

# Settlement of International Disputes

Pietro Ortolani, 26 October 2023



# Let's Get to Know Each Other

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and use the code **6553 5746**

## The “needs” of international commercial disputes

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- **Speed**
- **Neutrality**
- **Expertise**
- **Flexibility**
- **Confidentiality**
- **Finality**
- **Enforceability**
- **Centralised Dispute Resolution**

# Agenda

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1. Introduction to the **basic legal framework of arbitration and court litigation**
2. Drafting **arbitration clauses** and **choice-of-court agreements**
3. Resolving problems arising out of **Parallel proceedings**
4. A short introduction to the enforcement of **arbitral awards** vs. **Judgments**

# Arbitration... where?

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The **seat of arbitration** is the place selected by the parties or (failing any agreement) by the arbitrators, an arbitral institution, or a court. It is a legal link (**not** a physical one) with the a certain national procedural law.

E.g. seat in Amsterdam -> Dutch procedural law is applicable.

## It determines

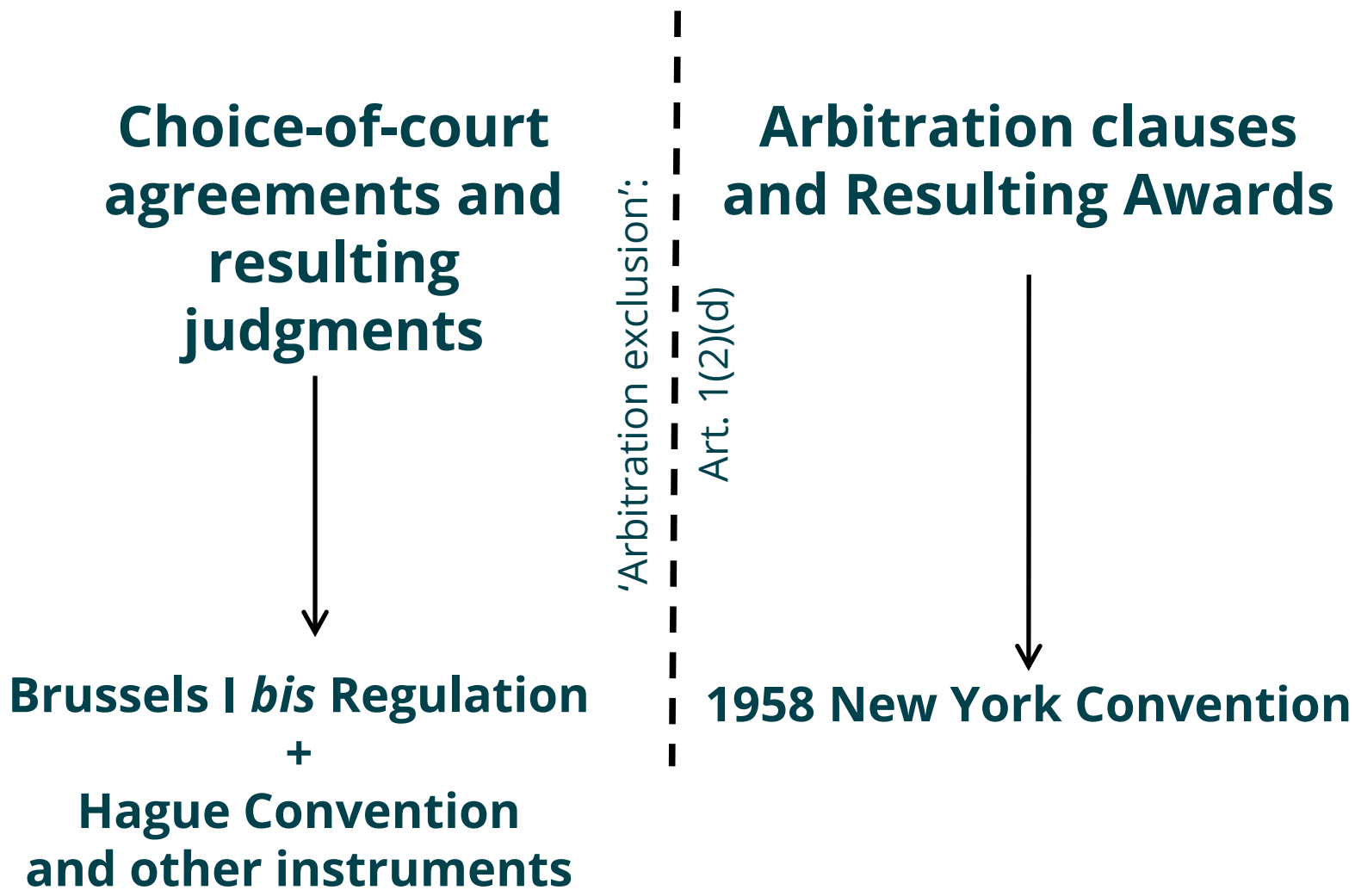
- The applicable procedural law
- The nationality of the arbitral award for the purpose of recognition and enforcement

## Two separate legal frameworks

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- **Arbitration: 1958 New York Convention** + other international instruments + domestic arbitration law
- **Litigation: Brussels I *bis* Regulation** (Regulation 1215/2012) + Lugano Convention + 2005 Hague Convention + other international instruments and domestic legislation

# The Brussels I System and Arbitration



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# Arbitration and Jurisdictional Clauses



# Advantages of Reaching an Agreement

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- **Predictability**
- **Centralization**
- Avoidance of **Parallel Proceedings**
- **Cost Saving**

## The most obvious difference

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- **Arbitration** is always based on **consent**: there is **no arbitration without an agreement to arbitrate**
- **Litigation** does **not** require an agreement, **but** choice-of-court agreements are key to ensuring predictability, centralization etc.

