

Regulation of CCPs and the Enforcement of Investor Rights

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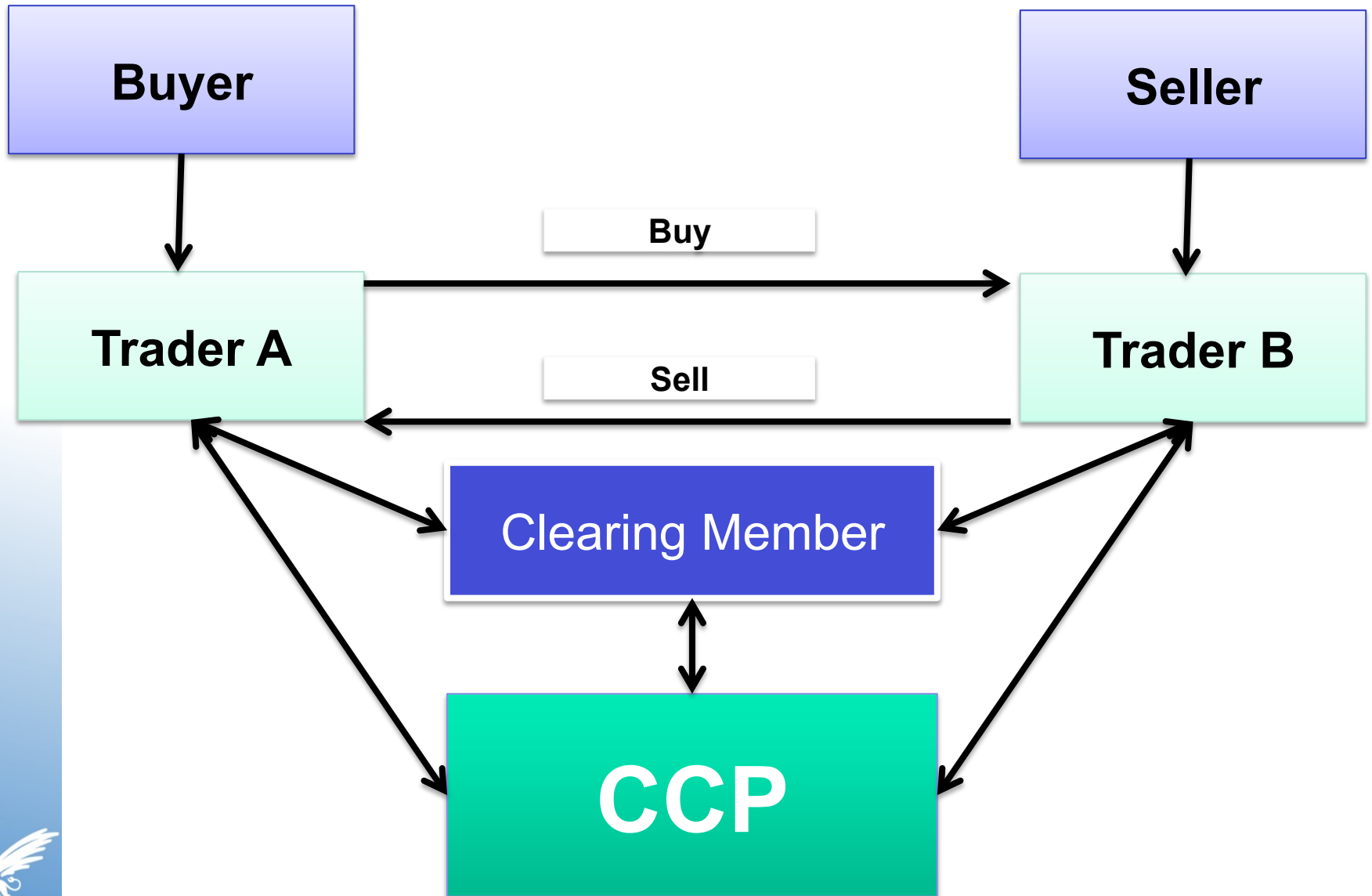
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The CCP Clearing Process



