

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 Docket No. 06-1080-cv

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

9 Plaintiffs-Appellees,

10 - v -

11 SOCIÉTÉ GÉNÉRALE, a French Banking Institution,

12 Defendant-Appellant.

13 -----
14 Before: FEINBERG, CABRANES, and SACK, Circuit Judges.

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

22 REVERSED.

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

27 CHRISTOPHER LANDAU, Kirkland & Ellis LLP
28 (Jeffrey B. Wall, of counsel),
29 Washington, DC, for Plaintiffs-
30 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 agreement¹ 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

¹ "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-*5.² 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, 1999.³ According to the agreement, Aon
20 promised to pay BSIL \$10 million upon the occurrence of a "Credit

²As 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.

³AFP 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, 11.⁴ 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

⁴The 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 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 district court also determined that GSIS's failure
17 to honor the Surety Bond constituted such an act, and that,
18 therefore, its denial of liability constituted a Sovereign (and
19 therefore Credit) Event under the agreement. Id., 2005 U.S.
20 Dist. LEXIS 2719 at *21. The court further concluded that Aon's
21 March 22, 2000, letter notifying SG that GSIS had declined to
22 make payment on the Surety Bond constituted sufficient notice of
23 the Credit Event under the agreement. Id. at *6, 2005 U.S. Dist.
24 LEXIS 2719, at *20. The court therefore granted Aon's motion for
25 summary judgment and denied SG's motion for judgment on the
26 pleadings.

1 SG appeals.

2 **DISCUSSION**

3 I. Standard of Review

4 "We review a district court's grant of summary judgment
5 de novo, construing the evidence in the light most favorable to
6 the nonmoving party and drawing all inferences and resolving all
7 ambiguities in favor of the nonmoving party." United Air Lines,
8 Inc. v. Insurance Co. of State of Pa., 439 F.3d 128, 130 (2d Cir.
9 2006) (citation and internal quotation marks omitted). Whether
10 the contractual language is ambiguous is also a question of law
11 subject to our de novo review. Krumme v. WestPoint Stevens Inc.,
12 238 F.3d 133, 139 (2d Cir. 2000). And "[w]here the parties'
13 intent is unambiguously conveyed by the plain meaning of the
14 agreements, then interpretation is a matter of law, and we will
15 review that interpretation de novo." Id. (citations and internal
16 quotation marks omitted).

17 New York law governs the Aon/SG CDS contract according
18 to its choice-of-law provision. No party disputes the
19 applicability of New York law here.

20 II. "Sovereign Event"

21 Credit default swaps are a method by which one party
22 (the protection buyer) transfers risk to another party (the
23 protection seller). In "emerging markets" such as the
24 Philippines,

25 [p]rotection buyers . . . can use credit derivatives to
26 manage particular market exposures and
27 return-on-investment; and protection sellers . . .

1 generally use credit derivatives to earn income and
2 diversify their own investment portfolios. Simply put,
3 a credit default swap is a bilateral financial contract
4 in which a protection buyer makes periodic payments to
5 the protection seller, in return for a contingent
6 payment if a predefined credit event occurs in the
7 reference credit

8 Often, the reference asset that the protection
9 buyer delivers to the protection seller following a
10 credit event is the instrument that is being hedged.
11 But in emerging markets, an investor may calculate that
12 a particular credit risk is reasonably correlated with
13 the performance of the sovereign itself, so that . . .
14 the investor may seek to isolate and hedge country risk
15 with credit default swaps written on some portion of
16 the sovereign's outstanding debt.

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

20 CDS agreements are thus significantly different from
21 insurance contracts. As amicus correctly points out, they "do
22 not, and are not meant to, indemnify the buyer of protection
23 against loss. Rather, CDS contracts allow parties to 'hedge'
24 risk by buying and selling risks at different prices and with
25 varying degrees of correlation." Br. of Int'l Swaps and
26 Derivatives Assoc., Inc. as Amicus Curiae in Support of Société
27 Générale, at 7 (footnote omitted). Aon bought from BSIL the risk
28 of a "Credit Event" as defined by the BSIL/Aon CDS contract.
29 With the Aon/SG CDS contract, Aon hedged the risk that it bought
30 from BSIL by selling to SG the risk of a "Credit Event" as
31 defined by the Aon/SG CDS contract. But the risk transferred to
32 Aon and the risk transferred by it were not necessarily

1 identical. The terms of each credit swap agreement independently
2 define the risk being transferred.

