Custody agreement: core terms under Swiss law

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The Swiss custody agreement has one job above all others: to put the client within Art. 242a DEBA. The provision requires that the custodian has undertaken to keep the crypto assets available for the client at all times and that the assets are either allocated individually to the client or allocated to a community and the client's share clearly determinable.[1] Everything else in the agreement is secondary to that undertaking. Any clause that qualifies it (a right to use, a lien that permits sale, a power to stake without attribution) must be read against it. The agreement should also be clear that it is a custody mandate under Art. 394 ff. and 472 ff. CO and that the custodian acts as an SRO-affiliated financial intermediary or licensed institution, because the regulatory status determines which supervisory regime polices the segregation.[2]

> **Undertaking to keep available.** The Custodian undertakes to hold the Crypto Assets for the Client and to keep them available for the Client at all times within the meaning of Art. 242a para. 2 of the Debt Enforcement and Bankruptcy Act. The Custodian shall not use the

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Crypto Assets for its own account, lend, pledge, stake, delegate or otherwise dispose of them except on the Client's written instruction given under clause [x].

Allocation. The Crypto Assets shall be held [in one or more distributed ledger addresses allocated exclusively to the Client] [in collective addresses together with crypto assets of other clients of the Custodian, in which case the Custodian shall maintain a ledger recording at all times the quantity of each Crypto Asset held for the Client, shall reconcile that ledger against the distributed ledger balances at least daily and shall make the reconciliation available to the Client and to its regulatory auditor on request]. The Client's share in collectively held Crypto Assets is the quantity so recorded.

Segregation in insolvency. The parties intend that the Crypto Assets are not part of the Custodian's estate in any bankruptcy, composition or restructuring proceeding and that the Client is entitled to their segregation. The Custodian shall structure its records and its arrangements with any sub-custodian so that this entitlement can be exercised without delay.

Forks and airdrops. Any crypto asset received by the Custodian by reason of a fork, airdrop or similar event in respect of the Crypto Assets shall be held for the Client under this Agreement. The Custodian may decline to support a fork or to claim an airdrop where doing so would in its reasonable opinion expose the Custodian or its clients to legal, security or operational risk, and shall notify the Client within [five] business days of the decision.

Keys. The Custodian shall hold the private keys controlling the Crypto Assets in accordance with its key management policy as notified to the Client and to [the SRO / FINMA], shall ensure that no single individual

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> can dispose of Crypto Assets alone, and shall keep at least [95] per cent of Crypto Assets by value in storage that is not connected to the internet.
>
> **Liability.** The Custodian is liable for loss of Crypto Assets caused by its failure to exercise the care of a professional custodian. The Custodian is not liable for loss caused by the inherent properties of the distributed ledger, by a protocol change or failure, or by instructions authenticated in accordance with clause [x], unless the Custodian knew or ought to have known that the instruction was not given by the Client. Liability for slight negligence is excluded to the extent permitted by Art. 100 CO.
>
> **Lien.** The Custodian has no lien, right of retention or set-off over the Crypto Assets except for fees due under this Agreement that are more than [sixty] days overdue, and then only to the extent of those fees.

The comment on the lien clause is the most important. Many custodians' standard terms grant a general lien over all client assets for all claims. Swiss courts may read such a lien as inconsistent with an undertaking to keep assets available at all times. In any event it converts the client's segregation claim into a contested one. A narrow lien for overdue fees is acceptable to most custodians once the point is explained.

Notes

1. DEBA Art. 242a para. 2; for bank custodians Art. 16 no. 1bis BankA extends the deposit-segregation regime to crypto assets held in the same way; see Part D, Chapter IV. ↩
2. Code of Obligations Art. 394 ff. (mandate) and Art. 472 ff. (deposit); the characterisation of the custody relationship is discussed in Part D, Chapter V. ↩

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