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CONDITIONED DEPOSITING (ESCROW) AGREEMENT IN RUSSIAN CIVIL LAW

Specialty 5.1.3. – Private Law (Civil) Sciences

ANNOTATION
dissertation for a scientific degree candidate of legal sciences

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The relevance of the dissertation research. In general, the stability of economic relations and civil turnover largely depends on the proper performance by business entities of their obligations under civil contracts. Despite the significant efforts of the Russian legislator and other regulators made in recent years to stabilize and improve the guarantees of the civil obligations subjects protection, unfortunately, the level of trust of counterparties to each other does not increase. Improper performance of contractual obligations, bad faith conduct and bankruptcy of counterparties have a very negative impact on the investment attractiveness of our country. In such a situation, there is an increasing need for effective legal instruments to protect the expectations of proper execution of transactions by the parties. A conditioned depositing (escrow) agreement is meant to be one of such instruments.

Chapter 47.1 of the Civil Code of the Russian Federation that covers a conditioned depositing (escrow) agreement was put into effect on June 1, 2018. However, four years later, it can be stated that the agreement in question has not received any widespread use in economic activity, with the exception of subsidiary use in escrow account agreements. This situation is conditioned, in particular, by a number of legal and technical errors and shortcomings contained in the legal regulation of the escrow agreement, as well as by inconsistency of norms of civil legislation, insolvency (bankruptcy) legislation and legislation on enforcement proceedings in regulating escrow and associated legal relations.

The relatively recent legalization of the legal construction of an escrow in the Russian legislation significantly affects the state of development of the civil doctrine on the research. The scientific theory of the conditioned depositing (escrow) agreement is at the initial stage of its formation.

Legislative problems in the regulation of the escrow agreement and the absence of a proper scientific theory on the agreement make its legal enforcement more complicated. Despite the four-year period of validity of the escrow

agreement rules in Russia, the judicial practice has only a few examples of addressing the articles of Chapter 47.1 of the Russian Federation Civil Code.

The ***purpose*** of the dissertation research is to develop a civil scientific understanding of the conditioned depositing (escrow) agreement, including its concept, features and functions, determining its place in the civil contracts classifications, differentiating it from related civil law constructions, establishing obligations and property immunities of the conditioned depositing (escrow) agreement parties.

Based on this goal, the following ***research tasks*** were set and solved in the work:

- to define the concept of the conditioned depositing (escrow) agreement;
- to identify the functions of the conditioned depositing (escrow) agreement;
- to establish the place of the conditioned depositing (escrow) agreement in the dichotomous classifications of civil contracts;
- to give a description of the conditioned depositing (escrow) agreement as a multilateral and non-fiduciary treaty;
- to distinguish the conditioned depositing (escrow) agreement from the notary's deposit of movable things, non-cash funds or uncertified securities;
- to compare the conditioned depositing (escrow) agreement and the escrow account agreement;
- to compare the conditioned depositing (escrow) agreement and the letter of credit;
- to compare the conditioned depositing (escrow) agreement and the storage agreement;
- to differentiate the conditioned depositing (escrow) agreement from the agreement on placing valuables into an individual bank safe (deposit box);
- to identify the obligations of the conditioned depositing (escrow) agreement parties;
- to analyze the property immunities of the parties to the conditioned depositing (escrow) agreement.

The object and the subject of the dissertation research. The object of the dissertation research is civil relations and some associated legal relations pertaining to the conclusion, execution, termination of the conditioned depositing (escrow) agreement, as well as the implementation of the third parties' rights in regard to the deposited property. The subject of the dissertation research is the scientific works, legislation, draft laws, materials of judicial practice on the topic of the research.

The methodological basis of the dissertation research is determined by the purpose and the tasks of the work and is mainly generated on dialectical scientific cognition of legal phenomena. The general scientific interdisciplinary methods of scientific research were used: analysis, synthesis, deduction, induction, classification, comparison, matching and other methods of formal logic. Systematic, functional and historical approaches were employed. The following private scientific (special legal) research methods were applied: formal-dogmatic; structural-functional; legal modelling method; historical legal method; method of legal interpretation.

