Договор хранения: ключевые условия по швейцарскому праву

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У швейцарского договора хранения одна задача важнее всех остальных: поставить клиента под защиту ст. 242a SchKG. Эта норма требует, чтобы кастодиан обязался постоянно держать криптоактивы в распоряжении клиента и чтобы активы были либо индивидуально закреплены за клиентом, либо закреплены за сообществом, а доля клиента была чётко определима.[1] Всё остальное в договоре вторично по отношению к этому обязательству. Любую оговорку, которая его ограничивает (право пользования, право удержания с возможностью продажи, право стейкать без закрепления за клиентом), нужно читать в его свете. Договор также должен ясно указывать, что речь идёт о поручении на хранение по ст. 394 и сл. и 472 и сл. OR и что кастодиан действует как финансовый посредник, состоящий в

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SRO, или как лицензированное учреждение: регуляторный статус определяет, какой надзорный режим следит за обособлением.[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 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

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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 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.

Важнее всего комментарий к оговорке о праве удержания. Стандартные условия многих кастодианов предоставляют общее право удержания всех активов клиента по всем требованиям. Швейцарские суды могут счесть такое право несовместимым с обязательством постоянно держать активы в распоряжении клиента. В любом случае оно превращает требование клиента об обособлении в спорное. Узкое право удержания только в отношении просроченного вознаграждения приемлемо для большинства кастодианов, когда им объясняют суть вопроса.

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Примечания

1. SchKG, ст. 242a абз. 2; для банков-кастодианов ст. 16 п. 1bis BankG распространяет режим обособления депозитов на криптоактивы, хранящиеся тем же способом; см. часть D, главу IV. ↩
2. OR, ст. 394 и сл. (поручение) и ст. 472 и сл. (хранение); квалификация отношений хранения рассматривается в части D, главе V. ↩

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