

Amsterdam, January 2012

Re: Draft escrow agreement Escrow4all

Dear Sir, / Madam,

Thank you for your interest in Escrow4all's solutions.

As knowledge leader in the escrow sector, we are very keen assist you to select or craft an escrow solution that adequately fits your requirements. For example:

- the right focus: software / source code escrow, SaaS escrow (including data and hosting)
- the right format: one-to-one agreement or a scalable frame agreement
- the right protection: the most appropriate verification level and deposit frequency

Should you have any queries or if you wish to receive a proposal or set up a meeting, please do not hesitate to contact us. We would be pleased to help you.

Best Regards,



Herman Kui  
*Commercial Director*



DRAFT

Software Escrow  
Frame Agreement

Dated: \_\_\_\_\_ 2012

*between*

Software Company  
as Licensor

*and*

ESCROW4ALL B.V.  
as Escrow Agent



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## General

*The undersigned parties:*

- (1) [Software Company], with registered office at [Address], [City] ([Postal Code]), [Country] hereby legally represented by [Initials + Name], (hereinafter referred to as “Licensor”);
- (2) ESCROW4ALL B.V., with registered office at MediArena 7, Amsterdam (1099 CZ), the Netherlands, hereby legally represented by [Initials + Name], (hereinafter referred to as “Escrow4all”);

*Whereas:*

- (a) Licensor has granted licensee(s) a license to utilize the software program(s) (“the Product”) as is further detailed in Annex 1 hereto;
- (b) Licensor has undertaken to provide maintenance and support in respect of the Product;
- (c) Licensee, in certain circumstances where Licensor is unable or fails to provide such maintenance and support as further detailed in Clause 6, may require access to the source code and technical documentation of the Product, to enable it to effect such maintenance and support;
- (d) Licensor has agreed to deposit with Escrow4all the source code and technical documentation of the Product.

*It is agreed as follows:*

## Clause 1 – Definitions

For the purpose of this Agreement, the terms in this Agreement shall have the following meaning:

Agreement: this escrow agreement, including the annexes hereto;

Beneficiary: any person, firm, company or other entity:

- to whom a license to use the Product has been granted (Licensee); and
- who has been issued with an Escrow Certificate by Escrow4all;

Beneficiary Declaration: a written confirmation through which Licensor declares to subscribe Licensee to the escrow arrangement;

Escrow Certificate: the certificate issued by Escrow4all, within five (5) working days after the reception of a Beneficiary Declaration, to the Licensee confirming escrow cover pursuant to the terms and conditions of the General Terms Escrow Arrangement;

General Terms Escrow Arrangement: the terms of the Agreement, these will be applicable to and be part of the escrow arrangement between Licensor, Beneficiary and Escrow4all;

Data Carrier: the medium or media containing the Material;

Deposit Form: the form setting out the details of the Material provided;

License Agreement: the license agreement between Licensor and Licensee with regard to the Product;

Material: the Source Code, Technical Documentation and Updates of the Product;

Product: all licensed computer software program(s) as defined in the License Agreement and as further specified in **Annex 1 'Escrow Material Overview'**;

Source Code: the computer programming code of the Product in human readable format, including all documentation and instructions necessary to maintain, interpret, compile and install;

Technical Documentation: the technical documentation required to enable Beneficiary to maintain, modify, and/or correct the Source Code of the Product;

Update: any modification, update or revision of the Product, made available by Licensor to Beneficiary, irrespective of the (commercial) name of such Update;

Continuity Purposes: use of the Material strictly and solely for maintenance, correction, modification or extension of the Product with due observation by Beneficiary of the restrictions in the License Agreement concerning among others intellectual property rights, use, confidentiality, reproduction and distribution;



Escrow Portal: a secured website, only accessible with a personal username/password, provided and maintained by Escrow4all as part of its services and standard procedures whereby parties (Licensor and Beneficiary) can obtain specific information on the Agreement such as Material on deposit and copies of verification reports;

VerifOne: the tests and processes forming Escrow4all's VerifOne testing service, in so far as they can be applied to the Material;

VerifTwo: the tests and processes forming Escrow4all's VerifTwo testing service, in so far as they can be applied to the Material;

VerifThree: the tests and processes forming Escrow4all's VerifThree testing service, in so far as they can be applied to the Material.