## What does a valid arbitration agreement do?

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- It **binds** the parties, i.e. forces them to arbitrate disputes
- Normally, it **precludes litigation**, i.e. prevents the parties from going to State courts
- The agreement to arbitrate is **separable** from the main contract, even when it is a clause in the main contract

## Can you use arbitration for *any* dispute?

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- **No:** the **law of the seat** determines the scope of **arbitrability**

### **Dutch Code of Civil Procedure, Article 1020(3)**

The arbitration agreement shall not serve to determine legal consequences of which the parties cannot **freely dispose**.

## Case-Study

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A famous musician concludes a licensing contract with two companies, Alpha Spain and Beta Netherlands, concerning the production of merchandise with the name of the artist.

In the contract, the parties agree that Alpha Spain will be prevented from selling the merchandise in the Netherlands, Luxembourg and Belgium, whilst Beta Netherlands will be prevented from selling the merchandise elsewhere. The contract contains an ICC arbitration agreement.

Alpha Spain starts selling merchandise in the Netherlands. Beta argues that the contract has been breached.

Is this dispute arbitrable?

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## The Expanding Boundaries of Arbitrability

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- For **competition** disputes:
  - In the US, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985)
  - In the EU, *Eco Swiss China Time Ltd v Benetton International NV*, Case C-126/97
- However, there may still be limitations in sectors such as:
  - **Consumer** disputes;
  - **Labour** disputes;
  - **IP** disputes.

## When can the parties decide to arbitrate?

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- **Before** any dispute has arisen -> **arbitration clause**
- **After** a dispute has already arisen -> **submission agreement**

# Elements of a pre-dispute clause

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- **Agreement** to arbitrate
- **Scope** of the arbitration agreement (which disputes?)
- **Seat** of arbitration
- Use of an arbitral **institution** and its rules vs. **Ad hoc** arbitration
- Appointment, number and qualifications of the **arbitrators**
- **Language** of the arbitration
- **Choice-of-law** agreement **with respect to the arbitration clause**



# Model NAI Clause

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<https://nai.nl/draft-a-model-clause/>

<https://iccwbo.org/news-publications/arbitration-adr-rules-and-tools/standard-icc-arbitration-clauses-english-version/>

[https://www.lcia.org/dispute\\_resolution\\_services/lcia\\_recommended\\_clauses.aspx](https://www.lcia.org/dispute_resolution_services/lcia_recommended_clauses.aspx)

## Additional (frequent) elements

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The arbitral tribunal shall be composed of one arbitrator/three arbitrators.

The arbitral tribunal shall be appointed according to \_\_\_\_

The place of arbitration shall be \_\_\_\_

The proceedings shall be conducted in the \_\_\_\_ language

The applicable law to the contract (and the arbitration clause) shall be \_\_\_\_\_

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## **Case-study A**

# Written Form under the NYC

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## Article II(1) New York Convention

Each Contracting State shall recognize an agreement **in writing** under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

# Confirmation by e-mail

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## Dutch court overrules London on email charterparty agreements

*Email confirmation of charterparty agreements — now standard practice in shipping — renders the arbitration clause void in the Netherlands, the Dutch Supreme Court has ruled*