The Contractual Nature of Investor Rights in CCP Clearing

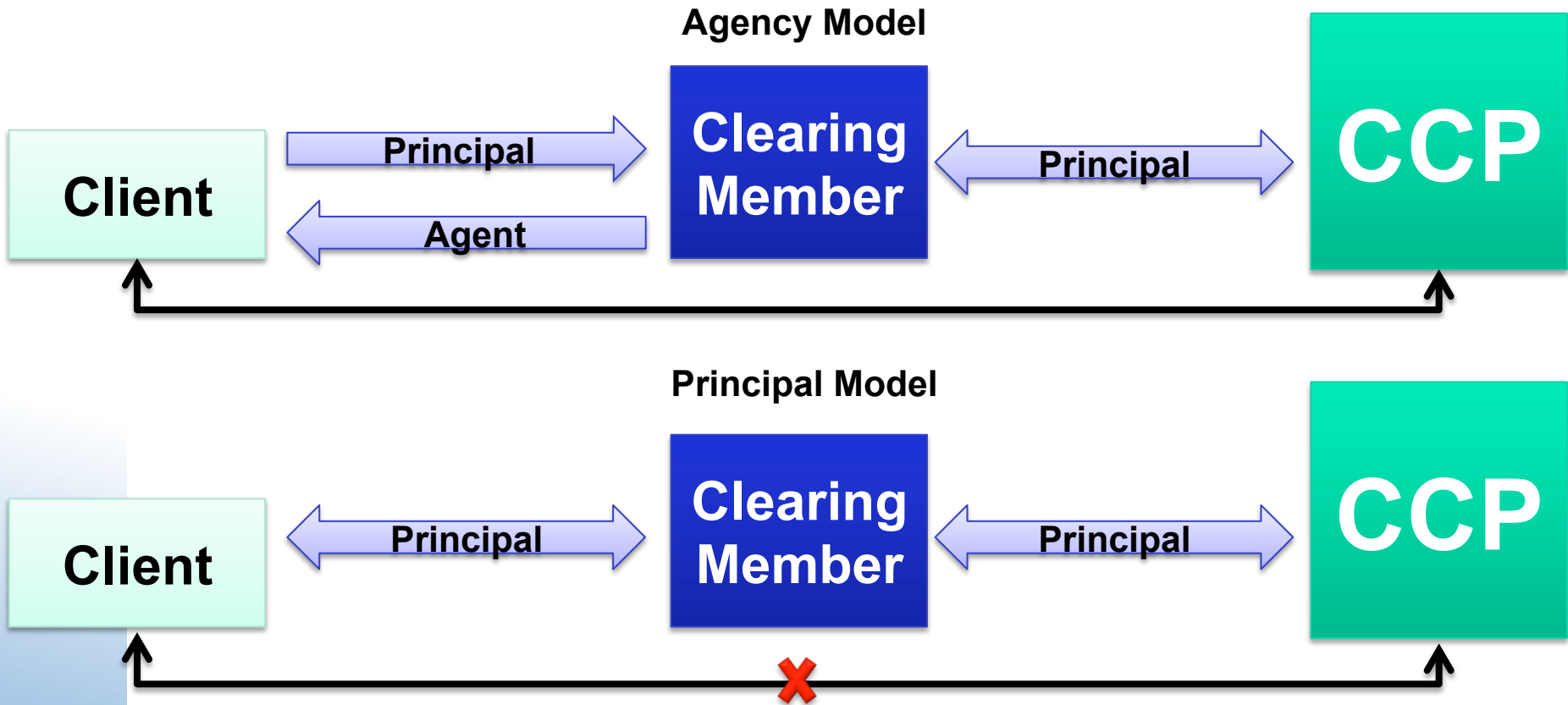
At EU level CCP Clearing traditionally out of the scope of hard law



