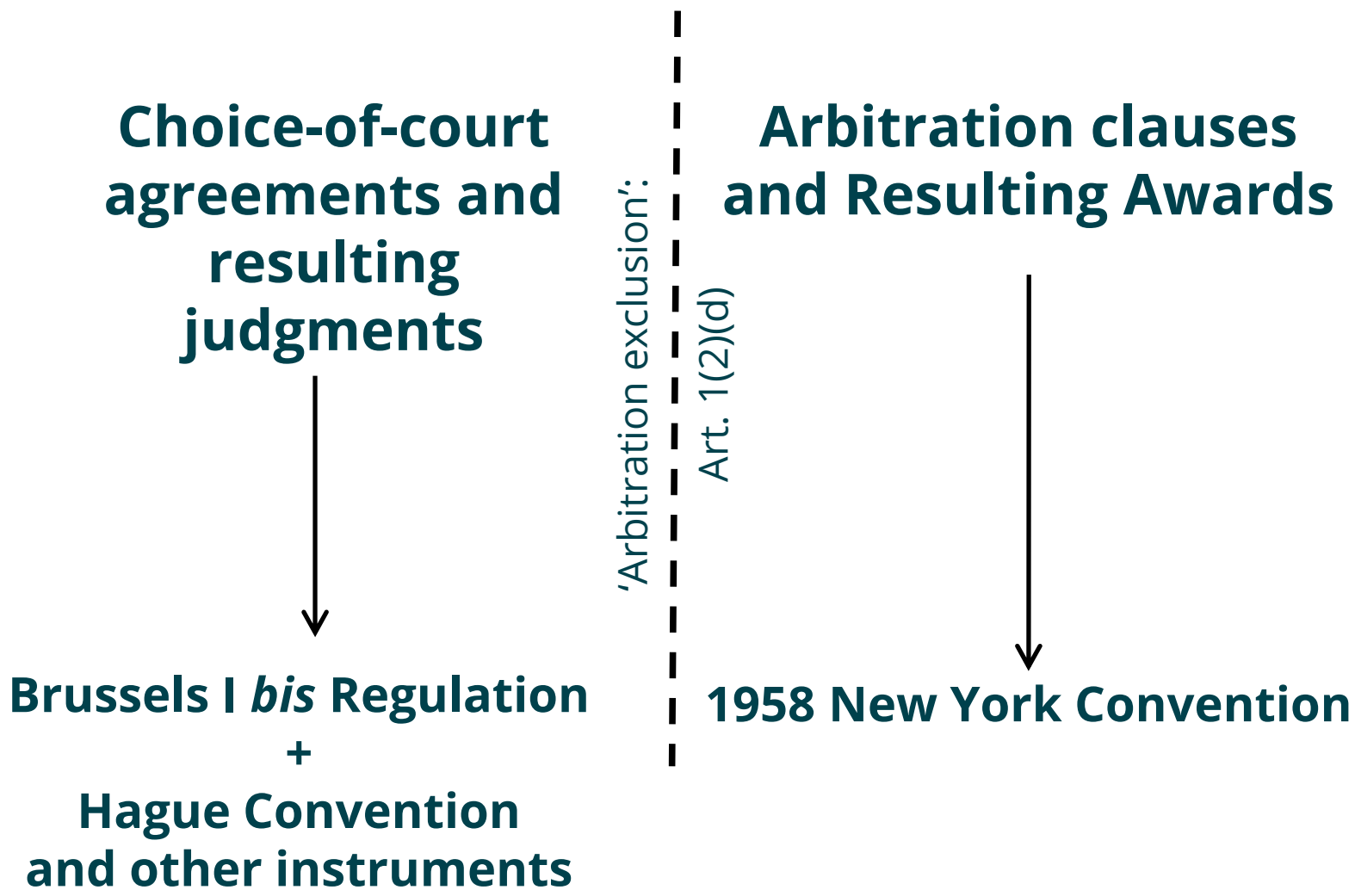


Settlement of International Disputes II

Pietro Ortolani, 30 November 2023

CPO^o

The Brussels I System and Arbitration



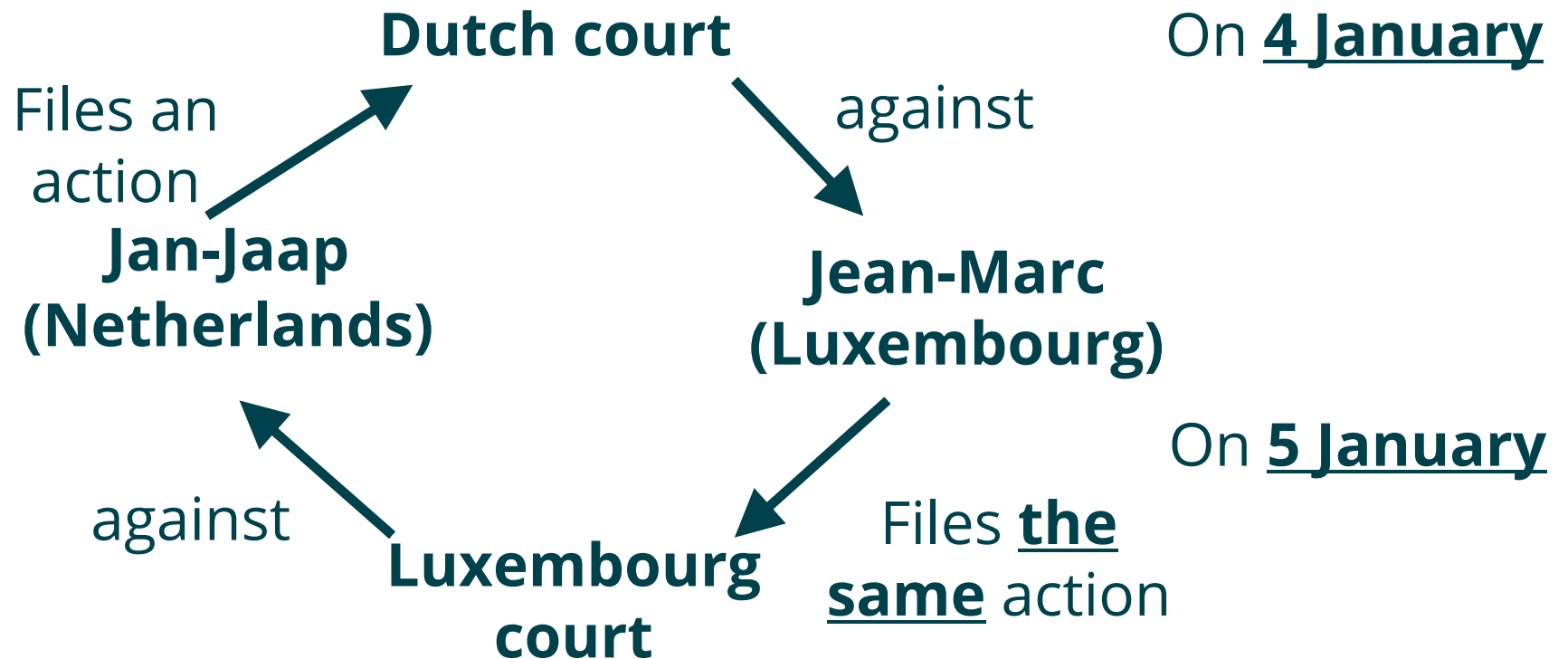
Agenda

- Parallel proceedings under the Brussels I *bis* Regulation (recap)
- A selection of procedural problems and open dilemmas concerning parallel arbitration/litigation proceedings
- Recognition and enforcement of outcomes: evaluating arbitration vs. litigation
- The “new kid on the block”: mediation and the Singapore Convention

Parallel Proceedings

- Heads of jurisdiction can **overlap**
 - e.g. Respondent domiciled in Luxembourg (art. 4), but place of performance of contractual obligations in the Netherlands (art. 7(1))
- What is the **problem** with parallel proceedings? Why do we want to avoid them?