3 To decide whether GSIS's failure to pay on the Surety
4 Bond because GSIS took the position that it was not a legally
5 binding obligation, an event that constituted a Credit Event as
6 defined in the BSIL/Aon CDS contract, also constituted a "Credit
7 Event" as defined in the Aon/SG CDS contract -- the issue
8 presently before us -- we look first to the language of the
9 contract. If it is unambiguous -- which we think that it is --
10 then "we are required to give effect to the contract as written."
11 K. Bell & Assocs., Inc. v. Lloyd's Underwriters, 97 F.3d 632, 637
12 (2d Cir. 1996) (citation and internal quotation marks omitted).

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

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

26 Aon/SG CDS Contract at 7. The contract defines "Reference
27 Entity" as "Republic of Philippines and any successors." Id. at
28 1. Thus, for purposes of our analysis, after redacting
29 inapplicable language, the Aon/SG CDS Contract provides that an
30 event is a "Sovereign Event" if it is "a condition . . . created
31 by or result[ing] from any act or failure to act by the

1 government of [the Republic of Philippines and any Successors] or
2 any agency or regulatory authority [thereof] . . . that has the
3 effect of . . . causing a failure to honour any obligation
4 relating to . . . any obligation issued by the government of [the
5 Republic of Philippines]."

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

20 Put another way, Aon asks us to conclude that the GSIS
21 default on the Surety Bond constituted (1) an act or failure to
22 act by an agency of the Philippine government (GSIS), which (2)
23 created a "condition," which had the effect of causing a failure
24 of (3) GSIS to honor its obligation, the Surety Bond, (4) which
25 obligation relates to an obligation of the Philippine

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

16 A literal reading of the Sovereign Event definition
17 might suggest that the "act or failure to act" by the government
18 of the Philippines that "had the effect of causing [the] failure
19 [of GSIS] to honour" the Surety Bond was something other than the
20 failure to pay on the Surety Bond itself. Hypothetically, for

⁵Aon 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, the result is the same in either case.

1 example, the "act" might have been the issuance of GSIS's letter
2 to BSIL's assignees denying liability. Even if that were what
3 Aon's complaint said,⁶ the argument would fail. The letter was,
4 to be sure, an "act." But it did not create a separate
5 "condition" which in turn caused the default on the Surety Bond.

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

⁶The 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 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 Aon points out that the Ursa Minor district court held
2 that GSIS's default in March 2000 qualified as a Credit Event
3 under the BSIL/Aon CDS contract. Compl. ¶ 36. Indeed the court
4 did so hold:

5 The definition of "Credit Event" [in the
6 BSIL/Aon CDS contract] specifically includes
7 failure by GSIS to pay under the [Surety]
8 Bond "for whatever reason or cause."
9 Plaintiffs allege that GSIS'[s] refusal to
10 make payment under the Bond amounted to a
11 Credit Event, that [Aon] was given proper
12 notice and that [Aon's] refusal to pay
13 constituted a default triggering Aon's
14 obligations under the Guarantee.

15 Ursa Minor, 2000 WL 1010278, at *6, 2000 U.S. Dist. LEXIS 10166,
16 at *18. The court then ruled against Aon because the GSIS
17 default constituted a Credit Event, which the BSIL/Aon CDS
18 contract defined as, inter alia, a "Failure to Pay," and because
19 Aon "ha[d] an obligation to pay irrespective of the Bond's
20 potential invalidity or enforceability with respect to GSIS."

21 Id. at *7, 2000 U.S. Dist. LEXIS 10166, at *22. The Ursa Minor
22 district court never addressed the possibility that the GSIS
23 default may have been a "Sovereign Event" -- under the BSIL/Aon
24 CDS contract, let alone under the Aon/SG CDS contract before us.
25 This is hardly surprising inasmuch as the BSIL/Aon CDS contract
26 did not define "Credit Event" to include "Sovereign Event" as the
27 Aon/SG CDS contract did.

