Prorogation of jurisdiction

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EJTN Civil Justice Seminar – Jurisdiction and recognition and enforcement of judgments in civil and commercial matters

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(Tacit) prorogation of jurisdiction

Can we enforce what we agreed upon?

Negotiation stage

- Dispute resolution clause
- If court litigation, which court to choose?

Litigation stage

- Where to sue?
  Chosen court? Is there a choice of court if jurisdiction is not challenged?
  or
  Another court despite the choice of court agreement?

Enforcement stage

- Can the court judgment be recognised and enforced where the judgment defendant/the assets are?

Jurisdiction rules in hierarchical order

Exclusive jurisdiction (for five specific subjects) Art. 24

Tacit prorogation Art. 26

Special jurisdiction rules (protective rules) Arts. 10 – 23

Jurisdiction clause Art 25

Defendant's domicile Art. 4 OR special (alternative) rules

Provisional measures

Art. 35

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Art 26 Brussels I Regulation

Article 26

1.   Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 24.

2.   In matters referred to in Sections 3, 4 or 5 where the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee is the defendant, the court shall, before assuming jurisdiction under paragraph 1, ensure that the defendant is informed of his right to contest the jurisdiction of the court and of the consequences of entering or not entering an appearance.

How is tacit prorogation assessed under the Regulation?
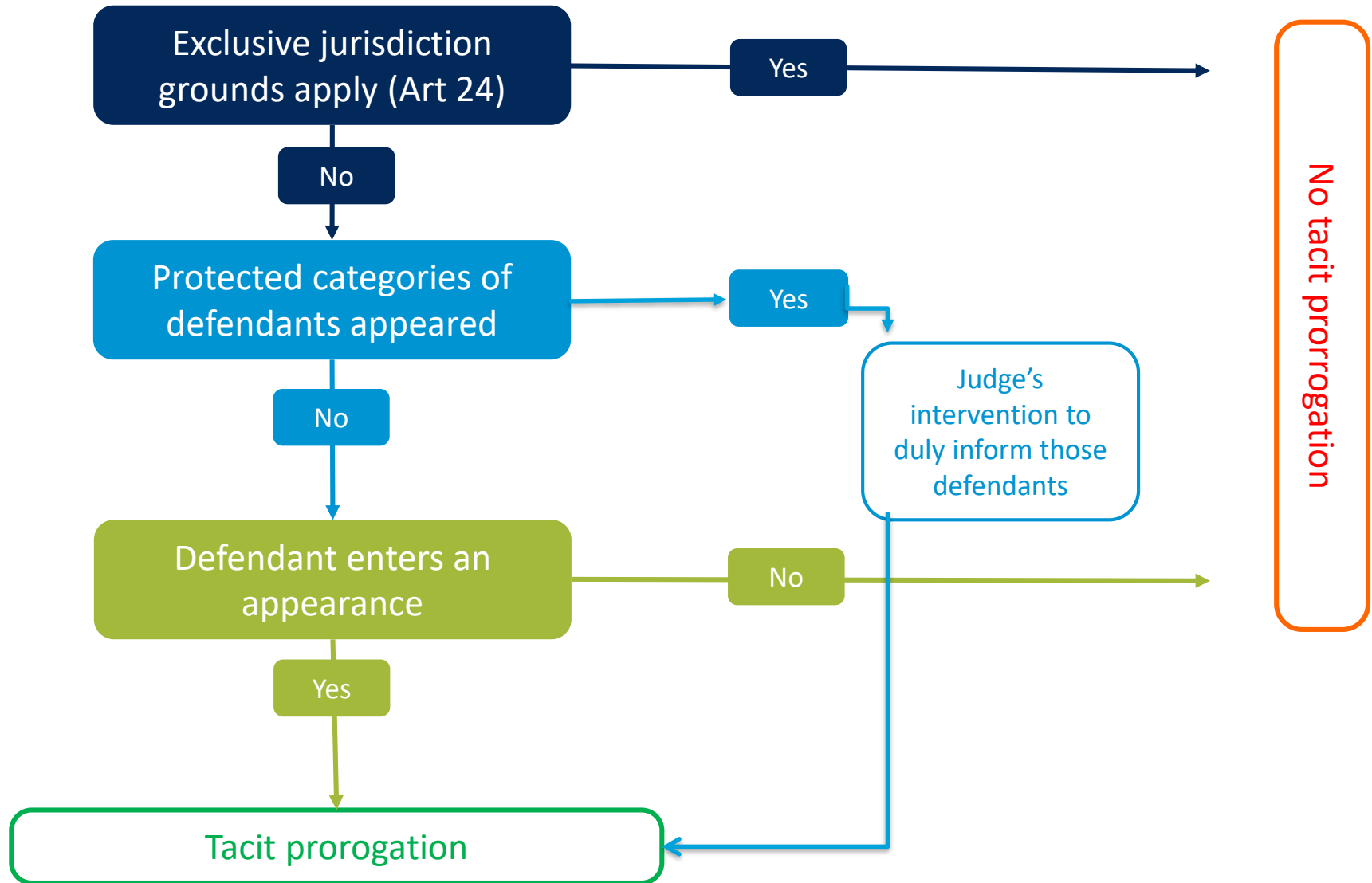
For that purpose, the European Judicial Network in civil and commercial matters established a non-mandatory standard text containing the information which the court could use to fulfil its obligation to provide to the defendant with the information pursuant to Article 26(2) of the Regulation.