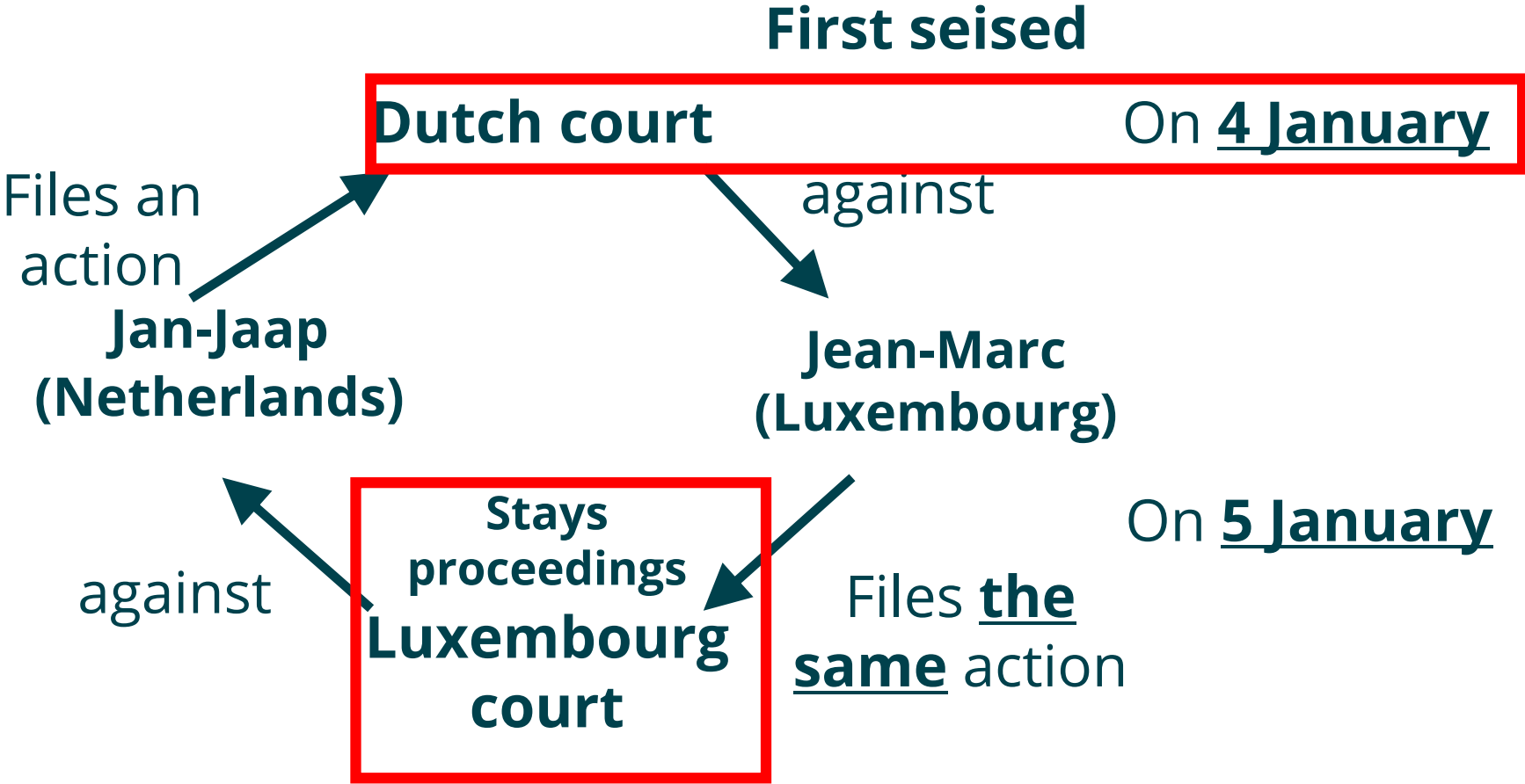
Art. 29: *Lis Pendens*



Art. 29 Bruxelles I *bis* Regulation

Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, **any court other than the court first seised shall of its own motion stay its proceedings** until such time as the jurisdiction of the court first seised is established.

Which court is "first seised"?



And what happens then? Art. 29 Bruxelles I *bis*

Where the jurisdiction of the court first seised is established, any court other than the court first seised shall **decline jurisdiction** in favour of that court.

Is this a good solution?

Advantages the Brussels I regime

- The rule is very simple
- The same rule always applies

Criticism against Brussels I regime

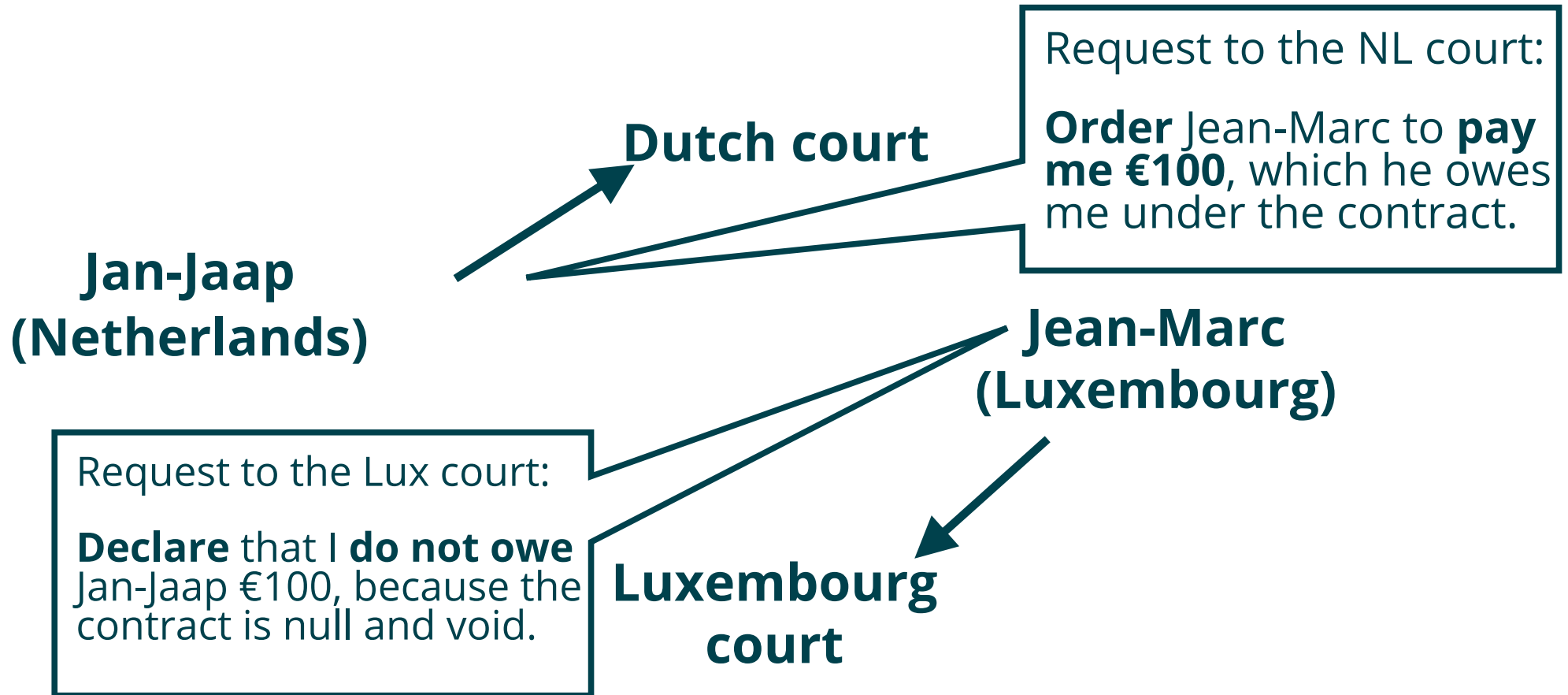
- Lacks flexibility
- Does not consider whether the court first seised is the most adequate one
 - Different approach in the common law world: *forum non conveniens*

A broad notion of “same cause of action”

Gubisch Maschinenfabrik KG v Giulio Palumbo, Case 144/86, ECLI:EU:C:1987:528

The concept of *lis pendens* pursuant to [current art. 29] covers a case where a party brings an action before a court in a Contracting State for the **rescission or discharge of an international sales contract** whilst an action by the other party to **enforce the same contract** is pending before a court in another Contracting State.

When do we have the “same cause of action”?



Request for performance

Request to the NL court:

Order Jean-Marc to **pay me €100**, which he owes me under the contract.

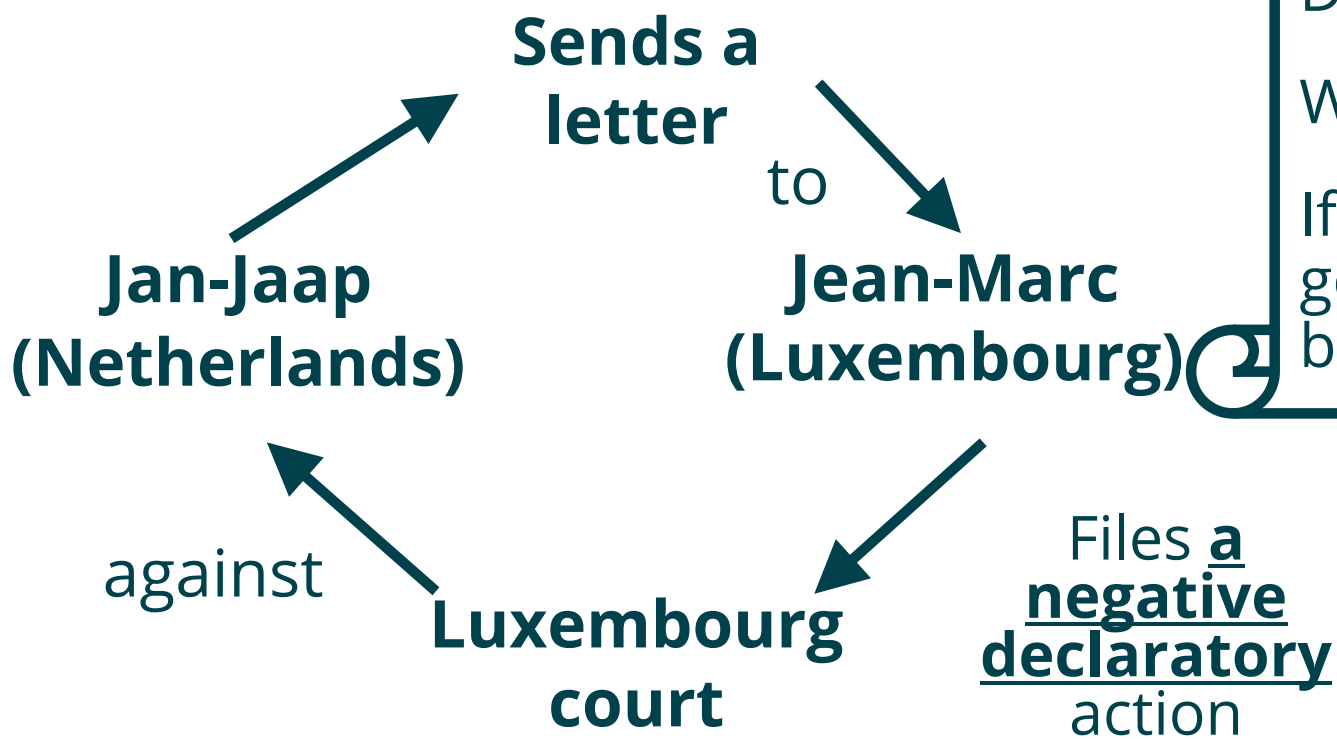
For the purposes of
Bruxelles I, these are
the same action ->
art. 29 is triggered

