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NOTARIES' ESCROW SERVICES IN SELLING REAL ESTATE IN THE REPUBLIC OF SLOVENIA

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Abstract Notary's escrow is a legal relationship between the notary and the parties to the underlying legal transaction, which is generally a sales agreement. Notary's escrow is regulated with mandatory statutory rules commissioning public notaries and the rules of the mandate agreement. Mutual obligations of the parties to the underlying legal transaction in and of themselves do not influence the notary's obligations under a notary's escrow agreement unless they are included in the notary's escrow agreement as a constituent part thereof. Slovenian legislation stipulates the general conditions of notaries' operations. However, it does not stipulate specific conditions that must be fulfilled in order to place documents, funds and securities into escrow with a notary, nor does it stipulate the mandatory component elements of the escrow order. Therefore, The Slovenian regulation of notary's escrow should be supplemented.

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1 Introduction

This article presents notary's escrow, which is a legal relationship involving a notary and the parties to the underlying legal transaction. Notary's escrow is regulated with mandatory statutory rules commissioning public notaries together with the rules of the mandate agreement.

This article responds to the question whether it is necessary to stipulate under law the specific conditions that must be fulfilled in order for documents, funds and securities to be placed in escrow with a notary in addition to the general conditions of notaries' operations. By analysing statutory rules and practical case studies, the article investigates the influence of mutual obligations of the parties to the underlying legal transaction (the relationship based on due date of performance) on the notary's obligations based on the notary's escrow agreement.

2 The meaning and purpose of escrow services

According to the rules of concurrent performance as defined under Article 101 of the Code of Obligations[1] (OZ), no party is obliged to perform their respective obligations if the other party fails to perform or is not prepared to concurrently perform its obligation, unless the parties or the law stipulates otherwise or if the nature of the respective transaction dictates otherwise. The seller of the real estate is not obliged to deliver the permission to register title to land to the buyer until the buyer has paid the asking purchase price. If the seller performs his/her obligation and delivers the document allowing permission to register title to land or property prior to receiving the purchase price, the seller is exposed to the risk of not receiving said purchase price. On the contrary, if the buyer pays the required purchase price to the seller before receiving proof of title from the land registry, the buyer is exposed to the risk that the seller will not perform his/her respective obligations. Delivery in terms of cash in hand is not possible in performing financial obligations when making due funds payable to the seller's bank account.

[1] Official Gazette of the Republic of Slovenia, Nos. 97/07, 64/16 and 20/18.

The parties avoid the risk of counterparty default with the help of an escrow agent, who assumes and stores in escrow the subject of performance of the contracting party, and delivers the same to the second contracting party once the latter performs his/her respective obligation. The escrow agent's task is to dispose of the property of the contracting parties. Therefore, the choice of the escrow agent is important. In practice, providing escrow services in the realm of real estate transactions fall under the domain of notaries, attorneys and real estate agents. Notary's escrow services are regulated under both the Notaries Act[2] (ZN) and the Protection of Buyers of Apartments and Single Occupancy Buildings Act[3] (ZVKSES). The Real Estate Agencies Act[4] (ZNPosr) stipulates that a real estate agency may accept funds into escrow from a client or third party in relation to a legal transaction in situations where it has acted as an agent; where it has an agreement in place with a bank on managing an escrow account; and, where the client or third party provide written authorisation for said escrow. Interpretation of legal situations arising from these relationships are subject to the rules of the OZ.

Escrow services are not limited to the escrow of funds. Documents may also be subject to escrow. In transactions involving real estate, these mainly consist of documents that include permissions to register title to real estate, namely, transfer of title, changes, charges or termination of rights. Case law has determined that performance by way of placing permission to register title to real estate in escrow with a notary should be considered as a form of concurrent performance.[5]

3 Statistical data

Data from the Chamber of Notaries of Slovenia on records in the register of escrow of funds, securities and documents (Escrow Register) for the last seven years indicate a gradual rise in the number of notaries' escrow transactions.

[2] Official Gazette of the Republic of Slovenia, Nos. 2/07, 33/07, 45/08 and 91/13.
[3] Official Gazette of the Republic of Slovenia, No. 18/04.
[4] Official Gazette of the Republic of Slovenia, Nos. 72/06, 49/11 and 47/19.
[5] VS RS, III Ips 25/2017, ECLI:SI: VSRS:2019: III.IPS.15.2017.

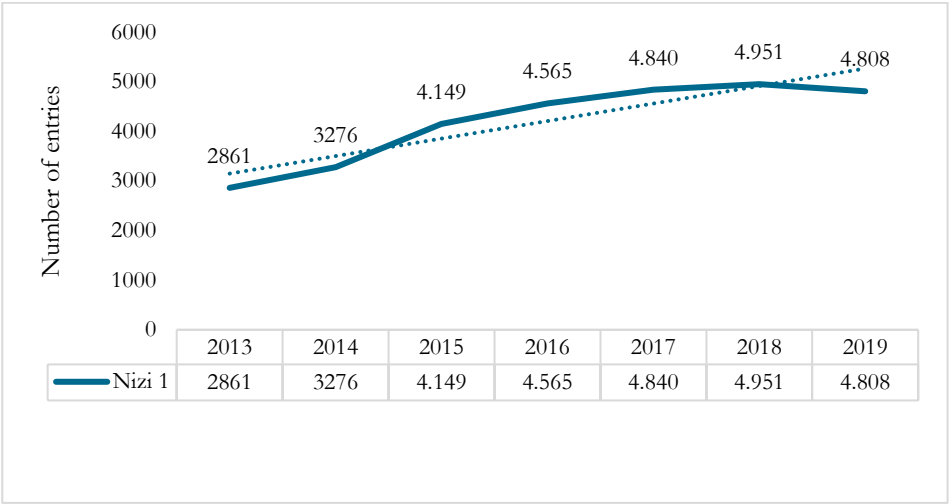

Figure 1: Entries in the Escrow Register
Source: The Chamber of Notaries of Slovenia

Data from one notary's office indicate a ratio between the number of documents and funds in escrow, and a trend revealing a gradual rise in the number of notaries' escrow transactions.

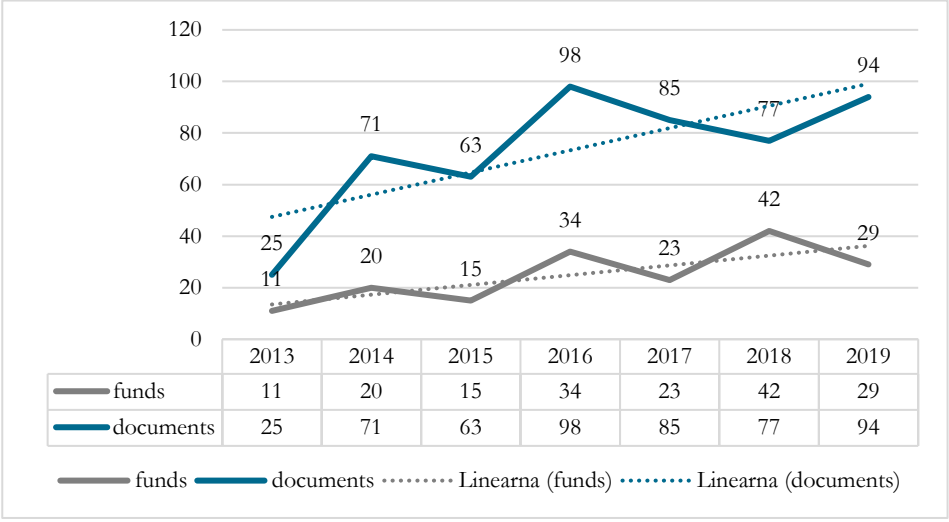

Figure 2: Entries in the Escrow of Founds and Documents
Source: The notary's office own data

4 Notary's escrow agreement

4.1 Technical rules of notaries' escrow based on the Notaries Act

The ZN contains both a special provision on the escrow of documents (Article 87 of ZN) as well as a special provision on escrow of funds and securities (Article 88 to 92 of ZN) amongst the specific provisions on notaries' services. Both are set forth in the section of the Act entitled "Assuming documents, funds and securities into escrow and delivery thereof".