Very heterogeneous CCP Clearing regimes



The Chain of Contracts in CCP Clearing



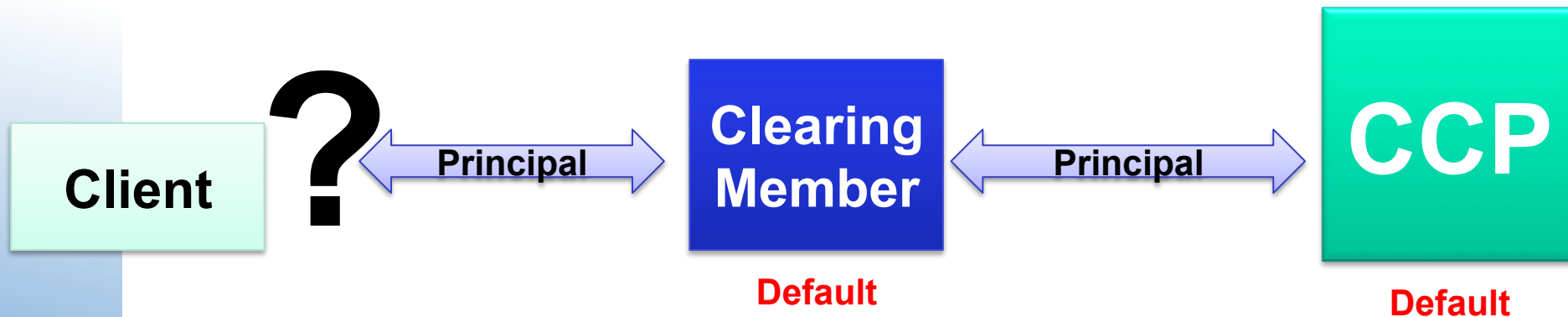
Client at the end of the chain in both models
Exposed to risk of default by either the CM or the CCP



Regulation of CCP Clearing through contracts and the position of clients

Rights of clients set in vague and unclear contracts

Contracts devised for the protection of CCPs and/or CMs



Failures in chain of intermediation may have impact on:

1. The conclusion of CCP Clearing
2. The assets (cash, securities..) provided by clients as margin



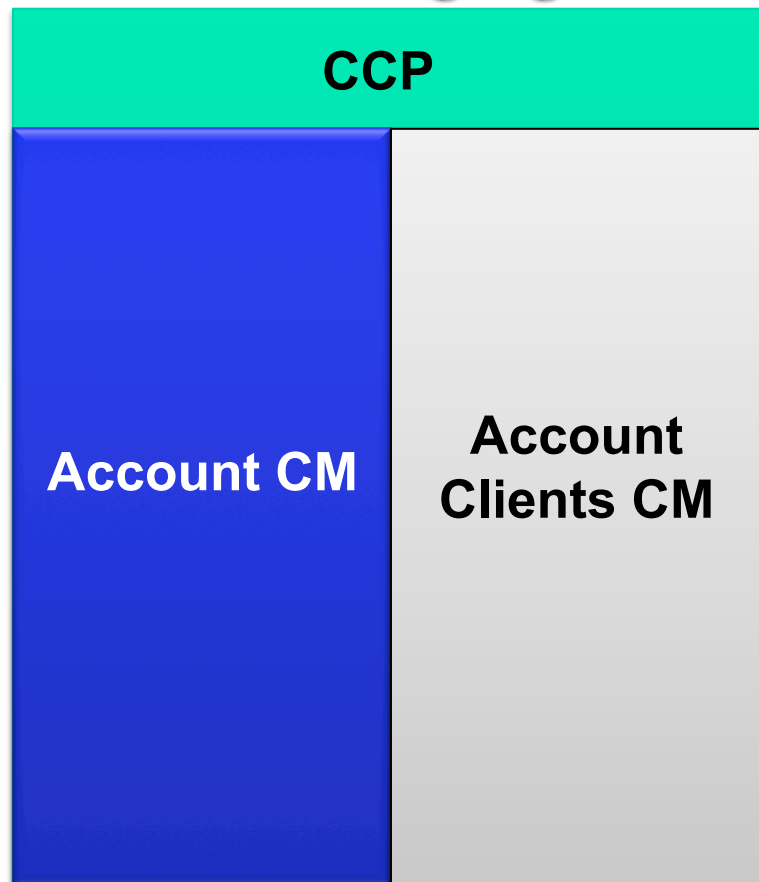
Post-crisis Regulatory Overhaul

- EU level: from soft-law to hard law
- European Market Infrastructure Regulation (EMIR)
- Potential for greater protection of clients and investors: segregation and portability
- Limitations: what CCP's regulation does not (or cannot) do.

