

Operational Risk Management

Information and Communications Technology (ICT)

White Paper

Active Escrow

(Active Software Source Code Escrow)

Important Good Governance information

for

South African Directors and Officers

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What is the purpose of this White Paper?

This White Paper provides concise information for the board of directors and senior management of organisations who wish to implement and maintain operational risk management measures consistent with the King provisions for good corporate governance. Specifically, the White Paper will assist directors and officers to identify:

- why active software escrow is a very necessary business tool for all organisations that are dependent on information technology;
- what constitutes professional, or active, software escrow;
- how to implement and maintain competent escrow protection measures as part of their duty of care for safeguarding their business continuity.

For instance, you should read this White Paper if your business absolutely depends on software over which you have limited or no control – software that you do not own but are licensed to use, etc.

Acting on the information that this White Paper contains constitutes a vital part of **your business continuity** plan. It is recommended that the following people within your organisation read it too, given their specialised roles within your organisation:

- Directors and senior managers whose duty it is to protect the organisation's tangible and intangible assets, and implement appropriate protective and reactive measures against their possible loss.
- Business continuity managers and chief information or technology officers responsible for ensuring your company is able to continue operating regardless of events which may disrupt the business environment.
- Legal officers who have a duty to understand the business and legal considerations in the development and implementation of the information technology and information security strategies.
- Internal auditors, risk managers and company secretaries who are responsible for risk management and compliance with organisational best practice.

If your company does not depend on technology such as software for mission critical business processes and functions, active escrow, as an operational risk management measure, is not likely to be of concern to you.

1. Executive overview.

To stay in business, all commercial and governmental institutions are often entirely dependent on software over which they have limited or no control.

If yours is such an organisation, you, as director and/or officer, and your organisation, need the protection that active software escrow has to offer.

For instance, the question South African directors and officers need to consider in respect of ICT operational risk is "What are our annual revenues that are dependent on technology platforms that we do not own" (for a leading South African short term insurer this is around R2.5billion) and this provides the imperative for the practice of active source code escrow in underwriting this risk.

An active escrow arrangement is typically the only way whereby access to maintainable information systems, by the software end-user, can be guaranteed:-

- Irrespective of the stability or commercial status of the software supplier;
- If certain predefined commitments such as warranty, support and maintenance are not honoured.

From an operational risk perspective, an active escrow arrangement is the only proper re-assurance that an organisation has that software that is vital to the survival of their business will not become 'orphanware'.

Reasons for orphanware range from the obvious, for instance insolvency on the part of the supplier, to the more subtle - what happens if a competitor acquires your supplier with the sole purpose of killing a competitive product.

The use of active software escrow is well entrenched in Europe and the United States, for purposes of ICT risk management and to comply with good governance regulations (eg Sarbanes Oxley section 404, etc), but many South African companies either ignore its potential for managing the multifaceted risks and due diligence obligations facing their company directors and/or officers, or they mistakenly believe that a passive escrow arrangement offers the same protection as one that is active.

Even though you are a diligent and hands-on executive, you might be overlooking a critical aspect of your company's business and inadvertently exposing the company to a high level of operational risk if your company's core, mission-critical information technology processes are dependent on software which you do not own but license to use from third parties, and, therefore are subject to conditions or events beyond your control.

This reliance on third parties may not appear to present a problem, but companies who want to continue to use software important to their business where it needs constant support by a software supplier could be affected by an unforeseen development impacting on the software supplier's business. Supplier insolvency, a change of ownership or a new strategic priority (for example, discontinuation of support and maintenance) could leave you stranded and have an extremely serious, possibly catastrophic, impact on the financial and business health of your company.

And, unfortunately for you, this risk is also excluded from all Directors & Officers (D&O) and loss of profit/business interruption insurance policies.

To manage the risk of your business's absolute dependence on your software supplier, active software escrow provides your business with guaranteed access to the source code for your mission critical systems and is the most elegant solution for managing the multifaceted risks and due diligence obligations facing you as a director.

A sound, commonsense approach to providing for business continuity, active software escrow provides cost effective relief and security for a business. In today's technology dependent business world, active escrow agreements between an end-user organisation and the supplier of the technology it utilises are a necessity, not a nice to have.

Should you have any doubt about your need for active software escrow, answer these three questions:

- Is the technical or IT know-how I use everyday critical to my business processes and functions?
- Is this know-how not easily replaceable by an alternative or is the conversion to an alternative too costly and/or too lengthy?
- What if the company that developed and now maintains one of my business critical software applications becomes insolvent, or is taken over by a competitor and changes business direction?

Frank answers could prompt you to rethink your existing unworkable escrow agreements, substantially lower your risk profile and strengthen your good corporate governance.

2. What is active software escrow and what protection does it provide?

Active versus 'passive' escrow

The practice of escrow can be identified as being either 'passive' or 'active'. 'Passive' escrow involves simply depositing the source code with the escrow agent. Here the escrow agent does not verify the source code to see that what was deposited was in fact the complete set of source code, associated technical documentation etc. Passive escrow therefore offers no proper reassurance that the source code material is present or that it will be of any use in the event of a release.

For an escrow agreement to be qualified as 'active', all three of the following conditions, as a minimum, must be properly dealt with:-

- 2.1. the arrangement should be legally sound;
- 2.2. all source code, together with all relevant technical material, should have been provided and subjected to technical verification;
- 2.3. source code and relevant material should be frequently updated as part of a robust and consistent administrative process.

In particular, 'active' escrow entails the verification of the deposit material, by a suitably qualified independent and neutral expert third party, to ensure that the source code as agreed upon between the parties is present and accurately and completely reflects the software in operation at the end users site.

Active escrow verification laboratory results provide evidence that 90% of unverified (i.e. 'passive') deposits are most likely to be of little or no use when they are needed. 'Passive' escrow is not an option for proper protection of your business continuity and does not constitute professional source code escrow practice.

Appendix E provides you with an auditor's checklist to ensure that you are able to specify your standard for active escrow when assessing and securing your business continuity/operational risk protection. [Source: CEN CWA 13620 - The international Procurement of Information Technology and Telecommunication Systems and Services' (SPRITE-S2) initiative refers.]

Protection for the licensed end-user

The principal benefit for the licensed end-user is that, if the software supplier goes out of business, the user is entitled to obtain the source code from the escrow agent for the sole purpose of continuing to use the software, supporting and enhancing it as required. This will not solve all the problems associated with insolvency, but will at least allow the user an opportunity it would not otherwise have for continuing to make use of the software.

The majority of software is licensed to users in object code only, that is, a machine-readable format which, for people, is largely unintelligible. This is a simple and effective way of limiting unauthorised use. As long as the licensee company can rely on the software supplier for support and enhancement of the software, it will not require access to the source code of the software, that is, the human-readable format which can be easily understood by software programmers familiar with the language and the application in question.

The phrase 'source code' is a vital one. Together with the related technical documentation, the source code is the 'secret recipe' for the object code that you are licensed to use.

Software escrow is an obligation on the part of the software supplier your company uses to deposit the source code for this software with a neutral and independent trusted third party, the escrow custodian or agent. The third party is authorised to release the source code to you under conditions agreed upon by the software supplier and your company. The agreement governing this arrangement is known as a 'source code deposit' or 'escrow' agreement and is usually a tripartite agreement between the licensor, the licensee and an independent third party 'escrow agent' who holds a copy of the source code.

If the software supplier is unable to support your software for any reason, the only way you are able to fix any problems or make any enhancements you need is if you have access to the source code.

Until recently, most escrow arrangements were passive in their approach. This means that passive custodians such as banks, notaries, legal firms physically 'held' a copy of the software source code as a deposit but did not technically verify that the deposit was the 'correct' or 'up-to-date' release version or, for that matter, that the material on deposit was complete in terms of the purpose or purposes intended.

Obviously, if the software deposit is out-of date, incomplete or, worse still, unusable, your business continuity remains seriously compromised and the protection afforded by the passive escrow agreement worth less than the paper it is written on.

Under an active software escrow agreement, however, the escrow agent subjects the material on deposit to consistent standards of technical verification on a regular, scheduled basis. It will also warrant that the deposit contains what your software supplier has committed to lodge so as to provide proper reassurance to you that the deposit is complete, up-to-date and usable.