Article 87 of the ZN stipulates that a notary is obliged to accept any type of document into escrow. Upon accepting the relevant documents, the notary drafts minutes that must include the place and type of takeover; the second and first name, profession and place of residence of the party placing the document in escrow (depositor); a description of the document; the purpose of the escrow and whom the document should be delivered to; a signature of the depositor; and, the signature and official seal of the notary. The document may be sent to the notary in the form of a dispatched letter, which replaces the minutes. The notary then issues a receipt of confirmation to the client on taking documents into escrow. When the notary delivers the deposited document to the eligible claimant, the notary must verify the recipient's identity, and the recipient must confirm receipt of the deposited documents with a signature. These technical rules must be applied when accepting documents related to sales of real estate (for example, a land registry permission to register title) into escrow by a notary. The rules under the ZN must also be applied when the subject of the notary's escrow includes the right to dispose of the designated consecutive order of charge registration as per Articles 68 to 76 of the Land Registry Act)[6] (ZZK-1).

Pursuant to the ZN, the key difference between the rules relating to placing documents in escrow and depositing funds in escrow is that while the notary is obliged to accept any type of document into escrow, the notary is only obliged to take funds (and securities) into escrow if these are delivered with the purpose of delivering the same to a certain person or state authority upon compiling notary's minutes of escrow. The notary's obligation to accept funds into escrow only applies

[6] Official Gazette of the Republic of Slovenia, Nos. 58/03, 37/08, 45/08, 28/09, 25/11, 14/15, 69/17, 11/18 and 16/19.

if the financial liability of a party to an escrow agreement is based on a legal transaction that was drafted in the form of a notarised record of minutes. If the legal transaction upon which the financial liability is based is not drafted in the form of a notarised record, the notary is relieved of any contractual obligations and may therefore refuse to provide notarial services. The same applies for the escrow of securities. The grounds for the described difference between the legal regulation of a notary's escrow of funds and securities, on the one hand, and escrow of documents on the other, is premised on the fact that an accurate stipulation of the terms of escrow is required for the notary to correctly and securely handle the entrusted funds or assets on behalf of the client, which is more easily achieved if the legal transaction is drafted in the form of a notarised record. The notary is only involved in establishing the terms of escrow. This must be clearly stipulated when drafting a document in the strict format of a notarised record. This is part of the notary's advisory and cautionary duty under Article 42 of the ZN. This also permits fulfilment of the due terms of escrow to be assessed objectively. Notary's arbitration is not permitted, while resolution of disputes that arise due to lack of clarity in the terms of escrow rests with the jurisdiction of the court. The subject of escrow remains with the notary until the court reaches a judgment on the matter. If the notary is unable to participate in establishing the terms of escrow, the notary may refuse to render notarial services pursuant to par. 1 of Article 88 of the ZN. This particularly applies when the parties to a transaction transfer funds or securities to the notary's escrow account without first consulting the notary in question, namely based on a legal transaction which the notary was not involved in. The ZN even provides for sending cash and securities by mail to the notary's address (par. 3 of Article 88 of ZN). In light of the foregoing, it is easier to understand the statutory rule stipulating that the notary is obliged to accept funds and securities into escrow only in cases where the legal transaction that serves as the basis for the financial liability has been drafted in the form of a notarised record.

Upon accepting the funds or securities into escrow, the notary must draft notary's minutes (if the takeover has not been recorded as part of the notarised record), which must include a serial number in the register of deposits; the time and place of takeover; an accurate description and value of the undertaken items; the name, surname and address of the depositor; and, the depositor’s statement on how to handle the items placed into escrow.

Inappropriate and unsuited to today's business environment and counterproductive in respect to the public policy on prevention of money laundering is the rule under par. 1 of Article 89 of ZN, which stipulates that the notary shall maintain the deposited funds and securities in an envelope. Fortunately, this regulation has been updated under Articles 89 and 90 of ZVKSES, which regulate the deposit of funds on bank accounts and deposit of dematerialised securities on accounts maintained by stock broking companies.

4.2 Substantial rules of notary's escrow under ZVKSES

Article 87 of the ZVKSES defines the terms of notary's escrow. It states that "by accepting documents, funds or securities into escrow pursuant to Articles 87 or 88 of ZN, a notary makes a pledge to the depositor to deposit the item in question and deliver it to the person designated by the depositor (eligible claimant), subject to fulfilling the term(s) that the depositor established upon placing the subject of escrow into notary's escrow, or instead to return the item to the depositor if said terms are not fulfilled by the set deadline."

Par. 2 of Article 87 of the ZVKSES is also important. It stipulates that the provisions under Section 3 of the ZVKSES are applied to notary's escrow, which is performed with the purpose of protecting the contracting party from the risk of non-performance of the counter contracting party. This provision raises the question of what other purpose notary's escrow could serve (in addition to protecting from risk of counterparty non-performance). Based on Article 23 of the ZN[7], the purpose of notary's escrow certainly may not be inadmissible. Further, the reason for notary's escrow may also not avoid legal obligations or prevent illegally causing damage to a third party. Therefore, it is difficult to imagine any real-life example where the placement of an item into escrow by parties to a legal transaction would be for a purpose other than for protecting against the risk of non-performance, and which at the same time would not be inadmissible.

According to Article 88 of the ZVKSES, when a notary accepts an item into escrow, an eligible claimant obtains their own and direct right to request the notary to deliver the subject of escrow, if due terms established by the depositor have been fulfilled

[7] A notary may not operate in transactions that are inadmissible by law.

by the deadline set by the depositor upon delivering the item into escrow. As the notary's escrow agreement entered into between the depositor and the notary has a legal nature of a contract in favour of a third party, the depositor may cancel or change his or her right until the eligible claimant notifies the notary of acceptance of said right. According to par. 3 of Article 88 of the ZVKSES, the eligible claimant's statement does not require a special format in order to remain valid, which means that the eligible claimant may give said statement in ordinary written form or even orally. However, in order to provide evidence of the eligible claimant's statement, a notary must draft notary's minutes of receipt of said statement. Therefore, an eligible claimant must provide either a written or oral statement to the notary reflecting acceptance of this right, and then the notary must draft minutes of confirming claimant's acceptance. From the moment the eligible claimant accepts his or her rights, the depositor may no longer unilaterally revoke said rights. The most economical solution to this problem is to have the eligible claimant present when the notary undertakes the subject of escrow, as the eligible claimant is therefore assumed to have accepted his or her rights. This legal fact is also confirmed by the notary in the notary's minutes of escrow.