28 Yet Aon contends that the Ursa Minor court's
29 determination that a Credit Event occurred under the BSIL/Aon CDS
30 contract necessarily means that a Credit Event occurred under the

1 Aon/SG CDS contract.⁷ But it does not follow from the occurrence
2 of a Credit Event as defined in one contract that there was a
3 Credit Event as defined in the other. There is, as noted, no
4 reason to assume that the risk transferred to Aon was precisely
5 the risk that it transferred or sought to transfer to SG. And we
6 can perceive of no basis for concluding that the district court's
7 decision in Ursa Minor that there was a "Failure to Pay" Credit
8 Event under the BSIL/Aon CDS contract implies that there was a
9 "Sovereign Event" Credit Event under the Aon/SG CDS contract.

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

13 III. "Failure to Pay"

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

⁷The 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 [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 "Failure to Pay," which is also one of the defined Credit Events
2 under that agreement.

3 "Although we ordinarily will not review an issue the
4 district court did not decide, whether we do so or not is a
5 matter within our discretion." Chertkova v. Connecticut General
6 Life Ins. Co., 92 F.3d 81, 88 (2d Cir. 1996) (citing Singleton v.
7 Wulff, 428 U.S. 106, 120-21 (1976)). We think this case an
8 appropriate one for exercising that discretion. Apparently as a
9 result of the district court's conclusion that a Sovereign Event
10 had occurred, the parties devote little attention to the Failure
11 to Pay issue in their briefs to us. But the parties amply
12 presented arguments on that issue to the district court. In
13 fact, there, the parties focused on the Failure to Pay language
14 rather than the Sovereign Event provision upon which the district
15 court eventually decided the motions. The interpretation of the
16 unambiguous terms of a contract is, moreover, a matter of law
17 that we may properly evaluate and decide ourselves. See Krumme,
18 238 F.3d at 139; Chertkova, 92 F.3d at 88.

19 As noted above, the Aon/SG CDS contract defines the
20 "Reference Entity" as the Republic of Philippines and any
21 successors. Aon/SG CDS Contract at 1. Under the Aon/SG CDS
22 contract, a "Failure to Pay means . . . the failure by the
23 Reference Entity [the Republic of Philippines and any Successors]
24 to make, when due, any payments equal to or exceeding the Payment
25 Requirement (if any) under any Obligations." Id. at 1, 7 (second
26 emphasis added). An "Obligation" under that agreement is: "With

1 respect to the [Republic of Philippines], any obligation,
2 (whether present or future, contingent or otherwise, as principal
3 or surety or otherwise) for the payment or repayment of money."

4 Id. at 2. The Reference Obligation is identified as:

5 Issuer/Borrower: Republic of Philippines
6 Maturity: April 15, 2008
7 Coupon. 8.8750%
8 Original Issue Amount: USD 500,000,000

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

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

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

⁹The Aon/SG CDS contract incorporates the 1991 ISDA Definitions (as supplemented by the 1998 Supplement). Aon/SG CDS

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

18 If we were to credit Aon's argument as to the expansive
19 meaning of "Republic of Philippines," it would follow that any
20 CDS contract listing a sovereign nation as a Reference Entity

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.

¹⁰Aon 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 will be incorporating the ISDA definition of "Sovereign" without
2 using the term, or at least that the contract is ambiguous in
3 that regard. We are given, and ourselves see, no reason to do
4 so.

5 Instead, we look to Philippine law for guidance about
6 the distinction between the Republic of the Philippines and its
7 agencies and instrumentalities. See First Nat'l City Bank v.
8 Banco Para El Comercia Exterior de Cuba, 462 U.S. 611, 626-27
9 (1983) ("[G]overnment instrumentalities established as juridical
10 entities distinct from the sovereign should normally be treated
11 as such."). Before the district court, SG offered uncontested
12 expert evidence that, under Philippine law, GSIS is considered a
13 juridical entity distinct from the Republic. Mem. in Support of
14 Mot. for J. on the Pleadings dated Oct. 2, 2000, at 11 (citing
15 Decl. of Cesar L. Villanueva dated Sept. 29, 2000). We conclude
16 that, as a matter of Philippine law, GSIS is a separate juridical
17 entity from the Republic of the Philippines. See, e.g., An Act
18 Amending Presidential Decree No. 1146, as amended, Expanding and
19 Increasing the Coverage and Benefits of the Government Service
20 Insurance System, Instituting Reforms Therein and For Other
21 Purposes, Rep. Act No. 8291, § 41 (1997) (Phil.) (stating GSIS's
22 powers and functions, including the power "to sue and be sued");
23 see also Curley v. AMR Corp., 153 F.3d 5, 12 (2d Cir. 1998)
24 ("[A]ppellate courts, as well as trial courts, may find and apply
25 foreign law."); Fed. R. Civ. P. 44.1 ("The court, in determining
26 foreign law, may consider any relevant material or source,