Within the scope of an organisation's risk management and business continuity policy, the primary purpose of the escrow agreement is to establish and maintain good governance standards:

- To safeguard the long term support and maintenance of the software should key development resources no longer be available;
- As part of its disaster recovery and business continuity plans so as to secure long term investment (direct and indirect) in information and communication technology through an independent, offsite escrow deposit of a complete set of software source code and related technical documentation;
- That, should there be a release of the deposit material, the software can be maintained by or for the end-user by suitably qualified person/s other than the original development resources.

The key objectives of escrow for the licensed end-user are therefore:

- Continuity of use of the software by your company under circumstances where that would be impossible without escrow.
- Safeguarding the underlying business process.
- Protection of your investment in the software, related hardware and staff training.
- Limiting your total dependency on the software supplier for support and maintenance of the software.

Protection for the software supplier

The benefits of active software escrow for the software supplier are that it will reinforce your ownership rights in the source code which, typically, is your most valuable asset. Other benefits include risk management and business continuity assurance, patent and copyright preservation, disaster recovery, and reduced dependency on employees.

With respect to patent, trade secret and copyright preservation, active escrow arrangements provide your company with documentation when securing a patent claim, significant assistance in an infringement suit, and robust proof to support an intellectual property copyright claim.

For disaster recovery, permanent loss of critical source code and related technical documentation is not an option. Having your most valued asset in escrow with a neutral third party provides you with an alternative to disaster in the event of an emergency. The active escrow agent will maintain a copy of your intellectual property stored off-site in a professional vaulting facility and available for restoration.

Finally, active escrow reduces your dependency on key employees who tend to 'hoard' instead of 'share' information. Regular escrow deposit cycles can ensure proper delivery according to functional specification and agreed deliverables (including documentation) when independent technical verification is performed on each deposit as a matter of course.

The escrow arrangement is in effect a licence granted by the software supplier to the end-user for end-user access to the source code under specified future conditions, that is a conditional source code licence.

Software suppliers and developers worldwide are increasingly recognising that:

- Escrow is a stamp of quality.
- Their clients' requests for escrow are perfectly legitimate as this deals with mission critical software that requires additional continuity of use warranties.

The key objectives of escrow for the software supplier are therefore:

- Good governance practice.
- Reassurance for your licensed end-users as to your commitment to their business.

Different types of software escrow arrangements

Your core business processes and functions may absolutely depend upon software that is:

- Bespoke or specifically designed for you,
- A standardised package that is used by many other licensed end-users, or,
- A standardised package that has been customised for your specific purposes.

Typically the escrow agreements for the above will fall into one of the following categories:

- **One deposit on behalf of one licensed end-user:** Here the software covered by the escrow agreement may be unique to the particular end user, that is either bespoke or a customised package and the agreement will be between the software owner, the licensee and the escrow agent. This may also be a starting point for you to enter into an escrow agreement with a standardised package supplier who does not yet have an escrow arrangement in place.
- **One deposit on behalf of multiple licensed end-users:** Here the software may be a standardised package with many users. In this case, the software supplier may deposit the standard software once in terms of a master agreement between it and the escrow agent. Subsidiary agreements will then be executed between the software supplier, the escrow agent and each participating licensee, all relating to the master agreement.

3. Four compelling reasons why active software escrow is a business necessity.

Reason 1: South African law currently does not provide for the protection of, and access to, software source code in the event of software supplier insolvency.

The Roman Dutch Law concept of 'deposit' (*depositum*) is part of South African law whereby a person delivers something to a third party for the purpose of safe custody and the latter either gratuitously or for reward undertakes to take care of the thing until certain circumstances agreed between the two principal parties occur. According to B Prozesky-Kuschke BLC LLB, Senior Lecturer in Private Law at the University of Pretoria in her article *DEPOSITUM AND ESCROW: The Current Application Regarding Computer Source Code in South African Law*:

"The classic principles regarding *depositum* need to be adapted to suit the needs of the parties involved in an arrangement for the protection and access to source codes. As no case law or proper legislation is currently available to show the way, the best solution remains to regulate the relationships and provide for specific eventualities by concluding proper, watertight agreements in this regard."

South African courts have not yet dealt with the use of software beyond insolvency on the part of the software supplier. While an escrow agreement will not solve all the problems associated with the insolvency, it will allow the user an opportunity it would not otherwise have for continuing to make use of the software, that is the user would be able to continue to use the software based on the terms and conditions of the prevailing license agreement and, most importantly, be able to maintain and support the software for the purposes of business continuity in the absence of the software supplier.

Reason 2: Active software escrow facilitates compliance with corporate governance imperatives.

The objectives of active software escrow are rooted in promoting ICT good governance, and take cognisance of the fact that suppliers and their licensed end-user can be proactive in complying with current protocols and quality standards such as (King II, Basel II, ISO9001, South African National Standard ISO/IEC17799, COSO, COBIT, ITIL, Sarbanes Oxley etc) etc.

For instance, ISO 9001 guidelines provide us with useful definitions:

"An escrow agent is an independent trusted 3rd party that takes custody of a software source code deposit", and,

"Escrow is an ancient legal term referring to a deed which only becomes effective upon the occurrence of a future event. This term has been applied to the deposit of source code by the software owner with an independent third party, known as the 'escrow agent'," and,

"Source code escrow agreements must be set up for each software product that an organisation uses. The following exceptions may be considered:

1. Software has no business-critical functions.
2. A software licence fee less than 3000 Euro.
3. Less than three regular users.
4. Shrink-wrapped commodity, off-the-shelf alternative products.

"Source code escrow is a disaster recovery and business continuity method that supports the procurement process and secures long term investment in information and communication technology."

ISO 9001 (ISO 9001, Quality Systems - Model for Quality Assurance in Design/Development, Production, Installation and Servicing) covers product design and development, it is the standard applied to software and has emerged as the undisputed **international benchmark for quality management**.

South African National Standard ISO/IEC17799 (edition 1) "*Information Technology – Code of Practice for Information Security Management*" defines a comprehensive process of information security management that enables better information security management and specifically includes business continuity management.

ISO 12207 describes five primary processes (with the subcategories of activities and tasks) – acquisition, supply, development, maintenance, and operation required to produce large, complex software systems.

ISO 15504 provides a framework for the assessment of processes. This framework can be used by organisations involved in planning, managing, monitoring, controlling and improving the acquisition, supply, development, operation, evolution and support of products and services.

ISO 31000 was published as a standard on the 13th of November 2009, and provides a standard on the implementation of risk management. A revised and harmonised ISO/IEC Guide 73 was published at the same time. The purpose of ISO 31000:2009 is to be applicable and adaptable for "any public, private or community enterprise, association, group or individual." Accordingly, the general scope of ISO 31000 - as a family of risk management standards - is not developed for a particular industry group, management system or subject matter field in mind, rather to provide best practice structure and guidance to all operations concerned with risk management (http://en.wikipedia.org/wiki/ISO_31000).

All these standards are consistent with the inclusion of active escrow as an important component of your best practice initiatives - effectively, the fact that a core business system is **dependent on licensed software** that the business does not own means that the business has been obliged to outsource this core function. Outsourcing of core or mission critical functions implies far greater operational risk and the business continuity considerations associated with this therefore become a major issue. **Corporate governance** guidelines, protocols and imperatives (King II, Basel II, Sarbanes Oxley etc) now also emphasise the end-user need for active software escrow and insist that company executives ensure that:

- Procedures and practices are in place to protect the company's assets and reputation.
- The company complies with all laws, regulations and best business practice.
- Technology and systems in the company are adequate to run the company properly.
- **ICT and software risks are identified and addressed.**

Reason 3: Active software escrow bridges the source code-object code divide.

When it comes to object code-source code, the issue is this: What would the impact be on your business if you spent, say, R5-million to license some software that is integral to your business's day-to-day, mission-critical operations but the company you paid closes shop leaving you with R5-million worth of parentless software? Would you then be interested in the difference between object code and source code?

Simply put, when your company licenses software, it more often than not gets a licence to use the machine-readable 'object code' but not access to the 'source code', which programmers read and work in.

If the software supplier is unable to support your software for any reason, the only way you can fix any problems or make any enhancements you need is if you have guaranteed access to the source code via your active software escrow arrangement.