## Clause 2 – Deposit of Material

- 2.1 No later than 20 business days after the Agreement date, Licensor will have deposited a copy of the Material with Escrow4all. The deposit by Licensor as referred in this Clause 2.1 and Clause 2.2 includes the transfer of the ownership to Escrow4all of the Data Carrier on which the Material is stored.
- 2.2 In addition to the deposit mentioned in Clause 2.1 above, Licensor shall, from time to time, but no later than 20 business days after the release thereof, deposit with Escrow4all any future Update.
- 2.3 The transfer of ownership of the Data Carrier referred to under Clause 2.1 and 2.2 shall not include a transfer to Escrow4all of any intellectual property rights in the Material. These remain at all times vested with Licensor or its successor-in-title from time to time.
- 2.4 Escrow4all shall within 5 business days after receipt of the deposit notify Licensor and Beneficiary via the Escrow Portal thereof.
- 2.5 In the event that Beneficiary does not receive confirmation of the deposit of the Material within 25 business days after operational implementation of any Update, Beneficiary shall notify Escrow4all thereof in writing.
- 2.6 Escrow4all shall hold the three latest deposits of the Material for the term of the Agreement. Older Material shall be destroyed by Escrow4all without requiring prior approval from Licensor and/or Beneficiary.

- 2.7 Licensor grants Escrow4all the rights to:
- make a back-up copy of the Material, if and when necessary;
  - load the Material on a computer system to perform verification of the Material in accordance with Clause 5;
  - release the Material to Beneficiary in accordance with Clause 6.

### Clause 3 – Obligations of Escrow4all

- 3.1 Escrow4all shall hold the Material on deposit in a safe and secure environment and shall use all reasonable endeavours to prevent unauthorised parties from having access to such environment.
- 3.2 Escrow4all shall keep records of its activities undertaken pursuant to this Agreement and provide these to Licensor and/or Beneficiary via the Escrow Portal or in written format where necessary.
- 3.3 Escrow4all shall make no use of the Material other than it is entitled to pursuant to the Agreement.
- 3.4 Escrow4all shall not disclose or divulge the Material to any third person save such of its employees who need the Material for verification purposes. Escrow4all will see to it that immediately after a verification procedure the Material and any copy made will be removed from the computer system(s) used for the verification.
- 3.5 Escrow4all shall release the Material only in accordance with the provisions of the Agreement.
- 3.6 If despite the security measures and other precautions taken by Escrow4all damage is done to, or loss takes place of, the Material, Escrow4all shall be obliged to promptly notify Licensor of this fact and Licensor shall be obliged to promptly provide a new copy of the Material to Escrow4all. The costs of providing a new copy shall be to the account of Escrow4all unless and to the extent that Licensor has not complied with its obligations to keep back-up copies as set out under Clause 4.1 below.

### Clause 4 – Obligations of Licensor and Beneficiary

- 4.1 Licensor warrants and represents that:
- 4.1.1 it is entitled to transfer the Material to Escrow4all pursuant to the provisions of the Agreement and agrees to indemnify and hold harmless Escrow4all from and against any claim by a third party in relation to the verification and/or the release of the Material in accordance with this Agreement;



- 4.1.2 the Material deposited with Escrow4all contains an accurate and complete version of the Product licensed to Beneficiary at the time of deposit;
  - 4.1.3 the Material deposited with Escrow4all is sufficient to enable a suitably qualified person to carry out maintenance, correction, modification and compilation of the Product;
  - 4.1.4 it shall hold available or procure the availability of copies of the latest versions of the Material as back-up.
- 4.2 Beneficiary warrants and represents that:
- 4.2.1 in case of release of the Material to Beneficiary under the Agreement, it will be used solely for Continuity Purposes and for the use thereof solely in connection with the business of Beneficiary;
  - 4.2.2 in case of release of the Material to Beneficiary, the use of the Material as well as the continued use of the Product shall be subject to the terms and conditions of the License Agreement;
  - 4.2.3 in case Beneficiary enters into an agreement with a third party for the provision of maintenance and support of the Product, Beneficiary will ensure that such third party conducts itself in strict compliance with the provisions of Clause 4.2.1 and 4.2.2 above.

## Clause 5 – Verification

- 5.1 With each deposit, Licensor shall provide to Escrow4all a Deposit Form setting out the details of the Material which is deposited for the benefit of Beneficiary.
- 5.2 Forthwith after each deposit, Escrow4all shall execute a VerifOne testing of the Material, in order to establish presence and readability of the components as detailed in the Deposit Form. Escrow4all shall inform Licensor and Beneficiary via the Escrow Portal of its findings within five business days after the verification.
- 5.3 Beneficiary shall at any time be entitled to request Escrow4all for extended verification (VerifTwo or VerifThree) in accordance with a plan to be agreed upon with Licensor, Beneficiary and Escrow4all. Licensor is obliged to cooperate with Escrow4all in the execution of extended verification(s).
- 5.4 The costs of Escrow4all, Licensor and Beneficiary, borne by the additional verification set out under Clause 5.3 above, shall be to the account of Beneficiary, unless the verification shows that Licensor materially has not met its obligations hereunder, in which case Licensor shall bear the relevant costs.