With regard to depositing funds in the form of credit on account with a bank, Article 89 of the ZVKSES stipulates that a notary may also accept funds into notary's escrow by instructing the depositor to transfer funds to a special escrow account held by the notary in the sum that is agreed as the amount of funds to be held in escrow by the notary: "In order for a notary to maintain escrow of funds, the notary must open a special bank account, which is designated to receive payments to account only, or perform only payments based on notary's escrow of funds. The financial claim held by the notary in relation to the bank that maintains the special escrow account is based on the funds held on said account and is considered as a common claim in relation to the bank and the notary's creditors. Said claim is held by all depositors that have placed funds into escrow by transferring funds to said account, or eligible claimants, respectively. Therefore, the notary's creditors may not seize this financial claim in order to recover their claims, which they hold in relation to the notary, which includes coercive measures in case the notary goes into bankruptcy (par. 2 of Article 804 in connection to Article 805 of OZ) and in case of the notary going into bankruptcy or in the case of the notary's death, said financial claim shall not be part of the bankruptcy estate or inheritance, respectively. As part of the internal relationship between the depositors or eligible claimants the law

considers that each of them holds an interest in the financial claim up to the amount that was deposited. If the sum of funds held on the special escrow account is lower than the sum of all deposited amounts, each eligible claimant shall have an interest in the financial claim in the share that is equal to the ratio between the deposited amount based on the respective notary's escrow, and the sum of all deposited funds".

This method of establishing the sum of the claim for a respective depositor or eligible claimant also applies when applying rules on guaranteed deposits with banks in the relationship between an individual depositor or eligible claimant and the bank. In this case the depositor holds a claim against the bank for as long as the terms of escrow are fulfilled. From the moment the terms for release of the funds to the eligible claimant are fulfilled, the holder of the claim in relation to the bank becomes the eligible claimant.

4.3 Rules under ZSJV

In placing the real estate purchase price into escrow, an important issue involves the rules pertaining to guaranteed deposits, which are stipulated in the Deposit Guarantee Scheme Act[8] (ZSJV). According to Article 10 of the ZSJV, a guaranteed deposit is an eligible claimant's deposit up to the balance of account of said deposit on the cut-off date for calculating the guarantee, including interest accrued up to said date, but with a maximum limit of EUR 100,000. Guaranteed deposits include funds on escrow accounts. Based on Article 3 of the ZSJV, this type of account may be opened by an authorized person on behalf of one or several persons acting as eligible claimants. The funds held in the account are treated separately from other funds held by the authorized person in question. According to Article 7 of the ZSJV, funds deposited into an escrow account shall be considered as part of the deposit of an eligible claimant in the part belonging to said claimant, so long as the bank was provided with his or her identification details. If not, then an escrow account is considered as bearer deposits, which are not included in the deposit guarantee scheme. Upon opening an escrow account, banks must warn the persons who are authorized to manage the escrow account of their duty to disclose data on actual eligible claimants in a timely manner. The notary (who is authorized to manage the escrow account) must provide the bank with the identification details concerning

[8] Official Gazette of the Republic of Slovenia, No. 27/16.

the claimant(s) that are eligible to receive funds from the account. The depositor (the buyer in a sales agreement) is the actual eligible claimant of funds on the escrow account until such time as the terms of escrow are not fulfilled, even though the position of eligible claimant (or beneficiary) according to the notary's escrow agreement is held by the seller. Once the terms for releasing the funds to the seller are fulfilled, the seller becomes the actual eligible claimant.

5 Legal nature of the notary's escrow agreement

5.1 Public law and private law elements

Pursuant to Article 2 of the ZN, notaries' services are not based on private law services contract. The relationship between a client and a notary instead bears a public law nature (Rijavec, 1998: I–X).

In addition to public law elements, the legal relationship between the notary and the notary's client also bears elements of private law. These feature in the basic characteristics of the mandate agreement (Article 766 to 787 of OZ).

The commissionee's performance bears the characteristics (legal nature) of the obligation of effort. The mandate agreement or a commission is an agreement where one contracting party (the commissionee) undertakes to provide a certain transaction(s) on behalf of the second contracting party (client), and in doing so is obligated to act with due professional diligence in the client's best interests (Plavšak, 2004: 188). In contrast to the commissionee's obligation of invested effort, the contractor's obligations based on a services agreement are premised upon the result or outcome, which is characterised by the commissionee's undertaking to achieve the optimal result for the client.

The substance of the legal relationship between the notary and the client is regulated pursuant to the free disposition obligation rules under a mandate agreement together with mandatory rules imposed under the ZN, which limit the autonomy of the parties, but with the ultimate objective of ensuring greater legal security of public services. This also applies to the notary's escrow agreement, which is a type of a mandate agreement or commission. The mandate relationship between the notary and the client is regulated by both general and special provisions under the ZN,

technical rules from Articles 87 to 92 of the ZN and substantial rules from Articles 87 to 90 of ZVKSES.

The notary's escrow agreement bears the characteristic (legal nature) of an agreement in favour of a third party, that is, the beneficiary or eligible claimant. According to par. 3 of Article 125 of the OZ, the agreement may provide for a right in favour of a third party. In a notary's escrow agreement, the third-party role (the person in favour of whom a right has been established under the notary's escrow agreement) is that of the eligible claimant. The notary's escrow agreement (entered into between the notary and the depositor) is considered concluded once the notary accepts the subject of escrow into custody or escrow. The notary must draft minutes of this legal fact (par. 2 of Article 87 and par. 2 of Article 88 of the ZN) (Plavšak, 2004: 210).

5.2 Conditions of admissibility of notary's escrow

Par. 1 of Article 2 of the ZN classifies accepting documents into escrow, as well as accepting funds and securities for delivery to third parties or state authorities, as part of notaries' powers. General provisions under the ZN on notaries' services regulate the conditions that must be met in order for a notary to be able to operate as per Article 2. Most commonly, the ZN defines these conditions as prohibitions:

- The notary may not draft documents that directly generate rights and obligations for the notary, his or her spouses or persons whom the notary is living with in a civil partnership or extramarital union; straight line relatives of any degree, or indirect family by marriage up to the second degree; or persons in relation to whom the notary acts act as foster parent; foster children; foster carers or legal guardians; or in cases where the notary acts as the legal representative of any party, or their proxy, respectively (Article 22 of the ZN);
- The notary may not perform matters provided for under Article 2 of the ZN in transactions that are defined by law as inadmissible or where there are grounds for suspicion that the parties are entering into transactions fictitiously or in order to avoid legal obligations or to cause illegal damage to a third party (par. 1 of Article 23 of ZN);

- The notary may not do business with any persons who do not have capacity to contract based on the fact that they are a minor or otherwise lack the capacity to contract on any other legal grounds (par. 2 of Article 23 of ZN).

Article 24a of the ZN does not prohibit the notary from drafting a document on a legal transaction or authentication of signature even if the notary establishes that a representative is not eligible to represent a party when concluding a legal transaction or that the interests of the representative are in conflict with the interests of the represented party. The notary must not only warn the parties of said facts but also of the consequences of the intended legal transaction. If the parties insist on their request for the notary to draft the notarised document despite the warnings, the notary must grant the parties' request and draft the document. When drafting such document, the notary must indicate what shortcomings and legal consequences the notary made the parties aware of. The prohibition of drafting a notarised document only applies if the parties object to such note being made.

According to the provisions under par. 5 of Article 43 of the ZN, the notary must decline a request to draft a notarised record if the notary identifies the existence of documents on associated legal transactions and the parties to those transactions refuse to disclose such documents.