Reason 4: Untested or passive escrow deposits are often useless when called upon to deliver what they promise – business continuity in the face of the software supplier's inability to continue supporting its technology.

The 'passive' approach to escrow or intellectual property custodianship involves simply 'holding' the material; active escrow involves both holding the material and verifying it to be usable in terms of the escrow agreement between the software supplier and the end-user.

For example, many professional escrow agents offer several levels of technical verification and reporting depending on how mission critical the client considers the business application to be. A review of the need for verification completed by a leading international escrow agent, recently reported that nine out of every 10 traditional, that is, passive source code deposits held in escrow would have been useless if not verified.

The reason why nearly all deposits failed to meet the verification criteria immediately is not because the lacking components are non-existent or that every software supplier makes a mess of the deposits, but because today's software environments are complex and software suppliers are often too busy to spend the time that is really required for creating a quality deposit. In fact the main reason is that they simply forget and/or overlook the deposit of small but important components.

However, bearing in mind that these deposits were historically held in passive escrow, the findings are very frightening – they suggest that the businesses involved would have experienced severe difficulty in using the material released in keeping with the terms of the agreement should anything happen to force it into play.

Today's directors and officers need to carefully consider the points made above as, despite their diligence in insisting that escrow agreements are in place for all of their mission critical systems, the actual escrow deposits may be of little or no value.

4. What does Gartner have to say about software source code escrow?

Securing your strategic ICT Investments - When licensing software or other technology, the IT, procurement or legal department needs to address increased regulatory compliance pressures to ensure the protection of strategic assets. Often, these strategic assets are in the form of software applications that materially affect a company's business.

Technology escrow is a smart and effective component of a business continuity strategy that software licensees can use to protect their mission critical applications in an ever-changing environment.

"It is an insurance policy to make sure you have access to that source code should that vendor no longer maintain that software for your organisation, so this gives you an alternative," notes Jane Disbrow, Gartner Research Director for the IT Asset Management and Applied Research Group, emphasising the need for escrow.

"Inherent to every technology license agreement is a level of risk. Companies that supply and demand technology must adjust to a fast-changing marketplace, and with such uncertainty, precautions are needed. Disbrow advises, "It is very important when setting up an escrow agreement to make sure the contract actually gives the customer the rights it needs in order to maintain that source code."

5. How do I know if my company needs active software escrow?

You need the protection of active software escrow if:

- Your business uses third party software through licence agreements.
- The software is critical to your daily operations and/or communications.
- A large number of employees or departments in your business rely on this software and there are man-months of training invested in its use.
- The software application links with other mission critical systems or applications.
- The software is customised for your business.
- You use third parties to update and maintain the software.
- Time to replace the software and implement a similar solution will be longer than 30 days.
- New hardware will be required if you need to replace the software.
- You would not be able to operate, support and update the software should the owner or licensor fail to support and maintain it.
- Your licence agreements do not address active source code escrow.

6. Who do I work with to give my company proper escrow protection?

Software escrow is increasingly seen as an important — even vital — element of the agreement between the supplier of computer or other high technology and his or her customer.

However, while legal practitioners are correct to advise their clients to consider escrow as a means of reducing risk and promoting continuity in a fluid business environment, lawyers, bankers and consultants should not make the mistake of naming themselves the escrow agent in the agreement, as this could lead to serious complications of an ethical and fiduciary nature.

This word of caution was offered as part of a wider discussion on risk management by leading New York business law practitioner, Ronald D Coleman, a specialist in civil litigation and the law of trademarks and the Internet.

In a paper titled *Managing Risk II: Litigation Prophylaxis in High-Tech Agreements* (www.innovasafe.com/articles.html), Coleman looked at the value of escrow in high-tech agreements and makes the accurate and critically important point that 'the heart of the escrow issue is that it is the only hard solution to the distinct possibility that your software supplier may go out of business... [Escrow] is a life preserver'.

In his paper, Coleman raised the equally valid issue of whether, given the three-part relationship between lawyer, his or her client (the technology provider) and the client's client (the software end-user), it is appropriate for the lawyer to be the person who holds

the software in escrow. Some may see this as a value-add for the client, or an extra convenience, or a cost saving. But Coleman believes it is 'a huge mistake'.

He wrote: 'Law firms that get caught in the middle of software escrow battles not only risk their client relationships. They risk being found both in derogation of their fiduciary obligations and possibly their legal ethics obligations.'

Coleman's trenchant solution to the problem? 'Find an escrow agent.'

As has been argued in the preceding pages, implementing an escrow agreement is not, as some seem to imagine, simply a matter of drafting an agreement and then locking away a few computer disks into a safe or a vault.

A hugely important aspect is to pre-verify that the code being deposited is (a) the correct material and (b) entire and complete, and therefore recompilable in such a manner that the user enjoys exactly the same functionality as before.

The average passive custodian – such as banks, notaries, legal firms – cannot be expected to possess the skills and resources necessary to carry out complex and demanding software, verification and deposit material administration, nor to interface with the software supplier at a high level in order to rectify any omissions. The ability to do so is extremely important, particularly when you consider that as the software evolves and changes over time, as it surely does, subsequent deposits will be required to ensure the requisite level of recompilability is maintained.

This falls well beyond the scope of conventional lawyering, which makes Ronald Coleman's advice — to enlist the aid of an escrow professional — that much more sensible and constructive.

For the escrow arrangement to be effective, ALL three of the following conditions should be met:

- The arrangement should be legally sound.
- All source code and relevant material should have been provided and subjected to technical verification.
- Source code and relevant material should be frequently updated as part of a robust and consistent administrative process.

Professional, or active, escrow best practice ensures that these conditions are met to the highest quality standards possible as this is vital for:

- Guaranteed access and legal right to the escrow material by the end-user in the event of a release condition.
- The escrow material to be useful in the event of such a release, that is suitably qualified end-user resources should be able support/maintain the material in the absence of the owner/supplier.

7. What about escrow agreements that are governed by foreign ie non-South African Law?

Foreign escrow agents are aggressively targeting South African End-Users and software Suppliers alike in attempting to sell them escrow contracts from call centres in countries such as the United Kingdom. Although these arrangements might initially appear to provide proper re-assurance of business continuity, attention should be paid to the nationality of the legal jurisdiction governing the escrow contract. The purpose of the escrow arrangement is that the End-User requires access to the source code and related material in the event of an emergency and as set out in the escrow contract. When the escrow contract is governed by foreign law, there is no guarantee that the End-User will not encounter unexpected issues (in particular, legal costs) that could render the escrow arrangement impractical if not impossible to rely upon in the event of such emergency. Escrow contracts that are governed by foreign jurisdictions are without doubt a matter of *caveat emptor* – let the buyer beware!

South African End-Users and software Suppliers that are considering entering into escrow arrangements should insist that the escrow contract be subject to RSA law if they want certainty as to the value of the arrangement.

Equally, legacy escrow arrangements that South African End-Users and/or software Suppliers have already put in place should be carefully reconsidered and reviewed on this basis – there is no point in relying on an escrow arrangement for mission critical business continuity if access to the source code material in an emergency is questionable.

8. What about quality standards in respect of the ongoing management of the escrow deposit?

An escrow agent has a very real duty of care in respect of both End-Users and software Suppliers. The escrow agent must be committed to total customer satisfaction on all levels, including by quality of product and service, reliability, and performance. The

correct way of ensuring consistent delivery of service is for the escrow agent to invest in the implementation and maintenance of an internationally recognised standard such as ISO9001 and the associated Quality Management System (QMS) that is audited on a regular basis.

Specifically, the implementation of an ISO 9001:2008 QMS is based on eight core quality management principles, namely, customer focus, leadership, involvement of people, process approach, systems approach to management, factual approach to decision making and mutually beneficial supplier relationships.

South African End-Users and software Suppliers that are considering entering into escrow arrangements should insist that the escrow agent has achieved the highest quality assurance standard possible – preferably, that they can prove that they are ISO 9001:2008 certified (not “accredited” or “compliant”, etc – they must provide evidence of actual ISO 9001:2008 “certification”).

Equally, legacy escrow arrangements that South African End-Users and/or software Suppliers have already in place should be carefully reconsidered and reviewed on this basis – there is no point in relying on an escrow arrangement for mission critical business continuity if the quality of escrow service delivery is not properly assured.

