</sup>As the Ursa Minor court explained, the nature of the Surety Bond and of BSIL's status as obligee thereunder was a matter of some dispute. 2000 WL 1010278, at \*1 & \*1 n.2, 2000 U.S. Dist. LEXIS 10166, at \*4-\*5 & \*5 n.2. The validity of the Surety Bond and of its assignment to BSIL is, however, not relevant to the issues on this appeal.

<sup>3</sup>AFP entered into the agreement, which Aon Corp. guaranteed. The distinction between AFP and Aon Corp. is not relevant to the issues on appeal.

1 Event," which the contract defined as a "Failure to Pay," that  
2 is, "the failure by [GSIS] to make, when due, any payments under  
3 the Obligations for whatever reason or cause." BSIL/Aon CDS  
4 contract, dated Feb. 4, 1999, at 3, 11.<sup>4</sup> The only "Obligation"  
5 referred to in the agreement was the Surety Bond. For this  
6 credit protection, BSIL paid Aon \$425,000.

7 To reduce its own risk exposure, on February 9, 1999,  
8 Aon entered into a separate credit default swap agreement with SG  
9 (the "Aon/SG CDS contract"). In it, SG promised to pay Aon \$10  
10 million upon the occurrence of a "Credit Event," defined as one  
11 of five occurrences: a "Failure to Pay," a "Sovereign Event," a  
12 "Cross Default," a "Repudiation," or a "Restructuring." But  
13 whereas the BSIL/Aon CDS contract defined "Reference Entity,"  
14 whose obligations were the subject of the swap, as GSIS and any  
15 successors and assigns, the Aon/SG CDS contract defined  
16 "Reference Entity" as "Republic of Philippines and any  
17 successors." Similarly, while the "Reference Obligation," which

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<sup>4</sup>The document that defines "Credit Event," "Failure to Pay," and other relevant terms is known in the industry as the "confirmation." Parties to credit derivative swaps enter into a standard form "Master Agreement" created by the International Swaps and Derivatives Association, Inc. ("ISDA"), which governs the legal and credit relationship between the parties and other aspects of the agreement. Br. of amicus curiae ISDA, at 8 (citing <http://www.isda.org> (follow "Education" hyperlink; then follow "Derivatives Documentation" hyperlink)). Supplemental documents, such as confirmations, set forth economic terms and other transaction-specific modifications to the Master Agreement and other standard documents. The provisions of the BSIL/Aon CDS contract and the Aon/SG CDS contract that are at issue here are both contained in "confirmations," which incorporate materially similar versions of the ISDA Master Agreement.

1 was the subject of the BSIL/Aon CDS contract, was GSIS's \$10  
2 million Surety Bond, the "Reference Obligation" of the Aon/SG CDS  
3 contract was a \$500 million Republic of Philippines treasury bond  
4 (US718286AE71, coupon rate 8.875%, maturing on April 15, 2008).  
5 For the credit protection under the Aon/SG CDS contract, Aon paid  
6 SG \$328,000, nearly \$100,000 less than the amount that BSIL had  
7 paid Aon for protection under the BSIL/Aon CDS contract.

8 About one year later, in March 2000, Ecobel defaulted  
9 on its BSIL loan. On March 9, 2000, Bankers Trustee Company,  
10 Ltd. ("Bankers"), to whom BSIL had assigned its rights under the  
11 various agreements relating to the loan, notified Aon that it had  
12 received a letter from GSIS stating that it did not intend to pay  
13 Bankers on the bond because it had not been appropriately  
14 authorized on GSIS's behalf. Aon responded the following day  
15 that it would not pay Bankers under the BSIL/Aon CDS contract  
16 because GSIS's statement that it intended to refuse to honor the  
17 Surety Bond did not constitute a "Credit Event" under the  
18 BSIL/Aon agreement. Aon then initiated a declaratory judgment  
19 action in the United States District Court for the Northern  
20 District of Illinois seeking clarification of its rights as  
21 against BSIL and SG under the various agreements.

22 Before the Illinois litigation was resolved, however,  
23 BSIL's assignees filed suit against Aon in the United States  
24 District Court for the Southern District of New York. The  
25 district court granted summary judgment in the action in favor of  
26 the assignees. Ursa Minor Ltd., 2000 WL 1010278, at \*12, 2000

1 U.S. Dist. LEXIS 10166, at \*39-\*40. The court concluded that the  
2 BSIL/Aon CDS contract specifically defined "Credit Event" as a  
3 failure by GSIS, the Reference Entity, to pay under the Surety  
4 Bond "'for whatever reason or cause,'" id. at \*2, \*6, 2000 U.S.  
5 Dist. LEXIS 10166 at \*7, \*18, and that GSIS's default clearly  
6 satisfied that condition, id. at \*6, 2000 U.S. Dist. LEXIS 10166,  
7 at \*18. The court noted that in the BSIL/Aon CDS contract, Aon  
8 had waived the defense of any illegality of the GSIS Surety Bond.  
9 The court concluded that Aon "bore the risk of non-payment by  
10 GSIS, for 'whatever reason or cause,' including a justifiable  
11 refusal to pay." Id. at \*7, 2000 U.S. Dist. LEXIS 10166, at \*26.