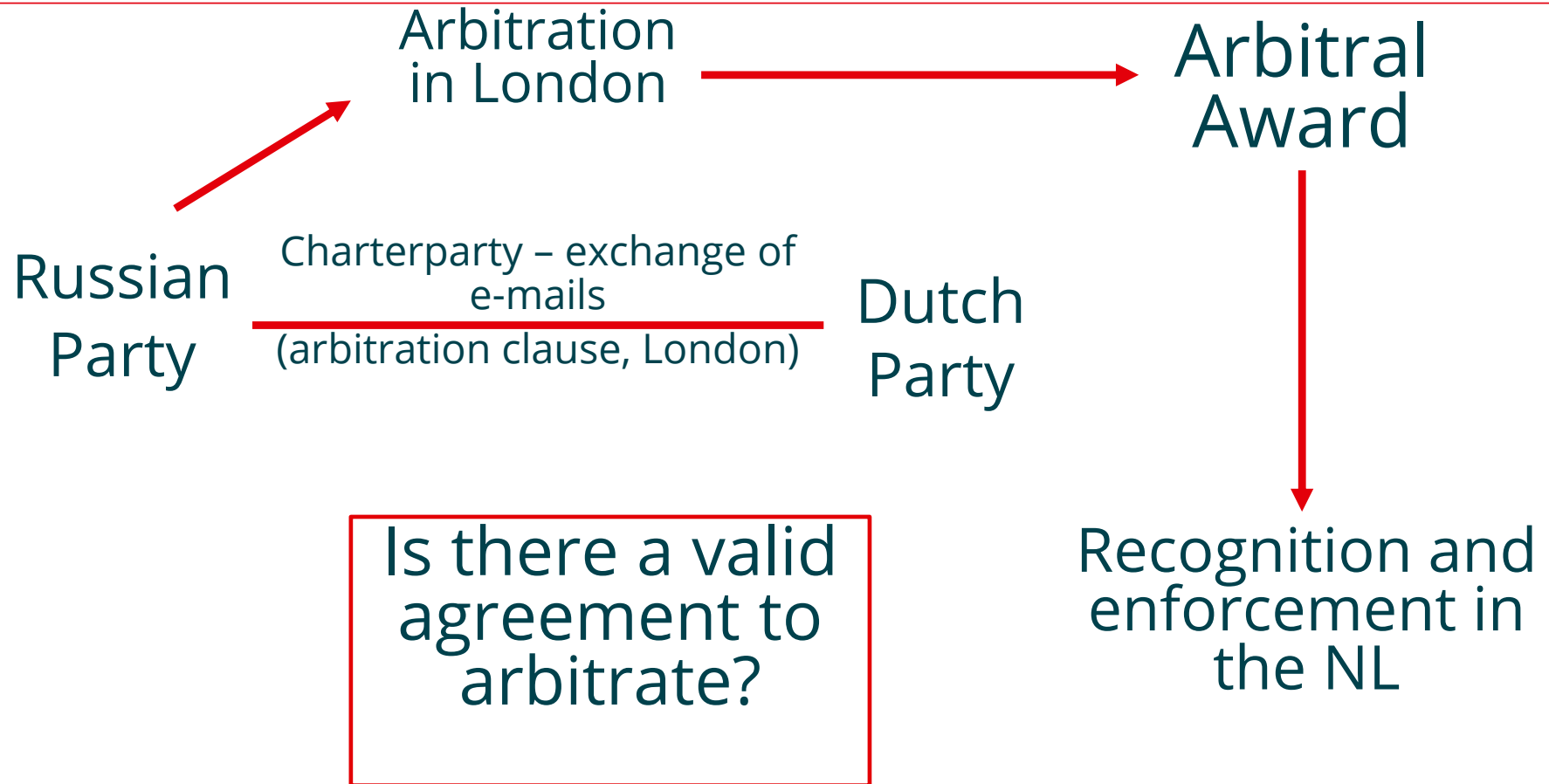
29 Apr 2020 | NEWS



Decision flies in the face of commercial reality, leading local shipping lawyer warns

## ECLI:NL:HR:2020:307

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**Let's compare arbitration clauses with  
choice-of-court (or jurisdictional) clauses**

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## **Case-study B**



## Art. 25 Brussels I *bis* Regulation

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1. If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, **unless the agreement is null and void as to its substantive validity under the law of that Member State**. Such jurisdiction **shall be exclusive unless the parties have agreed otherwise**. The agreement conferring jurisdiction shall be either:

## Art. 25 Brussels I *bis* Regulation

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- (a) in **writing** or **evidenced in writing**;
- (b) in a form which accords with **practices which the parties have established between themselves**; or
- (c) in international trade or commerce, in a form which accords with a **usage** of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

## Art. 25 Brussels I *bis* Regulation

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2. Any **communication by electronic means** which provides a durable record of the agreement shall be equivalent to 'writing'.

5. An agreement conferring jurisdiction which forms part of a contract shall be treated as an **agreement independent of the other terms of the contract**.

The validity of the agreement conferring jurisdiction cannot be contested solely on the ground that the contract is not valid.

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## **Case-study C**

## **NB: Many model DR clauses are non-exclusive**

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- Many sector-specific model dispute resolution clauses (e.g. financial sector, maritime sector) are **non-exclusive**
- **Brexit:** If the clause designates an **English court**, enforcement of the clause (and r&e of the resulting judgment) is **not possible** under Brussels I *bis* after 1 January 2021, and is also **not possible** under the 2005 Hague Convention, which does **not** apply to non-exclusive clauses

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# **CODEWORD Arbitration**

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# Procedural Problems arising out of parallel proceedings