You are being sued before the court of a Member State of the European Union under Regulation 1215/2012.

Under Article 26 of this Regulation the court before which a defendant enters an appearance shall - in principle - have jurisdiction even if jurisdiction cannot be derived from other provisions of the Regulation.

This rule, however, does not apply where appearance was entered to contest jurisdiction.

If you are certain that the court has no jurisdiction under the other provisions of the Regulation, you need not respond to the lawsuit in any way. If you have doubts about the issue of jurisdiction, it is advisable that you challenge jurisdiction of the court prior to entering into the subject-matter of the lawsuit.

Case scenario

Parties conclude a contract for the manufacturing of car engines. One of the clauses of the contract reads as follows:

The parties submit any disputes arising out of or in connection with this Contract to the exclusive jurisdiction of the International Commercial Court of Singapore (SICC).

The Italian company sues the Japanese company in Italy (despite the choice of court clause)

- The Japanese company appears and does NOT contest the jurisdiction of the Italian court

- Italian court has international jurisdiction pursuant to Art 26

Art 25 Brussels I Regulation

- 1) **Choice of court clause**
  - To be assessed separately from the rest of the contract (doctrine of separability)

- 2) **Who can agree?**
  - Regardless of parties' domicile
  - B2B – if protected parties, special provisions in Sections 3, 4 and 5 of Chapter II

- 3) **What is covered by the choice of court clause?**

  - In connection with a particular legal relationship
  - Contractual and non-contractual claims?
  - Illustrations: C-352/13 *CDC Hydrogen* (claim against anti-competitive practices) and C-595/17 *Apple Sales* (damages for alleged breach of competition rules)

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Art 25 Brussels I Regulation (cont'd)

- 4) **Which form?**

  - <u>Three options</u>:

    1) in writing (digital means also OK)
    2) in accord with practices established by the parties
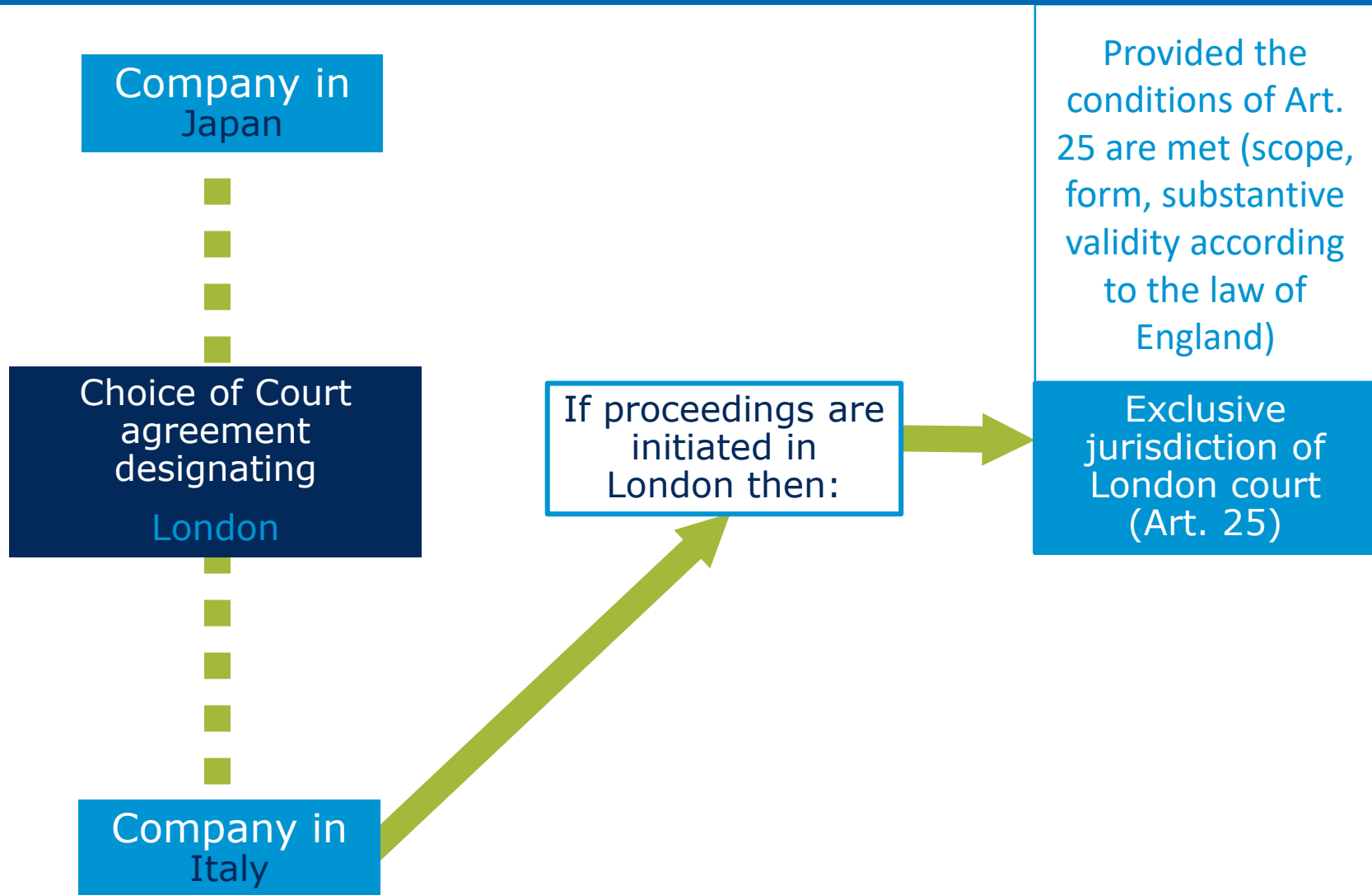   3) usage in particular branch (in international trade)

    – ex. C-322/14 *El Madjoub v. CarsOnTheWebb* ('click wrapping') or C-222/15 *Höszig* (forum clause in general conditions)

