

## **Source Code Escrow: A Man With Many Faces**

A source code escrow arrangement is one where upon commissioning of an application by a developer for its customer, its customer requires the source code to be deposited with a third party, referred to as a source code escrow agent, to hold for a predetermined period of time, only to be released to the customer/software licensee upon the occurrence of certain defined “release events”.

### Source Code Escrow: A IT Department’s Deployment Strategy

You are responsible for the uptime and robust IT strategy and architecture for your business: the IT backbone is responsible for revenue generating operations, customer facing portal, internal email and collaboration infrastructure. Your total IT strategy and architecture design is crucial to the top, bottom line and stock performance and your stock options.

Your decision to require the software source code of your vendor to be deposited in escrow with an escrow agent will be key to forming a complete solution and plug the holes in disaster recover policy, risk mitigation avenue and guarantee support continuity.

If a software developer is not able to support its product in the future—whether due to a bankruptcy, an end-of-life announcement or a merger, acquisition or strategic partnership, any of these called a “release event”, software licensees may request for a release. If the release conditions are satisfied, source code released.

Once an escrow agent is appointed, the source code for that software is placed within a secure software escrow account held by the escrow agent.

This will allow you to achieve the peace of mind by guaranteeing continuity even if licensor’s circumstances change, allowing recreating, maintaining and supporting mission-critical applications.

#### *Advantages for IT Administrators*

- Meet management’s disaster recovery policies
- Add to risk mitigation strategy of your IT infrastructure strategy/architecture
- Achieve operational continuity in the case of bankruptcy of developer, developer being acquired by your competitor, or any other events

### Source Code Escrow: Private Equity/Lender Converts Source Code Asset into Collateral

As a private equity investor or a bank lending to a startup or second stage tech startup, one of the most valuable assets (besides trade marks, patents or trade secrets) that can be collateralized is the source code of the crown jewel software asset of such a startup or second stage tech startup.

The use of Source Code Escrow to deposit source code to a neutral third party allows you to complement your arsenal of enforcement rights to include physical possession of the software source code. You have comprehensive rights in your Joint Venture Agreement, Investment Agreement, or Convertible Loan Agreement including security or charge documents, reserved matters clause, rights to information financial statements, operational

control – but the right to the release of the software source code in the event of the startup or founders' breach of contract is invaluable.

#### *Advantages for Investors or Lenders*

- Use the source code as collateral for a lending / investment transaction
- Protect yourself against the risk of default of repayment or breach of investment contract
- Discourage the borrower / investee company from any conduct which could constitute breach of contract

#### Source Code Escrow: Software Developers' Product Complement

A smooth business transaction is often defined by goals and comfort levels of all parties being met. A business relationship can often be brokered with an impartial third party sitting in the middle, particularly when mission-critical software, proprietary information or technology licensing.

You will have the ability to convince your potential customer that your relatively small Software Development House is able to guarantee continuity even if your circumstances change – be it you being acquired by a MNC, enter bankruptcy or receivership.

This may be key to close the deal with a large MNC customer.

A source code escrow agent can assist in serving as a risk mitigation avenue when two or more parties are negotiating a license for software. Once an escrow agent is appointed, the source code for that software is placed within a secure software escrow account held by the escrow agent.

If a software developer is not able to support its product in the future—whether due to a bankruptcy, an end-of-life announcement or a merger, acquisition or strategic partnership, any of these called a “release event”, software licensees may request for a release. If the release conditions are satisfied, source code released.

You can explain to your potential licensees/customers that they can achieve the peace of mind by guaranteeing continuity even if licensor's circumstances change, allowing recreating, maintaining and supporting mission-critical applications.

#### *Advantages for software licensees*

- Comply with disaster recovery obligations imposed by laws and company policies
- Reduce the risks of licensing software and ensure business continuity
- Maintain control over decisions to acquire new technology: assurance that existing software will continue to support your business