THE GOLDFISH MODEL OF ARBITRATION: AN 'OUT-OF-BOWL' APPROACH TO DEMYSTIFYING PROCEDURAL LAWS IN COMMERCIAL ARBITRATION

*Garv Malhotra**

ABSTRACT

The interplay of procedural laws in international arbitration often confuses arbitration enthusiasts and practitioners. It is a multi-dimensional concept which is hard to explain or understand in abstract. Proposed below is a graphical model, which by analogy, represents the key procedural laws in a commercial arbitration and the interplay between them. The author believes that 'The Goldfish Model' approach can simplify answering complex questions of applicable procedure for each stage of arbitration, whether domestic or international.

Disclaimers

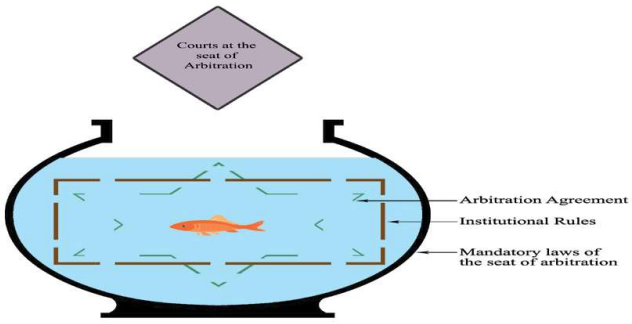
First, The Goldfish Model of Arbitration (the "**Goldfish Model**" or the "**Model**") does not postulate a new theory or style of practice. It simplifies and articulates the existing wealth of arbitral theory and practice from a different angle. The author recognizes that simplifying a system pivoted on the balance between "*judicial minimalism and party autonomy*"[1] can be a complex exercise with its own limitations. However, the objective of the Model is to imprint the broad architecture of the international arbitration system on the reader's mind.[2]

---

* The author is an international disputes lawyer and a partner at Skywards Law. He holds a B.Com., LL.B. (Hons.) from the Gujarat National Law University, Gandhinagar, an LL.M in arbitration from the National University of Singapore, Singapore and a Master's in International Disputes from the Graduate Institute, Geneva. The author is grateful to Professors Gabrielle-Kauffman Kohler, Jeffrey Waincymer and Gary Born; and Josef Ostřanský, Aviral Sinha, KhrystynaKostiushko, Naman Maheshwari, Prateek Bagaria and Surya Ravikumar for their extremely valuable inputs and support.

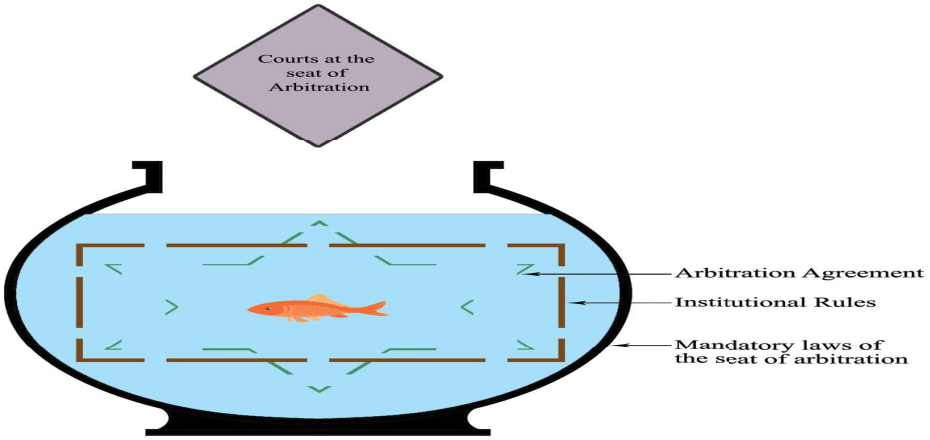
1. Rt Hon Lord Mustill, 'Too Many Laws' [1998] 6 (1) Asia Pacific Law Review 1-22; also see his judgment in *Channel Tunnel Group Limited v Balfour Beatty Construction Limited* [1993] AC 334, 357.
2. The author submits: like any model or theory, the *Goldfish Model* may perhaps skirt a few rare intricacies but broadly impresses the concept efficiently and should be judged and tested on its '*verisimilitude*' or '*truthlikeness*'. The author requests the reader's indulgence in this regard, see Graham Oddie, *Truthlikeness* (first published 2001, Edward N Zalta, 2016 edn, The Stanford Encyclopaedia of

Second, while a few renowned academics have questioned the relationship between arbitration and national legal systems,[3] the dominant global practice, academic thought, as well as the Model, accepts the limited but indispensable role of national courts and legal orders as fundamental.[4]



The Goldfish Model

(Larger image available on next)



The Goldfish Model

Philosophy). The idea for this model was born on the shores of *Lac Léman* (Lake Geneva) in 2015 and concluded in New Delhi in 2020 during the pandemic. The piece draws inspiration from an old short story, '*The fisherman and his wife*', Grimm Brothers, Tale No 19 (Library of Alexandria) and the writing style of imagination complemented by research was inspired by the American thriller novelist Michael Crichton, as well as Dr Viktor Frankl's book *Man's Search for Meaning* (1946).