12 On April 8, 2000, more than two months before the  
13 district court's decision in Ursa Minor, Aon filed this action in  
14 the same court, the United States District Court for the Southern  
15 District of New York, against SG, seeking payment of \$10 million  
16 under the Aon/SG CDS contract. On October 3, 2000, SG moved for  
17 judgment on the pleadings pursuant to Federal Rule of Civil  
18 Procedure 12(c), arguing principally that Aon had failed to  
19 allege a breach of the Aon/SG CDS contract because GSIS was not  
20 included in the definition of "Republic of Philippines," the  
21 Reference Entity of the Aon/SG CDS contract, and GSIS's default  
22 therefore did not constitute a Credit Event for the purposes of  
23 that agreement.

24 In response, Aon moved for summary judgment, contending  
25 first that the finding in Ursa Minor that a Credit Event had  
26 occurred for the purposes of the BSIL/Aon CDS contract, Ursa

1 Minor, 2000 WL 1010278, at \*7, 2000 U.S. Dist. LEXIS 10166, at  
2 \*22-\*23, necessarily meant that a Credit Event had occurred for  
3 the purposes of the Aon/SG CDS contract. Aon argued that because  
4 both Ursa Minor and this litigation were based on the same  
5 "series of transactions" and "evidence regarding whether or not  
6 there was a failure to pay," and because SG was "in privity with  
7 Aon," SG was precluded from relitigating that factual issue. Aon  
8 Mot. for Summ. J. dated Oct. 18, 2000, at 6-7. Aon urged the  
9 court to reject SG's argument "that the cases are distinct  
10 because the verbiage in the swap contracts in certain sections  
11 are slightly different" because the key issue, whether a "Credit  
12 Event" had occurred, was the same in both cases. Id. at 9.

13           Second, Aon argued that SG was liable to Aon because a  
14 Credit Event occurred as a matter of law under the provision of  
15 the Aon/SG CDS contract defining a Credit Event as, inter alia, a  
16 "Sovereign Event" or a "Failure to Pay." In response to SG's  
17 argument that the GSIS default was not a Sovereign Event because  
18 the Republic of the Philippines and GSIS are separate entities,  
19 Aon asserted that the April 14, 2000, letter from the Philippine  
20 government refusing to honor its statutory guarantee of GSIS's  
21 obligations "did not deny that GSIS had authority to bind it [the  
22 Philippine government], . . . nor does it assert that the GSIS  
23 and the Philippine government are separate and distinct  
24 entities . . . ." Id. at 11.

25           By order dated February 22, 2005, the district court  
26 denied SG's motion for judgment on the pleadings and granted

1 Aon's counter-motion for summary judgment. The court decided  
2 that under the plain and unambiguous terms of the Aon/SG CDS  
3 contract, GSIS's default satisfied the definition of "Sovereign  
4 Event," and therefore constituted a Credit Event. Aon Fin.  
5 Prods. & Aon Corp. v. Société Générale, 2005 WL 427535, 2005 U.S.  
6 Dist. LEXIS 2719 (S.D.N.Y. Feb. 22, 2005) ("Société Générale").  
7 The court concluded that the definition of "Sovereign Event,"  
8 which includes "a condition . . . that has the effect  
9 of . . . causing a failure to honour any obligation relating  
10 to . . . the government of the Reference Entity . . . ," id. at  
11 \*4, 2005 U.S. Dist. LEXIS 2719, at \*16 (quoting the Aon/SG CDS  
12 contract) (ellipses in original), "requires only that GSIS'[s]  
13 act have the effect of causing a failure to honour an obligation  
14 relating to the Philippine government," id. at \*5, 2005 U.S.  
15 Dist. LEXIS 2719, at \*16 (emphasis in original).

16 The court further concluded that Aon's March 22, 2000,  
17 letter notifying SG that GSIS had declined to make payment on the  
18 Surety Bond constituted sufficient notice of the Credit Event  
19 under the agreement. Id. at \*6, 2005 U.S. Dist. LEXIS 2719, at  
20 \*20. The court therefore granted Aon's motion for summary  
21 judgment and denied SG's motion for judgment on the pleadings.