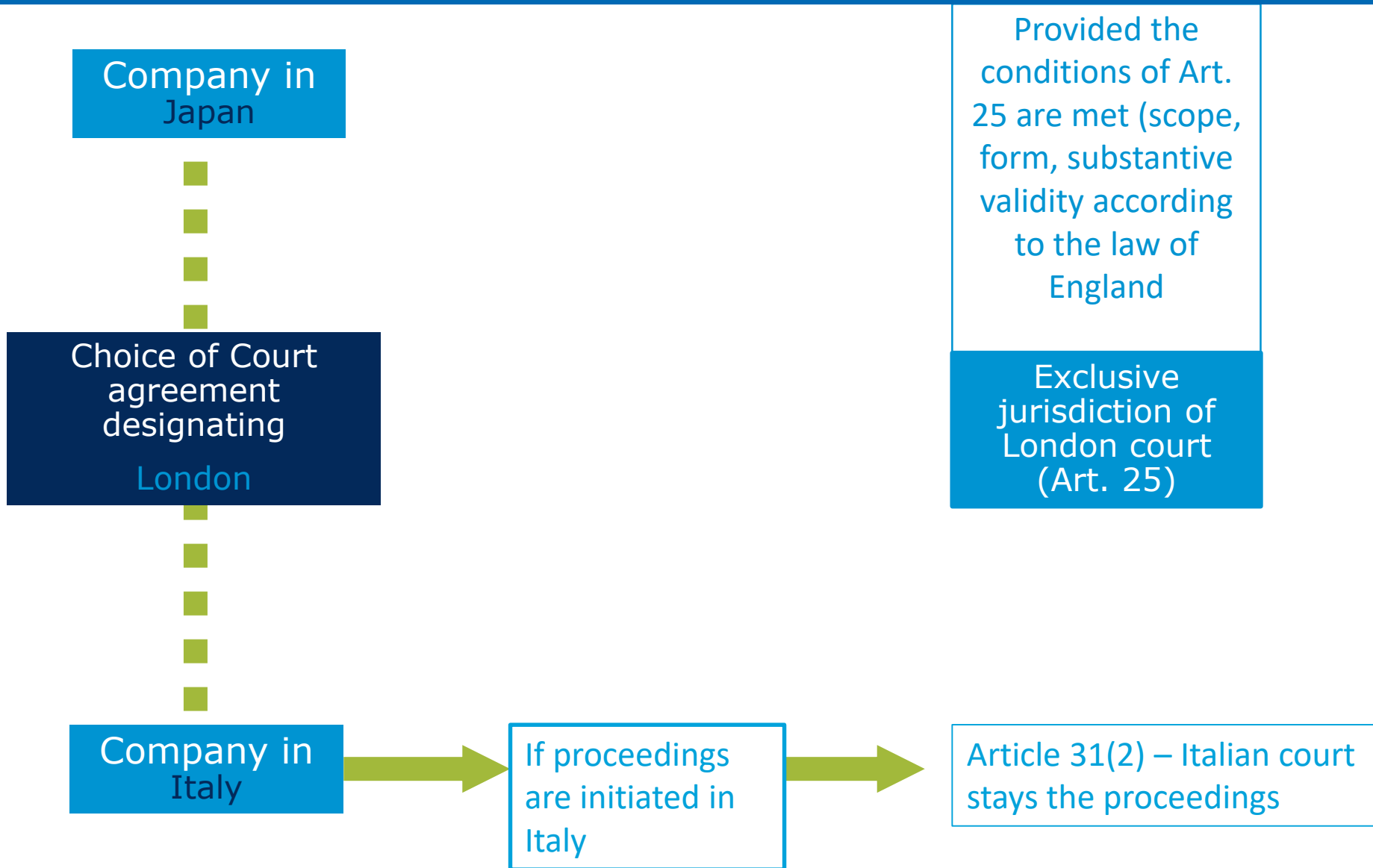- 5) **Substantive requirements of the law of the chosen court**

  - The law of the chosen court determines whether, for instance, incapacity, coercion or fraud occurred.

