# 保管協議：瑞士法律下的核心條款

Dr Alexander Ressos, TEP
Attorney-at-Law (Switzerland and Germany),
Solicitor (England & Wales and Hong Kong)
Of Counsel, KGP Legal LLC
alexander.ressos@kgplegal.com.sg
www.ressos.com.sg

瑞士保管協議最重要的任務只有一項：使客戶受《瑞士債務執行及破產法》（SchKG/DEBA）第242a條保障。該條文規定，保管人須已承諾隨時為客戶備有加密資產，而有關資產須個別分配予客戶，或分配予一個共同體而客戶的份額可清楚確定。[1]協議中的其他一切均從屬於這項承諾。任何對其加以限定的條款（使用權、容許出售的留置權、無須歸屬便可質押的權力），都必須對照這項承諾解讀。協議亦應清楚說明，這是《瑞士債務法》（OR/CO）第394條及其後條文以及第472條及其後條文下的保管委託，而保管人是以已加入自律組織（SRO）的金融中介人或持牌機構的身份行事，因為監管地位決定由哪一套監督制度監管資產分隔。[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.

對留置權條款的評註最為重要。不少保管人的標準條款，就所有申索對全部客戶資產設定一般留置權。瑞士法院或會把這種留置權解讀為與隨時備有資產的承諾不一致。無論如何，這種留置權會令客戶的分隔申索變成有爭議的申索。只要解釋清楚，大多數保管人都會接受只就逾期費用設定的狹窄留置權。

## 註釋

1. DEBA第242a條第2款；就銀行保管人而言，BankA第16條第1bis項把存款分隔制度延伸至以相同方式持有的加密資產；參見第D部分第IV章。↩
2. Code of Obligations第394條及其後條文（委託）及第472條及其後條文（寄存）；保管關係的定性於第D部分第V章討論。↩

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Author contact: Dr Alexander Ressos, TEP · contact@ressos.com