9. What do professional escrow services cost?

The professional escrow agent is a neutral and independent third party dedicated to the provision of active escrow services. For instance, the agent must provide for a permanently staffed **verification laboratory***, operating under their direct control, for the service to be of any value to you (unverified source code deposits provide no proper reassurance that they will be useful when you need them). Other key resources are dedicated legal experts and administrative staff that, taken as a whole with the laboratory resources, constitute a significant set of costs. Fortunately, internationally active escrow agents enjoy significant economies of scale and this makes the cost to the client more affordable. Entry level fees for active escrow services are typically as follows:

Item #	Description	Rands (VAT excluded)
1	Active Escrow <u>Contract</u> Arrangement Services Fee; Payable by Licensee (the initial fee, once off.)	Circa R12,000-00
2	Active Escrow <u>Deposit</u> Arrangement Services Fee; Payable by Licensee (the annual fee, in advance, recurring.)	Circa R16,000-00

When the fees are compared with the investment (direct and indirect) that you have made in ICT products that are vital to your business processes and functions, active escrow services provide a very cost effective means of managing operational risk. As such, the practice of active escrow is a form of technical insurance and compares favourably with the costs of D&O and Business Interruption (Multimark) policies.

Also, bear in mind that any liability associated with the cover that active escrow provides is not covered by D&O and/or Multimark policies. ‘Passive’ escrow is available at lower cost, but as it does not offer proper reassurance to the end-user, it does not serve the purpose.

*The international Procurement of Information Technology and Telecommunication Systems and Services’ (SPRITE-S2) initiative refers:- Guidelines for the application of ISO 9001 to the development, supply, installation and maintenance of computer software:

Verification of escrow deposits - Definitions:

➤ Verification

The process of determining that deposited media contain, as a minimum, accessible source code.

➤ Verification Laboratory

An area wherein media is verified under testing laboratory controls. The process is to be carried out for all escrow deposits and recorded in a formal report:

1. Carry out a virus check on each item of media deposited, where possible.
2. Ensure that each item of media can be read without error.
3. Check the contents of the media to see if compression has been used, in which case decompress the data.
4. View sample data to ensure that the deposit contains the correct source code.

5. Examine sample source code for copyright statements. Any copyright statement found should be noted in the Test Report. If the copyright statement is found embedded in tailored files related to proprietary development then these may be omitted.
6. View sample source code to assess legibility and maintainability. The formal report shall record the results of checks for the following:
 - a. Version numbers
 - b. Modification history
 - c. File structure/indentation
 - d. Source code comments
 - e. Meaningful names for:
 - I. Variable names
 - II. Procedure names
 - III. Meaningful file names

All deposits must successfully complete a **Standardised Verification** before they are accepted for vault storage.

10. How do I fast-track the process of managing this Operational Risk?

1. Determine how many mission-critical software applications currently running within your organisation are subject to software license agreements (that is, licensed for you to use) and therefore constitute technology and/or intellectual property beyond your control.
2. Determine whether the software license agreement/s concerned provide for software source code escrow.
 - 2.1. If there is such provision, make certain that this will ensure business continuity in the event of a release event or condition.

Scrutinise the terms and conditions of the escrow agreement and ensure that, in the event that there is no answer to the software supplier's phone when you want to place that emergency support call, your business continuity will not be compromised, i.e. that the arrangement is not 'passive' escrow, is not governed by foreign law, etc

In particular the 'passive' escrow check is a vital step because research shows that as many as nine out of every 10 traditional source code deposits held in escrow are useless. The reason for this potentially ruinous failure is that conventional (or passive) escrow deposits are not verified by technical specialists. The software is assumed to be complete and deployable, but there is no proper check on whether or not this is the case. An infinitely superior option to conventional or 'passive' escrow is the more rigorous 'active' escrow as provided by but a very few professional escrow agents on a worldwide basis.

- 2.2. If the license agreement does not provide for software source code escrow, or only provides for a 'passive' deposit, ask your software supplier for an active escrow agreement.

This is the only means you have to protect your interests and investments in ICT that is vital to you. Take control of these negotiations and insist on an internationally reputable escrow agent.

The escrow agent's recommended terms and conditions will be based on years if not decades of practical, unbiased experience and will ensure that the agreement is unambiguous in providing you with guaranteed right of access (in the shortest possible time) to the deposit material when you need it.

Also, the release conditions will obviate any otherwise unforeseen loopholes such as those that a liquidator could take advantage of and which might prevent or impede the release process.

The Appendices A - E contain the basic information that you need for starting the fast-track process.

Appendix A: Sample Escrow Clause for Software License Agreements

n.n. Source code deposit for purposes of business continuity (Software Source Code Escrow)

The Licensor (i.e. Supplier) and the Licensee (i.e. End-User) will enter into an agreement for active escrow with a neutral and independent trusted third party, the Escrow Agent, within 30 days of signature of the Licence Agreement. The purpose of the active escrow service is to provide the Licensee with proper reassurance of continuity for both use and maintenance of the Software in the event of release condition/s as specified in the escrow agreement. In the escrow agreement, the Licensor will warrant that:-

- n.n.1. a copy of the source code of the Software, related material and relevant technical documentation (collectively, the Escrow Material) will be deposited with the Escrow Agent. The agreement specifically provides for technical verification and ongoing administration of the Escrow Material by the Escrow Agent, and;
- n.n.2. the Escrow Material will contain the necessary elements required to regenerate an operational version of the Software, by suitably qualified resources, in the event of the specified release condition/s.

Appendix B: Sample 3 Party Active Escrow Agreement (i.e. between Supplier, Licensed End-User and Escrow Agent) – [source; Escrow Europe]

WHEREAS:

- I **By Licence Agreement**, Supplier has granted to End-User a licence for the use of the **software programme product** ("Product") as set out in **Annexure I**;
- II The **source code** of the Product and all related technical documentation are the property of **Supplier** and are of a confidential nature;
- III The source code of the Product and the technical documentation relating to it are not required for the general use of the Product under the terms of the Licence Agreement, but are required for the proper understanding, maintenance, amendment and any corrections of/to the Product;
- IV Within the scope of their **risk management** and business continuity policy, End-User wishes to ensure that Supplier protects End-User interests and investments in mission critical software through an escrow arrangement, the purpose of which is to establish and maintain **good governance standards**:-
- a. for a configuration benchmark of the Product which can be used for **future support, maintenance** etc. and/or to prove ownership in the case of **copyright** infringement;
 - b. for **independent verification** of the archived configuration;
 - c. to safeguard the long term support and maintenance of the Product should key **development resources no longer be available**;
 - d. as part of the **configuration management** process whereby a complete version of the Product, that has passed all configuration controls, verification, validation and user acceptance testing, should then be lodged as an escrow deposit;
 - e. as part of their disaster recovery and business continuity plans so as to **secure long term investment** in information and communication technology through an independent, offsite escrow deposit of a **complete set of software Product source code and related technical documentation**;
 - f. that, subject to the terms of the escrow arrangement, should the deposit be released, the Product can be **maintained by suitably qualified person/s**.
- V Supplier acknowledges that **End-User**, under certain circumstances and exclusively for **Continuity Purposes**, may require access to the source code of the Product and all related technical documentation;
- VI Supplier, for the benefit of End-User, agrees to deposit the **source code of the Product and related technical documentation** with Escrow Agent, under the terms and conditions as specified herein.