- 5.5 If verification shows that the Material as deposited with Escrow4all does not contain an accurate and complete reflection of the Product, then Licensor shall restore the discrepancy within twenty business days after notification to that by Escrow4all.

## Clause 6 – Release

- 6.1 Subject to the existence of a valid License Agreement at the time of the occurrence, Escrow4all must release the Material to Beneficiary if any of the following events occur:
- (I) Licensor is declared bankrupt, dissolved or liquidated;
  - (II) Licensor ceases to carry on its business;
  - (III) The business of Licensor under the License Agreement is transferred entirely or partly to a third party who is not willing and/or only under unreasonable commercial terms willing to continue to perform maintenance and support with regard to the Product;
  - (IV) Licensor breaches its obligations to provide maintenance and support in such a way that it substantially jeopardizes Beneficiary's ability to continue to use the Product;
  - (V) Licensor fails to perform one or more substantial obligations under the Agreement and remains in breach 20 business days after being notified of the default.
- 6.2 If in the opinion of Beneficiary an event referred to in Clause 6.1 occurs and Beneficiary requires the release of the Material on the basis thereof, Beneficiary shall send a written notice to this effect to Licensor and Escrow4all with reasonable evidence supporting such opinion.
- 6.3 Upon receipt of such notice as set out under Clause 6.2 above Escrow4all shall within five (5) business days notify Licensor in writing that a request for the release of Material has been received.
- 6.4 Licensor shall have ten (10) business days from the date of the notice from Escrow4all to register any objection to such release. If Licensor fails to register an objection within the stated ten (10) business days, Escrow4all shall be entitled to immediately release the Material to Beneficiary. If Licensor is bankrupt, dissolved or liquidated then Licensor shall have no rights of objection under this Clause 6.4.

- 6.5 If Licensor has registered an objection in accordance with Clause 6.4, Escrow4all will suspend the release of the Material. Licensor and Beneficiary shall promptly submit the question of whether the Beneficiary has the right to obtain the Material to the Foundation for the Settlement of Automation Disputes (SGOA, *Stichting Geschillenoplossing Organisatie en Automatisering* – [www.sgoa.org](http://www.sgoa.org)) in Haarlem, the Netherlands, to be resolved in accordance with its rules for summary arbitration proceedings as stated in its Rules of Arbitration. The decision of the SGOA shall be final and binding on all parties and shall not be subject to appeal to the courts.
- 6.6 Upon release of the Material under the Agreement, Licensor now for then grants Beneficiary the non-transferable, non-exclusive right to use the Material for Continuity Purposes and for the use thereof solely in connection with the business of Beneficiary.

## Clause 7 – Confidentiality

- 7.1 Each party undertakes to maintain all information and documentation coming into its possession under this Agreement in strict confidence and will not disclose or release such information or documentation other than in accordance with this Agreement.
- 7.2 Termination of this Agreement will not relieve any party or its employees from the obligation of confidentiality contained in this Agreement.

## Clause 8 – Liability

- 8.1 Escrow4all shall be liable to Licensor and/or Beneficiary for direct damage to the Material or any other 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 of Escrow4all, in which case its obligation to pay damages shall not exceed a sum of € 454.000 (four hundred and fifty four thousand euro) in total.
- 8.2 Escrow4all shall not be liable for any indirect damage including, but not limited to, industrial damage, loss of data, loss of profits and/or other consequential damages.
- 8.3 Without prejudice to Escrow4all's obligations and liability to verify the Material in accordance with Clause 5 hereof, Escrow4all shall not be responsible for Licensor's failure, if any, with respect to the completeness, accuracy or correctness of the Material.

## Clause 9 – Fees

- 9.1 For the services to be rendered by Escrow4all under his Agreement, Licensor shall pay the fees as specified in **Annex 2 – 'Fee Schedule'**.



- 9.2 Escrow4all shall:
- invoice the initial fee upon finalization of this Agreement;
  - invoice the (proportional part of the) Annual Escrow Fee upon signing of this Agreement for the then current calendar year;
  - thereafter invoice the Annual Escrow Fee every year in December for the following full calendar year;
  - invoice – if relevant – the Optional Services upon signing of this Agreement.
- 9.3 Escrow4all is entitled to readjust the Annual Escrow Fee in accordance with the (yearly) general price index (*Consumenten Prijs Index – CPI*) as published by the Dutch Central Statistical Office (CBS).
- 9.4 Payment of invoices rendered by Escrow4all shall be due within thirty (30) days of the invoice date. If the invoice is not paid by the due date, Licensor shall be liable for the legal interest for the period that payment has been delayed, unless the invoice has been disputed on reasonable grounds.
- 9.5 Escrow4all shall have no obligation to refund any fees already paid on termination of this Agreement. Licensor shall be obliged to pay any invoices submitted before the date of termination of this Agreement.