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Art 25 in practice

Company in Japan

Choice of Court agreement designating London

Company in Italy

If proceedings are initiated in London then:

Provided the conditions of Art. 25 are met (scope, form, substantive validity according to the law of England)

Exclusive jurisdiction of London court (Art. 25)

Art 25 in practice

Company in Japan

Choice of Court agreement designating London

Company in Italy

Provided the conditions of Art. 25 are met (scope, form, substantive validity according to the law of England

Exclusive jurisdiction of London court (Art. 25)

If proceedings are initiated in Italy

Article 31(2) – Italian court stays the proceedings

What if the chosen court in a non-Member State?

1) Seems an infrequent scenario but may become important in post-BREXIT times.

2) The 2005 Choice of Court Convention fills in that scenario

3) A Convention? Law of the Treaties!

4) Current status: see hcch.net

37: Convention of 30 June 2005 on Choice of Court Agreements
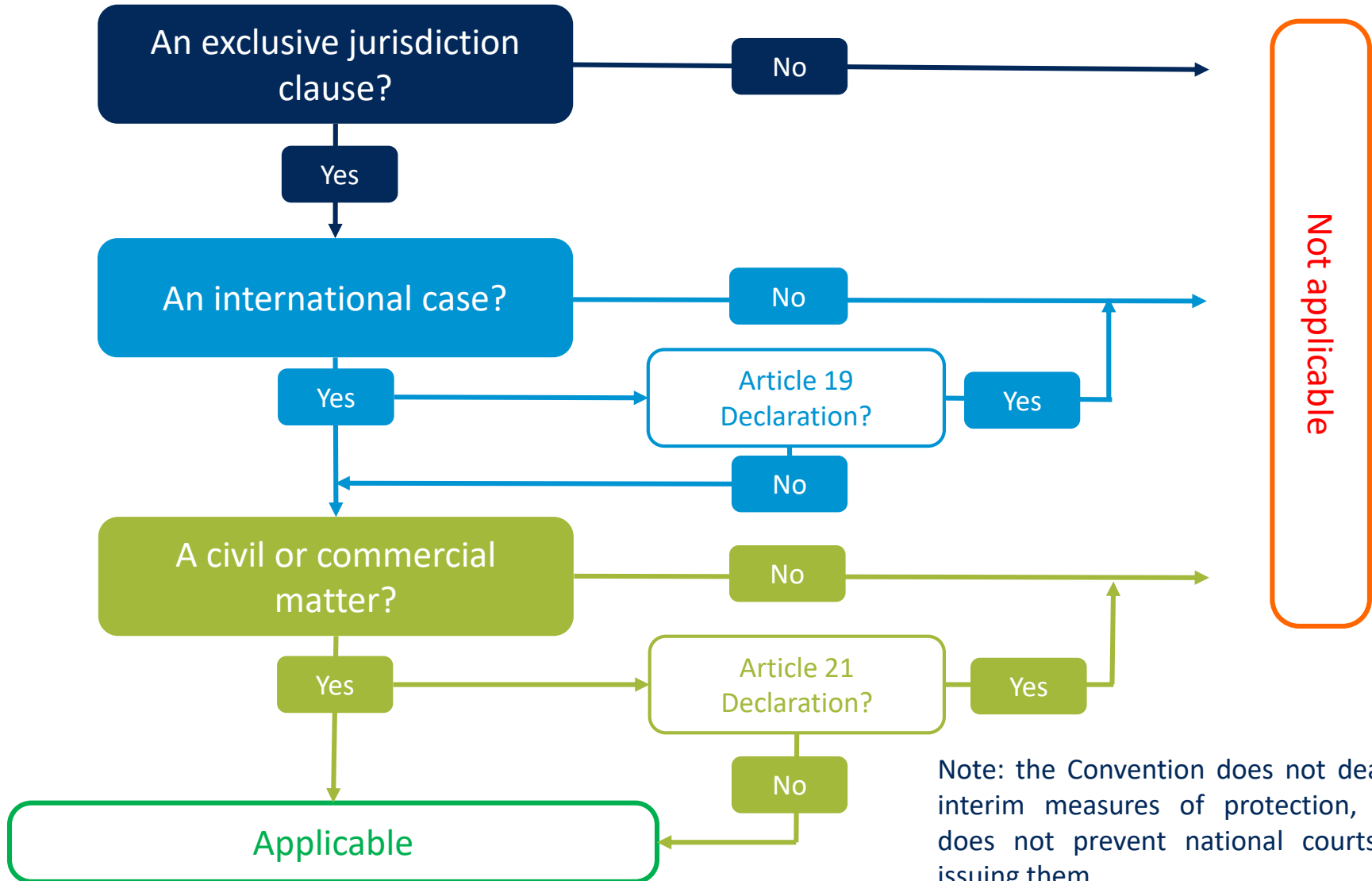
Entry into force: 1-X-2015

