

1 UNITED STATES COURT OF APPEALS  
2 FOR THE SECOND CIRCUIT  
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4 August Term, 2003

5 (Argued June 10, 2004 Decided August 31, 2004)

6 Docket No. 03-9275  
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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.

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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.

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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.<sup>1</sup> In other words, because the  
24 acceleration clause uses the term "par value," an accelerated

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<sup>1</sup>EM 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.<sup>2</sup>

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

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1 <sup>2</sup>Argentina 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.<sup>3</sup>

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

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1 <sup>3</sup>Had 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.

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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.

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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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