THE PARTIES HEREBY AGREE:

B1. Definitions and Interpretation

The following expressions used in this active escrow agreement, and in the **Annexure/s** hereto, shall have the following meaning:

- 1.1. **Agreement**: this Agreement between Supplier, End-User and Escrow Agent;
- 1.2. **Business Day**: a day which is not a Saturday, Sunday, or officially recognised public holiday;
- 1.3. **Commencement Date**: the date, as set out on the face of the Agreement which, regardless of any signature date, is the date on which the Agreement commences;
- 1.4. **Continuity Purposes**: the use of the Material, subsequent to a release condition as specified herein, strictly and solely for the purpose of maintenance, correction, modification and/or extension of the Product with due observation of the copyright and confidentiality clauses within the Licence Agreement;
- 1.5. **Domicilium**: the respective *domicilium citandi et executandi* as chosen by the Parties, as set out on Page 3 of the Agreement as their place of business address, for all purposes concerning the Agreement;
- 1.6. **Licence Agreement**: the licence agreement between Supplier and End-User concerning the Product;
- 1.7. **Maintenance Obligations**: the conditions set out in the Licence and/or Maintenance Agreement under which Supplier has agreed to support and maintain the Product;
- 1.8. **Material**:
 - 1.8.1. the **source code** of the Product ie the original code, as written by a computer programmer, using a computer programming language (or a tool which generates the code) and which constitutes the sequence of instructions, written in a programming language, which must first be compiled into object code and/or bytecode before a computer processing platform is capable of executing such instructions;
 - 1.8.2. all **alterations, updates and/or corrections** to the Product, that are made available by Supplier to End-User, subject to the Supplier's official release policy;

- 1.8.3. all **Technical Documentation** relevant and necessary for the maintenance of the Product.
- 1.9. **Medium:** the data carrier(s) containing the Material;
- 1.10. **Product:** the programme product, as detailed in **Annexure I**, licensed to End-User under the Licence Agreement that, as such, is the subject of the escrow arrangement;
- 1.11. **Technical Documentation:** the technical documentation required in order for End-User to maintain, amend, correct and/or modify the source code of the Product;
- 1.12. If any period is referred to in this agreement by way of reference to a number of days, the days shall be reckoned exclusively of the first and inclusively of the last day unless the last day falls on a day which is not a Business Day, in which case the day shall be the next succeeding Business Day;
- 1.13. Words imputing the singular shall include the plural and vice versa, words imputing one gender shall include the other gender/s and words imputing persons shall include partnerships and bodies corporate;
- 1.14. The clause headings to the paragraphs to this agreement are inserted for reference purposes only and shall not affect the interpretation of any of the provisions to which they relate.

B2. Deposit of Material

- 2.1. Supplier shall configure and then deposit the Material with Escrow Agent, for the benefit of the End-User, within thirty (30) days of Agreement Commencement Date and in accordance with the escrow deposit specification form (“**DSF**”) provided by Escrow Agent to Supplier for this purpose. Supplier warrants that the Material so deposited will:-
 - 2.1.1. contain an accurate and complete version of the Product, as licensed for use by End-User, as at the time of making such deposit;
 - 2.1.2. be accessible, readable and useable in its deposited form and/or, if the Material is encrypted, all decryption tools and decryption keys and/or passwords necessary to render the same accessible, readable and useable, will be deposited with Escrow Agent as a specified component of the Material.
- 2.2. Subject to the version control and version release policy as agreed to between Supplier and End-User from time to time, Supplier will deposit alterations to the Product within thirty (30) days of having made such alterations available to End-User. End-User warrants that the Material so deposited will:-
 - 2.2.1. contain an accurate and complete version of the alteration, as licensed for use by End-User, as at the time of making any such deposit;
 - 2.2.2. be accessible, readable and useable in its deposited form and/or, if the Material is encrypted, all decryption tools and decryption keys and/or passwords necessary to render the same accessible, readable and useable, will be deposited with Escrow Agent as a specified component of the Material.
- 2.3. For both the initial and subsequent deposits of the Material, Escrow Agent shall confirm receipt of such Material to End-User:
 - 2.3.1. for the initial Material deposit, if End-User does not receive confirmation of receipt of deposit from Escrow Agent within thirty (30) days from the Commencement Date, End-User shall immediately notify Escrow Agent and Supplier accordingly;
 - 2.3.2. for alterations to the Product, if End-User does not receive confirmation of deposit of such alteration from Escrow Agent, within thirty (30) days from having made such alterations available to End-User, End-User shall immediately notify Escrow Agent and Supplier accordingly.
- 2.4. In depositing the Material with Escrow Agent as per 2.1 and 2.2 above, Supplier shall transfer ownership of the Medium containing the Material to Escrow Agent. The transfer of ownership of the Medium shall not include a transfer to Escrow Agent of any intellectual property right in the Material. The intellectual property rights in the Material shall at all times remain vested in Supplier, or such other third party as may be determined from time-to-time.
- 2.5. Escrow Agent shall hold the two most recent deposits of the Material for the term of the Agreement. Unless agreed to otherwise, older Material (i.e. those prior to the two most recent deposits) shall be destroyed by Escrow Agent.
- 2.6. Escrow Agent shall make no use of the Material other than for which it is entitled, pursuant to the Agreement.
- 2.7. Supplier hereby grants Escrow Agent the rights to:
 - 2.7.1. make a back-up copy of the Material when necessary;
 - 2.7.2. load the Material on a computer system in order to verify the Material;
 - 2.7.3. release the Material to End-User in accordance with clause 5.

B3. Back-up of Material

- 3.1. Supplier shall ensure that it keeps a backup copy of the Material available for the duration/term of the Agreement.

B4. Verification of Material

- 4.1. Together with each deposit, Supplier shall complete and provide the appropriate escrow deposit specification form ("DSF") to Escrow Agent setting out the details of the Material that is deposited for the benefit of End-User.
- 4.2. Escrow Agent shall execute a level I verification (refer to guidelines in **Annexure III**) of the Material in order to establish presence and readability of the components as detailed on the DSF. Escrow Agent shall inform Supplier and End-User of its findings.
- 4.3. End-User shall at any time be entitled to request of Escrow Agent and Supplier that an extended verification (Level II-III; refer guidelines in Annexure III) be performed. If such an extended verification is requested, Supplier is obliged to cooperate with Escrow Agent in the execution of the verification to the extent as is reasonably necessary.
- 4.4. The costs of Escrow Agent, Supplier and End-User, borne by the additional verification set out under Clause 4.3 above, shall be for the account of End-User, unless the verification shows that Supplier materially has not met its obligations hereunder and has failed to remedy same within 30 days as per 4.5 below; in which case Supplier shall bear the costs.
- 4.5. Should a verification show that the Material as deposited with Escrow Agent does not contain an accurate and complete reflection of the Product licensed by End-User, Supplier shall remedy the discrepancy within thirty (30) days of the verification.

B5. Release of Material

- 5.1. Provided End-User has a valid License Agreement, Escrow Agent shall be obliged to release the Material to End-User if Supplier:
 - 5.1.1. ceases its business undertaking without validly assigning its Maintenance Obligations and its obligations under the Agreement to a competent third party;
 - 5.1.2. enters into any composition or arrangement with its creditors, or should be wound up, whether compulsory or voluntarily (other than for the purposes of solvent reconstruction or amalgamation) or has a judicial manager validly appointed over all or any part of its assets or its undertaking, or is the subject of an administration order and such action results in the Supplier being unable to fulfil its Maintenance Obligations, obligations under the License Agreement, the Agreement and/or for maintenance of the Product under any maintenance agreement entered into between the Supplier and the End-User;
 - 5.1.3. does not comply with the Maintenance Obligations, obligations under the License Agreement, the Agreement and/or for maintenance of the Product under any maintenance agreement entered into between the Supplier and the End-User to such an extent that its failure to comply endangers the continuity of use of the licensed Product by End-User;
 - 5.1.4. does not comply with Clause 11.1 below or has been subject to a take-over by a third party that does not continue the Maintenance Obligations or offers to accept them only on commercially unreasonable terms.
- 5.2. If, in the opinion of End-User, circumstance/es arise as defined under Clause 5.1, and End-User requires the release of the Material on the basis thereof, then End-User shall provide written notice to this effect to Supplier and Escrow Agent at their Domicilium address. Such notice shall contain any evidence as End-User may reasonably have in its possession to support the opinion.
- 5.3. Upon receipt of such notice as set out under clause 5.2 above, Escrow Agent shall, within five (5) days from date of receipt, provide written notice to Supplier that a request for the release of the Material has been received. The Supplier shall have ten (10) days from the date of receipt of this notice to notify both Escrow Agent and the End-User, by giving written notice to this effect, of any objection they may have to such release. Escrow Agent shall be entitled to release the Material to End-User with immediate effect if Supplier either:-
 - 5.3.1. fails to register an objection, or
 - 5.3.2. fails to register an objection within the stated ten (10) days.
- 5.4. If within the terms set out under Clause 5.3 above, Supplier raises an objection against the release and supports such an objection with reasonable evidence, End-User shall submit the question of End-User's' right to such release to the Arbitration Foundation of Southern Africa ("AFSA") to be resolved in accordance with its rules for expedited arbitration proceedings as stated in its most recent version of the AFSA Expedited Rules of Arbitration. In the event of AFSA not being available, for whatever reason, to accept the submission, the End-User will submit the matter to such other formally recognised arbitration body of similar standing. In any event:
 - 5.4.1. the arbitration shall be held in Cape Town in the English language with a view to the arbitration being completed within twenty-one (21) days after submission by the End-User;
 - 5.4.2. the Parties irrevocably agree that the decision in arbitration proceedings:
 - 5.4.2.1. shall be final and binding upon the Parties and shall not be subject to appeal to a court in legal proceedings;
 - 5.4.2.2. shall be carried into effect;
 - 5.4.2.3. may be made an order of any court of competent jurisdiction.

