ARBITRATING IN THE FINANCIAL CRISIS: INSOLVENCY AND PUBLIC POLICY VERSUS ARBITRATION AND PARTY AUTONOMY – WHICH LAW GOVERNS?

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ABSTRACT

Balancing the conflicting policy goals pursued by national insolvency and international arbitration proceedings can be problematic. While most insolvency laws aim at maximizing the value of the debtor's estate and its equal distribution to creditors, arbitration is governed by the principles of party autonomy and privity between the debtor and the creditor. The conflicting policy goals have to be balanced against each other when an arbitral tribunal is faced with the insolvency of one of the parties to an ongoing arbitration. Just recently, the effects of insolvency on an ongoing arbitration have triggered seemingly divergent decisions by arbitral tribunals and domestic courts in a case involving the same factual situation and the same parties. This paper analyzes the legal reasoning of these decisions and explores approaches for reconciling the interplay between insolvency and arbitration. It will be suggested that the preferable approach lies in generally characterizing the relationship between insolvency and arbitration as a problem of the validity of the arbitration agreement which forms the basis of the

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arbitral tribunal's jurisdiction. Consequently, the arbitral tribunal should look to the law applicable to the arbitration agreement or, alternatively, to the law of the seat of the arbitration, the lex loci arbitri, to determine the law governing the interplay between insolvency and arbitration

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