Negative declaratory action

Request to the Lux court:

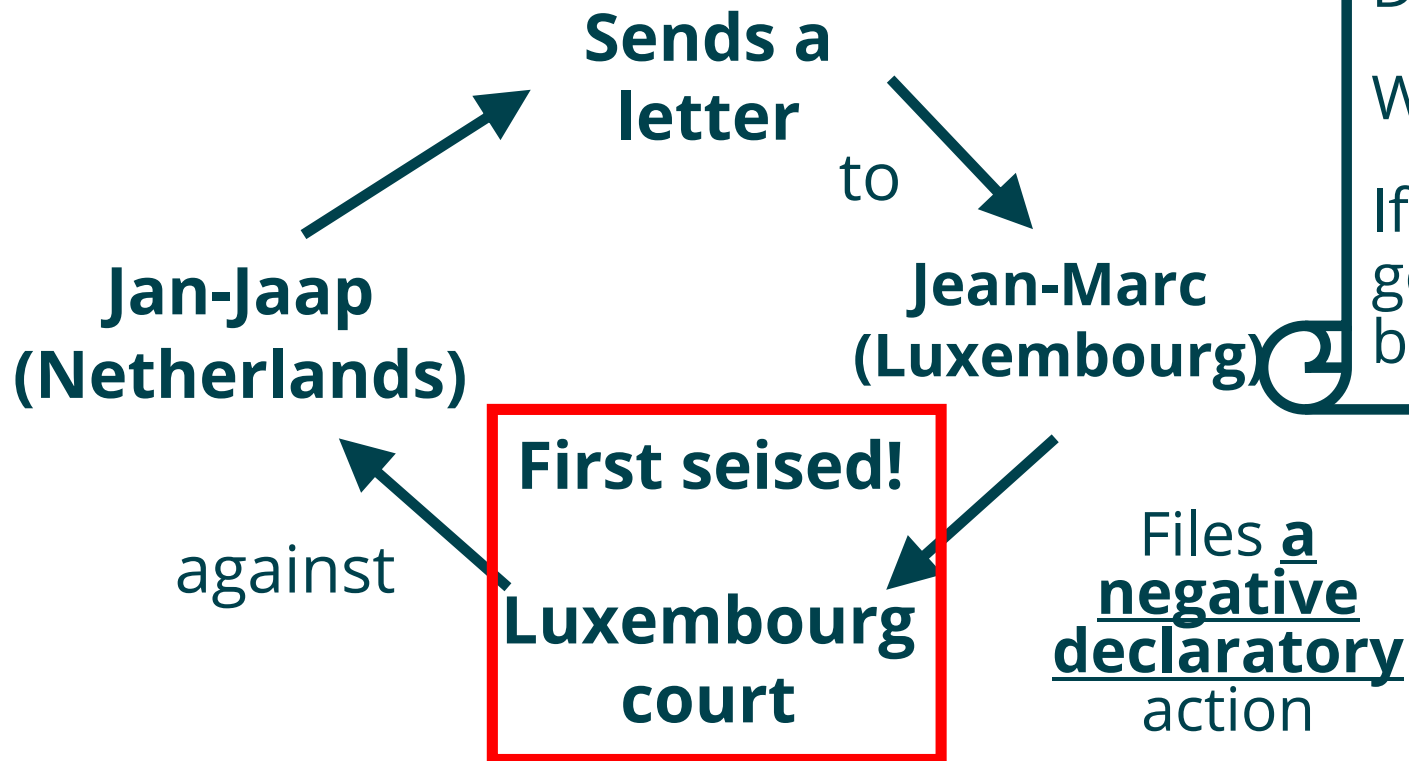
Declare that I **do not owe** Jan-Jaap €100, because the contract is null and void.

Do we risk a race to the courts?



4 January
Dear Jean Marc,
Where's my €100?
If you don't pay, I am going to have to sue you before Dutch courts!

On 5 January



4 January

Dear Jean Marc,

Where's my €100?

If you don't pay, I am going to have to sue you before Dutch courts!

On **5 January**

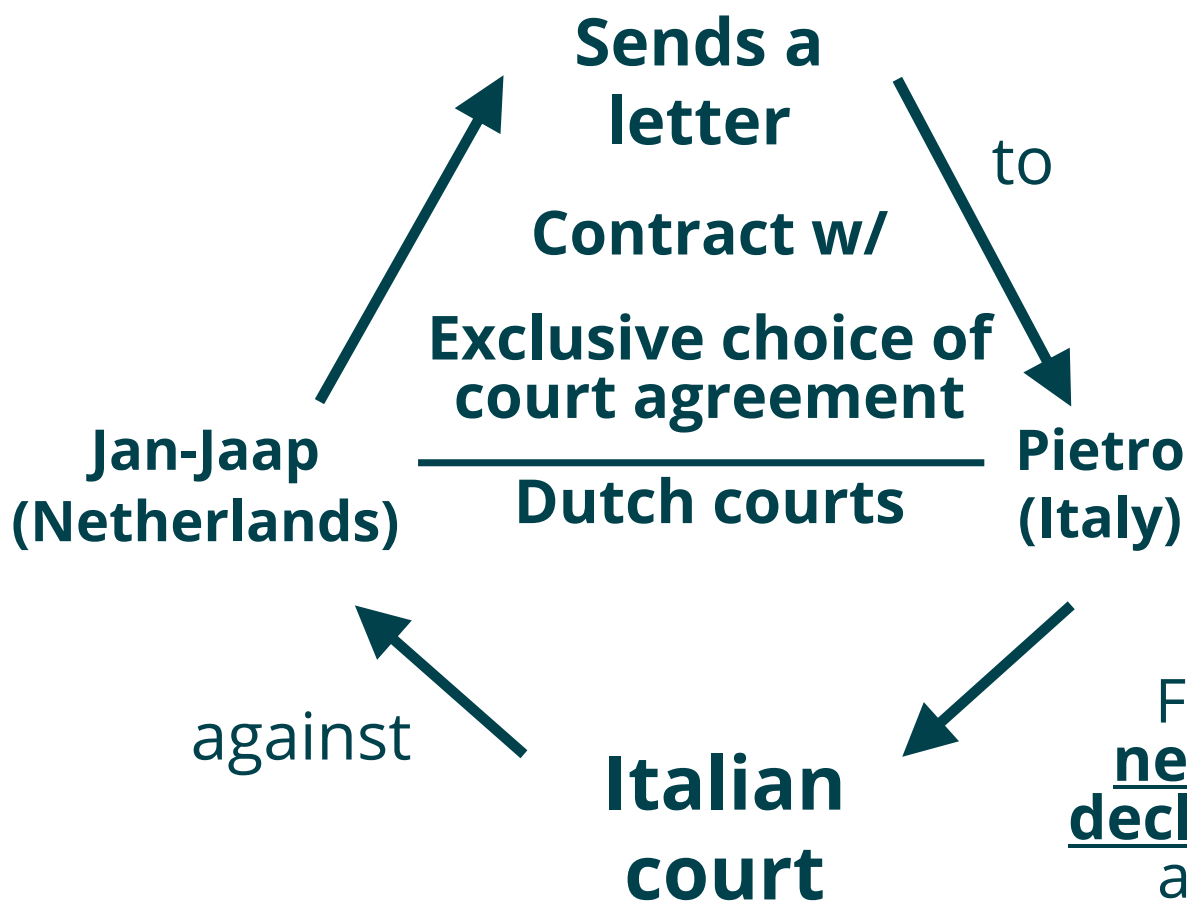
How to avoid this uncertainty?

