

Crypto-assets in bankruptcy

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The second main area of the Act is insolvency law. Before the Act, it was uncertain whether crypto-assets held by a custodian for its clients belonged to the clients or to the bankruptcy estate of the custodian. Swiss bankruptcy law allows the owner of movable property held by the bankrupt to claim its return. Crypto-assets are not movable property in the sense of the Civil Code, since they are not physical objects. While some authors argued for an analogous application of the rules on segregation, others considered that clients had only a claim against the estate.¹ The Act resolved the question by inserting Article 242a into the Debt Enforcement and Bankruptcy Act. It gives a person the right to claim crypto-based assets held by the bankrupt if the bankrupt has undertaken to keep them available for that person at all times and if the assets are attributed to that person individually or can be attributed to a community of persons with the share of each person clearly determined.² The rule protects clients of custodians that keep crypto-assets separately or in collective wallets with clear records. It does not protect clients whose assets are pooled without clear attribution or whose custodian has used them for its own purposes.

The Act also added a provision on access to data. A person who can show a legal or contractual right to data held by the bankrupt can claim access to it or its return, with the costs borne by the person who makes the claim.³ The rule, which extends beyond the crypto industry, is relevant for businesses that store data in the cloud or on the servers of a provider that becomes bankrupt.

For banks, the Act amended the Banking Act to treat crypto-based assets held in custody as custody assets that are segregated in the bank's insolvency, under conditions parallel to those of the Debt Enforcement and Bankruptcy Act.⁴ The protection of clients of crypto banks and of banks with crypto offerings rests on these provisions, on which FINMA's staking guidance of 2023, mentioned in Chapter I, builds.

1 Notes

1. Dominik Vock, "Aussonderung kryptobasierter Vermögenswerte und Zugang zu Daten im Konkurs", MME, 9 September 2021, mme.ch: whether custodial crypto-based assets could be segregated under Art. 242 SchKG was disputed in the literature before the DLT amendments. Federal Council, "Rechtliche Grundlagen für Distributed Ledger-Technologie und Blockchain in der Schweiz", report of 14 December 2018, p. 10, newsd.admin.ch: it was not conclusively settled whether crypto-based assets could be segregated. ↩
2. Debt Enforcement and Bankruptcy Act (SchKG, SR 281.1), Art. 242a paras. 1–2, fedlex.admin.ch (via droit-bilingue.ch): the claim to crypto-based assets over which the bankrupt has power of disposal is justified if the bankrupt undertook to keep them available for the third party at all times and they are attributed to the third party individually or to a community with the third party's share ascertainable; inserted by the DLT Act of 25 September 2020, in force since 1 August 2021 (AS 2021 33, 399; BBl 2020 233). ↩
3. Debt Enforcement and Bankruptcy Act (SR 281.1), Art. 242b paras. 1 and 3, fedlex.admin.ch (via droit-bilingue.ch): any third party proving a statutory or contractual entitlement to data in the power of disposal of the estate may demand access to or return of the data; the costs are borne by the person making the demand; in force since 1 August 2021. ↩
4. Banking Act (SR 952.0), Art. 16 no. 1bis (crypto-based assets are custody assets if the bank has undertaken to keep them available at all times and they are attributed to the client individually or to a community with the client's share ascertainable) and Art. 37d (custody assets are segregated under Arts. 17–18 of the Intermediated Securities Act), fedlex.admin.ch via droit-bilingue.ch; FINMA Guidance 08/2023, 20 December 2023, finma.ch. ↩

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