3. For instance, see B Goldman, *Les conflits de lois dans l'arbitrage international de droit privé* (MartinusNijhoff 1963) 347, 374; EGaillard, *Legal Theory of International Arbitration* (MartinusNijhoff 2010).
4. See generally, Nigel Blackby& Constantine Partasides, *Redfern & Hunter on International Arbitration*, (Oxford 6th edn), 1.198; FA Mann, 'Lex FacitArbitrum' in International Arbitration Liber Amicorum for Martin Domke(MartinusNijhoff, The Hague 1967, P Sanders (ed)); JF Poudret and SBesson, *Comparative Law of International Arbitration* (London, Sweet & Maxwell 2007).

1. INTRODUCTION

The Goldfish Model, by analogy, represents the process of arbitration and the interplay of key applicable laws. It is a model which has multiple dimensions, each of which is analogous to a *Fishbowl*.

Arbitration operates with enormous flexibility, anchored within the extremely broad but strictly impermeable outer-limits of national legal systems. The national laws lend legitimacy to the arbitration and the award. The ouster of courts' jurisdiction through an arbitration clause is not absolute.[5]

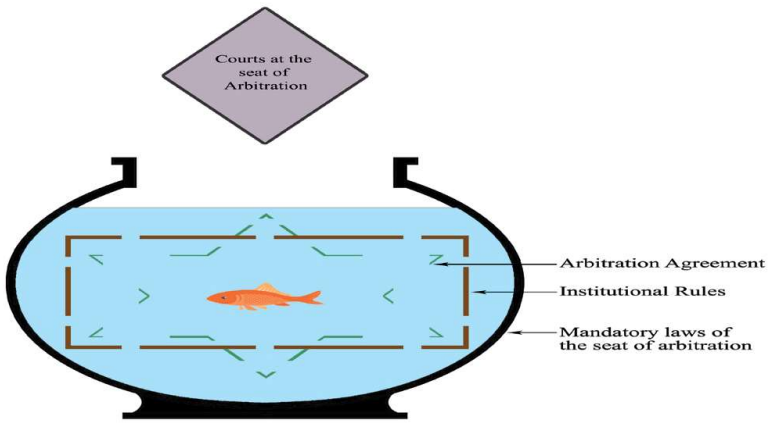
While various laws could potentially apply toarbitration,[6] The Goldfish Model restricts itself to the key laws that apply to an international commercial arbitration. This article and the Goldfish Model analogy runs on **3 levels**:

(i) Level One: Understanding the Fishbowl;

(ii) Level Two: Interplay between various elements of the Fishbowl; and

(iii) Level Three: Transfers between jurisdictions.

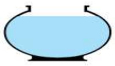
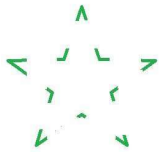
2. LEVEL ONE: UNDERSTANDING THE FISHBOWL



The Goldfish Model

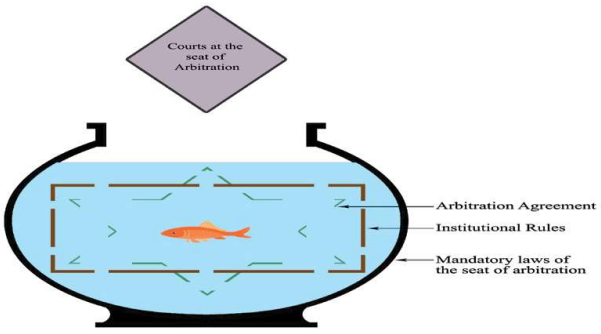
5. This is because getting rid of the court's power to correct departures from the law is effectively getting rid of the law itself; see Mustill(n 1).
6. Mustill (n 1); also see *Naviera Amazonica Peruana SA v BampaniaInternacional de Seguros del Peru* [1988] 1 Lloyd's Rep 11.

