我的保管安排是否破產隔離？

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這個問題對每一位把加密資產交託第三方的客戶都十分重要：交易所用戶、使用保管人的基金、使用私人銀行加密資產部門的家族辦公室，以及受託人。兩個司法管轄區透過不同的法律機制回答這個問題，而得出的結果比其學說所顯示的更為相近。瑞士以成文法解決問題。自2021年8月1日起，《瑞士債務執行及破產法》（SchKG/DEBA）第242a條容許把保管人承諾隨時為客戶保持可供提取的加密資產，從破產保管人的破產財產中分隔出來。有關資產必須個別分配予客戶，或分配予一群客戶而每名客戶的份額可清楚確定。[1]新加坡則依賴信託法。如保管人以信託形式持有客戶資產，客戶資產便受到保障；這要求意圖、標的物及對象均屬確定，並且在實務上分隔。自2024年4月4日起，《支付服務規例》規定持牌DPT服務提供者須以信託形式把客戶資產存放於獨立帳戶，從而以法律提供意圖及分隔。[2]

兩地的弱點相同。如保管人的紀錄欠佳，綜合錢包會違反瑞士對份額須可確定的要求。綜合錢包亦會違反新加坡對標的物須確定的要求，除非客戶的權益被界定為可替代資產池中的按比例份額。已質押、借出或再抵押的資產並非隨時保持可供提取，因此根據瑞士法律不能分隔。在新加坡，一旦保管人已把資產處置予第三方，這些資產便不再以信託形式持有。2024年FlowBank

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倒閉事件顯示，瑞士銀行的加密資產保管安排可能可以分隔，但其法定貨幣存款則不能。Hodlnaut及Zipmex的法律程序則顯示，新加坡法院會逐條審視服務條款，以決定客戶究竟是受益人還是無抵押債權人。[3]

次序

1. 細閱保管協議中的承諾。保管人是否承諾隨時為客戶保持特定資產或同等數量的資產可供提取？如保管人可使用、借出、質押或再抵押有關資產，該安排便屬貸款或存款，客戶在兩個司法管轄區均屬無抵押債權人。
2. 確定錢包結構。每名客戶個別分配的鏈上地址：在瑞士可予分隔，在新加坡屬信託財產。附鏈下帳簿的綜合錢包：在瑞士，只有帳簿記錄每名客戶的份額而令其可清楚確定時，才可予分隔；在新加坡，只有條款界定了對資產池的按比例實益權益時，才屬信託財產。
3. 檢查保管人的牌照狀況。瑞士銀行或證券公司會令《銀行法》第16條第1bis項及FINMA對分隔的監管發揮作用。瑞士SRO成員只能依賴《瑞士債務執行及破產法》第242a條。新加坡MPI須遵守保障規例並接受MAS視察。在兩地，無牌保管人都只能提供一般法律的保障。
4. 測試紀錄保存。要求提供鏈上結餘與客戶帳簿之間的對帳頻率、核數師就客戶資產分隔所作的報告，以及密鑰管理政策。無法提供每日對帳的保管人，在破產時無法證明份額可予確定。
5. 審視質押及收益功能。向客戶支付的任何收益，都是資產曾被使用的證據。如客戶既想要收益又想要破產隔離，便須把安排設計為一項委託，由保管人代客戶透過客戶可識別的驗證節點進行質押，並把已質押資產歸屬於客戶；FINMA在若干條件下接受銀行採用這種安排。[4]
6. 考慮法律衝突。根據《海牙信託公約》，就瑞士保管人所持資產設立的新加坡信託會在瑞士獲得承認，而《瑞士債務執行及破產法》第242a條保障受託人的分隔申索。受瑞士法律管轄的瑞士保管協議，在

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新加坡破產程序中會按保管人的破產程序地法（lex concursus）獲得執行；如保管人屬瑞士機構，該法律便是瑞士法律。[5]

特徵	瑞士	新加坡
法律機制	《瑞士債務執行及破產法》第242a條的法定分隔；銀行適用《銀行法》第16條	明示或法定信託；《2018年破產、重組及解散法》（IRDA）保留信託財產
個別分配的錢包	可予分隔	如能證明意圖及分隔，屬信託財產
綜合錢包，帳簿完善	可予分隔（份額可清楚確定）	如條款界定按比例份額，屬信託
綜合錢包，帳簿欠佳	不可分隔	信託因不確定而失效；屬無抵押申索
保管人可使用資產	不可分隔（貸款／存款）	不成立信託；屬無抵押申索
由保管人質押	只在符合FINMA條件時可予分隔	視乎條款；質押期間一般屬無抵押
持牌保管人	由FINMA監管分隔或由SRO審計	自2024年4月起適用MAS保障規則
破產程序	破產或FINMA清盤；根據第242a條提出分隔申索	清盤、司法管理或債務償還安排計劃；信託申索

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實務提示

在把超過100萬瑞士法郎交託任何保管人之前，應索取三份文件：保管協議、核數師就客戶資產分隔發出的最新鑒證報告，以及一頁紙的錢包架構說明。如保管人無法提供第三份文件，便應假設屬附內部帳簿的綜合結構，並查問份額如何確定。這些答案比牌照更能告訴你自己在破產時的處境。

註釋

1. Debt Enforcement and Bankruptcy Act of 11 April 1889 (DEBA; SchKG, SR 281.1)，第242a及242b條；就銀行保管人而言，Banking Act第16條第1bis項；參見第D部分第IV章及第H部分第VII章。↩
2. Payment Services Regulations 2019，經修訂並自2024年4月4日起生效，有關保障客戶資產的規定；參見第K部分第II章及第J部分第II及V章。↩
3. FlowBank個案於第H部分第VII章分析；Re Zipmex及Re Hodlnaut見第J部分第V章及第N部分第IV章。↩
4. FINMA Guidance 08/2023，2023年12月20日，有關保管人進行質押及把已質押資產視為保管資產的條件的一節；參見第E部分第VIII章。↩
5. Swiss Private International Law Act of 18 December 1987 (PILA; IPRG, SR 291)，第149a條及其後條文；Hague Convention on the Law Applicable to Trusts of 1 July 1985 (SR 0.221.371)；參見第D部分第VIII及IX章。↩

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