Last update: 4-II-2020
Number of Contracting Parties, incl. REIOs and States bound as a result of approval
by an REIO: 32

🖨 View and/or print full status report

The expression "Contracting Party" covers both, cases in which the Convention has, and cases in which the Convention has not yet, entered into force for that Party, incl. an REIO, following the deposit of its instrument of ratification, accession, acceptance or approval (see column EIF in the chart).
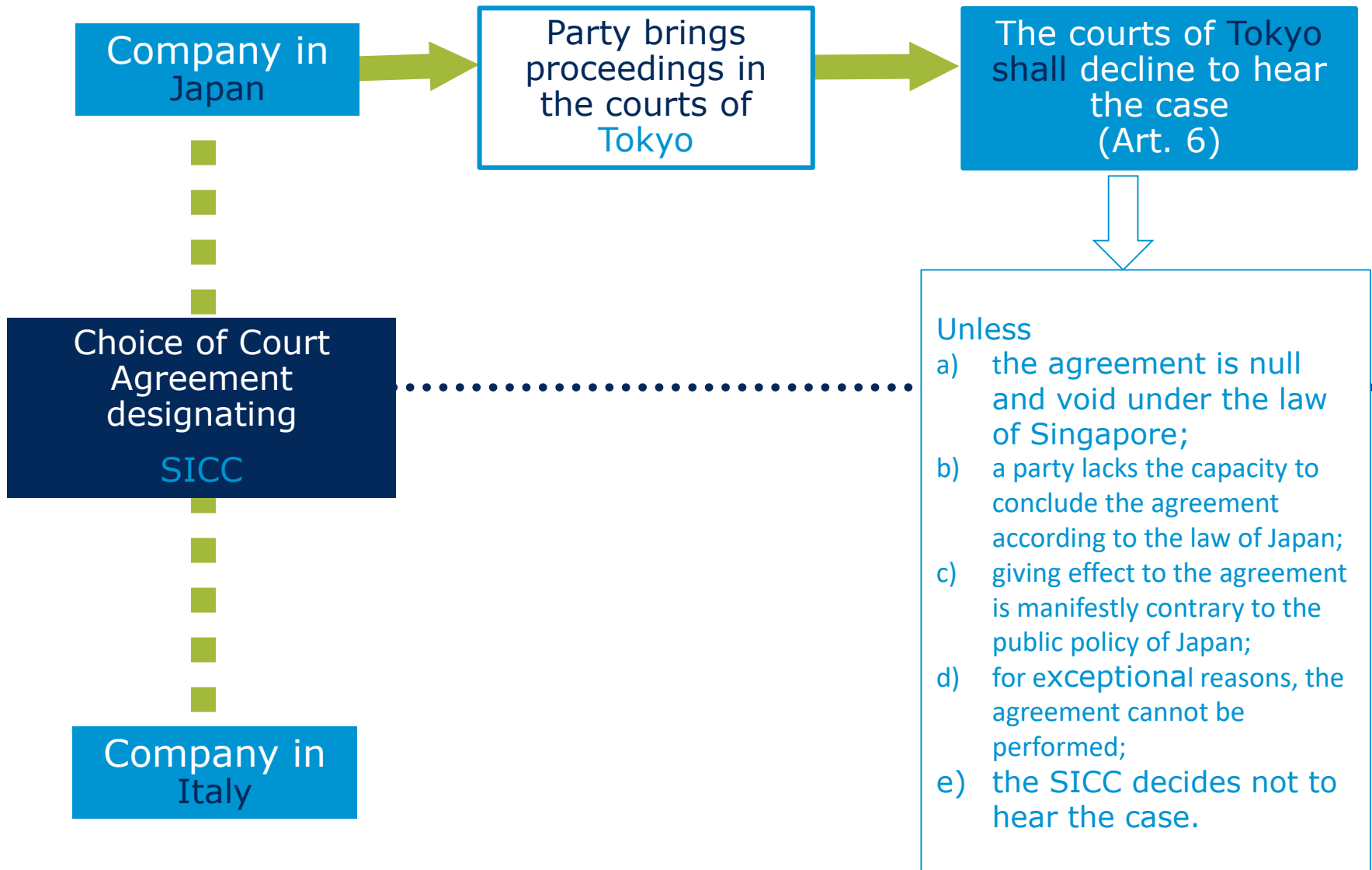
How does the Convention apply?