## Clause 10 – Terms & Termination

- 10.1 This Agreement shall commence on the date of this Agreement and shall be entered into for indefinite time.
- 10.2 This Agreement may be terminated:
- (a) By Licensor, in the event that Escrow4all:
    - has petitioned for suspension of payment(s) and/or has been declared bankrupt;  
or
    - has been dissolved and liquidated or closes down its businesses; or
    - has committed a material breach of this Agreement, which is not resolved within 20 business days after written notice of default.
  - (b) By Escrow4all, in the event that the fees have not been paid, and Licensor has not paid such fees after receipt of a written notice of default by Escrow4all, pursuant to which a reasonable term for payment is granted.



- 10.3 Beneficiary may terminate this Agreement in respect of itself only on three (3) months written notice by delivering a notice to this effect by recorded delivery to Licensor and Escrow4all.
- 10.4 Licensor, having deposited the Material on behalf of Beneficiary, has no right to unilaterally terminate the Agreement without the prior written consent of Beneficiary being provided to Escrow4all, other than in the specific circumstances as defined under Clause 10.2 sub A.
- 10.5 After termination of this Agreement pursuant to Clause 10.2 above, Escrow4all shall destroy all related Material or, upon written request of Licensor and at Licensor's cost, return the Material to Licensor.
- 10.6 In case this Agreement is terminated in accordance to Clause 10.2 sub A, Licensor is obliged to deposit the Material with another escrow provider on terms and conditions similar to those in this Agreement. Escrow4all thereupon is obliged to transfer the Material, to either the escrow provider or, in case Beneficiary decides not to continue the escrow arrangement, to Licensor itself.
- 10.7 In the event that this Agreement terminates after release of the Material to Beneficiary in conformity with the provisions of this Agreement, the provisions with respect to the obligations of Beneficiary (Clause 4.2) and confidentiality (Clause 7) shall remain applicable.

## Clause 11 – Miscellaneous

- 11.1 In all cases where the Agreement mentions the obligations to give written notice, such notice shall be sent to the following addresses:

*For Licensor:*

[Name Company]

[Name Contact – operational]

[Postal Address]

[Postal Code + City]

[Country]

[Email Address]

[Telephone number]

*For Escrow4all:*

Escrow4all BV

Attn. Customer Services

MediArena 7

1099 CZ Amsterdam

the Netherlands

helpdesk@escrow4all.com

Tel. +31 20 3420 250

- 11.2 This Agreement may be executed in any number of counterparts and by different parties in separate counterparts. Each counterpart when so executed shall be deemed to be an original and all of which together shall constitute one and the same agreement.

## Clause 12 – Assignment

- 12.1 Licensor 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.
- 12.2 In the event of a transfer as described in Clause 12.1, Licensor shall provide written notification to this effect to both Beneficiary and Escrow4all.

## Clause 13 – Applicable Laws & Disputes

- 13.1 This Agreement and all disputes arising from or in relation to this Agreement will be governed by the laws of The Netherlands.
- 13.2 Subject to objection to release of the Material as described in article 6.5 all other disputes arising out of, in relation with or in connection with this Agreement or any agreements resulting from will be brought exclusively before the competent court in Amsterdam.



## Signing

Agreed on \_\_\_\_\_ 2012

and:

(1) Signed for and on behalf of **Licensor**

Name \_\_\_\_\_

\_\_\_\_\_

Position \_\_\_\_\_

*(Authorised Signatory)*

(2) Signed for and on behalf of **ESCROW4ALL B.V.**

Name \_\_\_\_\_

\_\_\_\_\_

Position \_\_\_\_\_

*(Authorised Signatory)*



## Annex 1 – Escrow Material Overview

Licensor declares to deposit with Escrow4all the following Material concerning the Product as specified below, in accordance with the terms and conditions of the Agreement this Annex is part of:

Product

(name as known or \_\_\_\_\_  
licensed to Beneficiary):

Description	Yes	No
Source Code	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Technical Documentation	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Deposit Form	<input checked="" type="checkbox"/>	<input type="checkbox"/>

\_\_\_\_\_  
Licensor