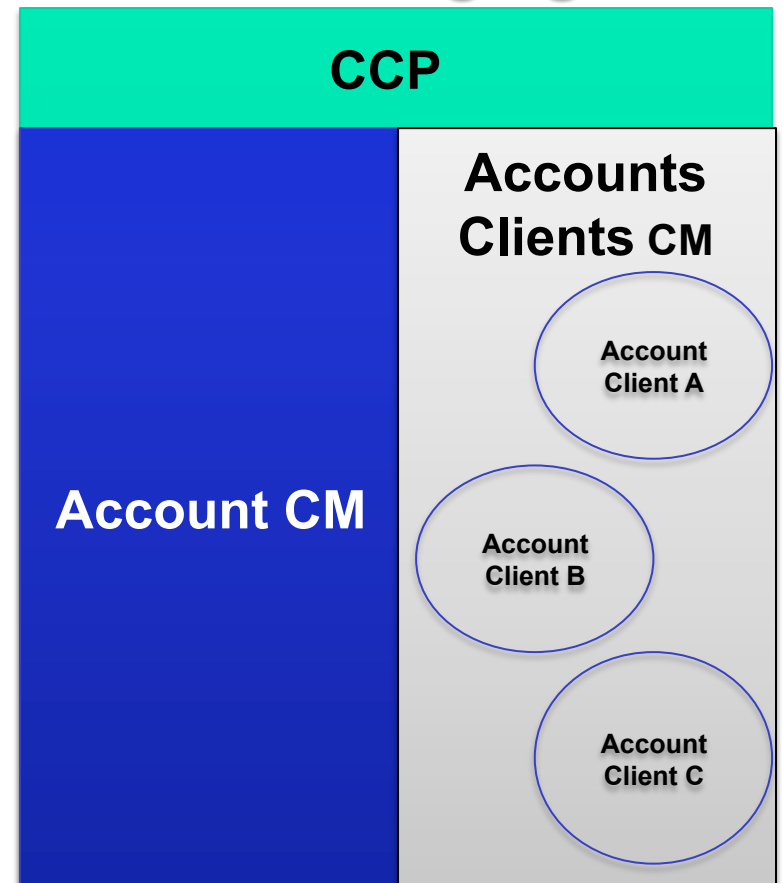


What Can Regulation Do (1)?: EMIR and Segregation

Omnibus Segregation

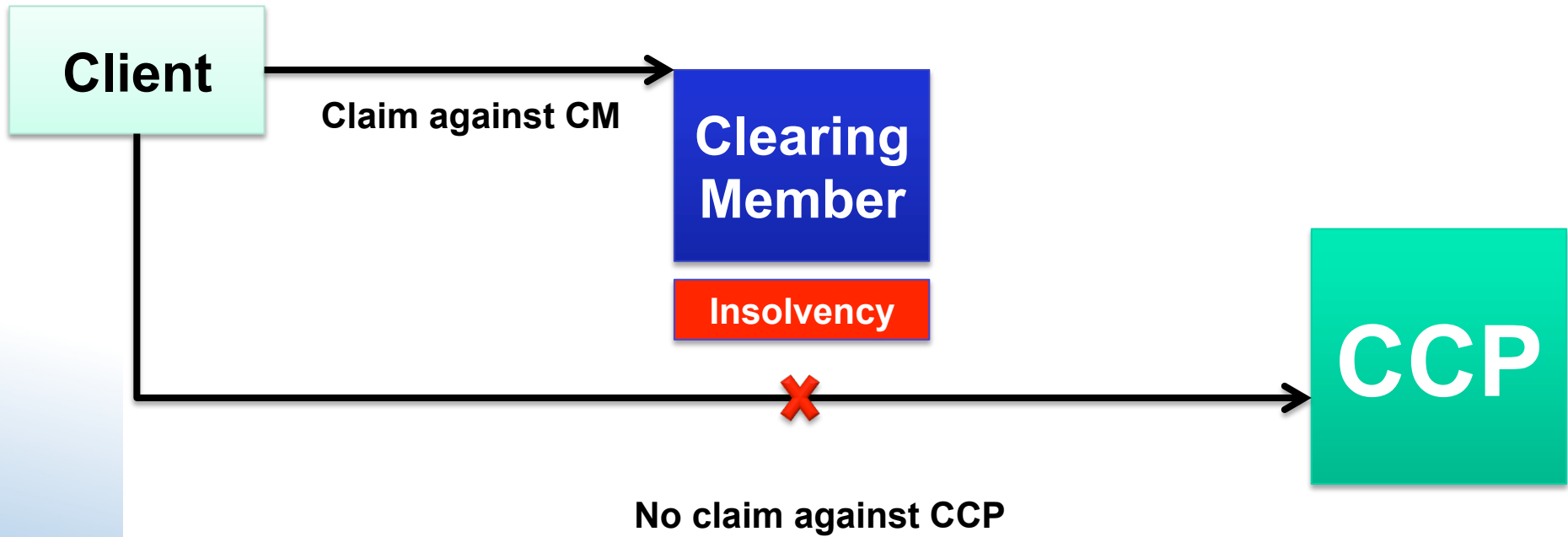


Individual Segregation



The Regulation of CCPs: limits (1)

DEFAULT OF CM



1. CCP liquidates and transfers value of assets to client: EMIR grants discretion to CCPs