According to Article 64a of the ZN, the notary shall refuse to authenticate a signature if the power of attorney for entering into a legal transaction involving the sale of real estate is not drafted in accordance with par. 3 of Article 64a of the ZN or if the notary learns that there is a conflict of interest between the principal and the attorney-in-fact in relation to the transactions cited in the power of attorney.

Refusing to render notarial services without due grounds constitutes a disciplinary violation (Article 113a of ZN).

Apart from the described general conditions of admissibility in relation to drafting notarised documents, the ZN does not provide for special conditions of admissibility in terms of notary's escrow. Technical rules under the ZN prescribe the notary's contractual duty in depositing documents.[9] However, these rules only apply

[9] The notary is obliged to accept any type of document into escrow (par. 1 of Article 87 of the ZN).

in situations involving the placing of funds and securities into escrow and if the subject of escrow is delivered at the time of drafting the relevant notarised record with the purpose of delivering the same to a specific person or state authority.[10] No special conditions regarding the admissibility of notary's escrow are prescribed under the ZVKSES, which includes general substantial rules of notary's escrow, which is performed with the purpose of protecting the contracting party from the risk of non-performance by the counterparty. Par. 2 of Article 8 of the ZVKSES states: "Provisions under Section 3 hereof apply to notary's escrow, which is performed with the purpose of protecting the contracting party from the risk of non-performance by the counterparty." Therefore, the ZVKSES does not stipulate conditions of admissibility with regard to notary's escrow, but rather regulates rules of said escrow. Regardless, it is difficult to imagine a notary's escrow that would not pursue the purpose of protecting the contracting party from the risk of non-performance by the counterparty and that would concurrently meet all general conditions of admissibility of drafting notarised documents under the ZN. In this regard, another important aspect is to consider the purpose of the parties with respect to provisions under the Money Laundering and Terrorism Financing Prevention Act[11] (ZPPDFT-1).

Slovenian law, apart from general conditions regarding notaries' services, does not prescribe specific conditions that must be fulfilled in order for documents, funds and securities to be accepted into escrow by a notary. German law makes different and more accurate provisions for placing funds into escrow.

[10] Notaries are obliged to accept cash, bills of exchange and other securities only if they are delivered at the time of drawing up a notarised record with the purpose of delivering the same to a specific person or state authority (par. 1 of Article 88 of the ZN).

[11] Official Gazette of the Republic of Slovenia, Nos. 68/16 and 81/19. Par. 1 of Article 2 of the ZPPDFT-1 provides: Under this act, money laundering includes any handling of funds or assets acquired through criminal actions, including: 1. exchange or any transfer of funds or other assets obtained through criminal acts; 2. hiding or concealing the true nature, source, location, movement, disposal, ownership or rights relating to funds or other assets obtained from criminal actions.

5.3 Conditions of admissibility of notary's escrow of funds under German law

Par. 1 of Article 57 of the German Authentications Act (BeurkG)[12] prohibits notary's escrow of cash.[13]

Conditions of admissibility of notary's escrow of funds are stipulated under par. 2 of Article 57 of the BeurkG. Notaries may only accept money into escrow if the following conditions are fulfilled:

- There is a legitimate interest of the parties to ensure protection with the notary placing funds into escrow; and
- The notary receives an escrow order, which includes all the prescribed elements (depositor, eligible claimant, amount, potential natural benefits or assets, time, terms of disbursement); and
- The notary accepts the escrow order including all of its component elements.

Moreover, par. 3 of Article 57 of the BeurkG allows the notary to accept funds into escrow after receiving an escrow order only if this is necessary in order to complete a legal transaction, taking into account the legitimate interests of all parties for security by placing funds into escrow with the notary. The notary does not maintain funds on the escrow account solely based on the clients' request, much like a bank, but rather the parties must have a legitimate interest(s) to ensure security by placing funds into escrow with a notary in each specific case.

[12] Beurkundungsgesetz dated 28 August 1969 (BGBl. I S., BGBL year 1969 I p. 1513), FNA 303-13, the ultimate amendment of Article 13 G to amend regulations on out-of-court resolution of disputes in consumer cases and amendments of other acts dated 30 November 2019 (BGBl. I S. BGBL year 2019 I p. 1942).

[13] In relation to modern trends of preventing money laundering and terrorism financing there is an interesting comparison with par. 1 of Article 89 of the ZN, which states that a notary shall maintain deposited money and securities in a special envelope, which features the subject of escrow and the client's name, respectively. Fortunately, Slovenian law includes the more recent ZVKSES, which likewise stipulates under par. 1 of Article 89 thereof that a notary may take funds into escrow by instructing the depositor to transfer funds to a special escrow account held by the notary in the sum that constitutes the subject of the notary's escrow of funds.

According to one part of the German theory (Brambring, 1999: 381–393), which uses practical case studies to justify objective criteria to identify legitimate interests to secure funds by placing them into escrow with a notary, this interest for notary's escrow of the purchase price in sales of real estate exists in more complex cases when a sold property is encumbered with third party rights (mortgages). So for example, a typical situation is where the mortgagee (bank or other lender) must be repaid from the purchase price, while the buyer funds the purchase price with a loan(s) secured from a lender(s) who in turn secures its (their) claims through a new mortgage(s). If lending institutions are not prepared to coordinate repayments, cancellations and registrations of mortgages themselves in such cases, and are not prepared to disburse loans directly to the beneficiaries, there is a legitimate interest to secure the purchase price by placing the funds into escrow with a notary. In such cases, the notary ensures appropriate protection for the creditors against the risk of non-payment. There is also a legitimate interest to secure the due purchase price by placing funds into escrow with a notary in a real estate transaction if the buyer's representative is unable to prove having the authority to represent the client upon concluding a sales agreement, and that representative or agent requires a certain amount of time in order to present proof of proxy powers (for example, the buyer is foreign legal entity). If there is a reasonable expectation that the agreement would not be concluded on these grounds, and the parties agree to register a preliminary note of the buyer's rights in the land registry, the notary must warn the seller of the risk of hindering a subsequent sale of the property in question. In this case, the only way to protect the seller would be to deposit the entire purchase price into an escrow account as a condition precedent for preliminary registration of title and release of the purchase price under the terms that may be fulfilled without the buyer being involved. On the other hand, there is no legitimate interest for security by placing the purchase price into notary's escrow in simple cases, such as, for example, when the real estate to be sold is free of any outstanding encumbrances and the buyer settles the purchase price directly to the seller's account. This is the case even in usual cases where the buyer secures a loan to make payment, so long as the transaction does not involve having to repay the seller's creditors. There is also no legitimate interest if the buyer pays the purchase price exclusively using buyer's own funds (cash) and without a mortgaged loan and even if the purchase price is used to repay the seller's creditors. These types of purchase and sale agreements may result in the placement of mortgage cancellation permits into the notary's escrow, which the notary then releases following due payment.

In contradistinction to the above-described objective criteria of establishing circumstances in which legitimate interests exist for securing funds by placing them into escrow, the second part of the German theory, which advocates subjective criteria and autonomy of the parties, posits that notary's escrow of funds is also justified even in cases where the objective criteria are not satisfied, if the parties nevertheless insist on concluding the transaction through the notary's escrow account (Weingärtner, 1999: 393–396).