Diving into the analogy

In the Model	In the Analogy	In an Arbitration
	***Goldfish***: It has the ability to swim within the *Fishbowl* and not beyond.	The *Goldfish* represents the **arbitration process** which is flexible, but rooted within a legal system.
	***Fishbowl***: The fishbowl is the fish's ecosystem. It is made up of solid glass and cannot be modified. One can choose the type or size of bowl but cannot modify its physical structure.	The *Fishbowl* represents **mandatory rules of the seat** of arbitration. The application of mandatory rules is a consequence of the choice of seat.[7]
	**Plants/*Green Star***: There are small water plants within the bowl which provide food & nourishment to the *Goldfish*. The shape and size of these plants can be trimmed as preferred.	The plants/*Green Starrepresents* the **arbitration agreement**. It is the enabling source of power and procedure which can be modified as desired by the parties. It usually has large gaps on issues of procedure.
	***Lights/Brown Rectangle***: These are standard aquarium lighting accessories which cannot be modified.	The lights/*Brown Rectanglerepresents* the **institutional rules** which are standard form contracts. In cases of *ad hoc* arbitration, the *Brown Rectangle* refers to the default arbitration rules of the seat of arbitration (e.g. the domestic arbitration legislation).
	***Floating Diamond:*** *This represents a supervisor which has only a limited access to and role in the ecosystem.*	The *floating diamond* represents the **courtsat the seat of arbitration**.Their access and supervision over the arbitration process is detached and limited to specific situations.

7. As a theoretical side note, the New York Convention on the Recognition & Enforcement of Arbitration Awards, 1958 (the "New York Convention") in Article V(1)(a) addresses the situation where parties choose a curial law, different from that of the seat. For instance, if the parties state in their arbitration clause that the seat of arbitration is Singapore but the law applicable to the arbitration agreement is French Law. While infrequent in practice, in such a situation, the *Fishbowl* will represent the mandatory rules of the curial law that the parties have expressed in their contract.

Working the Goldfish Model



The Goldfish Model

A. Within the Model

The Goldfish can swim straight in a direction until it is obstructed. In other words, the Goldfish can swim in a straight line if it is not obstructed by the *Green Star* (with large gaps) and then the *Brown Rectangle* (with small gaps). Moreover, even in a particular direction, through the gaps in the lines, the fish can, at a maximum, swim till the edge of the 'bowl' and no further.

In sum, identification of the obstructed path in a linear direction concludes at the first barrier and further evaluation is unnecessary to see how far the 'Goldfish' can swim in a straight line.

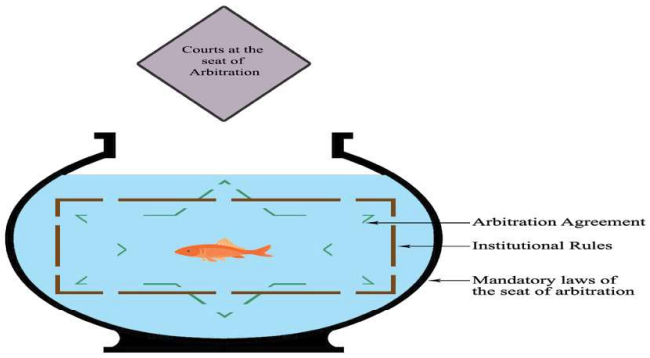
B. In an Arbitration Scenario

In the Model, the blue **water** represents the flexibility of the arbitration process.[8] The Goldfish (arbitration) can swim till the bowl if it is unobstructed by the plants (arbitration agreement) and the lights (institutional rules). However, this rarely happens as most procedural answers can be found in the arbitration agreement and/or the institutional rules (or the default domestic legislation in case of an *ad hoc* arbitration). The applicable law on any procedural issue in an arbitration will be the *first* obstruction faced by the *Goldfish* in the *Model*. This may be the arbitration agreement, the institutional rules or the *lex arbitri (lex arbitriis* further explained in Part C sub-part (ii) below).

In Perspective: Analysis of key applicable laws

8. 'Water' is a term borrowed in this model from international trade law where it denotes the flexibility of a country in its custom schedules (also called 'binding overhang'). It is the difference between the bound rate of duty and the actual applied rate. See Raj Bhala, *Dictionary of International Trade Law* (LexisNexis, 2nd edn).

C. The Arbitration Agreement /Green Star



The Goldfish Model

The first determinant of the arbitration procedure is the express choice of parties, i.e. the arbitration agreement (or *clause compromissoire*, as it is known in civil law systems[9]), and is called the "*foundation stone*" of international arbitration.[10] It is the source of tribunals' jurisdiction and the awards' legitimacy.

The arbitration agreement, while often featuring as a clause in the 'main contract', is considered an independent contract.[11] Such clauses usually do not go into the details of the procedure of settling disputes.[12] They only create a general obligation to arbitrate; identify the parties; broadly identify the subject matter of dispute (existing or foreseeable) and connect the arbitration to a legal system.