2. CCP liquidates and transfers value of assets to CM: problem of insolvency laws



The Regulation of CCPs: limits (2)

DEFAULT OF CCP

Client shielded: only in theory

Scope for contractual waivers of liability

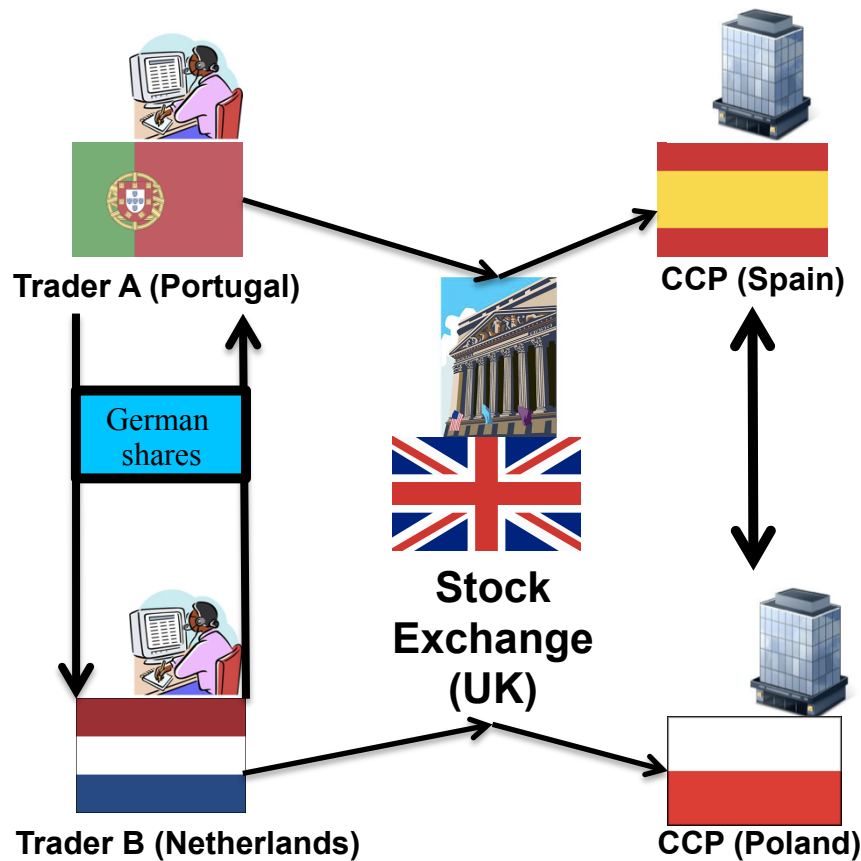
Example: the ISDA CM Disclosure Document:

