STATE OF WISCONSIN : CIRCUIT COURT : DANE COUNTY

In the Matter of the Rehabilitation of:

Segregated Account of Ambac Assurance Corporation

Case No. 10 CV 1576

ORDER DENYING REHABILITATOR'S MOTION TO ENFORCE INJUNCTION AGAINST ASSURED GUARANTY CORP. AND ASSURED GUARANTY RE LTD.

This matter came before the Court on the Rehabilitator's motion (the "Motion") to enforce this Court's March 24, 2011 Order for Temporary Injunctive Relief (the "Injunction"), as made permanent by Section 10.02 of the Plan of Rehabilitation and paragraph 9 of this Court's January 24, 2011 Order confirming the Plan, against Assured Guaranty Corp. ("Assured Guaranty") and Assured Guaranty Re Ltd. ("AG Re"). Having considered the arguments of the parties and the briefs, affidavits, and other written materials on file in these proceedings, the Court hereby makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. AG Re, an affiliate of Assured Guaranty, is a company engaged in underwriting financial guaranty reinsurance, organized under the laws of Bermuda, with its principal place of business in Bermuda.

2. AG Re does not have an office in the United States and does not do business in the United States.

3. In 2004, AG Re and Ambac entered into a reinsurance agreement, the Facultative Reinsurance Agreement (the "Facultative Agreement"). Under this agreement, AG Re agreed to reinsure a portion of certain insurance policies that were issued by Ambac Assurance Corporation ("Ambac").

4. Ambac's principal office is in New York City.

5. AG Re's dealings in connection with the Facultative Agreement have been with Ambac representatives at Ambac's headquarters in New York City, not in Wisconsin.

6. AG Re makes reinsurance payments to Ambac in New York.

7. The Facultative Agreement requires AG Re to send notices to Ambac in New York.

8. AG Re has not appeared in this proceeding.

9. The Rehabilitator has never served AG Re with a summons.

10. In 2003, Assured Guaranty and Ambac entered into a reinsurance agreement, the Second Amended and Restated Surplus Share Agreement (the "Surplus Share Agreement"). Pursuant to this agreement, Assured Guaranty agreed to reinsure a portion of certain insurance policies that were issued by Ambac.

11. Both the Surplus Share Agreement and the Facultative Agreement (together, the "Reinsurance Agreements") contain arbitration agreements under which the parties agreed to arbitrate all disputes under those agreements, with certain narrow exceptions.

12. On or about March 24, 2010, Ambac placed a number of insurance policies that it had issued, some of which were policies reinsured under the Surplus Share Agreement or the Facultative Agreement, into a Segregated Account pursuant to § 611.24 of the Wisconsin Statutes.

13. On or about March 24, 2010, the Rehabilitator commenced a proceeding in which the Segregated Account was placed in rehabilitation pursuant to Chapter 645 of the Wisconsin Statutes.

14. Neither the Facultative Agreement nor the Surplus Share Agreement has been allocated to the Segregated Account.

15. Neither Assured Guaranty nor AG Re (together, the "Assured Reinsurers") assert any interest in or make any claims against the Segregated Account.

16. In May and June 2010, counsel for the Assured Reinsurers sought confirmation from counsel for the Rehabilitator that the Reinsurance Agreements were not allocated to the Segregated Account and that the "Injunction" did not apply to these agreements since it "d[id] not apply to policies or other contracts which remain in the Ambac General Account." [1]

17. Counsel for the Rehabilitator told counsel for the Assured Reinsurers that the Reinsurance Agreements remained in Ambac's General Account.

18. In June 2010, counsel for the Assured Reinsurers discussed with counsel for the Rehabilitator whether the Injunction affected the Assured Reinsurers' contract rights under the Reinsurance Agreements, including their rights to arbitrate disputes with Ambac.

19. Following this discussion, counsel for the Rehabilitator sent an email stating the Rehabilitator's position:

> [T]he reinsurance agreements between Ambac Assurance Corporation, as ceding company and affiliates of Assured Guaranty, as reinsurer, have not been allocated to the Segregated Account and therefore are not subject to the rehabilitation proceeding. Accordingly, the temporary injunction does not apply to enjoin any actions that Assured Guaranty or its affiliates may take under the insurance agreements (including . . . demanding arbitration in accordance with the terms of the agreement).