# Parallel Proceedings

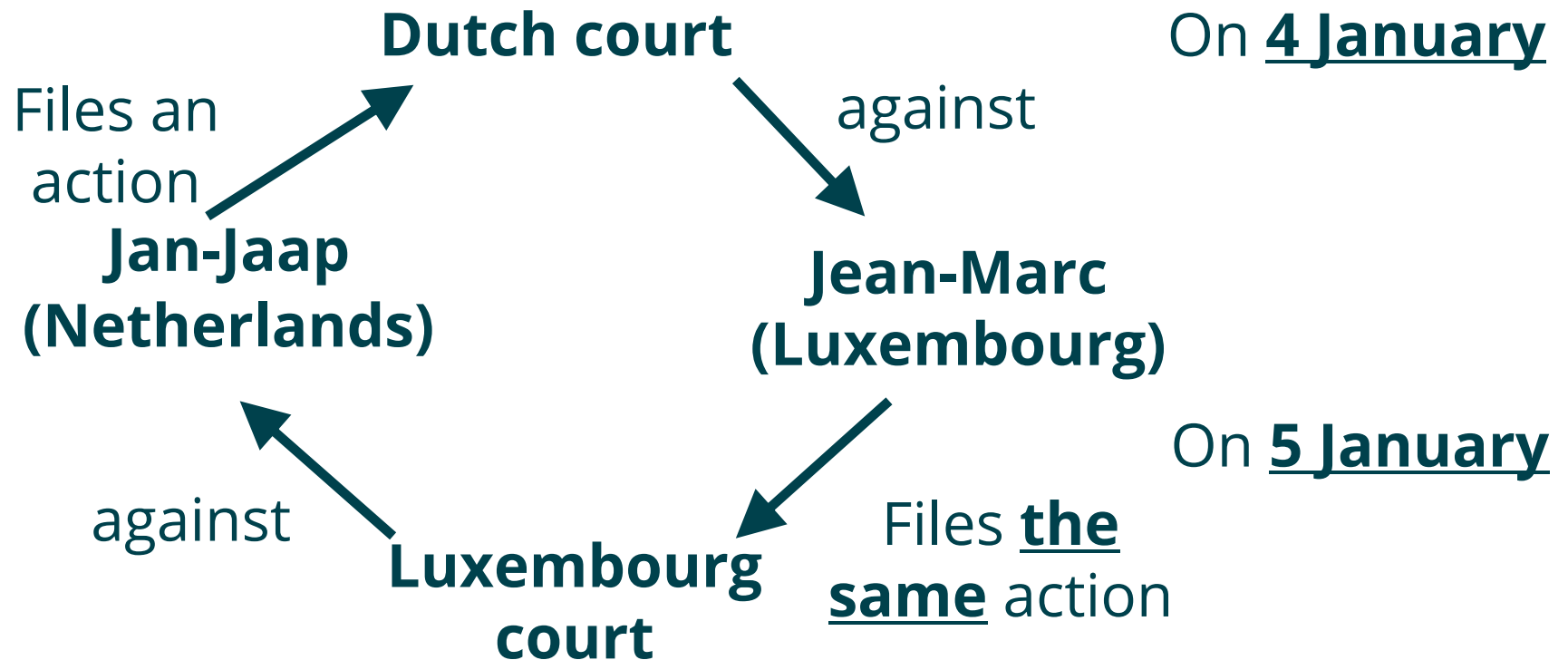
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- Heads of jurisdiction can **overlap**
  - e.g. Respondent domiciled in Luxembourg (art. 4), but place of performance of contractual obligations in the Netherlands (art. 7(1))
- What is the **problem** with parallel proceedings? Why do we want to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



## Art. 29: *Lis Pendens*

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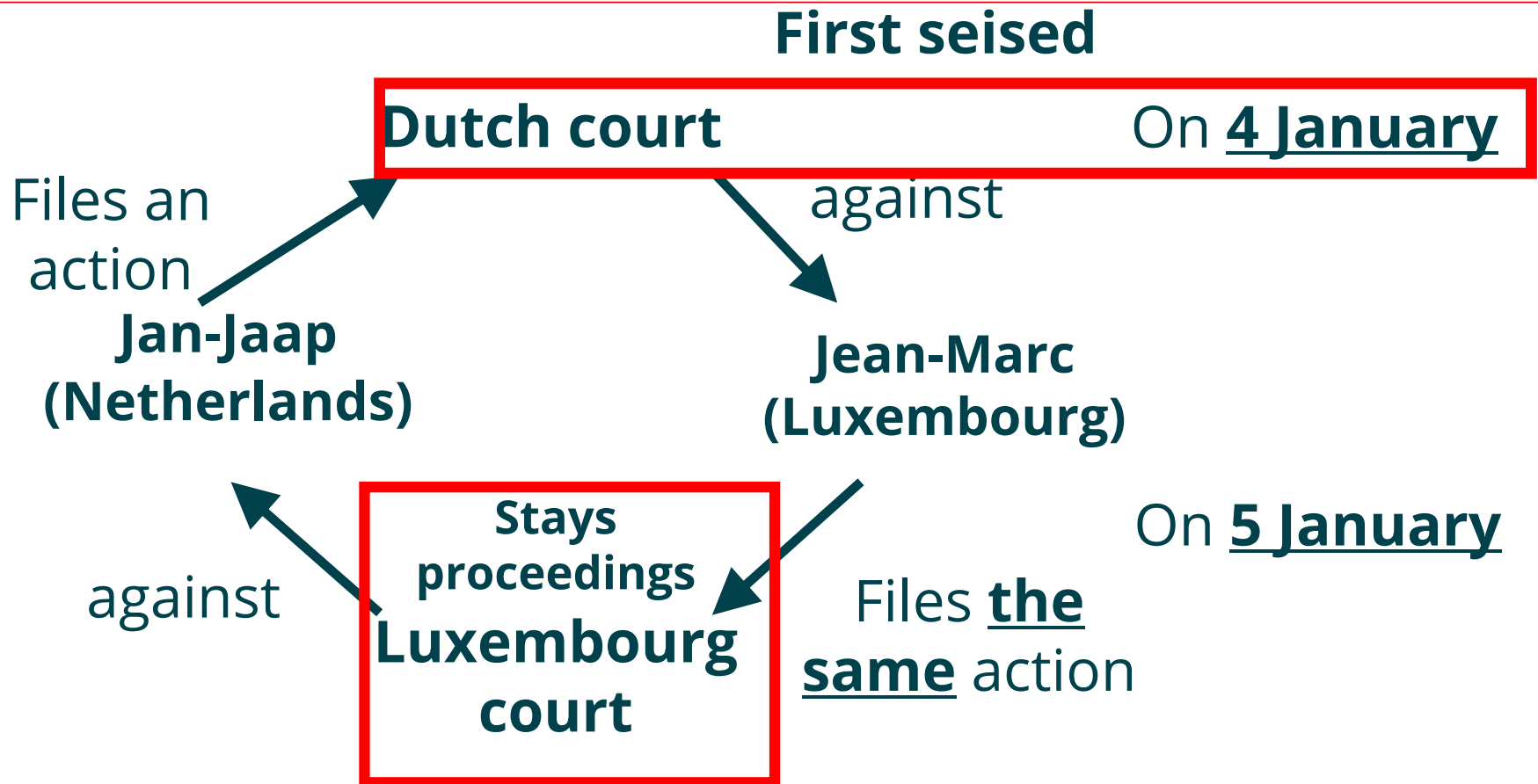


## Art. 29 Bruxelles I *bis* Regulation

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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*

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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?