22 SG appeals.

## 23 DISCUSSION

24 I. Standard of Review

25 "We review a district court's grant of summary judgment  
26 de novo, construing the evidence in the light most favorable to

1 the nonmoving party and drawing all inferences and resolving all  
2 ambiguities in favor of the nonmoving party." United Air Lines,  
3 Inc. v. Insurance Co. of State of Pa., 439 F.3d 128, 130 (2d Cir.  
4 2006) (citation and internal quotation marks omitted). Whether  
5 the contractual language is ambiguous is also a question of law  
6 subject to our de novo review. Krumme v. WestPoint Stevens Inc.,  
7 238 F.3d 133, 139 (2d Cir. 2000). And "[w]here the parties'  
8 intent is unambiguously conveyed by the plain meaning of the  
9 agreements, then interpretation is a matter of law, and we will  
10 review that interpretation de novo." Id. (citations and internal  
11 quotation marks omitted).

12 New York law governs the Aon/SG CDS contract according  
13 to its choice-of-law provision. No party disputes the  
14 applicability of New York law here.

## 15 II. "Sovereign Event"

16 Credit default swaps are a method by which one party  
17 (the protection buyer) transfers risk to another party (the  
18 protection seller). In "emerging markets" such as the  
19 Philippines,

20 [p]rotection buyers . . . can use credit derivatives to  
21 manage particular market exposures and  
22 return-on-investment; and protection sellers . . .  
23 generally use credit derivatives to earn income and  
24 diversify their own investment portfolios. Simply put,  
25 a credit default swap is a bilateral financial contract  
26 in which a protection buyer makes periodic payments to  
27 the protection seller, in return for a contingent  
28 payment if a predefined credit event occurs in the  
29 reference credit . . . .

30 Often, the reference asset that the protection  
31 buyer delivers to the protection seller following a

1 credit event is the instrument that is being hedged.  
2 But in emerging markets, an investor may calculate that  
3 a particular credit risk is reasonably correlated with  
4 the performance of the sovereign itself, so that . . .  
5 the investor may seek to isolate and hedge country risk  
6 with credit default swaps written on some portion of  
7 the sovereign's outstanding debt.

8 Eternity Global Master Fund Ltd. v. Morgan Guar. Trust Co. of  
9 N.Y., 375 F.3d 168, 172 (2d Cir. 2004) (brackets, ellipses,  
10 quotation marks, and footnotes omitted).

11 CDS agreements are thus significantly different from  
12 insurance contracts. As amicus correctly points out, they "do  
13 not, and are not meant to, indemnify the buyer of protection  
14 against loss. Rather, CDS contracts allow parties to 'hedge'  
15 risk by buying and selling risks at different prices and with  
16 varying degrees of correlation." Br. of amicus curiae Int'l  
17 Swaps and Derivatives Assoc., Inc. (ISDA), at 7 (footnote  
18 omitted). Aon bought from BSIL the risk of a "Credit Event" as  
19 defined by the BSIL/Aon CDS contract. With the Aon/SG CDS  
20 contract, Aon hedged the risk that it bought from BSIL by  
21 selling to SG the risk of a "Credit Event" as defined by the  
22 Aon/SG CDS contract. But the risk transferred to Aon and the  
23 risk transferred by it were not necessarily identical. The terms  
24 of each credit swap agreement independently define the risk being  
25 transferred.

26 To decide whether GSIS's failure to pay on the Surety  
27 Bond because GSIS took the position that it was not a legally  
28 binding obligation, an event that constituted a Credit Event as  
29 defined in the BSIL/Aon CDS contract, also constituted a "Credit

1 Event" as defined in the Aon/SG CDS contract -- the issue  
2 presently before us -- we look first to the language of the  
3 contract. If it is unambiguous -- which we think that it is --  
4 then "we are required to give effect to the contract as written."  
5 K. Bell & Assocs., Inc. v. Lloyd's Underwriters, 97 F.3d 632, 637  
6 (2d Cir. 1996) (citation and internal quotation marks omitted).

7 The Aon/SG CDS contract defines "Credit Event" as,  
8 inter alia, a "Sovereign Event," which is

9 a condition which is created by or results from any act  
10 or failure to act by the government of the Reference  
11 Entity or any agency or regulatory authority thereof,  
12 including the central bank of the Reference Entity,  
13 that has the effect of declaring a moratorium (whether  
14 de facto or de jure) on, or causing a failure to honour  
15 any obligation relating to, or cancelling or generally  
16 causing material changes to the terms and conditions  
17 of, any obligation issued by the government of the  
18 Reference Entity or the central bank of the Reference  
19 Entity.

20 Aon/SG CDS Contract at 7. The contract defines "Reference  
21 Entity" as "Republic of Philippines and any successors." Id. at  
22 1. Thus, for purposes of our analysis, after redacting  
23 inapplicable language, the Aon/SG CDS Contract provides that an  
24 event is a "Sovereign Event" if it is "a condition . . . created  
25 by or result[ing] from any act or failure to act by the  
26 government of [the Republic of Philippines and any Successors] or  
27 any agency or regulatory authority [thereof] . . . that has the  
28 effect of . . . causing a failure to honour any obligation  
29 relating to . . . any obligation issued by the government of [the  
30 Republic of Philippines]."