A possible, widespread strategy:

Exclusive choice-of-court agreement, e.g.

All disputes arising out of or in connection with this contract will be finally resolved by Dutch courts, to the exclusion of the jurisdiction of all other courts

The problem with the old Brussels reg.

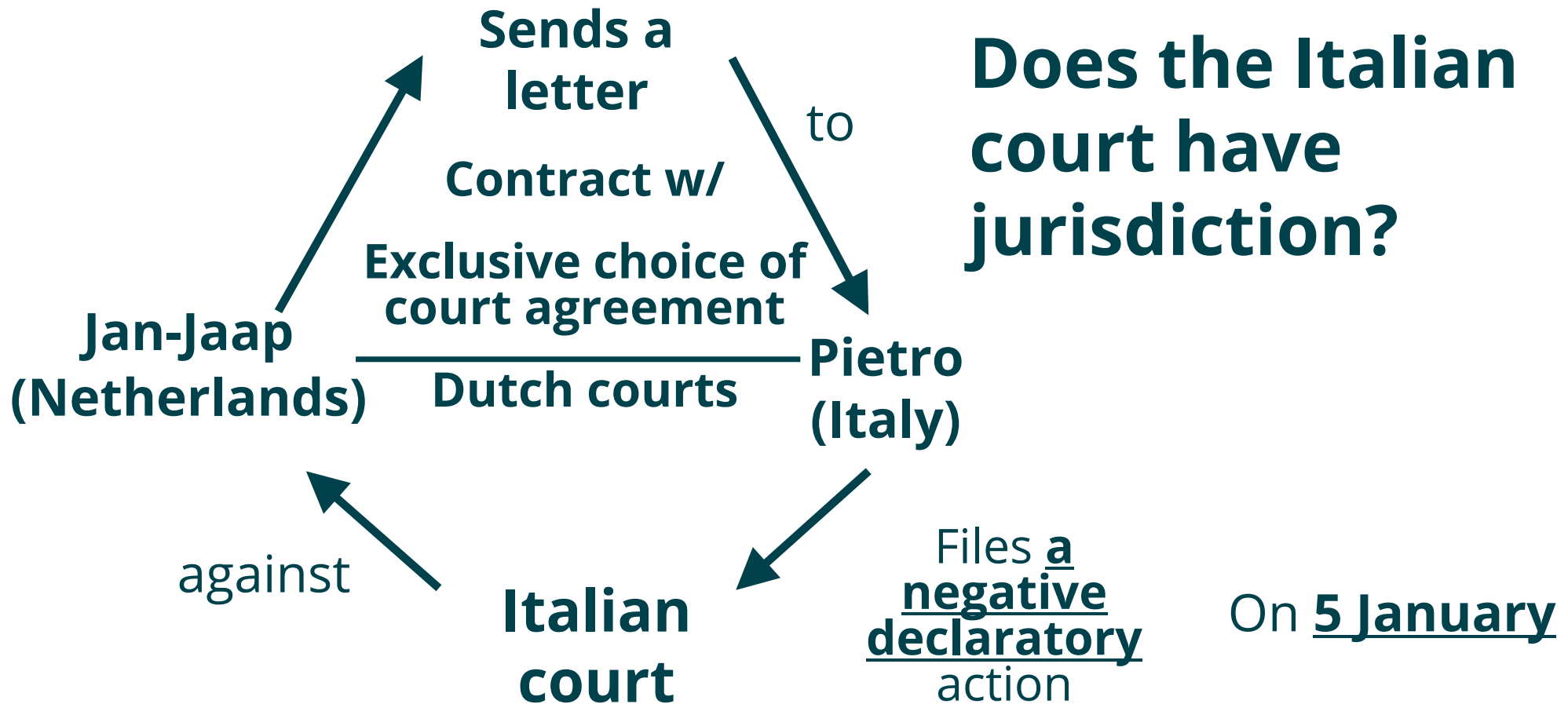


4 January
Dear Pietro,
Where's my €100?
If you don't pay, I am going to have to sue you before Dutch courts, as agreed!

On 5 January

Question:

Does the Italian court have jurisdiction?



Average waiting time:

4-5 years.

In the meantime, Dutch courts would have to stay any parallel proceedings, and wait for the court first seised (Italian court) to decline jurisdiction

I do not have jurisdiction: there is an exclusive choice-of-court agreement. You should have gone to Dutch courts.

Jan-Jaap
(Netherlands)

Pietro
(Italy)

against

Italian
court

"Italian torpedo"



***Erich Gasser GmbH v MISAT Srl*, Case C-116/02, ECLI:EU:C:2003:657**

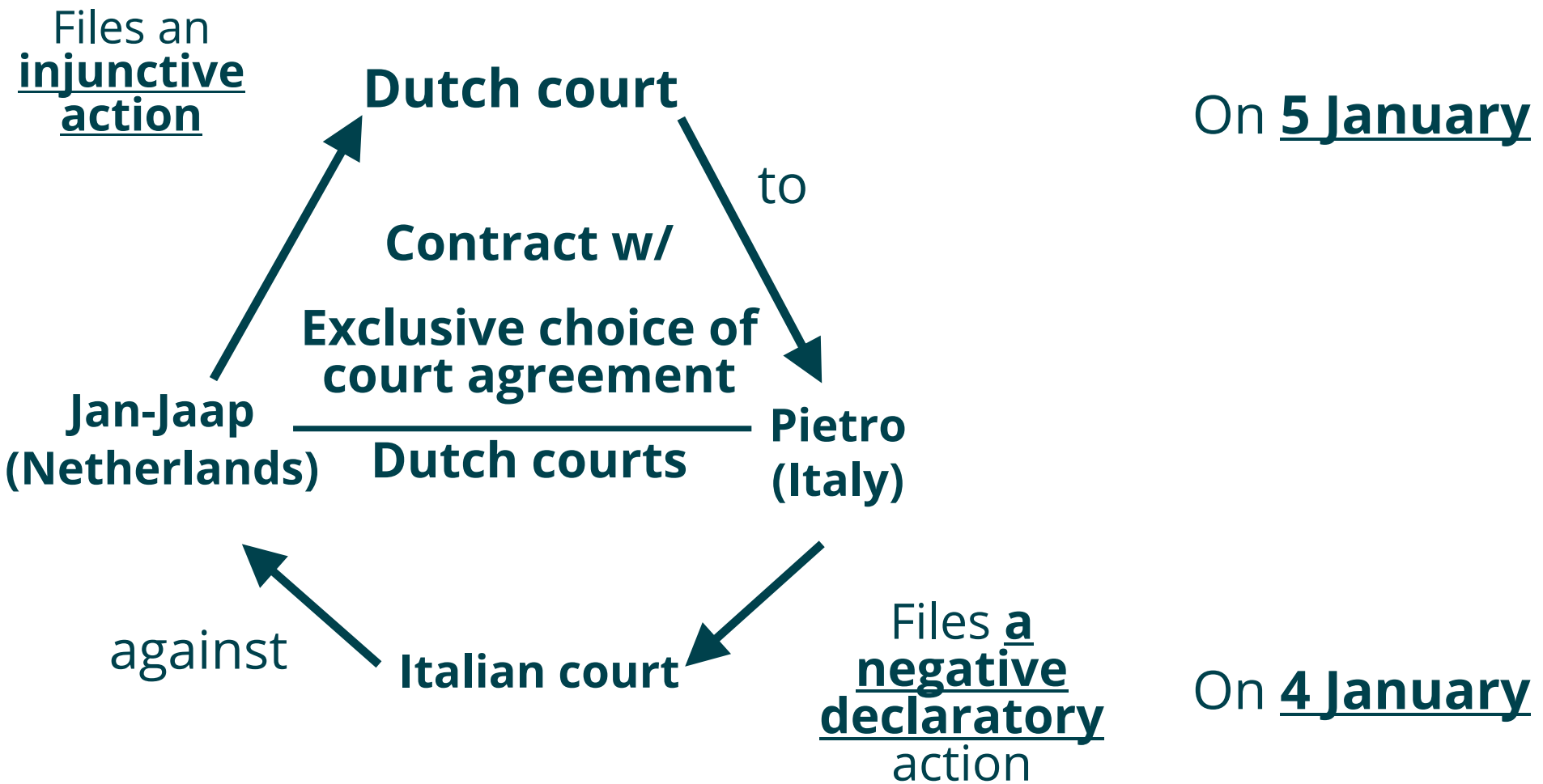
[the **old** *lis pendens* mechanism] must be interpreted as meaning that a court second seised whose jurisdiction has been claimed under an agreement conferring jurisdiction **must nevertheless stay proceedings** until the court first seised has declared that it has no jurisdiction.

