Pitfalls and opposing views

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Three recurring errors deserve a warning. The first is the belief that calling an arrangement "custody" makes it a trust. It does not. The word describes a service. The terms decide whether the service is performed as trustee or as debtor. The second is the belief that a trust protects against operational loss. It does not. A trust protects against the custodian's insolvency and against the custodian's creditors, but a hacked omnibus wallet is a loss shared by the beneficiaries. The third is the belief that the MAS rules have made private-law analysis unnecessary. They have not. A regulatory duty to hold on trust is enforced by MAS against the licensee. The customer's proprietary claim is enforced by the customer against the liquidator and depends on the trust having been validly declared and administered.

The opposing view, held by some insolvency practitioners, is that mandatory customer trusts make rescue harder. Trust assets cannot be used to fund a restructuring. The pro rata allocation of a shortfall across tens of thousands of customers consumes the estate in administrative cost. Both points are true. The answer given by the regulator, and in my view the right one, is that customer assets were never the platform's to use and that a restructuring funded by them is a transfer from customers to shareholders and creditors. Zipmex and Hodlnaut showed what the alternative looks like (Chapter V).

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