20. Relying on the Rehabilitator's interpretation of the Injunction, the Assured Reinsurers did not object to the Injunction.

21. On October 8, 2010, the Plan of Rehabilitation (the "Plan") was filed.

22. Counsel for the Assured Reinsurers sought confirmation from counsel for the Rehabilitator that the Plan would not be construed to limit the Assured Reinsurers' contractual rights under the Reinsurance Agreements.

[1] It is the Assured Reinsurers' position that ¶¶1-15 & 28-35 of these proposed Findings of Fact, as well as ¶¶1, 5-6, 9, 11-13, 15 & 17-18 of the proposed Conclusions of Law below, present a sufficient basis for an order denying the Rehabilitator's motion. The remaining paragraphs in the proposed Findings of Fact and Conclusions of Law are offered for the Court's reference in the event it decides the issues referred to in those paragraphs.

23. On November 5, 2010, counsel for the Assured Reinsurers discussed with counsel for the Rehabilitator the effect of the Plan on the Assured Reinsurers' rights under the Reinsurance Agreements.

24. In a follow-up email, counsel for the Assured Reinsurers summarized his understanding of the Rehabilitator's position:

> [W]e just wanted to confirm your view that the plan of rehabilitation will not alter the contractual provisions of the reinsurance agreements between Ambac Assurance Corporation, as ceding company and affiliates of Assured Guaranty as reinsurer or enjoin any actions that Assured Guaranty or its affiliates may take under such reinsurance agreements (including exercising contractual netting and set-off provisions, or demanding arbitration in accordance with the terms of such reinsurance agreements).

25. Counsel for the Rehabilitator responded in a November 6, 2010 email as follows: "Generally we agree with your summary . . . ." and that "general disagreements will remain subject to arbitration (consistent with the contract)."

26. Counsel for the Rehabilitator added what he termed a "caveat" about potential disputes over "underlying policy liabilities" for insurance polices allocated to the Segregated Account. If the Assured Reinsurers wanted to step into Ambac's shoes and contest claims by holders of underlying policies, he pointed out, the Plan required them to do so in this Court: "[t]he additional rights your client has under the insolvency clause (right to notice and to interpose a defense) necessarily must be exercised in the rehabilitation court, as this is where the underlying policy liability is located."

27. Relying on this confirmation that the Plan did not adversely affect their contractual rights under the Reinsurance Agreements, the Assured Reinsurers did not object to the Plan.

28. A dispute has arisen between Ambac and the Assured Reinsurers regarding the extent of the Assured Reinsurers' payment obligations to Ambac under the Reinsurance Agreements.

29. There also is a dispute between Ambac and the Assured Reinsurers over whether the arbitration agreements in the Reinsurance Agreements are effective. Ambac asserts that it has no obligation to arbitrate these disputes because an exception to the arbitration agreements in the Reinsurance Agreements applies, and the Assured Reinsurers assert that Ambac has an obligation to arbitrate.

30. On April 7, 2011, Assured and AG Re demanded arbitration of the dispute pursuant to Article 15 of the Facultative Agreement and Article 16 of the Surplus Share Agreement.

31. On April 8, 2011, Assured and AG Re filed a petition to compel arbitration in New York State court.

32. In this proceeding, the Rehabilitator has presented evidence and argument that the Office of the Commissioner of Insurance brought this proceeding as a rehabilitation of the Segregated Account, as opposed to a rehabilitation of Ambac or a liquidation of either the Segregated Account or Ambac because any of those approaches would have led to "the pulling of default triggers" – that is, a rehabilitation or liquidation of Ambac would have enabled other parties to invoke contract provisions that would have been disadvantageous to Ambac and its policyholders.

33. In seeking confirmation of the Plan, the Rehabilitator argued that there was a benefit to Ambac's policyholders from limiting the rehabilitation to the Segregated Account because a rehabilitation of Ambac (which he referred to as a "full rehabilitation") would have enabled contract parties to assert such rights against Ambac, taking value from Ambac policyholders:

> Recognizing that a full rehabilitation or liquidation would have triggered covenants across almost all policies and caused other

> adverse consequences and collateral damages, OCI determined that a segregated account approach would have the most beneficial outcome for all policyholders.