- 5.5. In the event of any condition as set out in clause 5.1.2. above, Supplier shall have no right of objection under clause 5.3 above.
- 5.6. In the event that Escrow Agent releases the Material to End-User pursuant to the provisions of this clause, Supplier, hereby grants to End-User a non-exclusive right to the use of the Material for Continuity Purposes only.
- 5.7. This clause 5 is severable from the rest of this agreement and shall remain valid and binding on the Parties notwithstanding any termination of this Agreement.

B6. Warranties and Undertakings

- 6.1. The Supplier warrants to and in favour of Escrow Agent and End-User that:
 - 6.1.1. possession of the Material by Escrow Agent shall not constitute an infringement of any intellectual property rights of the Supplier or any third party;
 - 6.1.2. it is entitled to lodge the Material with Escrow Agent pursuant to the provisions of the Agreement and agrees to indemnify and hold both Escrow Agent and End-User harmless from and against any claim against them for infringement or alleged infringement of any intellectual property right of any third party arising out of the possession of the Material including release of the Material as per clause 5 above;
- 6.2. Supplier warrants to and in favour of the End-User that the Material as deposited with Escrow Agent under this Agreement is sufficient to enable a suitably qualified person/persons to continue the maintenance of the Product.
- 6.3. In the event that Escrow Agent releases the Material to End-User, End-User warrants and undertakes that it shall exclusively use the Material that is made available under this Agreement for Continuity Purposes only and for the use thereof solely in connection with the business of End-User. End-User hereby acknowledges that certain conditions of the License Agreement shall continue to apply to the use of the Material including, but not limited to, payment of license fees, conditions of confidentiality, limited right to copy, limited right to use and Supplier's intellectual property rights.
- 6.4. Should End-User enter into an agreement with a third party for the maintenance, correction and/or modification of the Product/s, End-User warrants and undertakes that it shall impose upon such third party the obligations as set out in this clause 6.

B7. Escrow Agent Obligations

- 7.1. Escrow Agent shall safely store and keep the two most recent deposits of the Material in its vaults and shall use its best endeavours to prevent unauthorised third party access to the Material.
- 7.2. If, and as far as, any confidential information comes to the attention of Escrow Agent, it shall not divulge same to any third party. This obligation of confidentiality shall also apply to its employees, agents and/or authorised third parties. Confidential information as per this clause is understood to include:
 - 7.2.1. the Material on deposit;
 - 7.2.2. information as disclosed to Escrow Agent under notification of confidentiality.
- 7.3. Escrow Agent shall not disclose or divulge the Material to any third person apart from those of its employees who need the Material for verification purposes. Escrow Agent will see to it that, immediately after a verification procedure, the Material and any copy made will be deleted from the computer system used for the verification.
- 7.4. If, despite the security measures and other precautions taken by Escrow Agent, damage is done to the Material, or there is loss of the Material, Escrow Agent shall be obliged to promptly notify Supplier and Supplier shall be obliged to promptly provide a new copy of the relevant Material to Escrow Agent. The costs of providing a new copy shall be for the account of Escrow Agent unless, and to the extent that, Supplier has not complied with its obligation to keep back-up copies as set out under clause 3 above.
- 7.5. If the Agreement is terminated, Escrow Agent shall destroy the Material or, in the event of a request thereto, return the Material to Supplier, in as far as it has not released the Material to End-User, pursuant to clause 5 herein.

B8. Liability

- 8.1. Escrow Agent shall be liable to Supplier and/or End-User for direct damage to the Material or any other direct damage arising out of, or in connection with, the performance of the Agreement, provided such damage is the result of gross negligence or wilful misconduct on the part of Escrow Agent itself, in which case its obligation to pay damages shall not exceed the total amount of fees paid by End-User to Escrow Agent in respect of the Agreement.
- 8.2. Escrow Agent shall not be liable for any indirect damage including, but not limited to, industrial damage, loss of profits and/or other consequential damages.
- 8.3. Escrow Agent shall be responsible for the diligent execution of Escrow Agent technical verification processes and procedures. Escrow Agent shall not be responsible for the completeness, accuracy or correctness of the Material.

- 8.4. Supplier (or, in the event that Escrow Agent has released the Material to End-User, End-User) hereby indemnifies Escrow Agent from and against all claims by third parties which arise out of, or are otherwise connected with, the release of the Material under the terms of the Agreement.

B9. Agreement Term and Termination

- 9.1. Notwithstanding the dates on which the parties have signed the Agreement, the Agreement shall commence on the Commencement Date, shall be entered into for a minimum period of three years and, unless terminated as set out herein, will renew automatically for each year thereafter on the anniversary of the Commencement Date.
- 9.2. Subsequent to the initial three year period, End-User may, upon three (3) months written notice, terminate the Agreement by recorded delivery of such notice to Supplier and Escrow Agent.
- 9.3. Supplier, having deposited the Material with Escrow Agent on behalf of End-User, has no right to unilaterally terminate the Agreement without the prior written consent of End-User having been provided to Escrow Agent, other than in the specific circumstances defined under clause 9.4 below.
- 9.4. Supplier shall be entitled to terminate the Agreement, unconditionally, if Escrow Agent suffers bankruptcy, or, if Escrow Agent fails to perform its obligations under the Agreement and fails to remedy the defaulting condition/s within thirty (30) days of having been notified by Supplier of such default. In such circumstance, and at the request of End-User, Supplier is obliged to deposit the Material with another Escrow Agent mutually agreed to between End-User and Supplier. Escrow Agent is thereupon obliged to transfer the Material to either the Escrow Agent so designated by or, in the event that End-User decides not to continue the escrow, to Supplier itself.
- 9.5. Upon termination of the Agreement, Escrow Agent shall destroy the Material or, in the case of a request thereto, return the Material to Supplier. Escrow Agent shall have no obligation to destroy or return the Material if the Material is subject to another escrow agreement with Escrow Agent.

B10. Payment of Fees

- 10.1. End-User is liable for the payment of the fees as specified in **Annexure II** for the services to be rendered by Escrow Agent under the terms of the Agreement.
- 10.2. Escrow Agent shall invoice the initial fee upon being requested by End-User to proceed with the active escrow arrangement.
- 10.3. Escrow Agent shall invoice the annual fee once all the parties to the Agreement have confirmed their approval of the Agreement. The annual fee will be due each year thereafter on the anniversary of the Commencement Date. Escrow Agent is authorised to readjust the yearly fee in accordance with the South African Consumer Price Index (CPI). Such readjustment will be calculated based on an average for a twelve month period prior to the anniversary of the Commencement Date concerned.
- 10.4. Payment of invoices rendered by Escrow Agent shall be due within fourteen (14) days of the date of invoice. Escrow Agent reserves the right to charge interest at the rate of 2% per month for the period that payment has been delayed.
- 10.5. If End-User has not effected payment of Escrow Agent invoice/s in accordance with such due date, End-User shall not be entitled to invoke the provisions of clause 5 ("Release") herein and Escrow Agent shall have no obligation to release the Material to End-User. In the event of termination of the Agreement, premature or otherwise, Escrow Agent shall have no obligation to repay all or part of any fees paid pursuant to the Agreement.

B11. Assignment

- 11.1. Supplier undertakes to make the terms of this Agreement part of any transfer of ownership of the intellectual property rights of the Product to a third party.
- 11.2. In the event of such transfer, Supplier shall provide written notification to this effect to both End-User and Escrow Agent.