1           The district court concluded that this definition  
2 "requires only that," to be a Credit Event, "GSIS'[s] act ha[s]  
3 the effect of causing a failure to honour an obligation relating  
4 to the Philippine government." Société Générale, 2005 WL 427535,  
5 at \*5, 2005 U.S. Dist. LEXIS 2719, at \*16 (emphasis in original).  
6 Similarly, Aon argues that "the contract . . . defines Sovereign  
7 Event as, inter alia, a failure to honor any obligation 'relating  
8 to . . . any obligation issued by the Reference Entity [i.e., the  
9 Philippine government].'" We disagree with Aon and the district  
10 court principally because we think that these interpretations  
11 ignore the crucial word "condition" at the outset of the  
12 definition. GSIS's failure to pay on the Surety Bond may well  
13 have been a failure to act, or an event, but surely it was not a  
14 "condition."

15           Put another way, Aon asks us to conclude that the GSIS  
16 default on the Surety Bond constituted (1) an act or failure to  
17 act by an agency of the Philippine government (GSIS), which (2)  
18 created a "condition," which had the effect of causing a failure  
19 of (3) GSIS to honor its obligation, the Surety Bond, (4) which  
20 obligation relates to an obligation of the Philippine  
21 government.<sup>5</sup> But we do not think that the definition of

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<sup>5</sup>Aon argues that the Surety Bond was an "obligation relating to . . . an[] obligation issued by the government of the [Republic of the Philippines]" because of the Philippine government's statutory guaranty that it will pay GSIS's debts. See Société Générale, 2005 WL 427535, at \*5 n.11, 2005 U.S. Dist. LEXIS 2719, at \*16 n.11. We need not decide whether GSIS's obligation under the Surety Bond "relat[ed] to" any obligation of the Government of the Philippines, because, under our analysis,

1 Sovereign Event includes (a) the failure of a Philippine agency  
2 (GSIS) to honor its Surety Bond, thereby creating (b) a  
3 "condition" that in turn caused (c) the failure of the agency to  
4 honor the same Surety Bond, irrespective of whether the Surety  
5 Bond is an obligation that relates to an obligation of the  
6 Philippine government. The default was not a "condition" that  
7 caused the failure of GSIS to honor its obligation. Nor was it  
8 caused by an "act or failure to act by the Republic or its  
9 agency." It resulted from GSIS's decision that it was not  
10 legally bound to honor its putative obligation to pay. We do not  
11 think that GSIS's decision itself -- its determination that it is  
12 not legally bound by the Surety Bond to pay -- can be  
13 characterized as either "an act or failure to act" or as a  
14 "condition" within the ordinary meaning of those terms.

15 A literal reading of the Sovereign Event definition  
16 might suggest that the "act or failure to act" by the government  
17 of the Philippines that "had the effect of causing [the] failure  
18 [of GSIS] to honour" the Surety Bond was something other than the  
19 failure to pay on the Surety Bond itself. Hypothetically, for  
20 example, the "act" might have been the issuance of GSIS's letter  
21 to BSIL's assignees denying liability. Even if that were what  
22 Aon's complaint said,<sup>6</sup> the argument would fail. The letter was,

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the result is the same in either case.

<sup>6</sup>The complaint asserts simply that GSIS denied the validity of the Bond and failed to pay. It states that "[b]y virtue of GSIS'[s] dishonor of the purported surety bond to BSIL . . . [Aon] . . . notified BSIL . . . that since GSIS had determined

1 to be sure, an "act." But it did not create a separate  
2 "condition" which in turn caused the default on the Surety Bond.

3 Moreover, an "act or failure to act" in the context of  
4 a "Sovereign Event" seems to refer to such large-scale events as  
5 the restructuring of the Sovereign's -- i.e., the government's --  
6 debt, taken in its capacity as a sovereign. The act of debt  
7 restructuring by a sovereign may well cause -- indeed may be  
8 expected to cause -- a general "condition" throughout the country  
9 (e.g., currency devaluation, restriction on exports of U.S.  
10 dollars, and the like) that in turn results in one or more  
11 defaults on one or more particular obligations against which an  
12 entity doing business with or within the country would want to  
13 protect itself. Cf. Eternity Global, 375 F.3d at 170 (addressing  
14 the operation of CDS contracts where "the government of the  
15 Republic of Argentina, in the grip of economic crisis, initiated  
16 a 'voluntary debt exchange'"). There was no such act or  
17 resulting condition here.