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## 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*

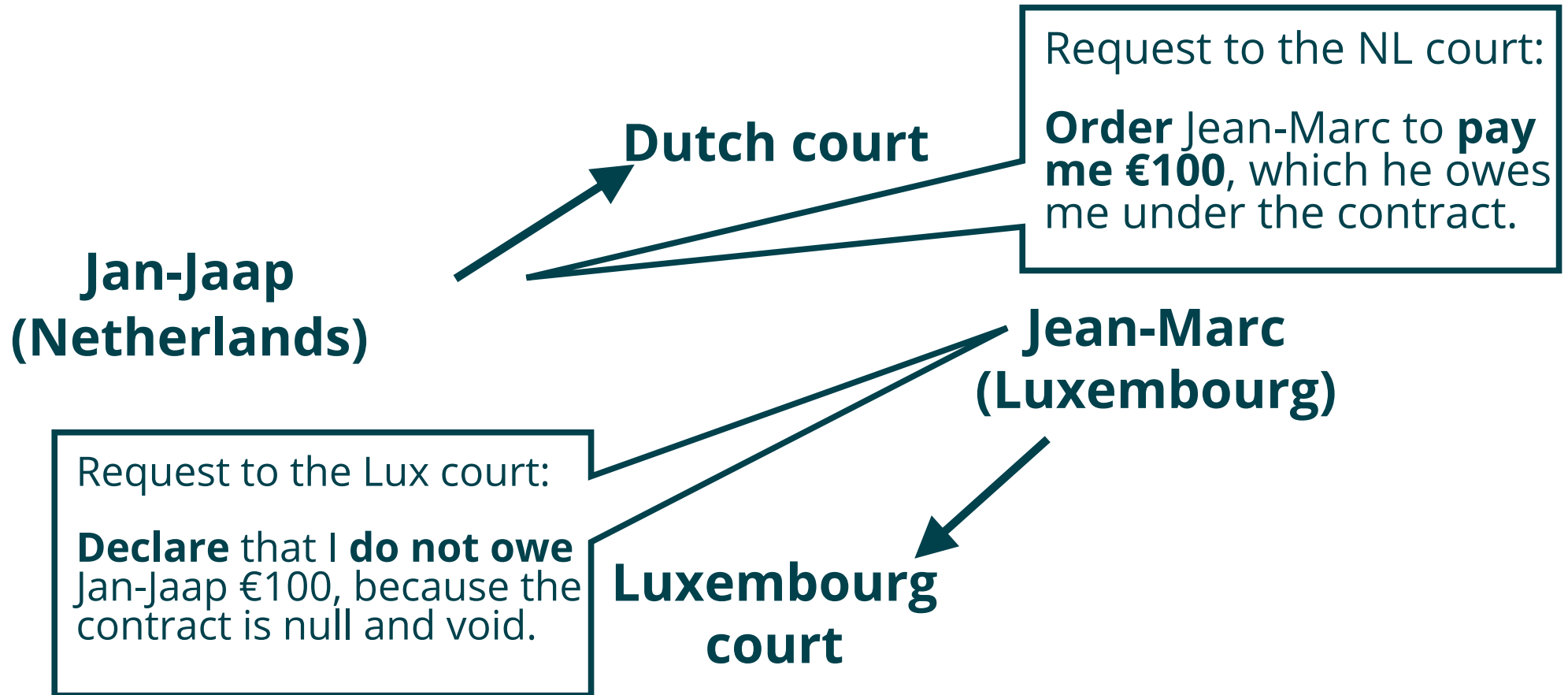
## A broad notion of “same cause of action”

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### **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”?



***Petiturum:***

**Performance**

Request to the NL court:

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

***Petiturum:***

***Declaration***

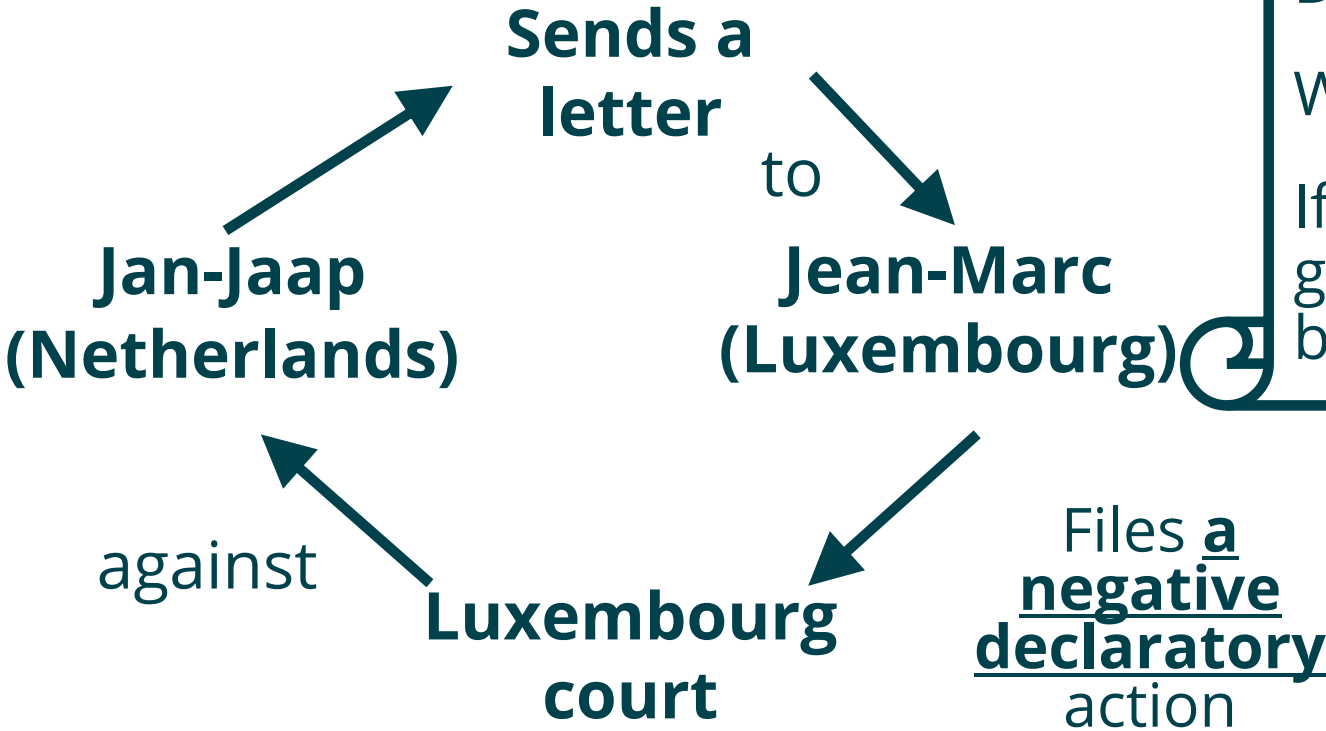
Request to the Lux court:

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

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



# Do we risk a race to the courts?



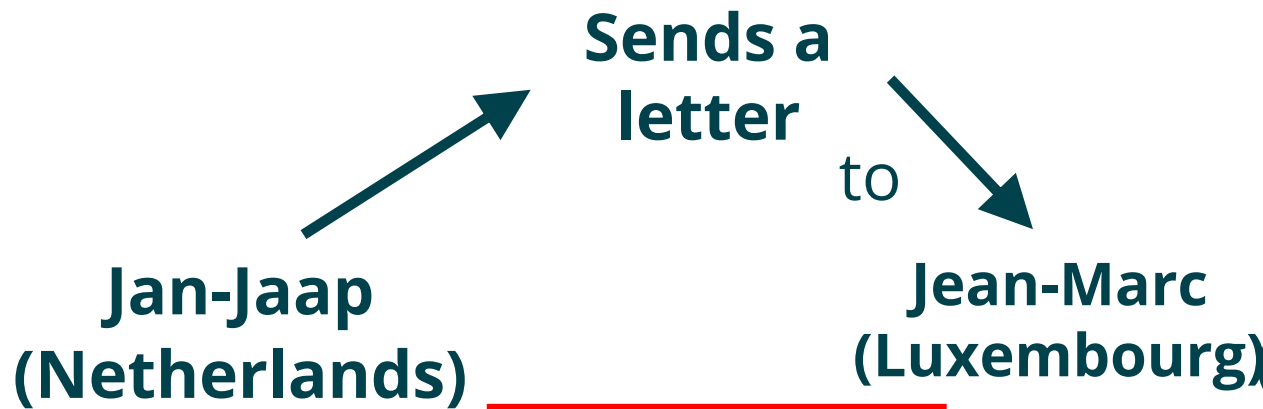
4 January

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!