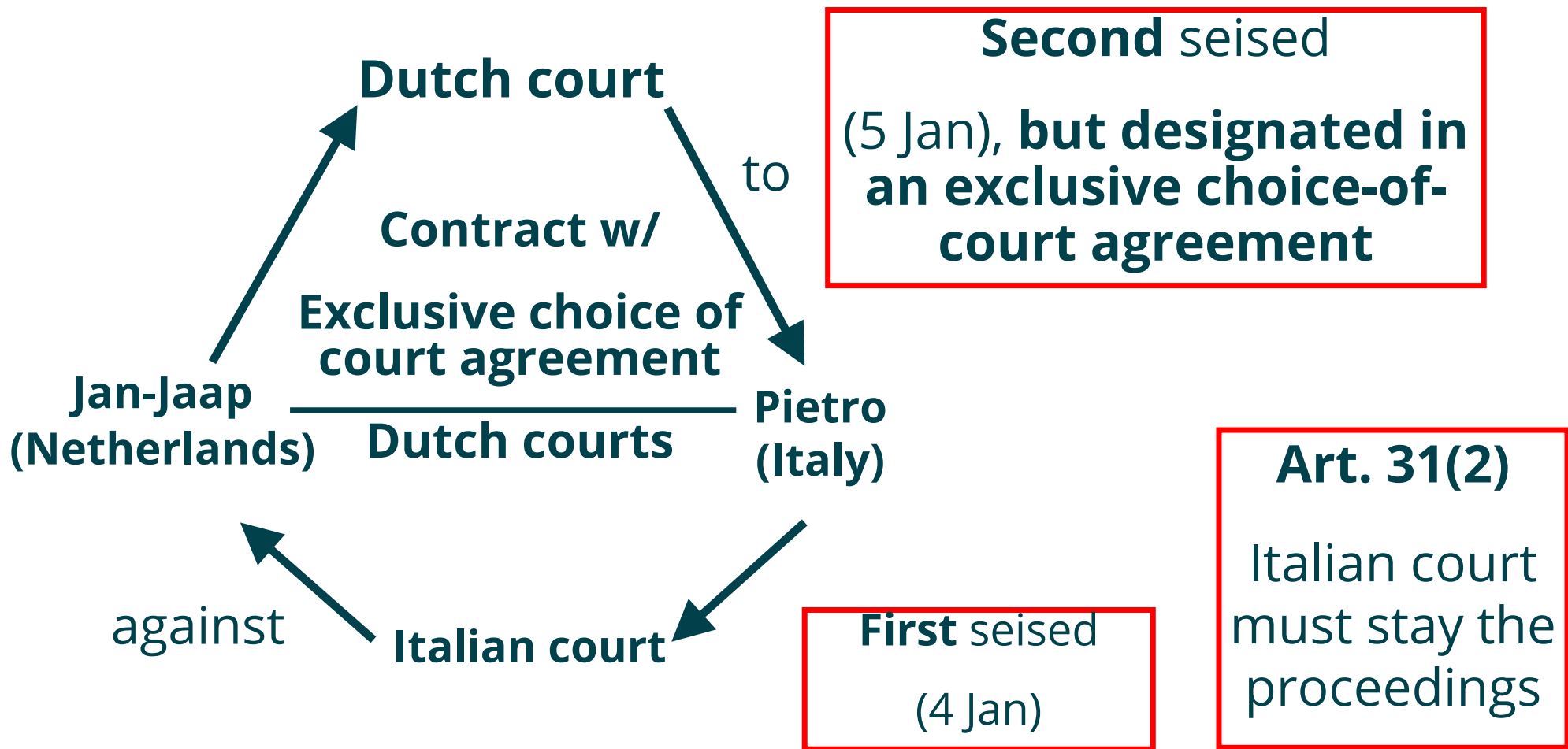
[the **old** *lis pendens* mechanism] must be interpreted as meaning that it **cannot be derogated** from where, in general, the **duration of proceedings** before the courts of the Contracting State in which the **court first seised** is established is **excessively long**.

How does the new regulation resolve the problem?

Art. 31(2)

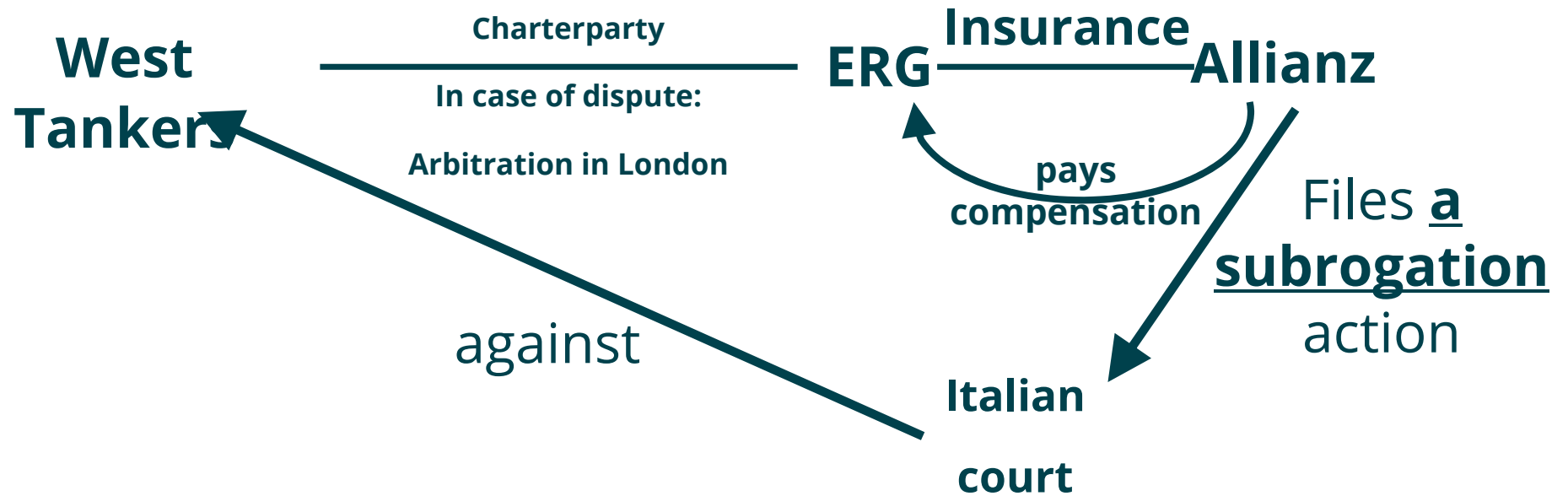
Where a court of a Member State on which an agreement as referred to in Article 25 confers **exclusive jurisdiction** is seised, **any court of another Member State shall stay the proceedings** until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement.