18 Aon points out that the Ursa Minor district court held  
19 that GSIS's default in March 2000 qualified as a Credit Event  
20 under the BSIL/Aon CDS contract. Compl. ¶ 36. Indeed the court  
21 did so hold:

22 The definition of "Credit Event" [in the  
23 BSIL/Aon CDS contract] specifically includes  
24 failure by GSIS to pay under the [Surety]

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that there was no valid reference obligation, that [Aon] had no  
obligation under the [BSIL/Aon CDS contract] and that  
consequently the actions taken by GSIS did not constitute a  
'Credit Event' [under the BSIL/Aon CDS contract]." Compl. ¶ 32.

1 Bond "for whatever reason or cause."  
2 Plaintiffs allege that GSIS'[s] refusal to  
3 make payment under the Bond amounted to a  
4 Credit Event, that [Aon] was given proper  
5 notice and that [Aon's] refusal to pay  
6 constituted a default triggering Aon's  
7 obligations under the Guarantee.

8 Ursa Minor, 2000 WL 1010278, at \*6, 2000 U.S. Dist. LEXIS 10166,

9 at \*18. The court then ruled against Aon because the GSIS

10 default constituted a Credit Event, which the BSIL/Aon CDS

11 contract defined as, inter alia, a "Failure to Pay," and because

12 Aon "ha[d] an obligation to pay irrespective of the Bond's

13 potential invalidity or enforceability with respect to GSIS."

14 Id. at \*7, 2000 U.S. Dist. LEXIS 10166, at \*22. The Ursa Minor

15 district court never addressed the possibility that the GSIS

16 default may have been a "Sovereign Event" -- under the BSIL/Aon

17 CDS contract, let alone under the Aon/SG CDS contract before us.

18 This is hardly surprising inasmuch as the BSIL/Aon CDS contract

19 did not define "Credit Event" to include "Sovereign Event" as the

20 Aon/SG CDS contract did.

21 Yet Aon contends that the Ursa Minor court's

22 determination that a Credit Event occurred under the BSIL/Aon CDS

23 contract necessarily means that a Credit Event occurred under the

24 Aon/SG CDS contract.<sup>7</sup> But it does not follow from the occurrence

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<sup>7</sup>The complaint says, "[The district court in Ursa Minor] found, as a matter of law, that a 'Credit Event' as defined in the Credit [D]efault Swap Agreement between [Aon] and [BSIL] . . . had occurred in March 2000. Since . . . a 'Credit Event' has occurred [with respect to the BSIL/Aon CDS contract,] . . . a 'Credit Event' has occurred under the [CDS contract] between [Aon] and [SG], since both agreements relied upon the same underlying documents and security." Compl. ¶ 39. "[F]ailure by

1 of a Credit Event as defined in one contract that there was a  
2 Credit Event as defined in the other. There is, as noted, no  
3 reason to assume that the risk transferred to Aon was precisely  
4 the risk that it transferred or sought to transfer to SG. And we  
5 can perceive of no basis for concluding that the district court's  
6 decision in Ursa Minor that there was a "Failure to Pay" Credit  
7 Event under the BSIL/Aon CDS contract implies that there was a  
8 "Sovereign Event" Credit Event under the Aon/SG CDS contract.

9 We therefore conclude that GSIS's default was not a  
10 "Sovereign Event" as that term is used in the Aon/SG CDS  
11 contract.

### 12 III. "Failure to Pay"

13 The district court considered only one of the five  
14 kinds of Credit Events referred to in the Aon/SG CDS contract --  
15 the Sovereign Event. Finding that there had been such a Credit  
16 Event under the terms of the Aon/SG CDS contract, the court  
17 declined to consider whether the events also constituted a  
18 "Failure to Pay," which is also one of the defined Credit Events  
19 under that agreement.

20 "Although we ordinarily will not review an issue the  
21 district court did not decide, whether we do so or not is a  
22 matter within our discretion." Chertkova v. Connecticut General  
23 Life Ins. Co., 92 F.3d 81, 88 (2d Cir. 1996) (citing Singleton v.

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[SG] to acknowledge the occurrence of a valid credit event  
constitutes a breach of the [CDS contract] Agreement entered into  
between [SG] and [Aon]." Compl. ¶ 43.

1 Wulff, 428 U.S. 106, 120-21 (1976)). We think this case an  
2 appropriate one for exercising that discretion. Apparently as a  
3 result of the district court's conclusion that a Sovereign Event  
4 had occurred, the parties devote little attention to the Failure  
5 to Pay issue in their briefs to us. But the parties amply  
6 presented arguments on that issue to the district court. In  
7 fact, there, the parties focused on the Failure to Pay language  
8 rather than the Sovereign Event provision upon which the district  
9 court eventually decided the motions. The interpretation of the  
10 unambiguous terms of a contract is, moreover, a matter of law  
11 that we may properly evaluate and decide ourselves. See Krumme,  
12 238 F.3d at 139; Chertkova, 92 F.3d at 88.