The scientific novelty of the dissertation research is in the fact that the dissertation work is the first monographic civil study of topical issues of the conditioned depositing (escrow) agreement, conducted on the basis of the current Russian legislation. This was the first research to be undertaken after the legalization of the escrow agreement in the Russian Federation Civil Code.

The conducted research offers the possibility to formulate the ***provisions*** characterized by scientific novelty and ***submitted for defense***:

1. The doctrinal definition of the conditioned depositing (escrow) agreement is given: this is an agreement under which the depositor *transfers* or undertakes to transfer property (movable things (including cash, documentary securities and documents), non-cash funds, uncertified securities) or *intellectual property objects* to the escrow agent for depositing, in order to fulfil the depositor's obligation to transfer them to another person (beneficiary), and the escrow agent undertakes to accept this property, to ensure its safety and transfer it to the beneficiary against

the occurrence of the grounds specified in the contract, *or return it to the depositor upon expiration of the contract or in case of non-occurrence of the grounds specified in the contract, and the depositor and the beneficiary, unless otherwise provided by the contract, jointly undertake to pay remuneration to the escrow agent.*

2. The functions of the escrow contract are revealed: the payment function, the security function, the guarantee function. Due to the lack of doctrinal, legislative and law enforcement *uniformity* in understanding the features as both the ways of fulfilling obligations and the obligation accessority, an escrow agreement cannot be unambiguously attributed either to methods of securing obligations or to accessory obligations. It has been proven that upon termination of the underlying contract for reasons not related to its execution, the escrow contract is terminated due to the legal impossibility of its execution (Article 416 of the Russian Federation Civil Code), and not on the basis of the rules of paragraph 4 of Article 329 of the Russian Federation Civil Code or Article 451 of the Russian Federation Civil Code; if the underlying agreement is invalid, the escrow agreement provides for the restitution obligations of the parties only if there is a corresponding indication in the escrow agreement.

3. It is proved that along with the legislated consensual construction of the conditioned depositing (escrow) agreement, its real model should also be legislated. The consensual nature of the escrow agreement has a specificity caused by the contiguity with the storage agreement, and determines the following rights and obligations of its parties, which need to be legally formalized:1) the escrow agent has no right to force the depositor to transfer the property; 2) the depositor is obliged to compensate the escrow agent for losses related to failed deposit; 3) the escrow agent is relieved of the obligation to accept the property for deposit (the right to withdraw from the contract) in case of failed deposit; 4) the depositor has no right to force the escrow agent to accept the property for depositing; 5) the escrow agent is obliged to compensate the depositor for the losses related to failed deposit.

Solving the issue on the unilaterally binding or reciprocal nature of the escrow agreement depends on the type of escrow (simple or mutual) and on its non-gratuitous or gratuitous character.

4. It was found that two groups of contracts should be distinguished among multilateral civil law contracts (with three or more participating parties): those in which the parties pursue a common goal, do not have opposing interests and synallagmatic duties, and those in which the parties do not strive to achieve a common goal, pursue opposing interests and have reciprocal duties. The escrow agreement belongs to the last group of multilateral treaties.

5. It is proved that fiduciary relations arise only in cases when the fiduciary has discretionary powers to perform actions (or not to act) at his own discretion and make a choice in the interests of the principal, therefore, according to the general rule, the escrow agreement should be recognized as non-fiduciary. If the escrow agreement specifically provides for the escrow agent's powers to use and (or) dispose of the deposited property, the escrow agent may have fiduciary duties if those powers meet the characteristics of discretionary powers.

6. It is proved that the comparison of the letter of credit and the escrow agreement is advisable only in terms of comparing the agreement of the conditioned depositing of non-cash funds with the covered (secured) letter of credit, under which the bank undertakes to make a payment using non-cash funds. They are differentiated from each other according to the following criteria: 1) the person directly executing the item of commitment; 2) the grounds of occurrence 3); the presence / absence of the obligation to check the grounds for the transfer of funds, the actual fulfilment of the main obligation; 4) the degree of immunity of the property; 5) the possibility of delegating the execution powers by the escrow agent / issuing bank to a third party; 6) the moment of of the main obligation fulfilment.