B12. Miscellaneous

- 12.1. The Agreement, the execution thereof and all modifications or amendments thereto, shall be governed by the laws of the Republic of South Africa.
- 12.2. The Agreement shall be binding on and enforceable by the estates, heirs, executors, administrators, trustees or permitted assigns of the Parties as fully and effectually as if they had signed this agreement in the first instance and

- reference to any Party shall be deemed to include such Party's estate, heirs, executors, administrators, trustees or permitted assigns, as the case may be.
- 12.3. Except as specifically provided for in Clause 5, the Parties shall submit any dispute which might arise with respect to the performance of the Agreement in the first instance to the respective chief executive officers of End-User, Supplier and/or Escrow Agent who will use their best endeavours to resolve the dispute within fifteen (15) days of such referral. If the dispute is not resolved within the fifteen (15) day period, the dispute shall be submitted to the Arbitration Foundation of Southern Africa ("AFSA") to be resolved in accordance with its rules for expedited arbitration proceedings as stated in its most recent version of the AFSA Expedited Rules of Arbitration. In the event of AFSA not being available, for whatever reason, to accept the submission, the Parties will submit the matter to such other formally recognised arbitration body of similar standing. In any event:
- 12.3.1. the arbitration shall be held in Cape Town in the English language with a view to the arbitration being completed within twenty-one (21) days after submission;
- 12.3.2. the Parties irrevocably agree that the decision in arbitration proceedings:
- 12.3.2.1. shall be final and binding upon the parties and shall not be subject to appeal to a court in legal proceedings;
- 12.3.2.2. shall be carried into effect;
- 12.3.2.3. may be made an order of any court of competent jurisdiction.
- 12.4. All costs, both in and out of court, including those of legal assistance, incurred by one party due to the non-performance of a material condition by the another party to the Agreement, shall be for the account of the party which has failed to perform such condition and shall be claimed on the attorney and client scale.
- 12.5. Any variation to the Agreement, or waiver of any right under the Agreement as signed by the parties, or any addendum hereto as signed by the parties, will only become valid and binding if it is recorded in writing, is signed by the parties and expressly refers to the Agreement.
- 12.6. The provisions of clause 5.4 above shall not preclude Escrow Agent from instituting legal action for the recovery of any amounts owing to it in terms of the Agreement or otherwise in any court having jurisdiction over the person of the defaulting party.
- 12.7. Any party shall be entitled from time to time, by written notice to the other/s, to vary its Domicilium address to any other address which is not a post office box or poste restante.
- 12.8. All notices given in terms of this Agreement shall be in writing and any notice given by any party to another ("the addressee") which;
- 12.8.1. is delivered by hand or transmitted by telefacsimile, shall be deemed to have been received by the addressee on the first Business Day after the date of delivery or transmission, as the case may be;
- 12.8.2. is posted by pre-paid registered post to the addressee at its Domicilium shall be deemed to have been received by the addressee on the fourteenth (14) day after the date of such posting.
- 12.9. Notwithstanding anything to the contrary of that as stated above, if a notice or communication is actually received by a party, adequate notice or communication shall have been given, even though it was not delivered in a manner described above.

B13. Signatures

- 13.1. **Signed for and on behalf of End-User**
- 13.2. **Signed for and on behalf of Supplier**
- 13.3. **Signed for and on behalf of Escrow Agent**

Appendix C: Sample Escrow Deposit Specification Form (DSF)

1. Introduction

The fundamental requirement for an escrow deposit is that a suitably qualified resource should be able to continue maintenance of the software for continuity purposes. This implies that an escrow deposit should contain:

- a complete software environment, **not only source code** (i.e. databases, resource files, project/make files, etc.)
- background information on the environment – the escrow Deposit Specification Form (DSF).

As the DSF must be included with each escrow deposit.

2. General Information

Supported media

Supported media are: CDROM, DVD, DLT-IV, 4MM-DDS4, 1/4" - 30GB (SLR60) and LTO-3.

Internet deposit (HTTPS/SFTP)

Please visit the Escrow Agent website for detailed information.

Supported backup/compression programs

Operating System	Backup	Compression
Windows	NtBackup/Veritas(9)	ZIP/ARJ/RAR
UNIX	Tar/Cpio	Gzip/Compress
AS/400	Savlib	None

Encryption

Use of encryption is possible. Please contact us for detailed information.

Shipment

Please ship the material to:

Escrow Agent Physical Address

Development environment

Considering that sometimes it will no longer be possible to obtain software used during product development, Escrow Agent advises Depositor to deposit its development environment (Compilers and Third Party Software). This is done to ensure that beneficiary can continue to modify/maintain software upon release. As deposit of third party software can be seen as a "backup" copy of the software, making a deposit of this software should generally be allowed under the terms of most license-agreements.

Please Note

1. Adhere to supported media, backup/compression programs. Escrow Agent will return any media which are not supported or which contain data archived by unsupported backup/compression or encryption programs.
2. Source code of utilities, libraries, self-developed components, license key software, etc. developed "in-house" should be part of the escrow deposit.
3. Please feel free to refer to in-house created documents when answering questions asked in this document.
4. All material including documentation should be provided on machine readable media: either disc or tape (not paper).

1. Supplier Information

Company Name: Software Unlimited Ltd.

Technical Contact: John Doe

Email: John.Doe@su.com

Telephone: +44 1 555 890 165

2. Product Information

Product Name & Version: SU Sales Office (SO) 1.51

Escrow Beneficiaries: Metal & Bolts Ltd.

3. Media Information

If material was provided by upload (SFTP/HTTPS) – please ignore this chapter.

Medium	Quantity	Label
<u>CDROM</u>	<u>1</u>	<u>SU Sales Office Source (CD 1/2)</u>
<u>CDROM</u>	<u>1</u>	<u>SU Sales Office technical and user documentation (CD 2/2)</u>
<u>CDROM</u>	<u>1</u>	<u>Backup copy third party software</u>

4. Compression/Encryption

If you password protected your compressed/encrypted archive please sent an email with the password to technical@escrowagent.com.

Compression used: Yes

Compression tool used: Zip

Encryption used: Yes

Encryption tool used: PGP

5. Remarks

Please include any other information below; for example if any special procedures are required to access your source code.

- Material is encrypted with PGP key provided by Escrow Agent (Escrow Agent Technical Department technical@escrowagent.com, fingerprint 01AA 6A76 2007 6747 D806 6DF8 43F3 3FAC 7513 9943).
- Self developed components are included on CD1\Components

6. Escrow Deposit Enquiry

- 6.1. Please list hardware/operating system/development environment (compilers)/third party software required to **compile** the software (or refer to a document which lists this information).

Item	Manufacturer
P500+, 256MB, 2 GB free HDD Space	-
Windows2000 Professional SP1	www.microsoft.com
Visual Studio 6 SP5	www.microsoft.com
Visual Studio.Net	www.microsoft.com
Powerbuilder 8.0	www.sybase.com
InfoPower 4.0B	Woll2Woll software
RoboHelp 7.0	www.helpware.net
Installshield 6.22	www.installshield.com

- 6.2. Please list location of technical documentation (or if none available – none).

CD2\Doc\Tech

- 6.3. Please list location of user documentation (or if none available – none).

CD1\So\Robo\ (Help File Source)

- 6.4. Please list location of compilation/build instructions (or if none available – none).

CD2\Doc\SU Sales Office Compilation.doc

Appendix D: Technical Verification Guidelines

For an escrow arrangement to be of any value, ALL three of the following conditions should be met:-

1. The arrangement should be **legally sound**
2. All source code and relevant material should have been provided and subjected to **technical verification**
3. Source code and relevant material should be frequently updated as part of a **robust and consistent administrative process**.

The objective of the verification services is to ensure to the highest degree possible that the second condition is met, thus ensuring that the escrow material will be useful in the event of a release.

We advise parties to execute a risk analysis and then choose from one the following verification levels:

- Level I - basic verification
- Level II - advanced verification
- Level III - full verification.

Currently, the scope of work performed at the various levels of Technical Verification by Escrow Agent may be summarised as follows:-

1. Verification Level I

1.1. Objective

To establish presence and readability of material as detailed on the Escrow Deposit Specification Form/escrow contract.