13 As noted above, the Aon/SG CDS contract defines the  
14 "Reference Entity" as the "Republic of Philippines and any  
15 successors." Aon/SG CDS Contract at 1. Under the Aon/SG CDS  
16 contract, a "Failure to Pay means . . . the failure by the  
17 Reference Entity [the Republic of Philippines and any Successors]  
18 to make, when due, any payments equal to or exceeding the Payment  
19 Requirement (if any) under any Obligations." Id. at 1, 7 (second  
20 emphasis added). An "Obligation" under that agreement is: "With  
21 respect to the [Republic of Philippines], any obligation,  
22 (whether present or future, contingent or otherwise, as principal  
23 or surety or otherwise) for the payment or repayment of money."  
24 Id. at 2. The Reference Obligation is identified as:

25 Issuer/Borrower: Republic of Philippines  
26 Maturity: April 15, 2008  
27 Coupon. 8.8750%

1 Original Issue Amount: USD 500,000,000

2 Id. The Payment Requirement is "USD 5,000,000 or its equivalent  
3 in any other currency at the time of the Credit Event." Id.

4 Aon argues that GSIS itself qualifies as the "Reference  
5 Entity" of the Aon/SG CDS contract, that is, that "Republic of  
6 Philippines" includes GSIS.<sup>8</sup> GSIS's default on the Surety Bond,  
7 therefore, is a "Failure to Pay" by the Reference Entity on an  
8 Obligation of the Reference Entity. Aon contends that because  
9 the ISDA Credit Derivatives Definitions, incorporated into the  
10 Aon/SG CDS contract, see Aon/SG CDS Contract at 1, define  
11 "Sovereign" as "any state, political subdivision or government,  
12 or any agency, instrumentality, ministry, department or other  
13 authority (including, without limiting the foregoing, the central  
14 bank) thereof," the term "Republic of Philippines" must also  
15 include "any agency" of the state. Br. of Plaintiffs-Appellees  
16 at 29 (citing 1999 ISDA Credit Derivatives Definitions § 2.23, at  
17 11).<sup>9</sup> We disagree.

18 It is clear from the face of the Aon/SG CDS contract  
19 that "Republic of Philippines" does not include GSIS or other

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<sup>8</sup>Aon does not argue that GSIS is a "Successor" to the Republic of the Philippines.

<sup>9</sup>The Aon/SG CDS contract incorporates the 1991 ISDA Definitions (as supplemented by the 1998 Supplement). Aon/SG CDS Contract at 1. Both parties cite the 1999 ISDA Credit Derivatives Definitions, see Br. of Defendants-Appellants at 29; Br. of Plaintiffs-Appellees at 29, which amicus explains "replicate[] in relevant part" the 1991 ISDA Definitions as supplemented by the 1998 Supplement. Br. of amicus curiae ISDA at 5.

1 government agencies like it.<sup>10</sup> There is no language in the  
2 Reference Entity definition, or anywhere else in the agreement as  
3 we read it, suggesting that it does, or indicating that it  
4 incorporates the ISDA definition of "Sovereign." To incorporate  
5 that definition of "Sovereign" into the definition of "Reference  
6 Entity," we would expect the parties to use that word,  
7 "Sovereign," in the relevant portion of the contract. They did  
8 not. Rather, they use the words "Republic of Philippines."  
9 Where the contract uses the word "Sovereign," in the term  
10 "Sovereign Event," by contrast, the contract does clearly mean to  
11 incorporate the ISDA definition. "Sovereign Event" is the only  
12 term in the Aon/SG CDS contract that refers not only to the  
13 Reference Entity, but to "the Reference Entity or any agency or  
14 regulatory authority thereof, including the central bank of the  
15 Reference Entity." Aon/SG CDS Contract at 7.

16 If we were to credit Aon's argument as to the expansive  
17 meaning of "Republic of Philippines," it would follow that any  
18 CDS contract listing a sovereign nation as a Reference Entity  
19 will be incorporating the ISDA definition of "Sovereign" without  
20 using the term, or at least that the contract is ambiguous in  
21 that regard. We are given, and ourselves see, no reason to do  
22 so.

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<sup>10</sup>Aon does not dispute that GSIS, which it agrees is an "agency" of the Philippines, is a separate juridical entity from the Republic of the Philippines.