The criticism of utilizing strictly objective criteria to identify when a legitimate interest exists that would warrant placing funds into notary's escrow for security is that such criteria are unduly restrictive and that it is unreasonable to restrict parties' autonomy to a legal transaction who wish to use the notary's escrow to achieve a higher, safer and more secure level of legal protection (Weingärtner, 1999: 396; Milak, 2017: 37).

5.4 A proposal for improving Slovenian regulation of notary's escrow

Notary's escrow is more effective, and the parties' legal protection is enhanced, if the escrow order is accurate in detail so that the notary does not have to act as an arbiter on whether the terms for release of the subject of escrow have been fulfilled. Therefore, the German rule, whereby the notary may only deposit money into escrow upon receipt of an order that includes all the required elements and if the notary explicitly accepts the order, is instructive. In other words, the notary may reject an order that does not contain all the required elements. In any case, the notary does not have a contractual duty upon accepting money into escrow according to German law. However, a Slovenian notary is obliged to accept money and securities if they are delivered upon drafting a relevant notarised record with the purpose of delivering the record to a specific person or state authority. Changes to this rule based on the German model would increase legal security. Slovenian regulation would also have to be complemented by identifying the essential component elements of the escrow order.

The most important regulation involves the conditions of notary's escrow. In relation to this issue, the previously quoted par. 2 of Article 87 of the ZVKSES already offers a solution, which is more precise than its German counterpart regarding when there is a legally sufficient "legitimate interest" of security the

notary's escrow. As already stated, the possible different interpretations of the term "legitimate interest" have caused trouble for both theoreticians and practitioners alike.

In certain cases, the law stipulates the duty of notary's escrow. This includes, for example, the Collective Management of Copyright and Related Rights Act[14] (ZKUASP), which provides for notary's or court escrow of funds under Article 47. Pursuant to this Article, the user may deposit funds to an escrow account if the collective organisation fails to enter into an agreement on non-exclusive transfer of rights with the individual for use of part of the repertoire of the collective organisation. With regard to collective legal actions for damages, where the eligible claimants and compensation amounts the claimants are entitled to are not nominal, the Collective Actions Act[15] (ZKolT) states that the court shall appoint a notary to manage the collective compensation. This Act requires the notary to establish an escrow account. The defendant is then obligated to fund this new account in accordance with the terms of the collective compensation ruling. Whenever the law stipulates an obligation with respect to notary's escrow, it is not necessary to separately assess whether or not its conditions have been fulfilled or whether an admissible purpose is applicable, as both are inherent in the law. All other cases of escrow that are not provided for under the law should be subject to the prescription of mandatory conditions, which also includes admissible purpose. The rule that a notary may accept an item into escrow only to protect the contracting party from the risk of non-performance by the counterparty would better clarify the distinction between cases of notary's escrow that have the primary objective of reducing business risk and cases where escrow is used to pursue other objectives that are more difficult to identify, justify and quantify.

[14] Official Gazette of the Republic of Slovenia, No. 63/16.
[15] Official Gazette of the Republic of Slovenia, No. 55/17.

6 Legal Relationships in notary's escrow in relation to the real estate sales agreement

6.1 Subject of the seller's performance in selling real estate

6.1.1 Delivery of permission to register title in the land registry

Unless otherwise agreed in the sales agreement, the seller of the real estate satisfies his or her legal obligation by delivering a suitable document that allows the buyer to register title in the land registry (Juhart, 2004: 109). By presenting said document to the land registry, the buyer of the real estate may register title to the property. However, delivery of said document to the buyer is the subject of the seller's obligation based on the sales agreement. Moreover, the methods of performance of the parties' mutual obligations under the sales agreement also determines their options for protection against the risk of non-performance.

Par. 1 of Article 40 of the ZZK-1 features the same stipulation with regard to documents that serve as the basis for registration of title when the document is a private document or a notarised record thereof. Therefore, both private documents as well as a notarised record of a legal transaction must include permission to register title with regard to the registration of rights that is being filed as an application (items 1 and 2, par. 1 of Article 40 of ZZK-1).

The permission to register title, which serves as the basis for registration, must feature the signature of the person to whom the right is being transferred, is being changed, charged or terminated, and said signature must be authenticated (par. 1 of Article 41 of ZZK-1). If the permission to register title is drafted in the form of a notarised record, and if the application for registration of title is supplemented with a copy of the notarised record, which is designated for registration in the land registry, then the requirement referred to under the previous paragraph is considered as having been fulfilled (par. 2 of Article 41 of ZZK-1).

The applicant must provide the notary who is filing the application for registration of title in the land registry with the documents that will serve as the basis for the requested registration and whose characteristics meet the following terms:

- The private document must be filed in its original copy;
- The notarised record may be filed as any counterpart thereof, unless the law states that it must be enclosed as a designated land registry counterpart (items 1 and 2, par. 1, Article 142 of ZZK-1).

6.1.2 Registration based on a private document

Article 23 (disposal legal transaction under the law of property of the Law of Property Code[16] (SPZ) defines the contents and format of a permission to register title in the land registry. In order to register title in the land registry, it is necessary to append the original copy of the private document that includes a notarised permission to the land registry application to register title under ZZK-1 (item 1, par. 1 of Article 142 in connection with par. 1 of Article 41 of ZZK-1). The permission to register title in the land registry must include a statement of the person granting the right to register title, with the contents as provided for under SPZ (par. 3 of Article 32 of ZZK-1).

To register title, it is necessary to file the original copy of the private document that includes the permission to register title with an authentication of the seller's signature by a notary. The original copy must also feature confirmation from the tax authorities of payment of due real estate sales tax (when the transaction is subject to payment of said tax). According to Article 13 of the Real Estate Sales Tax Act[17] (ZDPN-2), the tax authority issues a decision on assessment of the real estate sales tax with a stamp on the original copy of the sales contract. The notarised certificate of authentication of the seller's signature on the contract (which includes the permission to register title in the land registry) must be attached to the original copy. The seller satisfies his or her obligation under the sales agreement by delivering the original copy of the permission to register title in the land registry (with a notarised signature of the seller) to the buyer. The seller may avoid the risk of non-performance of the buyer's obligations by delivering said document into escrow with a notary with an order to the notary to release the document from escrow and deliver the same to the buyer once the latter settles the entire purchase price. Once the buyer receives the original copy of the sales agreement with the permission to register title

[16] Official Gazette of the Republic of Slovenia, Nos. 87/02, 91/13 and 23/20.
[17] Official Gazette of the Republic of Slovenia, Nos. 117/06 and 25/16.

in the land registry, the buyer may successfully apply for registration of title in buyers' name.

6.1.3 Registration based on a notarised record

According to Article 57 of the ZN, original copies of notarised records are kept by the notary who drew them up. The notary must issue counterparts to the respective parties. According to Article 83 of the ZN, the notarisation clause on a counterpart of a notarised record shall also include reference to whom the counterpart is made out to. The notary issues one counterpart of a notarised record to each party, while a further counterpart is issued to the applicant for registration of title in the land registry (designated counterpart). When issuing a subsequent counterpart of a notarised record for registration in the land registry, the importance of this document for legal transactions indicates that it is reasonable to apply the strict rules imposed under Article 74 of the ZN, which would, based on the literal interpretation of the ZN, apply only in case of issuing new counterparts of an enforceable notarised record. This means that a new counterpart of a notarised record that is designated for registration in the land registry may only be issued if the previous counterpart has been returned, or subject to consent of the respective parties, or based on a court ruling.