against

**First seised!**  
**Luxembourg  
court**

Files a  
negative  
declaratory  
action

On 5 January

## How to avoid this uncertainty?

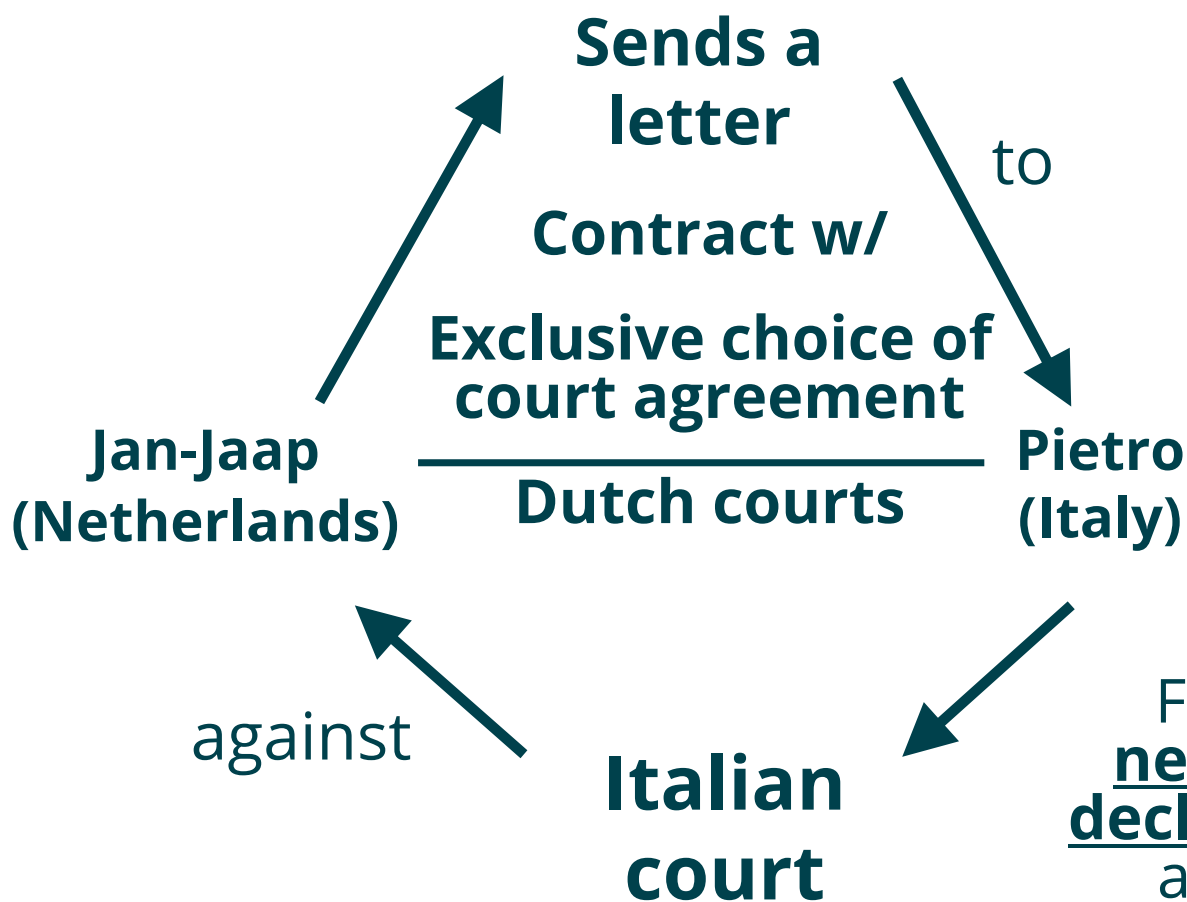
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A possible, widespread strategy:

### **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.

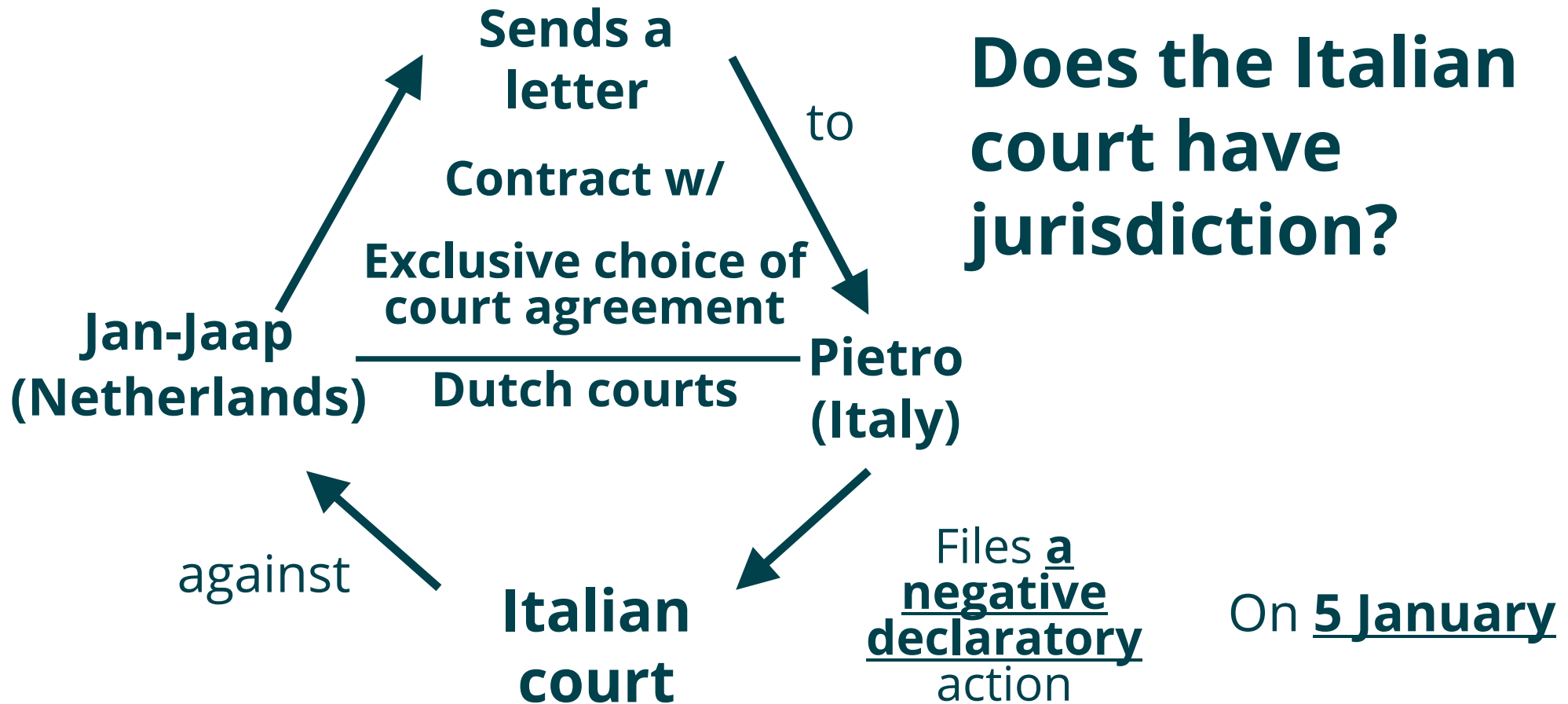


4 January  
Dear Pietro,  
Where's my €100?  
If you don't pay, I am going to have to sue you before Dutch courts, as agreed!

