

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT
3

4 August Term, 2003

5 (Argued June 10, 2004

Decided August 31, 2004)

6 Docket No. 03-9275
7

8 EM Ltd.,

9 Plaintiff-Appellee,

10 v.

11 The Republic of Argentina,

12 Defendant-Appellant.

13 Before OAKES and RAGGI, Circuit Judges, and HOLWELL,*
14 District Judge.

15 Bondholder sued Argentina for payment on defaulted bonds,
16 arguing that payment must be made in dollars rather than
17 Argentine pesos under the terms of the bonds. The United States
18 District Court for the Southern District of New York granted
19 summary judgment to bondholder, concluding that the language of
20 the bond documents allowed for dollar election on payments of
21 accelerated principal in the event of default.

22 Affirmed.

1 *Honorable Richard J. Holwell, United States District Judge
2 for the Southern District of New York, sitting by designation.

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1 Jonathan L. Blackman, New York, NY
2 (Carmin D. Boccuzzi and Cleary,
3 Gottlieb, Steen & Hamilton, of
4 counsel), for Defendant-Appellant.

5 David W. Rivkin, New York, NY (John
6 B. Missing, Dennis H. Hranitzky and
7 Debevoise & Plimpton, LLP, of
8 counsel), for Plaintiff-Appellee.

9

10 Per Curiam:

11 The Republic of Argentina ("Argentina") contests the right
12 of its bondholder, EM Ltd. ("EM"), to collect the amount due on
13 defaulted bonds in United States dollars rather than Argentine
14 pesos, which are significantly devalued in relation to the
15 dollar. There is no question that Argentina defaulted on the
16 bonds or that EM has declared due the principal amount it is
17 owed. Rather, the parties take differing views as to whether the
18 bond certificates and Fiscal Agency Agreement (collectively "the
19 bond documents") require EM to collect what it is owed in pesos,
20 thereby receiving a substantially smaller sum, or whether EM is
21 allowed to elect to receive payment in dollars at the
22 contractually set rate of one dollar per peso. The United States
23 District Court for the Southern District of New York, Thomas L.
24 Greisa, Judge, granted summary judgment to EM, concluding that
25 the language of the bond documents, specifically the acceleration

26 provision and the election provision, allowed for EM to elect to
27 be paid in dollars at the one-to-one ratio.

3 We are presented in this appeal with a simple question of
4 contract interpretation. The bond documents provide in an
5 acceleration clause that when accelerating in the event of a
6 default, the bondholder "shall declare the principal amount (that
7 is, the par value)" of the bonds due and payable as a consequence
8 of the default. The documents contain an election provision
9 which states that:

10 with respect to any payment, the Holder of this
11 Security elects to receive such payment in U.S. dollars
12 by giving notice to the Fiscal Agent in writing not
13 later than the close of business on the fifth business
14 day prior to the applicable Interest Payment Date, the
15 Maturity Date or other date of payment, as the case may
16 be[.]

17 The documents are explicit that when payment in dollars is
18 elected, "payment will be made in U.S. dollars at the ratio of
19 one U.S. dollar to one Argentine peso regardless of the changes
20 in foreign exchange rates."

21 Argentina argues that the words "par value" in the
22 acceleration clause mean the face value of the bonds, which in
23 this case is denominated in pesos.¹ In other words, because the
24 acceleration clause uses the term "par value," an accelerated

¹EM owns bonds with a value of 595,396,345 Argentine pesos.

1 payment must be made in pesos for the peso amount on the face of
2 the bonds. Argentina also contends that the election clause
3 cannot be read to apply to an accelerated payment, thereby
4 removing any possibility that such a payment can be required in
5 dollars. We find both of these arguments to be without merit.²

6 First, we cannot agree with Argentina that because the bonds
7 are denominated in pesos, an accelerated payment of the principal
8 amount can only be made in pesos. To support its position,
9 Argentina cites the decision of the New York Court of Appeals in
10 Village of Fort Edward v. Fish, 156 N.Y. 363, 370 (1898), where
11 the court held that "[p]ar' means equal, and par value means a
12 value equal to the face of the bonds." But in Fish, the face
13 value of the bonds was found to be \$50,444.44: the \$50,000
14 amount denominated on the bonds plus accrued interest of \$444.44.
15 Id. at 371. If the "par value" of the bonds was equal to the
16 face value, as stated by the court, then the par value was not
17 the amount actually denominated on the bonds. We are therefore
18 unwilling to rely on Fish to give "par value" the determinative
19 reading Argentina urges in this case. Instead, because the term

1 ²Argentina argued additionally in its brief that the dollar
2 election language of the certificates applies only to payments of
3 matured, not accelerated, principal and interest. It abandoned
4 this claim at oral argument.