7. The criteria of differentiating between the agreement for a conditioned depositing of a thing (an escrow agreement) and the storage agreement are revealed: 1) the purpose; 2) the object; 3) the number of parties; 4) the moment of

the contractual obligations commencement; 5) the mechanism of the contract execution; 6) the ability to dispose of the thing during the term of the contract; 7) the protection of the thing from the seizure. It is found that the legal regulation of the escrow contract and the storage contract is different against the following criteria: the form of the contract, the term of the contract; the grounds of the responsibility of the escrow agent / of the thing holder; the possibility of mixing things.

The subsidiary application of the following storage agreement does not contradict the law and the essence of escrow obligations: the procedure for transferring (returning) the thing (Article 899 of the Russian Federation Civil Code); requirements for fulfilling the obligation to return a thing (Article 900 of the Russian Federation Civil Code); conditions and consequences of forced delegation of the execution powers (Article 895 of the Russian Federation Civil Code); consequences of changing the storage conditions (Article 893 of the Russian Federation Civil Code); the procedure for payment of remuneration (Article 896 of the Russian Federation Civil Code); the consequences of transferring a thing with dangerous properties (Article 894 of the Russian Federation Civil Code); the consequences of failed storage (Article 888 of the Russian Federation Civil Code).

8. It is determined that the property immunities of the parties to the escrow agreement are conditioned by its essence, purpose, performance of its guarantee and security functions, and consist in the prohibition of foreclosure, seizure and application of other provisional measures in respect of the deposited property. The property immunity in respect of deposited property should be granted not only for the commitments of the escrow agent and the depositor, but also for the commitments of the beneficiary.

The guarantee securing the interests of creditors of the escrow agreement parties is the possibility of foreclosure against their rights (claims) in respect of the deposited property. To increase the guarantee efficiency, it is necessary: 1) to clarify that with regard to the depositor’s debts, foreclosure is allowed not against

any right (claim) to the escrow agent or beneficiary, but only against the rights (claims) *related to the deposited property return*; 2) to complement the enforcement proceedings legislation with the possibility of foreclosure against the right (claim) of the depositor to return the deposited property not only to the escrow agent, but also to the *beneficiary*; 3) to define the legal regime of the deposited property in the legislation on insolvency (bankruptcy) for cases of applying bankruptcy procedures and declaring the depositor or other escrow agreement parties bankrupt; 4) to apply negative legal consequences prescribed by the legislation for the bad faith conduct when concluding escrow contracts, including cases of their fictitiousness (refusal of judicial protection, recognition of transactions as invalid, etc.).

Theoretical significance of the dissertation research is in the fact that the scientific conclusions and provisions made in it together represent an integral civilistic doctrine of the conditioned depositing (escrow) agreement which can become an integral part of the Russian contract law doctrine. Some of the conclusions made can complement such sections of the civil law science as civil contracts classification and functions, execution of contracts, enforcement of obligations, insolvency (bankruptcy), settlements, etc.

The practical significance of the dissertation research is confirmed by the fact that it makes specific proposals that can be used in improving civil legislation in terms of regulating the escrow agreement and associated legal relations; in research work for further development of the escrow agreement legal construction and its individual elements, as well as in educational and teaching activities, including in educational courses “Civil Law (Part 2)”, “Contract Law”, “Banking Law”, “Bankruptcy Law”.

Approbation of the dissertation research results. The main provisions of the research have been published in 9 scientific articles, including 4 of them - in publications included in the List of Peer-Reviewed Publications recommended by the Higher Attestation Commission at the Ministry of Science and Higher Education of the Russian Federation for publishing the results of dissertation

research, and 1 of them - in a journal included into the List of Journals recommended by the RANEPA Academic Council for publishing articles on jurisprudence.

The author of the dissertation was among the developers of Perm Krai Law No. 144-PC dated 31.10.2017 “Concerning the state support measures for certain categories of citizens affected by the actions of the builders who have not completed the construction of an apartment complex”.

The results of the study were used in the work of the Committee on State Construction and Legislation of the State Duma, and also implemented in the practical activities of State Corporation “Support Foundation for the Reform of the Housing and Utility Sector”.