Parties have the autonomy to undertake any obligation by agreement.[13] The only legal limitation to this right is that parties cannot contract outside the mandatory rules of the *lex arbitri*. For instance, Article 182(3) of the Swiss Private International Law (PILA), provides for the parties' "*right to be heard in adversarial proceedings*". This is a mandatory rule of Swiss

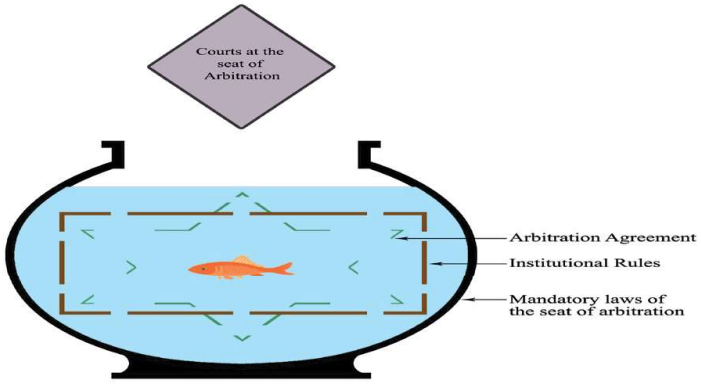
9. BlackbyandPartasides(n 4), 1.149.
10. BlackbyandPartasides(n 4), 1.140.
11. Professor Pierre Mayer articulates this beautifully by stating that a contract containing an arbitration clause is essentially a single '*instrumentum*'*containing* two '*negotia*'. See P Mayer, 'Limits of Severability of Arbitration Clause' in Albert Jan van den Berg (ed), ICCA Congress Series No 9 (Kluwer International1999)261-267.
12. Poudret & Besson at page 130 of their treatise call them '*white clauses*', i.e. clauses which express the parties' will to arbitrate but do not lend any assistance on procedural and logistical issues.
13. While the *burden of proving* the existence of an arbitration clause is similar to general contracts, the *standard of proof* differs. Arbitration agreements must be in writing, see Article II of the New York Convention and Article 7 of the UNCITRAL Model Law, 1985.

law which the parties cannot waive either by contract or by adopting any institutional rules (mandatory rules are further explained in Part (c) sub-part (iii) below).

In sum, the first determinant of the arbitral procedure is the parties' arbitration agreement. Parties can choose its design with flexibility so long as the agreement does not conflict with the mandatory laws of the seat of arbitration.

D. Institutional Rules / Brown Rectangle

Institutional rules provide a detailed procedural framework for conducting arbitration. These are a standard set of procedures that can be included by their simple reference in an arbitration clause.[14] The institutional rules are drafted based on the best global practices and are intended to be almost exhaustive rules on issues of arbitral procedure. Often the reference to institutional rules is an agreement (institutional rules) within an agreement (arbitration clause) within another agreement (main contract).



The Goldfish Model

Most of these rules are administered by institutions such as the ICC, LCIA, PCA, SIAC, MCIA, etc. but the rules may exist independent of administering institutions as well (e.g. the UNCITRAL Rules). Moreover, parties can choose to have one set of rules administered by another institution.[15] In case of *ad hoc* arbitrations (without institutional rules),

14. There have been various instances where courts around the world have held inexact references to an arbitration institution to be binding on the parties. The author would like to believe that the debate of pathological clauses has now become passé.
15. The ICC amended Article 1(2) of their rules in 2012 to state that "*The Court is the only body authorized to administer arbitrations under the Rule*" and it's Secretariat appears to have formed the view that "*it is not possible for another institution to administer an ICC arbitration properly*", see Jason Fry and others, *The Secretariat's*

this *Brown Rectangle* vanishes and the fish can swim up to the laws of the place where the arbitration is juridically seated. The mandatory rules of the seat remain the same irrespective of the fact that the arbitration is *ad hoc* or institutional. However, other non-mandatory rules of the seat are of relevance where there are no institutional rules governing the arbitration. The mandatory and non-mandatory rules of the seat of arbitration collectively form the *lex arbitri*.

In sum, the institutional rules (or default rules of the seat) provide a detailed procedure for the conduct of arbitration. However, in case of a contradiction between the institutional rules and the parties' arbitration agreement, the arbitration agreement will override. In the *Goldfish Model*, the institutional rules (*Brown Rectangle*) are usually broader than the contract but cannot validly be broader than the mandatory rules of *lex arbitri* or the *Fishbowl*.

