

# NEWSLETTER

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*Source: Wikipedia*

## ESCROW ARRANGEMENTS IN GHANA

### WHAT IS AN ESCROW?

An Escrow is a contractual arrangement between parties who agree to deliver to a third party a thing of value, money, title documents or otherwise to be held by that third party until a specific event has happened. Such third party is termed as an Escrow Agent.

To protect commercial transactions from the risk of theft, fraud and/ or misuse, parties may adopt an escrow as a security mechanism.

## HOW DOES ESCROW WORK?

An escrow arrangement is usually entered into by parties to a transaction where one party (the depositor) is obliged to deposit funds, assets, or documents to the Escrow Agent until the conditions of its release stated in the arrangement are met. Once this occurs the Escrow Agent shall deliver the fund, assets, or documents to the other party, who is the beneficiary. For example, in some online marketplace transactions, a payment service provider usually holds payment from the buyer in escrow until the seller delivers the goods purchased by the buyer on the platform.

## WHAT TYPES OF TRANSACTIONS CAN AN ESCROW BE USED IN?

Escrow services can be employed in various forms of transactions, regardless of what they cover, as they offer an extra layer of security in commercial transactions. Some common types of transactions include:

1. **Real Estate:** An escrow is commonly used in property transactions to hold funds until the completion of the closing process, ensuring a smooth transfer of ownership.
2. **Business Sales (Mergers and acquisitions):** An escrow can facilitate the sale of businesses by holding purchase funds until all terms of the sale are met.
3. **Venture Capital Investment:** An escrow is used in such transactions as a way to ensure the entrepreneurs fulfil their obligations, such as obtaining necessary regulatory approvals or meeting specific performance milestones, before accessing the investment amount.
4. **Online Transactions:** An escrow provides a secure method for online buyers and sellers to exchange goods and payments, reducing the risk of fraud or disputes.
5. **Legal Settlements:** An escrow is used in legal settlements to hold funds until all legal requirements are fulfilled, such as resolving disputes or satisfying court judgments.

## WHO QUALIFIES TO BE AN ESCROW AGENT?

An Escrow Agent is a neutral third party tasked with the responsibility of ensuring the safety of the assets placed in escrow until certain conditions are met or the transaction is completed. In this capacity, the Escrow Agent acts as a trusted intermediary between the parties involved in the transaction. This arrangement establishes a limited agency relationship, wherein the Escrow Agent represents the interests of both parties to the extent defined by the escrow agreement.

The primary duties of the Escrow Agent are:

1. to abide strictly by the instructions of the parties in the escrow arrangement;

2. to redeliver the item in his or her possession only after the completion of the conditions of the escrow arrangement; and
3. has a fiduciary duty to employ reasonable care and fairness in the discharge of its duties.

There are no particular laws in Ghana that restrict or make provisions for who can act as an Escrow Agent, however, in practice various professional bodies and institutions are employed to act in such capacities and these include:

1. **Banks and Financial Institutions:** These institutions are among the most commonly used as Escrow Agents, particularly in monetary transactions. Their secure infrastructure, financial expertise, and regulatory oversight make them well-suited for handling escrow arrangements involving large sums of money.
2. **Lawyers:** Their expertise in legal matters make them suitable to act as Escrow Agents, especially in property transactions. Lawyers may also serve as Escrow Agents in various other transactions, such as business acquisitions or intellectual property agreements, where legal oversight is crucial for protecting the interests of the parties involved.
3. **Government Agencies:** In certain governmental transactions, such as public infrastructure projects or regulatory compliance matters, government agencies may be designated as Escrow Agents. Governmental escrow arrangements may be utilized to hold funds for specific purposes, such as debt repayment and construction projects.
4. **Escrow Companies:** Some companies specialize in providing escrow services as their primary business activity. Escrow companies may cater to specific sectors or niche markets, offering tailored solutions to meet the unique needs of their clients.

## ESCROW AGREEMENT

For an escrow to be valid there must be a binding agreement executed between the Parties to a transaction and the Escrow Agent. A valid escrow agreement will therefore contain the following provisions:

1. **Parties:** An escrow agreement should clearly identify the parties involved in the underlying transaction for which the escrow is established.
2. **Identity of the Escrow Agent:** The agreement must spell out the person who will be appointed as the Escrow Agent.
3. **Joint appointment of the Escrow Agent:** The parties must jointly appoint the Escrow Agent, underscoring the mutual agreement and consent required for the escrow agreement to proceed.

4. **Terms of the Agreement:** The escrow agreement outlines the specific terms and conditions governing the escrow, including the duration of the escrow, conditions for the release of funds or assets, and any other pertinent details.
5. **Duties of the Parties:** Each party's obligations and responsibilities concerning the escrow should be stated in the agreement. This may include depositing funds or assets into escrow, providing necessary documentation, and adhering to agreed-upon timelines.
6. **Duties of the Escrow Agent:** The escrow agreement outlines the duties and responsibilities of the Escrow Agent indicating most especially, its neutrality. These duties include securely holding the escrowed assets, disbursing funds or assets according to agreed-upon conditions, and maintaining confidentiality.
7. Fees and expenses of the Escrow Agent.
8. Governing Law and Dispute Resolution in case of any legal actions

## **REGULATION OF ESCROW SERVICE PROVIDERS**

Unlike other jurisdictions such as the United States of America, which has laws regulating the creation and activities of escrow offices, there are no such laws in Ghana.

## **CONCLUSION**

Commercial transactions entail myriad risks, necessitating the implementation of comprehensive measures to mitigate risks and ensure security. Escrow arrangements enable parties to proceed with transactions confidently. Escrow accounts safeguard funds until all contractual obligations are fulfilled, thus guarding against potential mismanagement or misuse of funds.

The conditional release of funds, a key feature of the arrangement, ensures that payment occurs only once predefined criteria are met. This practice helps prevent disputes over payment terms and ensures smooth transaction proceedings.

Escrow proves invaluable in resolving commercial disputes. The neutral Escrow Agent holds funds or assets until disputes are resolved through negotiation, mediation, or legal channels, thereby ensuring fair outcomes for all parties involved.