1.2. Features

- Readability check (media read check, virus check etc.).
- Check for the presence of source code (aim is to establish whether source code of the products/modules as described in the escrow contract/Escrow Deposit Specification Form is present).
- Check for the presence of user and technical documentation.
- Check for the presence of development environment/third party software or description thereof.
- Reporting.

1.3. Facts

- A level I verification is the minimum quality level for an escrow deposit: Verification Level I is executed for *each and every* deposit lodged with Escrow Agent.
- The technical staff of Escrow Agent generally performs this verification in-house. *Cost for this level of verification is included in the yearly fee.*
- The number of hours allocated to this verification is 4.
- For detailed information on this level of verification please refer to the document Verification Procedure Level I

1.4. Conclusion

Our verification level I service is a low cost means of establishing that the materials as agreed upon between parties are present and in a readable form. This verification, however, does not guarantee that the material on deposit represents an accurate and complete reflection of the software currently operational at clients' site. Extended verification is required for a high(er) level of security.

2. Verification Level II

2.1. Objective

To examine to fullest extent possible that source code for each supplier specific component is present in the deposit.

2.2. Features

- Analysis of software (compiled/object code) as was provided by software supplier to its clients. End result of this analysis is a detailed overview of files for which source code should have been provided.
- For each file found on the detailed overview Escrow Agent aims to ascertain that source code was provided.
- Reporting.

2.3. Facts

- Most software programmes consist of many hundreds of components. Practice has shown that providing source code for each and every component is a very complicated issue. This level of verification was developed to deal with this problem.
- The technical staff of Escrow Agent generally perform this verification in-house. *Cost for this level of verification is time/material based and additional to the yearly fee.*

- Number of hours required for this verification is at least 12.
- For detailed information on this level of verification please refer to the document Verification Procedure Level II.

2.4. Conclusion

Implementation of our verification service level II significantly improves the certainty that the escrow material is complete at limited additional costs to the parties involved. This verification, however, does not fully guarantee that the material on deposit is complete. Extended verification is required for a high(er) level of security.

3. Verification Level III

3.1. Objective

To examine to fullest extent possible that an escrow beneficiary can continue maintenance, correction, modification and/or extension of software should software supplier no longer be in a position to provide these services.

3.2. Features

- Consultation with escrow parties to establish scope of the level III verification.
- Compilation of escrow material.
- Test of compilation results by:
 - escrow beneficiary or
 - Escrow Agent.
- Dialogue between supplier and Escrow Agent to discuss miscellaneous escrow issues.
- Reporting.

3.3 Facts

- A level III verification is always customized. Escrow Agent provides a basic framework that a level III verification should adhere to and parties concerned decide among them what the final result will be.
- The major part of this verification is generally executed at depositors' site by the technical staff of depositor and Escrow Agent. *Cost for this level of verification is time/material based and additional to the yearly fee.*
- Number of hours required for this verification is at least 24.
- For detailed information on this level of verification please refer to the document Verification Procedure Level III.

3.4. Conclusions

A verification level III offers the highest level of security that deposited material can be used to maintain the software should software supplier no longer be in a position to offer this service.

Please note:-

When performing our initial verification (Level I), we typically find that there is a failure rate of around 10% for new escrow deposits. This figure rises exponentially for deposits verified at a higher level: For instance, we have found that some 70% of deposits fail to meet the Verification Level III quality requirements. This may impede the use of the deposit on release and/or even result in a deposit being of no value. Ideally, Escrow Agent advises beneficiaries to have a Level III verification performed for the initial deposit; thereafter Level I or Level II verification for updates depending on the complexity of the software application suite.

Escrow Agent reserves the right to improve, modify and/or amend the scope of work performed, at the various levels of Technical Verification, from time to time.

Appendix E: Source Code Escrow Agreements, Auditors Checklist – [source: CEN CWA 13620 (ref ISO9001)]

A Guide To Using Source Code Escrow To Protect Procurement of Software Products

Introduction

Source code escrow is a process whereby access to maintainable information systems by the End-User can be guaranteed:

- Irrespective of the stability of the commercial status of the software supplier
- If certain predefined commitments such as warranty, support and maintenance are not honoured

The process requires specific actions from organizations procuring Information and Communications Technologies (ICT) systems, supplying the software for the ICT systems, and independent brokers — escrow agents — for holding the ICT source code, and quality assessors who are auditing any part of this process.

These guidelines:

- Promote the use of escrow to purchasers so that the need for escrow may be identified and, hence, agreements can be set up at the proper time, reducing risk in ICT procurement.
- Instruct suppliers as to what and when they need to deposit into escrow and how source code escrow can be used as a marketing tool for their software
- Direct escrow agents as to what facilities an escrow agent must offer to safeguard the interests of both software purchasers and suppliers
- Set out a legal framework for the implementation and application of source code escrow, showing how in complex situations (such as those involving software development contracts), expensive and lengthy litigation can be avoided

Source code escrow is a disaster recovery and business continuity method that supports the procurement process and secures long term investment in information and communication technology. It adds value to the infrastructure of trade by providing benchmark evidence for legal practitioners. Standardization shall be realised through the distillation of best practice in the field of source code escrow. This shall complement other standardization work in ICT and related fields.

It is only on this basis that the End-User can properly secure their interests and investments (direct and indirect) in mission critical Software and, as part of their Operational Risk Management policy, establish and maintain **good governance standards**:-

- a. for a configuration benchmark of the Software which can be used for **future support, maintenance** etc.
- b. for **independent verification** of the archived configuration;
- c. to safeguard the long term support and maintenance of the Software should key **development resources no longer be available**;
- d. as part of the **configuration management** process whereby a complete version of the Software, that has passed all configuration controls, verification, validation and user acceptance testing, should then be lodged as an escrow deposit;
- e. as part of their **disaster recovery and business continuity plans** so as to secure long term investment in information and communication technology through an independent, offsite escrow deposit of a complete set of Software source code and related technical documentation;
- f. that, subject to the terms of the escrow arrangement, should the deposit be released, the **Software can be maintained** by or on behalf of the End-User by suitably qualified resources in the absence of the original developers.

Source Code Escrow Agreements - Audit Checklist

#	Item	Complete in full or note as not applicable				
1	Beneficiary:					
2	Software Product:					
3	Software Supplier:					
4	Version Number:					
5	Licence(s) Details:	To be completed by Licensed End-User				
6	Date Delivered/Accepted:	To be completed by Licensed End-User				
7	Company Asset Reference:	To be completed by Licensed End-User				
8	Escrow Agent:					
9	BEE certification #:					
10	Active Escrow Agreement?					
11	Agreement Commencement date:					
12	Date of last escrow deposit:					
13	Governed by foreign or RSA Law:					
14	Account Manager:					
#	Checks/Actions (should be "yes")	In place?	Corrective Action ¹⁰	Evidence ¹¹	Documentation Maintained by:	Checked by:
Active Escrow quality checks:-						
1.	Independent and neutral escrow agent ie?					
1.1.	Not software supplier's (or End-User's) bank?					
1.2.	Not software supplier's (or End-User's) lawyers?					
1.3.	Not software supplier's (or End-User's) auditors?					
2.	Has in-house legal expertise?					
3.	Has technical verification laboratory?					
4.	Supplies professional storage vaulting?					
5.	Monitors software updates?					
6.	Maintains a direct relationship with licensee and Licensor?					
7.	Has adequate insurance?					
8.	Has ISO9001:2008 certificated quality system?					
9.	Escrow agreement adequately specifies:					
9.1.	Release events?					
9.2.	Procedures for release?					
9.3.	Dispute management?					
9.4.	Legal compliance?					
9.5.	Effective information procedures?					
9.6.	Effective enforcement procedures?					
10.	Technical Verification Source Code (Level I)					
11.	Technical Verification Source Code vs Object Code (Level II), OR					
12.	Technical Verification Full Compile and Restore (Level III)					
Authorisation						
I have verified that an adequate Escrow Agreement is in place for the Software detailed above.						
Name	To be completed by Licensed End-User Authorised Representative					
Title/Position					
Signature					
Date					
Notes						
10	If necessary: Action . . /Assigned to . . /Completion date					
11	Reference to a clause in a contract or agreement documentation etc. that was checked (or that will be required if Corrective action is needed)					
Please return this completed form to the Head of the Audit Committee, Chief Risk Officer (CRO), Chief Operating Officer (COO), and/or other accountable party, as the case may be.						

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