E. The Mandatory Rules of the Seat of Arbitration /Fishbowl

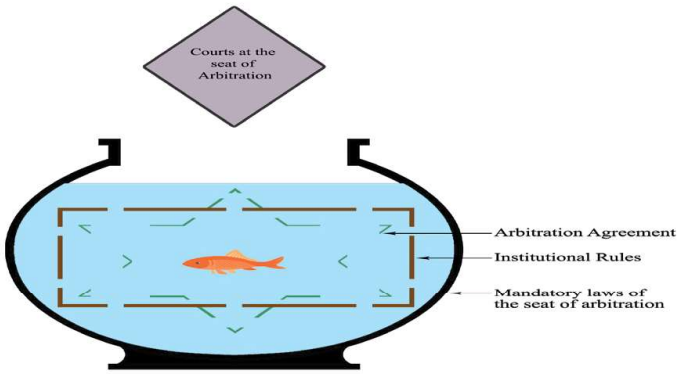
The mandatory rules are the fundamental and non-derogable rules of a jurisdiction. These may be substantive or procedural rules contained within codified (or even uncodified) laws of that jurisdiction. Thus, the parties' agreement must be within the range permitted by the laws that are in force in the concerned jurisdiction.[16]

The *Fishbowl* is the outer shell of this ecosystem and the fish cannot swim beyond the bowl. Additionally, one can select a bowl depending on its preference of size, colour, etc.; however, once selected, one cannot alter the bowl's structure. This is analogous to the mandatory rules of *lex arbitri* which are a non-waivable consequence of the seat of arbitration.

The mandatory rules of the seat are fundamental to the larger interest and public policy of the concerned jurisdiction. Therefore, in this regard, private arbitration becomes an aspect of public law.[17]Parties' freedom to contract ends at mandatory rules of *lex arbitri* which define its outer limits.

Guide to ICC Arbitration (ICC 2012). However, the author has come across more than a few instances in practice where the ICC Rules are being administered by institutions like SIAC on the basis of parties' specific arbitration clauses. Based on experience, arbitrators are unsympathetic to jurisdictional challenges against the Tribunal & the institution on grounds of such 'cross-administration'. Within the model, this will be a situation of the parties' specific agreement (*Green Star*) overriding the general institutional rules (*Brown Rectangle*).

16. Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International 2012) at 3.7, 182-183.
17. Mustill (n 1).



The Goldfish Model

Mandatory rules of a seat could be the rules contained in the arbitration statute and other statutes. These would not only include rights relating to due process but would also determine issues like arbitrability. For instance, in an arbitration related to bankruptcy seated in New Delhi, Indian law will decide whether the parties could validly arbitrate bankruptcy-related disputes, thus, defining the outer-limits of party autonomy. In the *Model*, the *flexibility* of the parties' arbitration agreement and the institutional rules extends only till the limit of the bowl and not beyond.

F. Courts at the Seat of Arbitration / Floating Diamond

The courts at the seat of arbitration have a limited but key role in an arbitration process. The assent of parties to a 'seat' is considered their assent to the consequential supervisory role of the 'courts' at the seat of arbitration.[18]

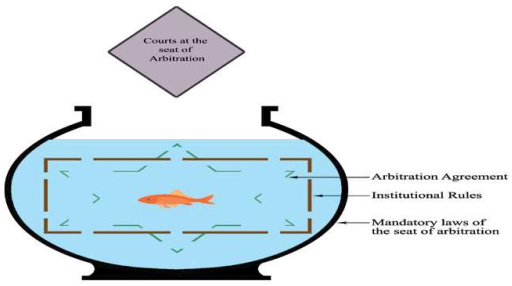
In the *Model*, the courts are depicted as a detached-supervisor who sits outside but passively observes the *Goldfish* in order to ensure that it is properly maturing. It is mindful of its limited role, knowing fully well that the Goldfish derives its nourishment from the 'plants' and vision from the installed 'light'.

The supervisor interferes in limited emergency situations, where the *Goldfish* has an imminent risk of suffering a life-threatening disease. The only time that the supervisor will be entitled to conduct a basic check-up of the fish is when it is claimed to have outgrown the bowl and is ready to be moved to a lake (explained further below in Level 3 of this article). At this

18. David Joseph QC in his treatise *Jurisdiction & Arbitration Agreements* (Sweet & Maxwell 2015) states on page 114 that "*An agreement to arbitrate disputes in England carries with it the agreement of the parties that the courts of England will have supervisory jurisdiction over the arbitration and the Tribunal*".

stage, the supervisor can verify (against pre-set parameters) whether this fish was matured in a proper manner and is free of chronic diseases.