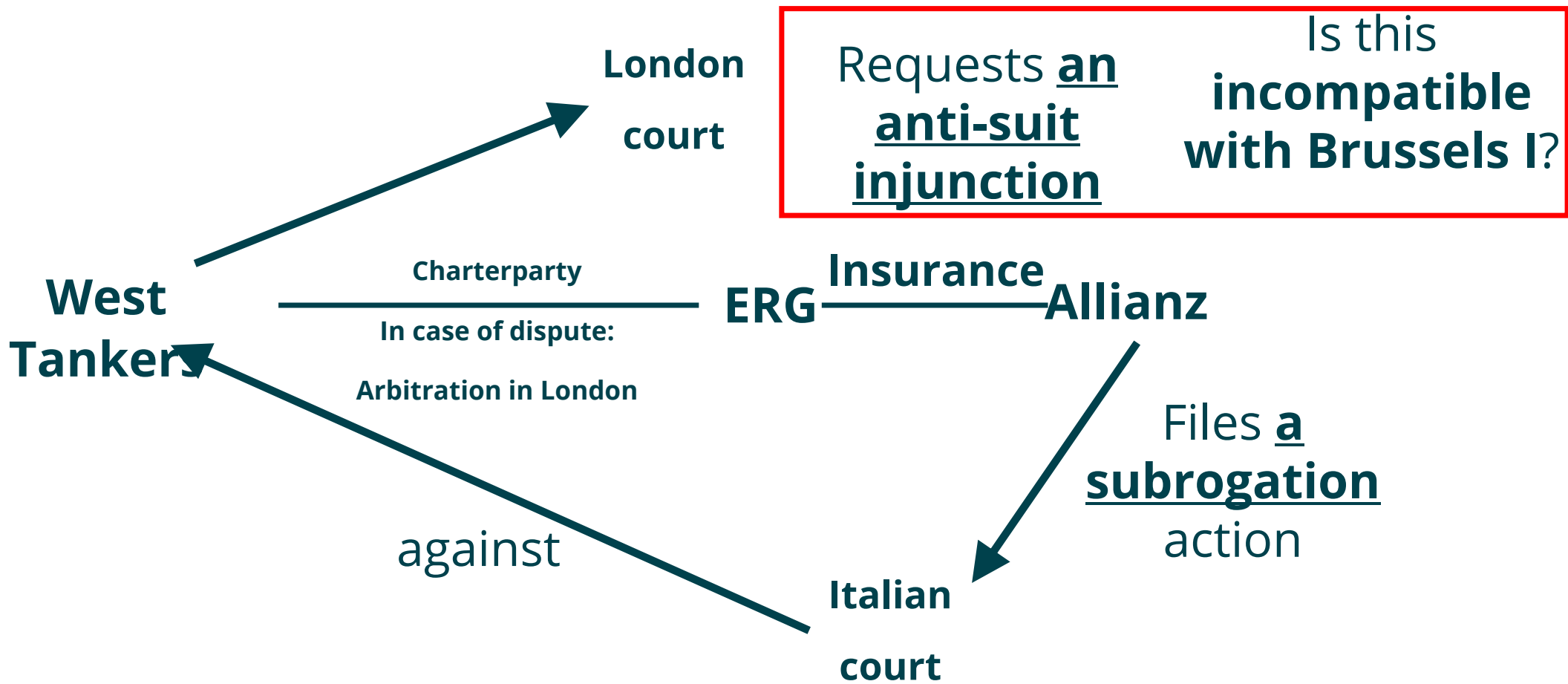




**Procedural Problem n. 2:
“Anti-suit injunction” protecting an arbitration
agreement**

What happened in *West Tankers*



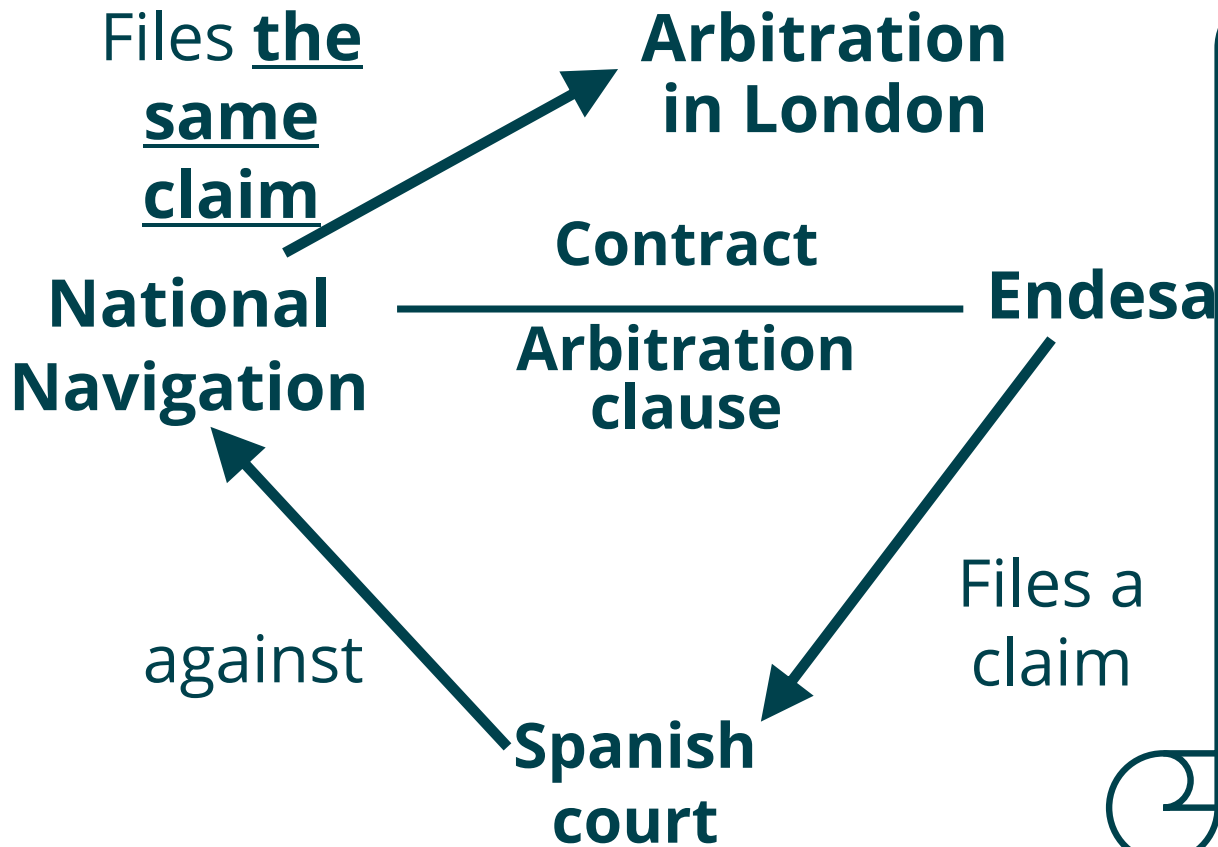


Allianz SpA and Generali Assicurazioni Generali SpA v West Tankers Inc., C-185/07, ECLI:EU:C:2009:69

It is incompatible with [Brussels I] for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement.

**Procedural Problem n. 3:
“Torpedo Action” against an arbitration agreement**

National Navigation Co v Endesa Generacion SA (The Wadi Sudr) [2009] EWCA Civ 1397

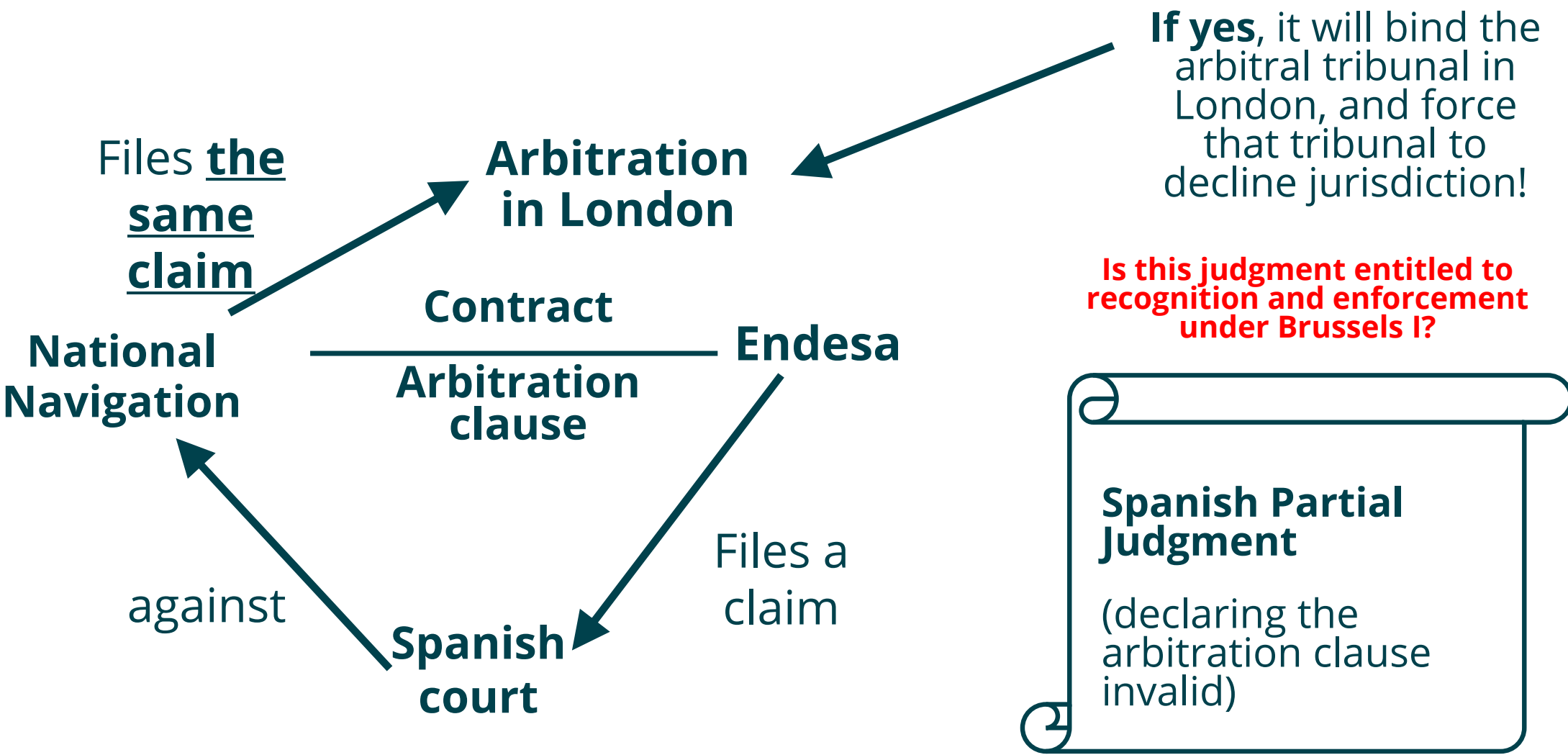


Spanish Partial Judgment

The Court finds that the arbitration clause is **null and void**.