1           Instead, we look to Philippine law for guidance about  
2 the distinction between the Republic of the Philippines and its  
3 agencies and instrumentalities. See First Nat'l City Bank v.  
4 Banco Para El Comercia Exterior de Cuba, 462 U.S. 611, 626-27  
5 (1983) ("[G]overnment instrumentalities established as juridical  
6 entities distinct from the sovereign should normally be treated  
7 as such."). Before the district court, SG offered uncontested  
8 expert evidence that, under Philippine law, GSIS is considered a  
9 juridical entity distinct from the Republic. Mem. in Support of  
10 Mot. for J. on the Pleadings dated Oct. 2, 2000, at 11 (citing  
11 Decl. of Cesar L. Villanueva dated Sept. 29, 2000). We conclude  
12 that, as a matter of Philippine law, GSIS is a separate juridical  
13 entity from the Republic of the Philippines. See, e.g., An Act  
14 Amending Presidential Decree No. 1146, as amended, Expanding and  
15 Increasing the Coverage and Benefits of the Government Service  
16 Insurance System, Instituting Reforms Therein and For Other  
17 Purposes, Rep. Act No. 8291, § 41 (1997) (Phil.) (stating GSIS's  
18 powers and functions, including the power "to sue and be sued");  
19 see also Curley v. AMR Corp., 153 F.3d 5, 12 (2d Cir. 1998)  
20 ("[A]ppellate courts, as well as trial courts, may find and apply  
21 foreign law."); Fed. R. Civ. P. 44.1 ("The court, in determining  
22 foreign law, may consider any relevant material or source,  
23 including testimony, whether or not submitted by a party or  
24 admissible under the Federal Rules of Evidence. The court's  
25 determination shall be treated as a ruling on a question of  
26 law."). As such, GSIS is not the "Republic of Philippines"; its

1 obligations are not the Republic of the Philippines' obligations;  
2 and a failure by GSIS to make a payment on its obligations is not  
3 equivalent to the failure of the Republic of the Philippines to  
4 make a payment on its obligations.

5 To be sure, in the context of the argument that GSIS's  
6 failure to pay on the Surety Bond was a "Failure to Pay" as  
7 defined by the Aon/SG contract, Aon's assertion that the issue  
8 was decided by Ursa Minor appears to have more traction than when  
9 made in support of Aon's Sovereign Event argument. Although the  
10 Ursa Minor court did not address the question of whether a  
11 Sovereign Event had occurred -- there was no such provision in  
12 the BSIL/Aon CDS contract -- it did decide that there had been a  
13 "Failure to Pay" under that contract. Aon therefore argues that  
14 the Ursa Minor court's decision that there was a "Failure to Pay"  
15 under the BSIL/Aon CDS contract foreclosed the district court --  
16 and forecloses us -- under principles of issue preclusion (or  
17 collateral estoppel) from deciding that there was no "Failure to  
18 Pay" under the Aon/SG CDS contract.

19 But even though the identical term "Failure to Pay" is  
20 used in both CDS agreements, and the Ursa Minor court decided  
21 that there was a Failure to Pay under the BSIL/Aon agreement, the  
22 term "Failure to Pay" has distinctly different meanings in the  
23 two agreements. Under the BSIL/Aon CDS contract, which defines  
24 "Reference Entity" as "GSIS and any Successors and assigns," and  
25 "Obligation(s)" as the Surety Bond, "Failure to Pay means . . .  
26 the failure by the Reference Entity [GSIS and any Successors and

1 assigns] to make, when due, any payments under the Obligations  
2 [the Surety Bond] for whatever reason or cause." BSIL/Aon CDS  
3 Contract at 2, 4, 11 (first italics in original). As discussed  
4 above, the Aon/SG CDS contract, by contrast, defines "Reference  
5 Entity" as "Republic of Philippines and any Successors." In that  
6 contract, "Failure to Pay means . . . the failure by the  
7 Reference Entity [Republic of Philippines and any Successors] to  
8 make, when due, any payments equal to or exceeding the Payment  
9 Requirement (if any) under any Obligations." Aon/SG CDS Contract  
10 at 1, 7 (first italics in original). Moreover, whereas the  
11 BSIL/Aon CDS contract defines "Obligation" as the Surety Bond,  
12 the Aon/SG CDS contract defines "Obligation" as "With respect to  
13 the Reference Entity [Republic of Philippines], any obligation  
14 (whether present or future, contingent or otherwise, as principal  
15 or surety or otherwise) for the payment or repayment of money."  
16 Id. at 2. Thus, the Aon/BSIL agreement explicitly covers failure  
17 to pay by GSIS on the Surety Bond, while the Aon/SG agreement  
18 explicitly does not do so. It covers failure to pay by the  
19 Republic of the Philippines on obligations of the Republic of the  
20 Philippines.

21 One might argue, then, although the plaintiffs do not,  
22 that the Republic's statutory guarantee of GSIS's debt was an  
23 Obligation of the Reference Entity, which the Republic failed to  
24 pay when the Surety Bond came due on March 7, 2000, and that this  
25 failure to pay was a Credit Event, triggering SG's payment  
26 obligations under the contract. This argument would also fail.