Just like the supervisor of a *Fishbowl*, the courts at the seat of arbitration have a very limited scope of intervention in an arbitration. The only time the courts have an opportunity to examine an arbitration seated in their jurisdiction is when an award is challenged before them.[19] During the lifespan of an arbitration, the courts remain mindful that the arbitrators derive their powers from the parties' contract and respect their own obligations to refrain from intervention.[20]



The Goldfish Model

The courts at the seat of arbitration have specific powers at designated junctures, e.g. at the annulment stage, to test the validity of the arbitration awards and to set-aside the award on grounds such as lack of a valid agreement, ignorance of due process, etc.[21]

The courts can also ensure that the parties' contractual framework (arbitration agreement and the institutional rules) do not contravene the mandatory rules of the seat. If the courts of the seat of arbitration decide to 'set-aside an award', the award is rendered null and void. On the other hand, an enforcing court only has the limited power of refusing to recognize and enforce an award in its own jurisdiction leaving the award open to enforcement in other countries. In the *Goldfish Model*, the supervisor above the bowl can intervene only in limited and exceptional circumstances. Once the fish has matured, the supervisor has the power to declare it as matured, partially defective requiring amputation or not fit for consumption.

Testing a simple Prototype of the Model

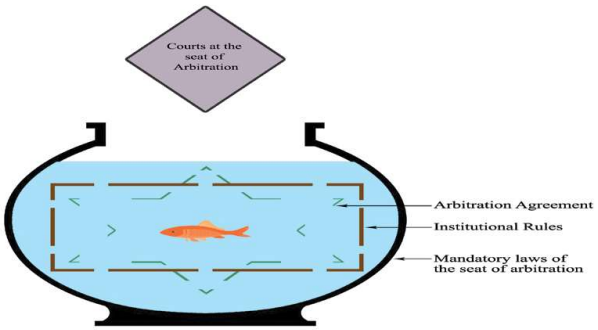
The *Goldfish Model* can be used to solve most procedural issues that may arise in an arbitration. To test the working of this model simpliciter,

19. For instance, under Article 34 of the UNCITRAL Model Law at the seat of the arbitration with a view to set-aside the Tribunal's final award.
20. The UNCITRAL Model Law, Art 5 and 8.
21. The New York Convention, Art V(1)(a) to (e).

let us take an example of an arbitration clause in a contract that states: "*parties will arbitrate their disputes related to this contract in The Hague, Netherlands under the LCIA Rules*".

In response to a procedural question, like the number of arbitrators that should be appointed, we must first picture the arbitration as the *Goldfish* in the *Model*. The fish will swim in a straight line in any direction, only till it encounters the first barrier.

The *Goldfish* will first swim toward (or check) the arbitration agreement (*Green Star*). This clause does not provide guidance on the number of arbitrators. The fish will then move to the institutional rules (*Brown Rectangle*). The LCIA Rules provide an answer in Article 5.8.[22] If the institutional rules did not have an answer to this procedural question (an unlikely situation as most rules provide for the Tribunal's residuary procedural discretion), the fish would swim to the Fishbowl and find the answer in the Dutch Arbitration Act, 2015 (that provides for a default quorum) or other relevant Dutch laws in force.[23]



The Goldfish Model

3. LEVEL TWO: INTERPLAY BETWEEN VARIOUS COMPONENTS OF THE FISHBOWL

In this section, we will 'zoom-in' and look at a few specific examples of interaction between the key procedural laws that apply in an arbitration.

22. London Court of International Arbitration Rules (LCIA Rules), Art 5.8: "*A sole arbitrator shall be appointed unless the parties have agreed in writing otherwise or if the LCIA Court determines that in the circumstances a three-member tribunal is appropriate (or, exceptionally, more than three).*"
23. The inquiry and analysis is analogous to the private international law tests of the express choice (agreement) followed by the implied choice (rules), followed by the law of the place of closest connection (seat of arbitration) followed by Common law countries like Singapore and India; English law however, considers the governing law of the contract to be the law of closest connection.

Arbitration Agreement v. Institutional Rules

Arbitration is a creature of contract. The contact between the parties to arbitrate, i.e., the arbitration agreement, usually demonstrates a general intention to arbitrate disputes without offering detailed guidance as to the arbitration procedure.

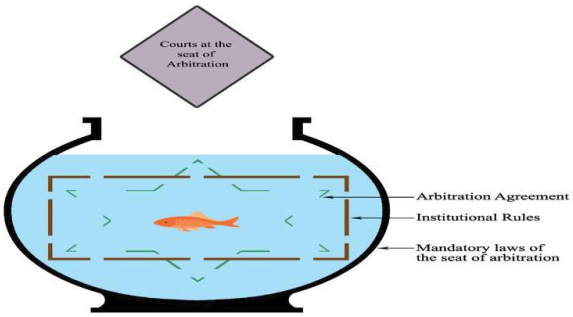
The arbitration agreement (*Green Star*) may, however, in rare cases, be broader than the institutional rules (*Brown Rectangle*). This does not render the contract void. It is a situation where the specific consent of the parties (express choice given in their arbitration agreement) expands the general consent of the parties (implied or, in this case, secondary express choice given in the institutional rules). This means that the *Green Star* could validly be within or outside the *Brown Rectangle*, so long as it stays within the bowl. For instance, where parties prescribe time limits (in the arbitration agreement) which are broader than the time limits laid down in the institutional rules, then notwithstanding the stipulation in the institutional rules, the stipulation in the parties' agreement will be determinative of the time limits.