Rules under Articles 33 to 38 of the ZZK-1, that regulate the authentication of a signature on a permission to register title in the land registry, should also be applied when issuing counterparts of a notarised record. The notary may not authenticate the signature on a permission to register title in the land registry which is drafted in the form of a private document (and in case of a notarised record of permission to register title in the land registry, the notary may not issue counterparts thereof), if due terms are not fulfilled for authentication of the signature, such as, for example, obtaining confirmation of paid taxes (Article 37 of ZZK-1) and obtaining documents reflecting fulfilment of potential terms under special regulations (Article 38 of ZZK-1).

If an application to register title in the land registry is filed immediately after a notarised record is drafted either by law or by authorisation of the parties to a respective legal transaction, the notary does not have to issue a separate counterpart for registration in the land registry in accordance with par. 2 of Article 142 of the

ZZK-1, and may alternatively enclose a digital copy of the notarised record with the land registry application. When interpreting par. 2 of Article 142 of the ZZK-1, it is necessary to consider that a land registry application may not be filed before due terms are fulfilled as per Articles 37 (confirmation of paid taxes) and 38 (documents demonstrating fulfilment of due terms under special regulations) of the ZZK-1, respectively. This means that a special designated counterpart for registration in the land registry is only issued when the parties authorise the notary to file an application for registration of title in the land registry in favour of the buyer, and only after the buyer's obligations have been proven to have been fulfilled, or after other terms established by the parties in the authorisation or order for placing the land registry counterpart in escrow have been fulfilled, but not immediately after the notarised record is drafted and due terms have been fulfilled under Articles 37 and 38 of the ZZK-1. Only in the described case is it mandatory to issue a special counterpart designated for registration in the land registry.

Item 2, par. 1 of Article 142 of the ZZK-1 (documents that serve as the basis for the required registration), which states that a land registry application may be appended with a notarised record in the form of any counterpart, unless the law stipulates that it must be appended with a counterpart that is designated for registration in the land registry, is complemented by par. 2 of Article 41 of the ZZK-1, which provides that in case of a notarised record of land registry, permission is considered that the signature of the seller on the land registry permit has been authenticated, if the application for registration in the land registry is appended with a counterpart of the notarised record designated for registration in the land registry. On the contrary, a signature is considered as not having been authenticated if the counterpart of the notarised record has not been designated for registration in the land registry.

In order to perform a registration in the land registry based on a disposal legal transaction under the law of property (land registry permit or permission to register title to land), it is not sufficient to file any counterpart of the relevant notarised record, but rather the application for registration must be appended with the counterpart that is designated for registration in the land registry, as any other counterparts are considered to lack a notary's authentication of signature on the land registry permit for registration of title. An exception is provided for under par. 2 of Article 142 of the ZZK-1, whereby the notary files a land registry application

immediately after drafting a notarised record and following fulfilment of the terms as per Articles 37 and 38 of the ZZK-1. Only in this case does the notary not have to issue a special designated counterpart for the land registry and instead may attach a digital copy of the original to the application for registration of title in the land registry. However, even in this case not any counterpart of the relevant notarised record will suffice for registration.

6.2 Notary's escrow agreement as a contract in favour of a third party

A seller of real estate who places the subject of sellers' performance obligation into escrow with a notary (permission to register title in the land registry in favour of the buyer, which features a notarised signature of the seller) is called a depositor. The buyer is the eligible claimant or beneficiary and is entitled to demand that the notary releases the land registry permission to register title once the terms determined by the depositor have been fulfilled. The depositor will be effectively protected from the risk of the buyer's non-performance if the term set for delivery of the land registry permission from notary's escrow to the buyer is the counter-performance by the buyer as per the sales agreement (payment of the purchase price). In this case, payment of the purchase price is the deferred term of the notary's escrow agreement. If the deferred term is not fulfilled by the set deadline, the notary's escrow agreement is terminated and the notary is obliged to return the permission to register title in the land registry to the seller.

As part of the contract in favour of a third party, there are three constituent entities comprising the legal relationships. When the seller deposits the land registry permit, the seller (depositor) is acting as the promissory and the notary as the fiduciary. The contract concluded in favour of a third party represents the assignment relationship. The buyer (third-party beneficiary) does not participate in concluding the notary's escrow agreement. Instead, the seller and the notary enter into such agreement in favour of the buyer. The sales agreement entered into between the seller and the buyer is a relationship based on the due date of performance. On the other hand, legal theory posits that the relationship between the escrow agent (notary) and beneficiary (buyer) is a causal relationship (Polajnar Pavčnik, 2004: 659). The seller is entitled to demand that the notary delivers the permission to register title in the land registry to the buyer once the deferred clause established by the seller has been fulfilled. The deferred clause constitutes payment of the purchase price to the seller.

The seller may change the terms of escrow and may also cancel the escrow and take the deposited document back until such time as the buyer states that he or she agrees with the terms of escrow. The sales agreement (relationship based on due date of performance) is concluded between the seller and the buyer; the notary is not party to said agreement. The principle of relativity as stipulated under Article 125 of the OZ provides that an agreement creates rights and obligations only between the contracting parties. However, its effects do not extend to third parties that were not involved in concluding the agreement, the assignment (notary – depositor) and causal relationship (notary – beneficiary), which the notary is party to. According to a special rule provided for under Article 128 of the OZ, the notary may exercise all rights to appeal against the buyer (who is not party to the assignment), which are afforded under the agreement in favour of a third party (for example, that the seller failed to deliver the document into notary's escrow, or delivered it late, or later than set in the notary's escrow agreement). The notary obviously holds the same right to appeal against the other party to the assignment – the seller. The seller and the buyer do not have any right to appeal against the notary that would be based on the sales agreement. For example, the buyer does not have any claims based on the seller's guarantee for any material defects, as the notary is not a party to the sales agreement. Therefore, it is important to clearly establish all terms of escrow, since in the case there are discrepancies between the terms of escrow, as defined by the seller in the notary's escrow agreement, and the provisions of the sales agreement, the notary is obliged to respect the contents of the notary's escrow agreement (assignment) and not the sales agreement (relationship based on due date of performance).

Case study 1: Terms of escrow of permission to register title – the purchase price is paid by the buyer to the seller using buyers' own funds

The seller delivers permission to register title to real estate in the land registry in favour of the buyer into notary's escrow and determines that:

1. *The notary shall release the permission to register title to real estate in the land registry to the buyer if the buyer provides the notary with confirmation from the bank managing the buyer's account on payment of due purchase price of EUR 200,000 to the seller's account by 30 September 2020;*
2. *The notary returns the permission to register title to real estate in the land registry to the seller if the term stipulated under Item 1 is not fulfilled by 30 September 2020.*

6.3 Assignment of claims

Whenever the buyer (borrower) authorises the bank (lender) to disburse the loan amount to the seller's account based on a mortgaged loan agreement, while authorising the seller to receive the transferred sum as the purchase price based on the sales agreement, the legal relationship between the buyer, the bank and the seller bears the nature of an assignment of claims.