1 including testimony, whether or not submitted by a party or
2 admissible under the Federal Rules of Evidence. The court's
3 determination shall be treated as a ruling on a question of
4 law."). As such, GSIS is not the "Republic of Philippines"; its
5 obligations are not the Republic of the Philippines' obligations;
6 and a failure by GSIS to make a payment on its obligations is not
7 equivalent to the failure of the Republic of the Philippines to
8 make a payment on its obligations.

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

23 But even though the identical term "Failure to Pay" is
24 used in both CDS agreements, and the Ursa Minor court decided
25 that there was a Failure to Pay under the BSIL/Aon agreement, the
26 term "Failure to Pay" has distinctly different meanings in the

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

25 One might argue, then, although the parties do not,
26 that the Republic's statutory guarantee of GSIS's debt was an

1 Obligation of the Reference Entity, which the Republic failed to
2 pay when the Surety Bond came due on March 7, 2000, and that this
3 failure to pay was a Credit Event, triggering SG's payment
4 obligations under the contract. We think this argument would
5 also fail. To trigger SG's payment obligations, a Credit Event
6 must occur before the Termination Date of the CDS agreement,
7 March 31, 2000. Aon/SG CDS Contract at 1. But Aon did not send
8 a Notice and Demand to the Government of the Republic of the
9 Philippines until April 3, 2000, three days after the Termination
10 Date of the Aon/SG CDS contract. See Société Générale, 2005 WL
11 427535, at *2 n.7, 2005 U.S. Dist. LEXIS 2719, at *9 n.7. And
12 the Republic of the Philippines did not deny Aon's demand until
13 April 14, 2000, two weeks after the Termination Date. Id.
14 Because the Republic's denial of liability did not occur before
15 the Termination Date, it cannot constitute a Credit Event under
16 the contract.

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

24 IV. Credit Event Notice

25 Although not central to the result we reach, we note
26 that the contract also provides that SG is obligated to pay Aon

1 only after Aon serves SG with a "Credit Event Notice" and a
2 demand for payment. See Aon/SG ISDA Master Agreement, dated Feb.
3 9, 1999, at 5 (defining, as an "Event of Default," "[f]ailure by
4 the party to make, when due, any payment under this
5 Agreement . . . if such failure is not remedied on or before the
6 third Local Business Day after notice of such failure is given to
7 the party" (emphasis added)); see also Mem. in Support of Pls.'
8 Mot. for Sum. J., dated Oct. 17, 2000, at 13 (arguing that
9 "[SG's] obligation is absolute and unconditional upon a notice of
10 a 'credit event' and a demand for payment thereunder" (emphasis
11 added)).

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

26 Recognizing this matter is not likely to
27 settle itself, in an effort to get a

1 resolution, we have this day filed suit in
2 Chicago seeking a declaration of the rights
3 and obligations of all relevant parties. In
4 order to preserve our rights under
5 [Aon]-Societe Generale [sic] agreement, we
6 felt compelled to name you in the litigation;
7 however, recognize our alignment of
8 interests. If our position is upheld, you
9 will not have to pay us. If we lose, you
10 will owe us. We think our interests are the
11 same, but again, for procedural reasons and
12 to protect our rights in what we think would
13 be the unlikely event we are called upon to
14 pay BSIL, we named you. . . .

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

28 Id. at 2.

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

1 **CONCLUSION**

2 As a matter of law and under the unambiguous meaning of
3 the Aon/SG CDS contract, no Credit Event occurred thereunder and
4 SG therefore did not breach that agreement by declining to pay
5 Aon thereunder. We therefore reverse the judgment of the
6 district court and enter judgment in favor of SG.