Another example can be of an arbitration clause referring to the ICC Arbitration Rules but expressly excluding the mandatory 'scrutiny' process. This would *strict sensu*, be a valid and not a pathological clause. Maximum consequence may be that the ICC may refuse to administer the arbitration. In such a case, it will be an *ad hoc* arbitration (notwithstanding practical difficulties) based on all the ICC Rules, except those relating to 'scrutiny' (please don't try this at home!).

The contractual stipulations of the parties can be broader than the institutional rules (i.e., the *Green Star* can be broader than the Brown Rectangle). However, this may open up a can of worms. Therefore, staying within the institutional rules is almost always better, efficient and cheaper.

Arbitration Agreement & Institutional Rules v. Mandatory Rules of the Seat

In the *Goldfish Model*, if the *Green Star* and/or the *Brown Rectangle* (depicting the agreement or institutional rules) go beyond the glass *Fishbowl* of mandatory rules, they are void to the extent of such derogation. This means that when the *Brown Rectangle* or the *Green Star* goes beyond the *Fishbowl*, it automatically gets trimmed to the size which fits within the bowl by virtue of the supremacy of the mandatory rules of the seat. The arbitral clause however, may still be valid and operable by virtue of the *doctrine of severability.*



The Goldfish Model

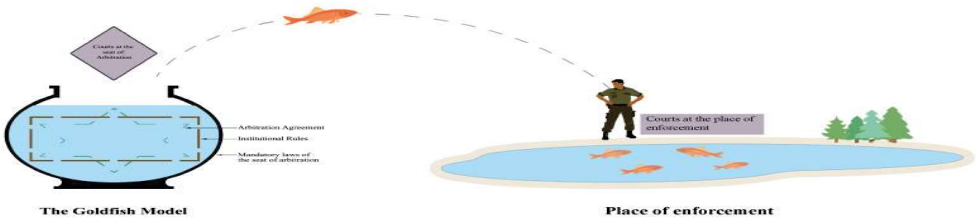
For instance, Bankruptcy disputes being non-arbitrable under the laws of The Hague, cannot be made arbitrable by the parties' arbitration agreement. Similarly, equality of parties being a mandatory principle under Swiss law would mean that parties, by agreement, cannot give the right to appoint an arbitrator to a single side.

In case of *derogation from the mandatory rules of law*, there are two possible outcomes:

(i) If it is a '*procedural derogation*',e.g., waiver of the right to be heard, then the derogatory provision in the contract or rules will be deemed to be replaced by the mandatory rules of lex arbitri. For instance, in a Switzerland-seated arbitration, A and B agree that only A has the right to be heard. This violates the Swiss mandatory rule of equality. Therefore, it will automatically stand modified to the extent of conformity with the mandatory rule and *both* A and B will have the right to be heard.

(ii) If it is a '*substantive derogation*' that goes to the root of the matter, e.g. one related to the arbitrability of a dispute, then the tribunal will have to decline jurisdiction. For instance, the parties have an arbitration agreement covering bankruptcy-related disputes but are subject to the rules of Bankruptcy Arbitration Association in an arbitration seated in New Delhi. Now, the Indian law prohibits arbitration of bankruptcy disputes. As a result, the *Brown Rectangle* depicting the institutional rules and the *Green Star* depicting the arbitration agreement would extend beyond the mandatory rules of *lex arbitri* and will, thus, be void to the extent of such derogation. In this case, the derogation is such that it goes to the root of the jurisdiction of the tribunal. As mandatory laws of *lex arbitri* (Indian law) prohibit arbitrating bankruptcy disputes, the tribunal will have to decline jurisdiction.

Having 'zoomed-into' the interplay between the various applicable laws to an arbitration, let us now 'zoom-out' and head to the next level of the *Model* involving the transfer of the arbitration from the *Fishbowl* to a lake (or the movement of the award from the seat of arbitration to the site of enforcement).



4. LEVEL THREE: TRANSFERS BETWEEN JURISDICTIONS

In a domestic arbitration, the enforcement process remains in the same legal ecosystem whereas in an international arbitration, the result of the arbitration (i.e., the award) is often enforced in another jurisdiction. The next level applies in case of international commercial arbitration where the seat of arbitration and the enforcing country are different jurisdictions.

When the *Goldfish* has matured enough to outgrow the *Fishbowl*, it's existence in that ecosystem would have come to a logical conclusion. At this stage, it would need to be moved to a larger lake (the "**Lake**"). The Lake would have its own set of rules, administered by a supervisor who recognizes a 'creature' as a 'fully matured fish' capable of being considered equivalent of a fish that was matured in their own Lake.

