

SECURING BUSINESS-CRITICAL SOFTWARE



If you have commissioned a bespoke piece of software which is central to your business, what would happen if the company supplying and maintaining that software stopped supporting it (perhaps following a change of control) or ceased trading for whatever reason including its insolvency?

Since IT systems now have such a key role in any business the necessity of backing up data is well recognised and should be ingrained into your "IT culture". However in addition to the data, the software itself should also be safeguarded but in the majority of cases this is an element which is not so well recognised. If something were to happen to the software developer there are three main options, you either:

- maintain the software yourself;
- try to find someone else to do it;
- remove the software and start again.

In the first two of these options you need to have access to the source-code and perhaps other intellectual property rights such as copyright and know-how. The easiest way to plan for this situation is to enter an Escrow arrangement. The customer, the software developer and a third party (an escrow agent) will enter an agreement where the

source-code, manuals and any other necessary information are deposited with the escrow agent who will hold that information until such time as the customer becomes entitled to it - the so-called "trigger-events".

In theory anyone can be an escrow agent so long as they are an independent third party capable of storing the necessary information. In practice however the escrow market, in the UK at least, is dominated by a few large organisations. This means that the customer and the software developer have little room for manoeuvre when entering the agreement.

The 'trigger-events' are the most important element of the agreement and this is one area where there can be negotiation. They are a list of the circumstances in which the source code etc will be released to the customer. Some of the most common are where:

- the software developer ceases business (possibly due to insolvency);
- the software developer is taken over and no longer agrees to support the software;
- the software developer fails to meet its maintenance and support obligations;
- the software developer simply stops providing support;
- the software is changed significantly and the new version isn't suitable for the customer's needs.

An often overlooked but important feature of any escrow arrangement is to ensure the software developer updates the information held by the escrow agent. If what is held is not what is being used when the software developer goes bankrupt then much of the potential benefit is lost.

For further information on Escrow arrangements or with software procurement generally please contact Lester Cameron (LFCameron@paul-williamsons.co.uk)