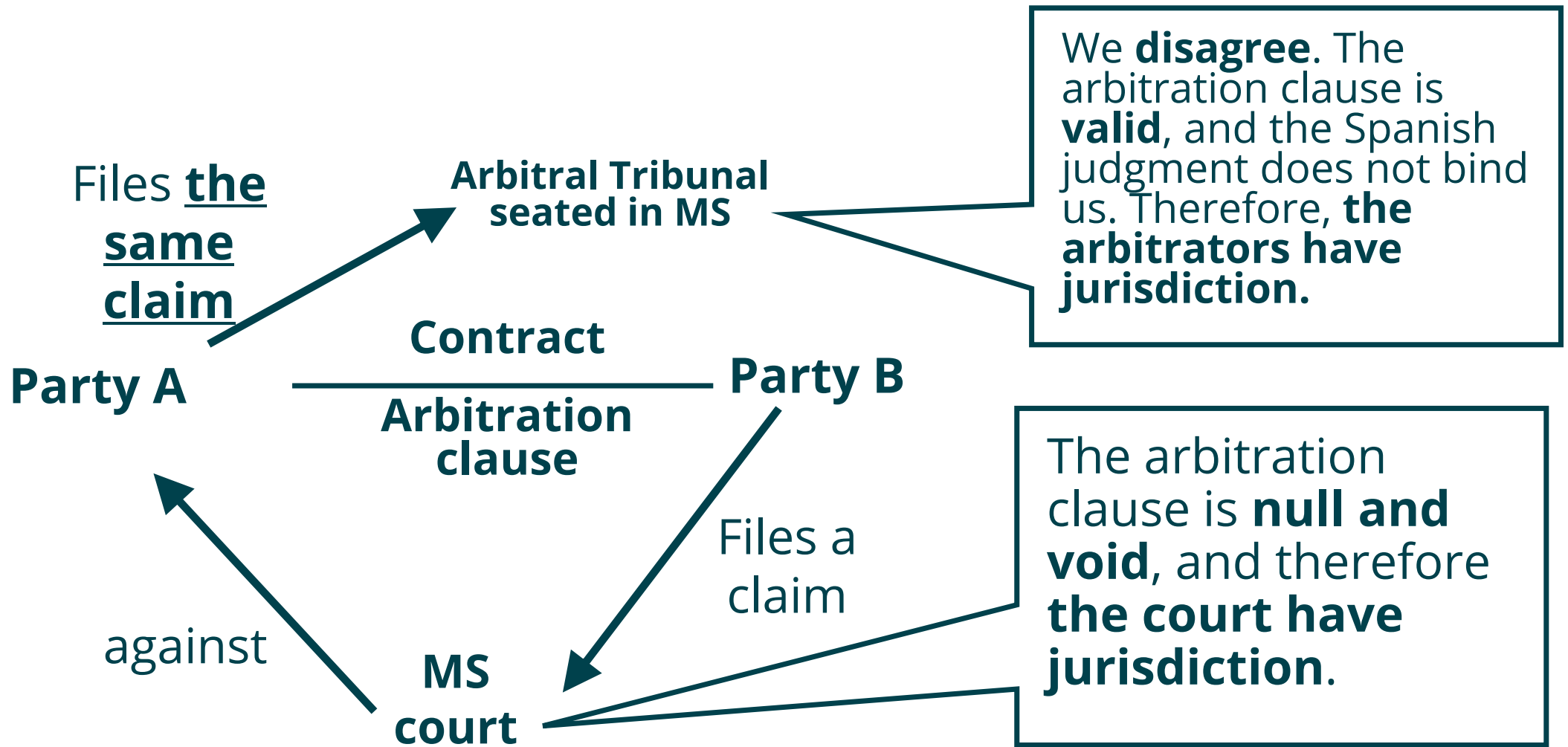
Therefore, the Court declares that **it has jurisdiction** to hear the case.

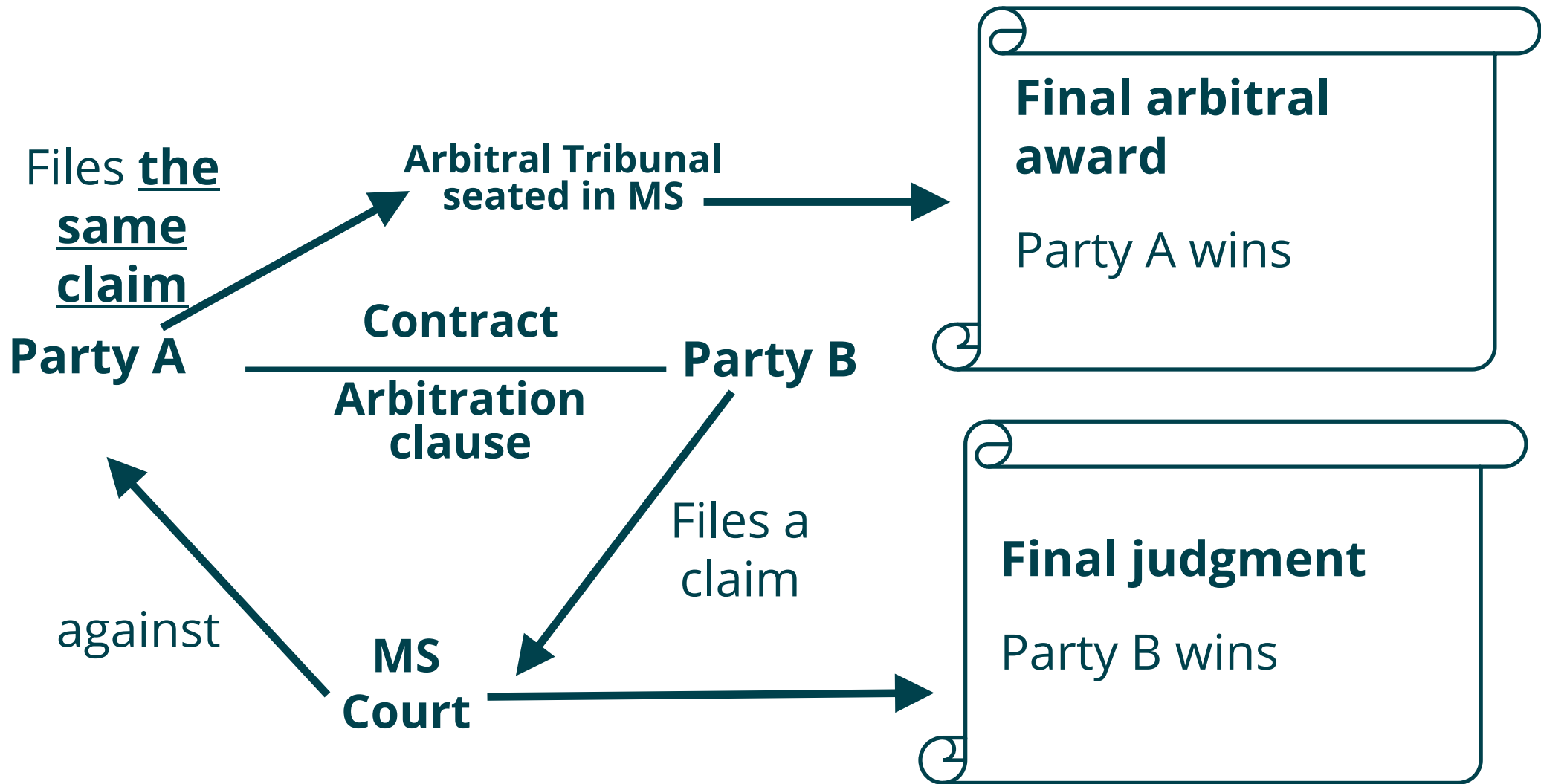
The merits of the case will be decided in a separate judgment, in the future



The Solution: Recital 12

A ruling given by a court of a Member State as to whether or not an arbitration agreement is null and void, inoperative or incapable of being performed should **not be subject to the rules of recognition and enforcement laid down in this Regulation**, regardless of whether the court decided on this as a principal issue or as an incidental question.





The Solution(?): Recital 12

On the other hand, where a court of a Member State, exercising jurisdiction under this Regulation or under national law, has determined that an arbitration agreement is null and void, inoperative or incapable of being performed, this **should not preclude that court's judgment on the substance of the matter from being recognised or, as the case may be, enforced** in accordance with this Regulation.

This should be **without prejudice to the competence of the courts of the Member States to decide on the recognition and enforcement of arbitral awards in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards**, done at New York on 10 June 1958 ('the 1958 New York Convention'), which takes precedence over this Regulation.