Case study 2: Terms of escrow of permission to register title – the purchase price is paid by the buyer using a loan

The seller delivers permission to register title to real estate in the land registry in favour of the buyer into notary's escrow and determines that:

1. *The notary shall release the permission to register title to real estate in the land registry to the buyer if the buyer provides the notary with confirmation from the bank managing the buyer's account on payment of due purchase price of EUR 200,000 to the seller's account by 30 September 2020;*
2. *The notary returns the permission to register title to real estate in the land registry to the seller if the term stipulated under Item 1 is not fulfilled by 30 September 2020.*

If the buyer fulfils the obligation to pay part or the entire purchase price by entering into a loan agreement with a commercial bank and the lender's (commercial bank) claim for repayment of the loan is secured with a mortgage placed on the purchased property, then the term stipulated under Item 1 hereinabove has been fulfilled even if the buyer provides confirmation of payment of part of the purchase price as per Item 1 hereinabove and the commercial bank assumes the obligation to disburse the loan amount in the sum of the remaining outstanding part of the purchase price to the seller's account. In this situation the buyer's obligation to pay the purchase price of EUR 200,000 will have been fulfilled.

An assignment of claims is also applicable when parties to the sales agreement agree that the buyer shall pay part of the purchase price to the seller's creditor. By transferring due funds (assignment) one person, the assignor, authorises another person, the assignor's debtor (obligor), to perform something on their account in relation to a third party (recipient of the funds, assignee), while authorising the latter to accept this performance on their own behalf (Article 1035 of OZ). When the

seller authorises the buyer to make due payment of the purchase price to their (the seller's) creditor, the assignment of claims consists of two authorisations by the seller: authorisation to the buyer to make the purchase price payable to the seller's creditor and authorisation to the latter to accept said payment as the purchase price based on the sales agreement.

By accepting the assignment, the assignor's debtor unilaterally abstractly undertakes to perform the outstanding obligation to the assignee (Vrenčur, 2004: 1079). The buyer's acceptance of the seller's authorisation establishes a relationship between the buyer and the seller's creditor. The seller acts as the assignor, while the buyer is the assignor's debtor, whereas the seller's creditor acts as the recipient of funds transfer (assignee). This is characterized as a double authorisation. The legal relationship between the seller (assignor) and their creditor (beneficiary, recipient of funds, assignee) is a relationship based on due date of performance (for example, a loan agreement), while the sales agreement between the seller and the buyer (assignor's debtor) constitutes and assignment.

After accepting the transfer (after issuing a statement that they agree with payment of the purchase price to the seller's creditor), the buyer may no longer enforce any appeals against the seller's creditor, which the seller holds in relation to sellers' creditor (as a borrower from the loan agreement – relationship based on due date of performance). However, according to a special rule under par. 2 of Article 1037 of the OZ, buyer may enforce any appeals that refer to the validity of acceptance, appeals that are based on the contents of acceptance and the contents of the transfer itself, and appeals directly against the creditor. The notary is not a party in the relationship of assignment of claims and is obliged to act in accordance with the notary's escrow agreement. Eventual appeals by the parties based on the relationship and premised upon on the due date of performance (loan agreement between the seller and their creditor) and the assignment relationship between the seller and the buyer (sales agreement) in and of themselves do not affect the notary's obligation based on the notary's escrow agreement.

Case study 3: Terms of escrow of permission to register title – the purchase price is paid by the buyer to the mortgagee

The seller delivers permission to register title to real estate in the land registry in favour of the buyer into notary's escrow and determines that the notary shall release the same to the buyer if the following two terms are fulfilled by 30 September 2020:

1. *The buyer submits confirmation from the bank managing the buyer's account on payment of the entire purchase price of EUR 200,000 of which a part is payable to the seller's mortgagee in the amount calculated by the latter on the cut-off date of 30 September 2020 and the seller's account for the remainder of the outstanding sum, and*
2. *The seller's mortgagee places the permission to cancel the outstanding mortgage in the land registry into the notary's escrow with an order for the notary to release the permission to the buyer once the latter fulfils the terms stipulated under Item 1 hereinabove; or, that the notary returns the permission for registration of title to the property in favour of the buyer to the seller, and the permission to cancel the mortgage in the land registry to the mortgagee (if the creditor placed it into notary's escrow), if both terms are not fulfilled by 30 September 2020.*

Establishing whether the suspensive condition has been fulfilled may cause problems in practice. Moreover, the buyer, who in case study 3 pays the due purchase price before placement of the mortgage cancellation receipt into notary's escrow, is exposed to the risk that the creditor will not release the mortgage cancellation receipt. These types of risk, along with the additional risks of providing evidence of fulfilment of terms of notary's escrow, may easily be avoided by placing counter-performance of both parties to the sales agreement into notary's escrow.

Generally, when depositing the permission to register title in the land registry, the seller (depositor) determines that the buyer shall prove performance of the suspensive condition (payment of due purchase price) by presenting proof of payment of a certain amount to the seller's bank account. This proof of payment can only be the buyer's bank draft order. According to the Payment Services, Services for Issuing Electronic Money and Payment Systems Act[18] (ZPlaSSIED), access to information on transactions on a bank account is reserved for the user of

[18] Official Gazette of the Republic of Slovenia, Nos. 7/18 and 9/18.

said account (recipient of payment). The payer may present a payment order which was used to process the payment transaction. The draft payment order itself does not guarantee that the amount stated in the payment transaction was actually approved and credited to the recipient's account due to the possibility of the payment order being denied or the payer unilaterally cancelling the order. On the other hand, proving that the permission to register title in the land registry was delivered to the seller may also be problematic when the subject of notary's escrow is limited to escrow of the purchase price.

The depositor often wishes to make release of the subject of escrow to the beneficiary conditional on the depositor's consent. For example, the seller wishes to stipulate that the buyer is entitled to assume permission to register title in the land registry from the notary's escrow only subject to prior confirmation by the seller that the latter has received the entire purchase price to his or her account. Another example is a case where the notary is holding the purchase price in escrow and the buyer wishes to stipulate that the notary disburses the deposited purchase price to the seller once they receive confirmation from the buyer that they have received permission to register title in the land registry from the seller. In both of the cases described above, making release of the subject of escrow to the beneficiary conditional upon the depositor's consent does not make sense, as the notary's escrow is redundant in such cases. In these types of terms of escrow, the notary may not release the subject of escrow to the beneficiary without the depositor's consent. The legal position of the beneficiary, in such cases, is no different from a position where the subject of the depositor's performance lies in the depositor's possession and not in notary's escrow.

Application of the suspensive condition may be demonstrated with a degree of certainty in cases where the notary is holding both subjects of counter-performance of the respective contracting parties in escrow. In such an example, the seller acts as the depositor of the permission to register title in the land registry as well as the claimant to receipt of the due purchase price, while the buyer, acts as the depositor of the purchase price and claimant or beneficiary of receipt of the permission to register title in the land registry. The suspensive condition relating to the validity of both notary's escrow agreements are deemed fulfilled only after the subject(s) of the counter-performance are placed into escrow with a notary. As the holder of the escrow account (Article 14 of ZPlaSSIED), the notary issues a receipt of

confirmation upon receipt of payment in favour of the escrow account. The notary also issues a confirmation of receipt of the permission to register title in the land registry into escrow by the notary. By fulfilling the suspensive condition(s), each of the beneficiaries or claimants obtains the right for the notary to release the subject of escrow.