How does the Convention operate? (cont'd)
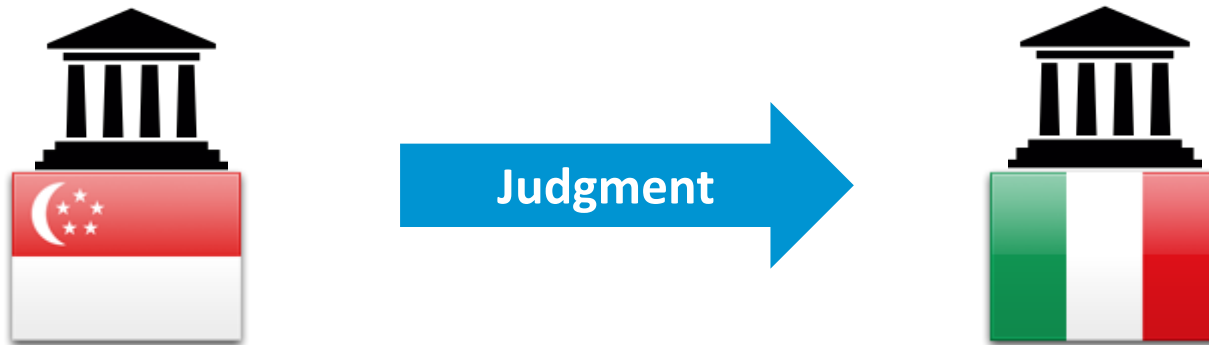
Company in Japan → **Party brings proceedings in the courts of Tokyo** → **The courts of Tokyo shall decline to hear the case (Art. 6)**