“...your claims against us are limited recourse so that you will only receive amounts from us in relation to Client Transactions if we receive equivalent amounts from the CCP in relation to relevant CCP Transactions;”



The Regulation of CCPs: limits (3)

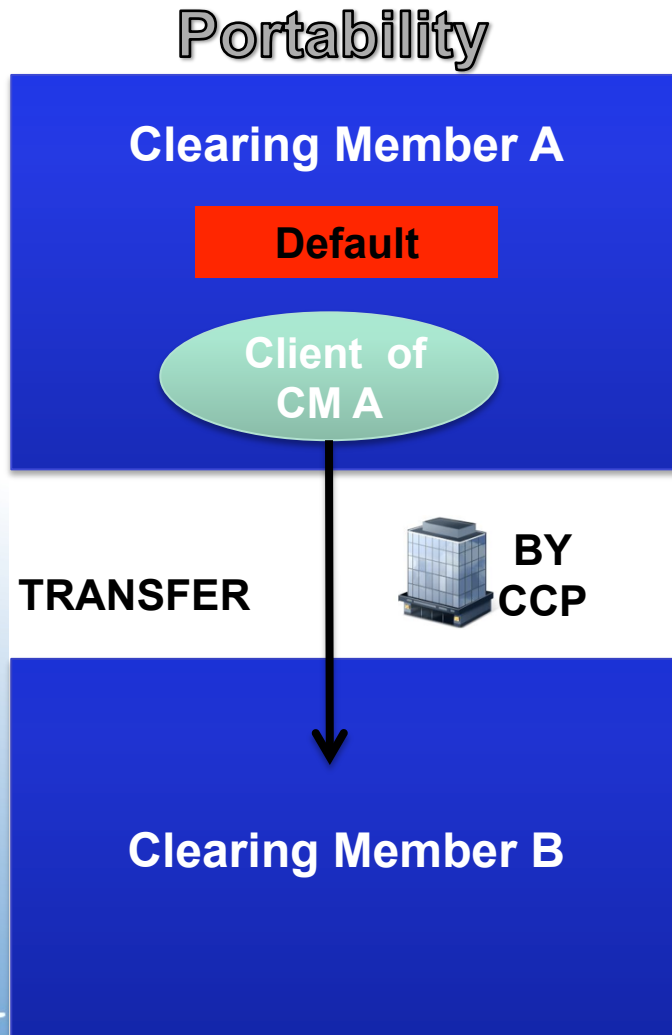
DEFAULT OF CM OR CCP IN A CROSS-BORDER CHAIN



- The problem of the applicable law: Winding Up, Insolvency...
- Conflict between provisions different countries



What Can Regulation Do (2)?: EMIR and Portability



THREATS ENFORCEMENT CLIENT RIGHTS:

A) Omnibus segregation: no individual portability

B) Individual segregation:

1. Insolvency: positions and assets seen as part of the defaulting CM's estate

2. Portability requires ex-ante agreement with CMs



Conclusions (1)

- Financial crisis had led to regulatory intervention in area of CCP Clearing
- Enhancement of some rights of clients in CCP process



Conclusions (2)

- The approach of EMIR and its weaknesses:
 - Objectives
 - Competition and avoidance of systemic risk
 - Give preeminence to position of CCPs and CMs
 - Core aspects of client protection often dismissed
 - Risk for the effective and efficient enforcement of client rights
 - Technique
 - Delegation to CCPs and CMs, not to ESMA



Conclusions (3)

- The intrinsic limitations of the regulation of CCPs:

Other areas of law have substantial influence on the ability of clients to enforce their rights



Thank you!