5 "par value" as used here modifies the term "principal amount,"
6 the acceleration clause more readily lends itself to the
7 interpretation that "par value" means the amount due or owed to
8 the bondholder. Indeed, it was this amount that was found to be
9 the face value in Fish. Accordingly, we reject Argentina's
10 position that the use of the words "par value" requires that
11 payment of accelerated principal must be in pesos.

8 Although the words "par value" do not, in and of themselves,
9 determine the outcome here, there can be no doubt that if the
10 bond documents did not contain an election clause, the amount due
11 upon acceleration would be the principal amount as denominated in
12 pesos. As we noted in oral argument, defaulting parties are not
13 free to pay the principal due upon declaration in whatever
14 currency they choose. So it is the election clause that is at
15 the heart of this matter, and its applicability that we must
16 decide.

17 Argentina argues that, despite the plain language of the
18 election clause allowing the bondholder to elect payment in
19 dollars "with respect to any payment," the election clause cannot
20 apply to an accelerated payment because it requires the
21 accelerating party to provide five days' notice of election. The
22 five-day notice requirement, Argentina contends, is

23 irreconcilable with the fact that, according to the acceleration
24 provision, accelerated payments are due and payable immediately.
25 Put another way, the accelerating party cannot demand immediate
26 payment and elect to have that payment made in dollars five days
27 later. It is Argentina's view that, due to this perceived
28 irreconcilability, the election clause does not apply to
29 accelerated payments.

8 EM points out, however, that there is no actual tension
9 between the language of the acceleration clause and the five-day
10 notice requirement of the election clause. Upon acceleration,
11 the principal is declared due and payable immediately. In
12 electing the payment currency, the bondholder must notify
13 Argentina five days before the date of payment. EM argues, and
14 we agree, that "payable" and "payment" are not the same: one
15 means that payment is owed and the other means that payment is
16 made. If the bondholder elects to receive payment in dollars
17 five days before payment is tendered, then the provisions of both
18 the acceleration and the election clauses are fully met.

19 Mindful of our duty to harmonize the terms of a contract
20 whenever possible, see Terwilliger v. Terwilliger, 206 F.3d 240,
21 245 (2d Cir. 2000), we decline to read the language of the bond
22 documents as establishing that the date of payment in the

23 election clause and the date the bond becomes payable under a
24 notice of acceleration are the same day. The commonsense
25 interpretation of "the date of payment" is the date when money is
26 actually tendered to satisfy the debt. Here, when EM accelerated
27 in response to Argentina's default, the amount owed to EM became
28 payable immediately upon the notice of acceleration. Because
29 payment was not tendered immediately -- and indeed has never been
30 tendered -- EM's election in the acceleration notice to be paid
31 in dollars occurred five days before payment, thereby meeting the
10 election notice requirement.³

11 When the acceleration and election clauses are read in
12 conjunction, there can be no doubt that Argentina is required to
13 pay EM the accelerated principal in dollars at a rate of one
14 dollar per peso. The election clause states clearly that it
15 applies "with respect to any payment" and that notice of election
16 must be given on the "fifth business day prior to the applicable
17 Interest Payment Date, the Maturity Date or other date of
18 payment" (emphasis added). We see no reason why payment of
19 accelerated principal would not be encompassed by such

1 ³Had Argentina tried to pay the amount due in pesos on one
2 of the five days following the notice of acceleration, this would
3 be a different case. During that period, the five-day notice
4 requirement would not have been met.

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5 contractual language. If the parties intended that an
6 accelerated payment of the principal amount could be made only in
7 pesos, they would have said so directly, either in the
8 acceleration clause itself or by excluding accelerated payments
9 from the election clause.

6 We therefore reject the strained reading of the bond
7 documents put forth by Argentina. Additionally, we have
8 considered Argentina's arguments with respect to the defaulted
9 March 19, 2002, interest payment and conclude that no genuine
10 issues of fact are raised requiring reversal of summary judgment
11 on that issue. Accordingly, we hold that EM is entitled to
12 collect the amount due on the defaulted bonds in dollars and
13 affirm the grant of summary judgment to EM.

XX

Kommentar: das interessante an diesem Urteil ist, dass Argentinien
technische Details (die rückzahlbare Währung - ARS oder USD - in der
Berufung klären will; die generelle, erstinstanzliche Verurteilung zur
Zahlung wird nicht in der Berufung in Frage gestellt.

Der Kommentar eines befreundeten internationalen Wirtschaftsanzwaltes dazu:

A very interesting part, for Your purposes, is (in my opinion) the fact that in the Appeal Argentine did NOT appeal the fact that it has to pay, and only appealed the fact on whether it has to pay in dollars or in pesos.

I remember that German Courts should be facing the problem of the "emergency situation" which lead to the default; it could be interesting, in my opinion, for Your lawyers to show to a German Court that the fact that Argentinahas to pay is so certain that such question was not even raised in the Appeal.

Ich werde das in der Tat in meine nächsten Klagen einfließen lassen

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