Case study 4: Terms of escrow of permission to register title – the purchase price is paid by the buyer by placing funds into notary's escrow

The seller delivers permission to register title to real estate in the land registry in favour of the buyer into notary's escrow and determines that the notary shall release the same to the buyer if the following two terms are fulfilled by 30 September 2020:

1. *The buyer places the entire purchase price of EUR 200,000 into notary's escrow with an order for the notary to transfer part of the purchase price to the seller's mortgagee after receiving the documents referred to under Item 2 herein below by 30 September 2020, namely in the amount calculated by the mortgagee on the cut-off date of 30 September 2020, and for the notary to transfer the remainder of the outstanding purchase price to the seller's account, and*
2. *The seller's mortgagee places the permission to cancel the outstanding mortgage in the land registry into the notary's escrow with an order for the notary to release the permission to the buyer once the latter fulfils the terms stipulated under Item 1 hereinabove, or that the notary returns the permission for registration of title to the property in favour of the buyer to the seller, and the permission to cancel the mortgage in the land registry to the mortgagee (if the creditor placed it into notary's escrow), if both terms are not fulfilled by 30 September 2020.*

In case studies 3 and 4, the seller's property is charged with a mortgage in favour of sellers' creditor, resulting in several legal relationships that arise between the seller, buyer, seller's creditor and the notary. In case study 3, two notary's escrow agreements are created (escrow of the permission to register title in the land registry in favour of the buyer and escrow of the permission to cancel the mortgage in the land registry). In case study 4, in addition to both notary's escrow agreements as per case study 3, a third agreement comes into place, namely on escrow of the purchase price, entered into between the buyer and the notary. In both cases, the parties are also in an assignment relationship, whereby the seller grants a double authorisation,

namely authorising the buyer for payment of part of the purchase price to the mortgagee and authorizing the mortgagee to receive the buyer's payment.

By depositing the land registry permit, the notary and the seller enter into a notary's escrow agreement in favour of the buyer, who holds the position of a third party. The notary notifies the buyer of the terms of escrow. Once the buyer receives his or her rights, the seller may no longer change the terms of escrow of the land registry permit. Acceptance of rights may be explicit, with the buyer issuing a special statement, although it may also be conclusive by transferring the due purchase price to the escrow account.

Once the buyer transfers the purchase price to the escrow account, the notary's escrow agreement is concluded in favour of the seller and the seller's mortgagee, with both acting as third parties. The notary also notifies the mortgagee of the terms of escrow of the purchase price. However, the buyer may no longer unilaterally demand that the notary returns the deposited purchase price or change the terms of escrow thereof from the time the purchase price is deposited until the creditor grants consent, as the terms of notary's escrow constitute a constituent element of the notary's escrow agreement placing the seller's permission to register title in the land registry into escrow, which the buyer has explicitly accepted or at least conclusively by transferring the due purchase price into notary's escrow.

Even the seller's creditor may accept his or her rights explicitly with a special statement or conclusively by placing the land registry permit for cancellation of the mortgage into notary's escrow. This also concludes the agreement placing the land registry permit for cancellation of the mortgage into the notary's escrow.

The seller, buyer and the seller's mortgagee enter into an assignment relationship or a double authorisation. The seller (assignor) authorises the buyer (assignor's debtor) to pay part of the due purchase price to the seller's creditor (assignee). It is important that the assignee, who is the seller's creditor, may no longer withdraw from the transfer after accepting the same, which the assignee could do if it was not the seller's creditor (Article 1043 of OZ). This would be the case if the assignor wanted to grant the assignee a gift. Whenever the assignee is the seller's creditor, the seller may not cancel the transfer on these very grounds (Article 1044 of OZ). The notary is neither a party to the sales agreement nor to the legal relationship between the seller and

their creditor (for example, in a loan agreement), whereby the other parties may not exercise any right to appeal both relationships based on a due date of performance with respect to the notary performing the notary's escrow agreement.

In all of the described cases it is advisable to apply for preliminary notice of title in favour of the buyer in order to ensure complete protection of the order of priority for registration of title to the buyer of the property when placing a land registry permit and purchase price into notary's escrow (whenever the deadline for payment of the purchase price does not exceed one month) or a notice for the order of priority in acquiring title whenever the deadline for payment of the purchase price is longer. When applying for notice of the order of priority, the applicant determines the buyer as the beneficiary to dispose with the registered order of priority in acquiring title to the property in question.

The notary compiles notary's minutes on the seller's statement, while the subject of notary's escrow is the right of disposal with the registered order of priority in acquiring title. The terms of escrow of said right are identical to the terms of placing a land registry permit into escrow.

7 Format of the notary's escrow agreement

According to Article 2 of the ZN, the notary's powers include drafting public documents and deeds on legal transactions. A public document on a legal transaction is a notarised record. A notary's escrow agreement is a legal transaction, although the format of a notarised record is not mandatory in order for the transaction to be valid. A notarised record of confirmation of accepting the subject of escrow from the depositor, and a notarised record of the beneficiary's statement on establishing the terms for release from escrow to the beneficiary, are sufficient. No special format is prescribed either for the beneficiary's statement on accepting these rights or the terms of escrow, although the notary must draft notary's minutes when taking the statement. Notary's minutes are a public document on confirmation of facts: the statements of will or facts that grant rights. Notaries' obligations that arise from the notary's escrow agreement apply by virtue of the law itself (Article 87 of ZVKSES) with the notary accepting the subject of escrow. No special notary's statement on accepting said obligations is necessary. The same obligations obviously apply even if said facts (depositor's statement and undertaking the subject of escrow) are included

in the legal transaction deed, which is concluded in a stricter format, that is, in the form of a notarised record.

8 Conclusion

Whenever the law provides for the obligation of notary's escrow it is not necessary to separately assess whether conditions for escrow have been fulfilled or whether an admissible purpose applies, as both are provided for by the law. However, the law must prescribe mandatory conditions for admissibility of other cases of notary's escrow according to the will of the parties. The rule that the notary may only accept an item into escrow in order to protect the contracting party from the risk of non-performance by the counterparty would draw a clearer distinction between cases of notary's escrow, which pursues the objective of reducing business risk, from cases of escrow that pursue other objectives.

As the notary is not a party to the underlying legal transaction (relationship based on a due date of performance), the parties may not exercise their right to appeal against the notary's performance of the notary's escrow agreement (assignment relationship), which they have in relation to other parties in a relationship based on a due date of performance.

References

Brambring, G. (1999) Das "berechtigte Sicherungsinteresse" als Voraussetzung für notarielle Verwahrungstätigkeit, Deutsche Notar-Zeitschrift, pp. 381–393.

Juhart, M. (2004) Obligacijski zakonik s komentarjem, in Juhart, M., Plavšak, N. (eds.) (Ljubljana: GV Založba).

Milak, F. (2017) Treuhand – javnobilježnički polog prema njemačkom pravu, Javni bilježnik, XXI, pp. 33–44.

Plavšak, N. (2004) Uvodna pojasnila, ZVKSES (Ljubljana: GV Založba).

Plavšak, N. (2004) Obligacijski zakonik s komentarjem, in Juhart, M., Plavšak, N. (eds.) (Ljubljana: GV Založba).

Polajnar Pavčnik, A. (2004) Obligacijski zakonik s komentarjem, in Juhart, M., Plavšak, N. (eds.) (Ljubljana: GV Založba).

Rijavec, V. (1998) Civilnopravna odgovornost notarjev, Pravna praksa 17(11), pp. i–ix.

Vrenčur R. (2004) Obligacijski zakonik s komentarjem, in Juhart, M., Plavšak, N. (eds.) (Ljubljana: GV Založba).

Weingärtner, H. (1999) Berechtigtes Sicherungsinteresse i.S. des § 54a Abs. 2, BeurkG, Deutsche Notar-Zeitschrift, pp. 393–396.

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