Consider that the Lake has its own laws to the effect that it would admit any fully matured Goldfish unless it suffers from a major defect. As such, the *Goldfish* would, by default, be admitted unless it is demonstrated that the fish was matured improperly or suffers from one of the particular identified diseases. If it were a 'home-bred fish' of the Lake, it would have already matured under the oversight of the supervisor, and, thus, would not have to be tested for diseases and maturity again.

In the *Goldfish Model*, the arbitration will remain within the confines of the arbitration agreement, the institutional rules and the mandatory rules of *lex arbitri* till the time it reaches a logical conclusion, i.e. the final award.

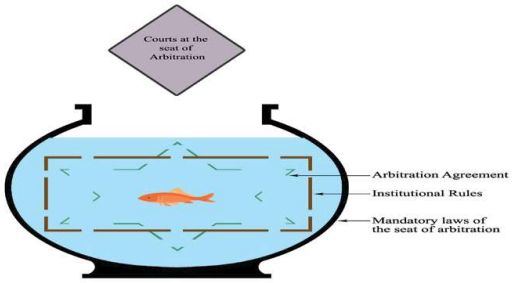
After the final award is made, any/all of the parties may choose to challenge that award before the courts at the seat of the arbitration. A party may, in parallel, take the award to another country for enforcement. Most legal systems confer effects on arbitral awards that are identical or similar to those of court judgments, notably that of *res judicata*. However, these

effects are conferred by a legal system on awards seated in their jurisdiction. The New York Convention provides for the recognition and enforcement of these awards *outside* the territory of the seat jurisdiction[24] unless the award suffers from one of the "*grave deficiencies*"[25] enumerated in Article V of the New York Convention and Article 34 of the UNCITRAL Model Law (applied by the local courts as per their domestic laws, e.g. the Indian Arbitration and Conciliation Act, 1996).

The task of the *Supervisor* of the *Fishbowl* (courts at the seat) and the *Supervisor* of the Lake (courts at the site of enforcement) are similar in some regards but their competencies are mutually exclusive. The decision of one may persuade the other but does not bind it.[26]

In the author's view, when determining the flexibility of procedure during the lifespan of an arbitration (i.e., in the *Fishbowl*), the arbitrators must be mindful of whether the *Goldfish* of arbitration would be considered fit by the Supervisor of another *Fishbowl*. In other words, the arbitrators should ideally be mindful of the enforceability of their awards in a reasonably probable location of enforcement so that the amount of time and costs spent in arbitrating a dispute are not wasted.

5. CONCLUSION



The Goldfish Model

Arbitration is like a majestic *Goldfish*. When in water, it can glide through the ferns and swim around the lights, so long as it stays within the bowl

24. *ICCA Guide to the Interpretation of the New York Convention, 1958* (ICCA 2011)9.
25. P Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (Sweet & Maxwell, 3rdedn) 7-001.
26. The difference between the 'French' approach and the 'American' approach to enforcement of foreign awards is based primarily on the degree of deference given to the opinion of courts at the seat in deciding annulment actions. The French courts instead of automatically refusing the annulment decision of the courts at the seat of arbitration, conduct their own *de novo* enquiry into the enforceability of the award whereas the American courts give much deference to the annulment decision at the court of seat.

and steers clear of the obstructions. Unfortunately, it is often hard to see the outline of *Fishbowl* while swimming towards it, right until the *Goldfish* bumps its head.

Given the fact that the courts at the seat of arbitration can only conduct a limited review of an award *after* it has been made, there is little guidance on what rules actually constitute the mandatory laws of a seat (at an *ex-ante* stage). Most guidance on what violates mandatory rules of a seat come from expensive battle scars of other parties (euphemistically called precedents). The author considers this as inefficient. States can save everyone a lot of time, effort and money if they could simply add a provision in their arbitration legislations stating what its mandatory laws are. This would reduce the risk of unwanted surprises and reduce judicial overreach in interpretation.

The author encourages the use of the *Goldfish Model*, with due credit where possible, and concludes that the Goldfish Model has the following *two key uses*.

First, it can become an integral *teaching tool* to acquaint students of arbitration with the interplay of various laws applicable to arbitration. The learned professors may consider using the *Goldfish Model* at appropriate times in their course and discourses on arbitration. Once this model is understood properly, it has the potential to get imprinted.

Secondly, this Model can be used to *visually demonstrate procedural laws* (similar to corporate structure diagrams) and to graphically represent the basis for adjudicating complex procedural issues. It can equally help courts in assessing derogations from their national mandatory laws and in-house counsel in drafting their arbitration agreements while avoiding pathological *midnight* clauses that increase litigation exposure.