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**

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[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?

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## 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.



Files an injunctive action

**Dutch court**

On 5 January

to

Contract w/

**Exclusive choice of court agreement**

Jan-Jaap

Pietro (Italy)

(Netherlands)

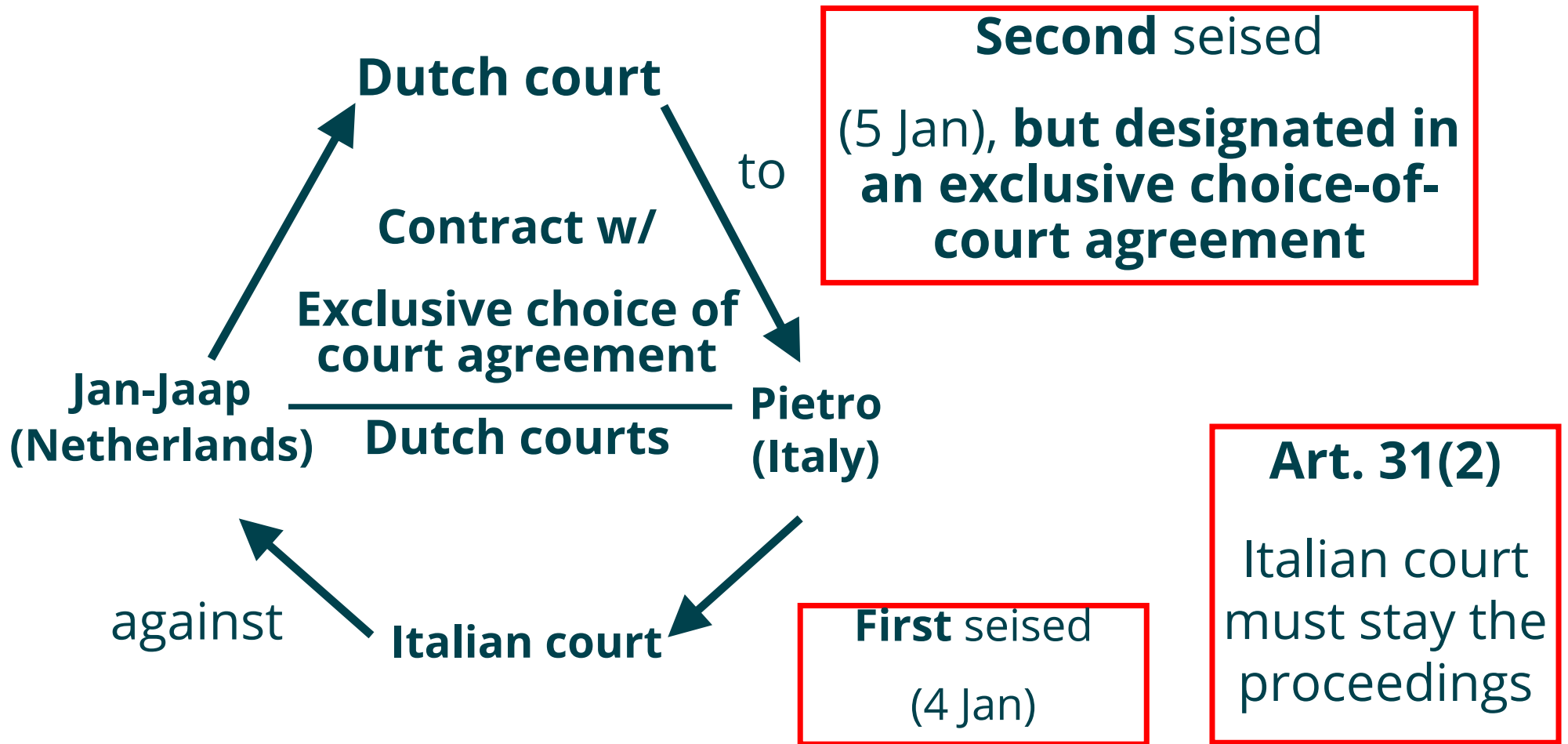
**Dutch courts**

against

**Italian court**

Files a negative declaratory action

On 4 January



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# Recognition and Enforcement

# Finding the Applicable Law

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## 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

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## 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	<b>No second guessing by r&amp;e court + Gothaer effect</b>
Proper notice	Proper notice + appeal attempt
<i>Ultra petita</i>	<b>Not applicable</b>
Tribunal or procedure not in accordance with agreement	<b>Not applicable</b>
Annulled award	Annulled judgment can <b>never</b> be recognised and enforced
Arbitrability	<b>Not applicable</b>
Public Policy	Public Policy
Not mentioned, but possibly implicit in public policy	Res judicata
<b>Not applicable</b>	Conflict with certain jurisdictional rules