**Procedural Problem n. 4:
Judgment rendered “on the basis of” another judgment**

Case C-568/20 (J v H) ECLI:EU:C:2022:264

Party A

Party B

Jordanian courts

Award of
damages in
favour of A

NB: R&E of this judgment is NOT covered by the Brussels regime, because Jordan is not a EU Member State

High Court E&W:

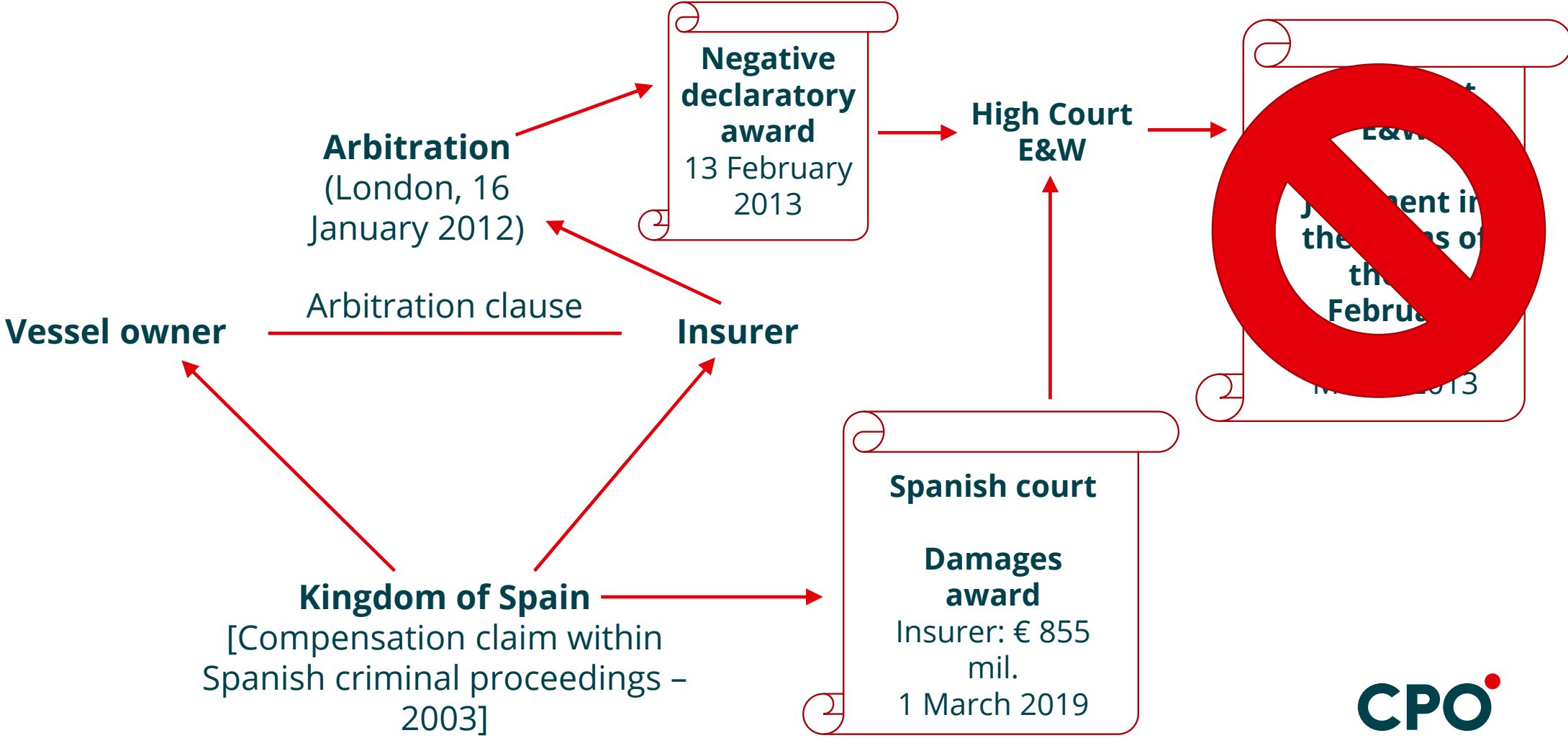
Payment order against B, issued "on the basis of" the Jordanian judgment

Austrian courts:

Are they obliged to recognize and enforce the English (at the time EU) judgment under the Brussels regulation?

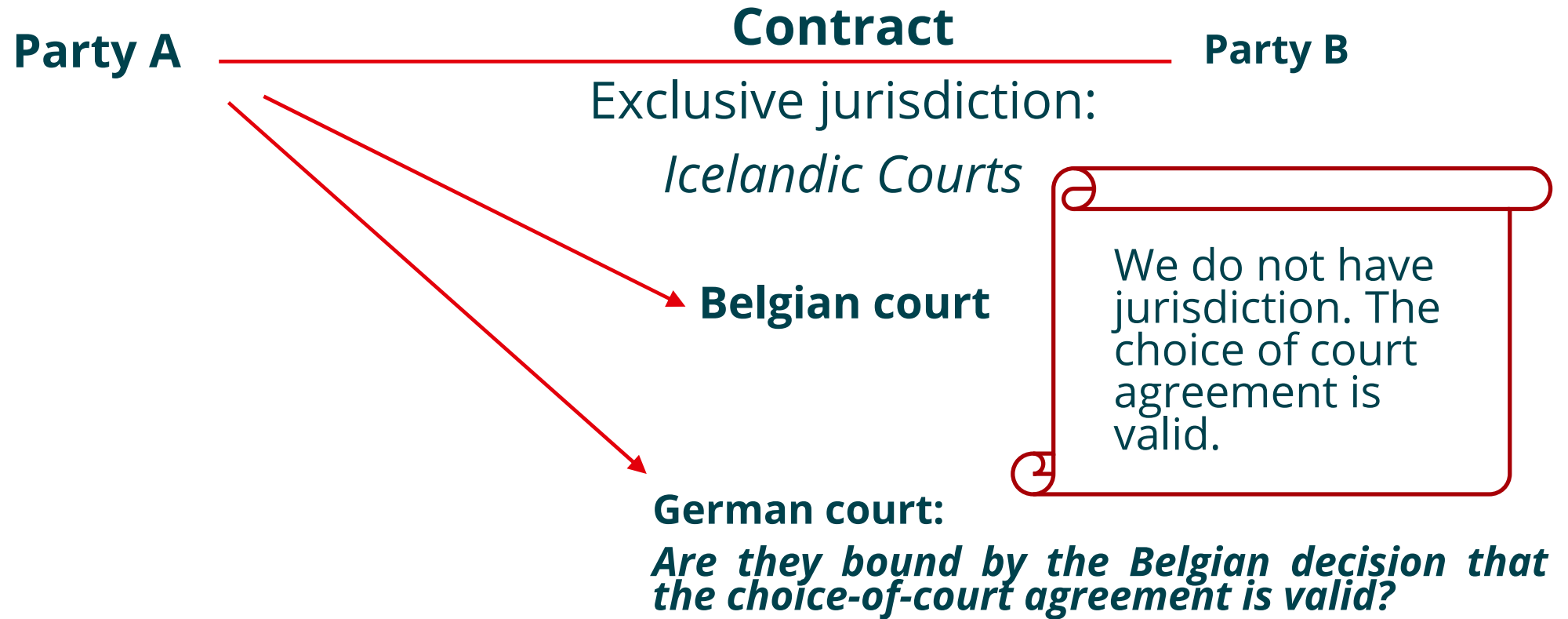
**Procedural Problem n. 5:
Arbitration award undermining *lis pendens***

Case C-700/20 (London Steam-Ship Owners) ECLI:EU:C:2022:488



**Procedural Problem n. 6:
Judgment on the validity of a choice-of-court agreement**

What is a “judgment”? C-456/11 (Gothaer)



Recognition and Enforcement

Finding the Applicable Law

Arbitral Awards

- Domestic -> National law
- Foreign -> New York Convention (+ National Law)

Never the Brussels regime

Court Judgments

- Domestic -> National law
- From another EU MS -> Brussels I *bis* Regulation
- From a non-EU MS -> Applicable treaties (if any) or national law of the country of enforcement

R&E Application

New York Convention, Art. IV

- a) The **duly authenticated original award or a duly certified copy thereof**;
- (b) The **original agreement referred to in article II or a duly certified copy thereof**.
+ **translations**, if necessary

Brussels I *bis*, Art. 37

- a) **Authentic copy** of the judgment (not translated)
- b) **Certificate** (translated, if necessary)

Permissiveness vs. Mandatory language

New York Convention, Art. V

Recognition and enforcement of the award **may** be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that

Brussels I *bis* Regulation, Art. 45

On the application of any interested party, the recognition of a judgment **shall** be refused:

Grounds for refusal

New York Convention, Art. V	Brussels I <i>bis</i> Regulation, Art. 45
Invalidity of the clause or incapacity	No second guessing by r&e court + Gothaer effect
Proper notice	Proper notice + appeal attempt
<i>Ultra petita</i>	Not applicable
Tribunal or procedure not in accordance with agreement	Not applicable
Annulled award	Annulled judgment can never be recognised and enforced
Arbitrability	Not applicable
Public Policy	Public Policy
Not mentioned, but possibly implicit in public policy	Res judicata
Not applicable	Conflict with certain jurisdictional rules

A look at the Singapore Convention

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Requirements

- The purpose: ensuring the **international enforceability of IMSAs**
- What does **“enforcement”** mean in this context?
- Production requirements:
 - Signed settlement agreement;
 - Evidence of mediation, such as:
 - Mediator’s signature on settlement agreement;
 - Mediator’s certification that the mediation has taken place;
 - Certificate of a mediation institute;
 - Any other evidence accepted by the competent authority

Grounds for refusal (art. 5)

- Incapacity;
- Nullity / lack of bindingness / modification of settlement agreement;
- Obligations have already been performed;
- Obligations are not clear or comprehensible;
- Relief would be contrary to the terms of the settlement agreement;
- Serious breach by the mediator of standards applicable to the mediator or the mediation, without which breach a party would not have entered into the settlement agreement;
- Mediator's failure to disclose lack of independence and impartiality, and this failure influenced the conclusion of the settlement agreement;
- Public policy;
- Dispute incapable of being settled through mediation.