Choice of Court Agreement designating SICC

Company in Italy

Unless
a) the agreement is null and void under the law of Singapore;
b) a party lacks the capacity to conclude the agreement according to the law of Japan;
c) giving effect to the agreement is manifestly contrary to the public policy of Japan;
d) for exceptional reasons, the agreement cannot be performed;
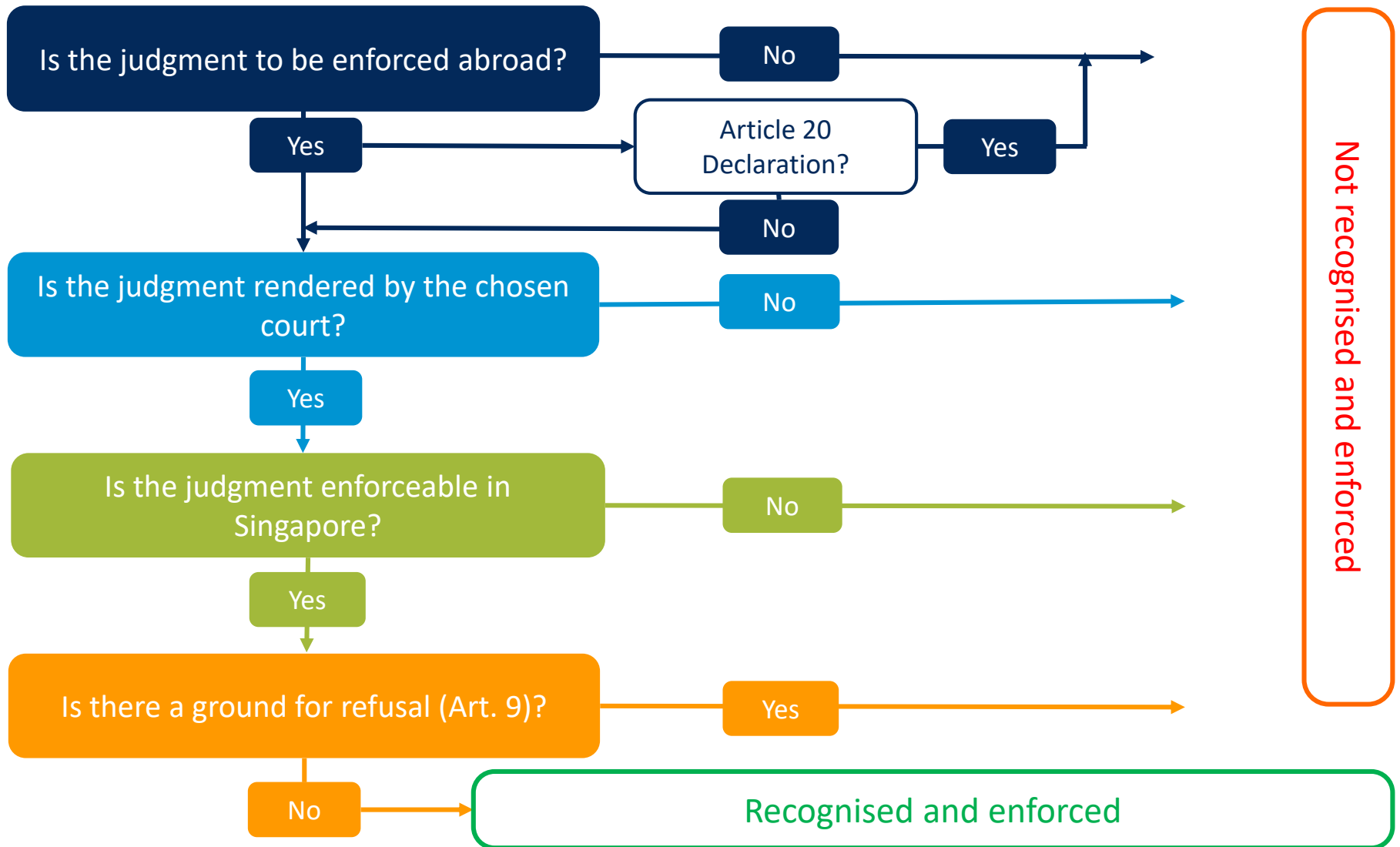e) the SICC decides not to hear the case.

Enforceability of the judgment rendered by the SICC

The SICC delivered a judgment: the Italian party to pay damages for non-delivery to the Japanese party.

The judgment needs to be recognised and enforced in Italy.

How does the Convention apply?
(enforcing the SICC judgment in Italy)

In a nutshell

Which (international) rule applies?
- Scopes of Arts. 26 and 25
- 2005 Choice of Court Convention

What needs to be checked?
- Is there a choice of court if jurisdiction is not challenged?
- Chosen court
- Another court despite the choice of court agreement

Recognition and enforcement
- Where the judgment defendant/the assets are.
- Suppression of control