Custody agreement: core terms under Singapore law

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Under Singapore law the custody agreement achieves insolvency remoteness by creating a trust. The drafting must therefore supply the three certainties: intention, subject matter and object. The subject-matter certainty is the one that omnibus wallets endanger. The solution adopted after the Lehman and Gatecoin decisions is to define the beneficial interest as a proportionate share of each pool of fungible assets, so that the trust attaches to the pool and the client's share is a fraction of it.[1] For a licensed DPT service provider, the Payment Services Regulations impose the trust by law. The agreement should still declare it, because customers of unlicensed custodians have only the agreement to rely on. The declaration also settles the proportionate-share question that the regulations leave to the custodian's terms.

> ***Declaration of trust.*** *The Custodian holds the Customer Assets on trust for the Customer. The Customer's beneficial interest in Customer Assets held in a pooled wallet with assets of other customers is an undivided share of each type of Customer Asset in that wallet equal to the proportion that the quantity recorded to the Customer's account bears to the total quantity of that type recorded to all customers' accounts.*
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> ***Segregation.*** *The Custodian shall hold Customer Assets in wallets separate from its own assets and shall not commingle Customer Assets with its own assets or with assets held for any purpose other than custody for customers. The Custodian shall maintain books and records sufficient to identify at all times the Customer Assets held for each customer and shall reconcile those records daily against the distributed ledger.*
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> ***No use.*** *The Custodian shall not lend, stake, pledge, rehypothecate or otherwise use Customer Assets for its own benefit or for the benefit of any third party, and shall not grant any security interest over Customer Assets, except as the Customer directs in writing in respect of a specific transaction.*
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> ***Trust account for fiat.*** *Money received from or for the Customer shall be held in a trust account with a bank in Singapore designated as such in accordance with the Payment Services Regulations and shall not be used for any purpose other than payment to or at the direction of the Customer.*
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> ***Exclusion of other relationships.*** *Nothing in this Agreement creates a debtor–creditor relationship in respect of Customer Assets, and the Custodian's obligation is to deliver the Customer Assets themselves, or the Customer's share of pooled Customer Assets, and not their value.*
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> ***Limitation.*** *The Custodian is liable for loss of Customer Assets caused by its negligence, wilful default or fraud. The Custodian is not liable for loss caused by events outside its reasonable control, including*

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> *protocol failure, network congestion or the acts of a sub-custodian selected and monitored with reasonable care, provided that nothing in this clause limits liability for breach of trust that cannot be excluded under the Trustees Act 1967 or the Unfair Contract Terms Act 1977.*

The Singapore court in the Hodlnaut and Zipmex proceedings read terms of service that spoke of "lending" and "earning" against the customers who had agreed them, treating the assets as the platform's and the customers as unsecured creditors.[2] A customer-side reviewer should strike any language that describes the arrangement as a deposit, a loan or an investment product, together with any clause under which the customer "transfers" assets to the platform. The word "hold" and the word "trust" should appear in the operative provisions.

Notes

1. Re Lehman Brothers International (Europe) (2012) UKSC 6 and Re Gatecoin Ltd (2023) HKCFI 914 are discussed as persuasive authority in Part J, Chapter II; the Payment Services Regulations 2019 as amended in 2024 require licensed DPT service providers to hold customer assets on trust.
2. The customer-claim analysis in Re Zipmex Asia Pte Ltd and Re Hodlnaut Pte Ltd is at Part J, Chapter V and Part N, Chapter IV.

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