34. The Rehabilitator took the position that those adverse consequences were avoided by limiting the rehabilitation to the Segregated Account.

35. In granting the motion to confirm the Plan, the Court adopted the Rehabilitator's proposed findings and conclusions. The Court found that a rehabilitation of Ambac would have triggered certain provisions in Ambac contracts, whereas a rehabilitation of the Segregated Account would not, and rested its decision to confirm the Plan on that legal distinction.

CONCLUSIONS OF LAW

1. This Court does not have personal jurisdiction over AG Re.

2. Under Wis. Stat. § 611.24(3)(e), the Segregated Account is a separate insurer for purposes of proceedings under Chapter 645 of the Wisconsin Statutes.

3. Only the Segregated Account is subject to this rehabilitation proceeding.

4. There is no rehabilitation under Chapter 645 against Ambac.

5. The Injunction should be strictly construed, with any close questions of interpretation resolved in favor of the enjoined party.

6. By its terms, the Injunction granted in this case "does not apply to policies or other contracts which remain in the Ambac General Account. The injunctive relief specified . . . pertains to the Segregated Account, and policies, contracts, assets and liabilities allocated to the Segregated Account."

7. Paragraph 1 of the Injunction does not enjoin the Assured Reinsurers from arbitrating their disputes with Ambac under the Reinsurance Agreements.

8. Paragraph 7 of the Injunction does not enjoin the Assured Reinsurers from not paying the amount that Ambac says are due under the Reinsurance Agreements.

9. By arbitrating their disputes with Ambac and by seeking to compel such arbitration, AG Re and Assured Guaranty have not violated the Injunction.

10. The Rehabilitator is equitably estopped from arguing that the Injunction bars the Assured Reinsurers from seeking arbitration of disputes arising under the Reinsurance Agreements.

11. Wis. Stat. § 645.04(3) does not prohibit the enforcement of the arbitration provision of the Reinsurance Agreements because neither Ambac nor the General Account of Ambac is "subject to a delinquency proceeding." Only the Segregated Account is "subject to a delinquency proceeding."

12. Enforcing the Federal Arbitration Act to compel Ambac to arbitrate its disputes with the Assured Reinsurers would not invalidate, impair or supersede § 645.04(3) because this dispute does not involve arbitration against an insurer that is "subject to a delinquency proceeding."

13. Because no Wisconsin statute prohibits the enforcement of an arbitration clause in a contract between two private parties that are not subject to delinquency proceedings, there is no reverse preemption under the McCarran-Ferguson Act, 15 U.S.C. §§ 1101 *et seq.*

14. Because the arbitration agreement in the Facultative Agreement is subject to Article II of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 (the "New York Convention"), which is not an "Act of Congress," there is no reverse preemption under the McCarran-Ferguson Act with respect to enforcement of that arbitration agreement pursuant to the New York Convention.

15. This Court previously noted the distinction between its roles in an ordinary, adversarial litigation and in a rehabilitation proceeding. Resolving the contract disputes between Ambac and the Assured Reinsurers would call on the Court to adjudicate claims in adversarial litigation.

16. Chapter 645 of the Wisconsin Insurance Law does not authorize the Court to hear and resolve, as part of this rehabilitation proceeding, these contract disputes between Ambac and the Assured Reinsurers.

17. The contract disputes between Ambac and the Assured Reinsurers should be decided either in an arbitration or in ordinary, adversary litigation, not in a motion to a court supervising the rehabilitation of the Segregated Account of Ambac.

18. Accordingly, this Court declines to hear or resolve the contract disputes between Ambac and the Assured Reinsurers

NOW THEREFORE, based upon the foregoing findings of Fact and Conclusions of Law, the above-described written materials, and the written and oral arguments of the parties, it is hereby ORDERED that the Rehabilitator's Motion to Enforce the Injunction Against Assured Guaranty Corp. and Assured Guaranty Re Ltd. is DENIED.

Dated this _____ day of May, 2011.

BY THE COURT:

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Honorable William D. Johnston
Lafayette County Circuit Court Judge
Presiding by Judicial Appointment