1 To trigger SG's payment obligations, a Credit Event must occur  
2 before the Termination Date of the CDS agreement, March 31, 2000.  
3 Aon/SG CDS Contract at 1. But Aon did not send a Notice and  
4 Demand to the Government of the Republic of the Philippines until  
5 April 3, 2000, three days after the Termination Date of the  
6 Aon/SG CDS contract. See Société Générale, 2005 WL 427535, at \*2  
7 n.7, 2005 U.S. Dist. LEXIS 2719, at \*9 n.7. And the Republic of  
8 the Philippines did not deny Aon's demand until April 14, 2000,  
9 two weeks after the Termination Date. Id. Because the  
10 Republic's denial of liability did not occur before the  
11 Termination Date, it cannot constitute a Credit Event under the  
12 contract.

13 We therefore conclude that neither the default, which  
14 constituted a Failure to Pay under the BSIL/Aon CDS contract, nor  
15 the Republic's failure to honor its alleged statutory obligation,  
16 constituted a Failure to Pay under the Aon/SG CDS contract. For  
17 the same reasons, neither event constituted a "Repudiation."  
18 They similarly do not satisfy the other definitions of Credit  
19 Event enumerated in the Aon/SG CDS contract.

#### 20 IV. Credit Event Notice

21 Although not central to the result we reach, we note  
22 that the contract also provides that SG is obligated to pay Aon  
23 only after Aon serves SG with a "Credit Event Notice" and a  
24 demand for payment. See Aon/SG ISDA Master Agreement, dated Feb.  
25 9, 1999, at 5 (defining, as an "Event of Default," "[f]ailure by  
26 the party to make, when due, any payment under this

1 Agreement . . . if such failure is not remedied on or before the  
2 third Local Business Day after notice of such failure is given to  
3 the party" (emphasis added)); see also Mem. in Support of Pls.'  
4 Mot. for Sum. J., dated Oct. 17, 2000, at 13 (arguing that  
5 "[SG's] obligation is absolute and unconditional upon a notice of  
6 a 'credit event' and a demand for payment thereunder" (emphasis  
7 added)).

8           The district court concluded that Aon's March 22, 2000,  
9 letter constituted a Credit Event Notice. Société Générale, 2005  
10 WL 427535, at \*6, 2005 U.S. Dist. LEXIS 2719, at \*19. We  
11 disagree. The Aon/SG CDS contract defines "Credit Event Notice"  
12 as "an irrevocable notice (which may be oral, including by  
13 telephone) to the parties and the Calculation Agent that  
14 describes the occurrence of a Credit Event on or after the  
15 Effective Date and on or prior to the Scheduled Termination  
16 Date." Aon/SG CDS Contract at 7. In the March 22 letter, which  
17 does not use the term "Credit Event Notice," Aon informed SG that  
18 GSIS had declined to make payments on the Surety Bond and that  
19 BSIL had made a demand on Aon pursuant to the BSIL/Aon CDS  
20 agreement. Letter from Aon to SG (Mar. 22, 2000), at 1. The  
21 letter outlined Aon's position:

22           Recognizing this matter is not likely to  
23 settle itself, in an effort to get a  
24 resolution, we have this day filed suit in  
25 Chicago seeking a declaration of the rights  
26 and obligations of all relevant parties. In  
27 order to preserve our rights under  
28 [Aon]-Societe Generale [sic] agreement, we  
29 felt compelled to name you in the litigation;  
30 however, recognize our alignment of  
31 interests. If our position is upheld, you

1 will not have to pay us. If we lose, you  
2 will owe us. We think our interests are the  
3 same, but again, for procedural reasons and  
4 to protect our rights in what we think would  
5 be the unlikely event we are called upon to  
6 pay BSIL, we named you. . . .

7 In this vein, the [Aon/SG CDS contract]  
8 contains several procedural requirements  
9 which must be met for presentment to you on  
10 our agreement, such as presenting a claim to  
11 the Government of the Philippines and  
12 producing "Publicly available information."  
13 Out of an abundance of caution we are  
14 initiating those steps as part of our  
15 notification to you, but in light of our  
16 position there is no obligation on the  
17 underlying matter [sic], we would like to  
18 discuss with you whether we could dispense  
19 with those prerequisites.

20 Id. at 2.

21 To be a "Credit Event Notice," the action taken must be  
22 "irrevocable." Aon/SG CDS Contract at 7. The March 22 letter  
23 was not irrevocable. Aon went to great lengths to explain in the  
24 letter the circumstances under which it would rescind its  
25 contention that SG "owed" Aon and would agree that no Credit  
26 Event had occurred under either CDS contract and that neither Aon  
27 nor SG was obligated to pay under them. This letter was not a  
28 Credit Event Notice and therefore could not have triggered SG's  
29 payment obligations under the contract.

30 **CONCLUSION**

31 As a matter of law and under the unambiguous language  
32 of the Aon/SG CDS contract, no Credit Event occurred thereunder  
33 and SG therefore did not breach that agreement by declining to  
34 pay Aon thereunder. We therefore reverse the judgment of the  
35 district court and enter judgment in favor of SG.