

Commentary on ALOS 05

These comments are intended to facilitate the use of ALOS 05. They explain certain issues associated with the provisions but are not part of the contract itself. In the event of the contract not governing a situation that arises, the rules of the Sale of Goods Act apply.

1. The contract is not intended to be used when the client provides a substantial part of the physical material.

3. 'Three days' advance notice' means three working days.
This Clause does not govern trial runs, which must be agreed separately.

4. Delivery Clauses should be interpreted in accordance with Incoterms 2000 (International Chamber of Commerce Rules on Interpretation of Trade Terms). DDP (delivery duty paid) is an Incoterms' concept and means that the delivery shall, if agreed, be made to the place requested by the Purchaser. The risk in the goods passes when the Seller has supplied the goods to the place specified in the contract. It is appropriate for the Purchaser to ensure that the goods are receipted on, for example, a consignment note.

The term 'free seller's factory' or 'Ex works', means that the risk and the costs for the transport are borne by the Purchaser. The Seller's obligations are limited to making the goods available at his factory or warehouse. Risk passes when the goods have been separated for the Purchaser.

7. Delay in delivery on the part of the Seller exists when the date of delivery does not correspond to the agreed date for delivery.
The term 'in writing' also refers to messages in electronic form.

9. 'Liquidated damages' means damages determined in advance. It is consequently sufficient that the Seller is responsible for the delay for the agreed liquidated damages to be paid. The Purchaser consequently does not need to prove what damage he has actually suffered. Liquidated damages are computed on the price excluding VAT. If the parties *do not* wish liquidated damages for delay to be payable, the contract must be completed with '0%'.

10. In order to assess whether the delay is of fundamental importance for the Purchaser, an individual assessment must be conducted. This review is objective. It means that the Purchaser in the individual case has both a clear and justified interest in revocation. When making this assessment, the kind of purchase (staple goods or special goods), the nature of the goods and the scope of the deviation in relation to a fault-free supply are taken into account, among other things.

The Purchaser is also entitled to revoke the contract when the maximum liquidated damages have been paid. It is not necessary to conduct any assessment of significance. If the goods have not been received by the Purchaser within the agreed time and the maximum liquidated damages have accrued, the Purchaser shall notify the Seller in writing that he intends to revoke the purchase. However, the Purchaser is not entitled to revoke the contract before he has given the Seller written notice of a final time limit, which may not be less than one week. Before the Purchaser notifies the Seller of this, the maximum liquidated damages must have accrued. The reason for this is that the parties should not remain passive in relation to each other. The Seller shall in accordance with Clause 7 notify the Purchaser that he can keep to the agreed delivery time. If the delay in delivery is of fundamental importance for the Purchaser, the Seller shall be informed of this. The contract can then be revoked on this ground, even if the maximum liquidated damages have not accrued.

11. Indirect loss means

1. a loss as a consequence of reduction or loss of production or turnover,
2. other loss as a consequence of it not being possible to use the goods in the intended way,
3. loss of profit as a consequence of a contract with a third party having lapsed or being impossible to perform properly, and
4. other similar loss, provided it was difficult to anticipate.

There is no clear interpretation of the concept 'gross negligence'. According to legal cases, gross negligence is deemed to exist in the case of criminal conduct or when the Seller has a conscious intent regarding a serious risk of damage.

Increased production costs may as a rule be deemed to be a direct loss and consequently form a basis for damages.

It is possible to contract for a greater limit on damages than 20% as referred to in the contract. If, for example, a covering purchase may come into question and such a purchase may be expected to involve greater costs, it may be appropriate to increase the damages limit. If the parties agree that the Seller, in the event of delay in delivery as referred to in Clause 11, may obtain payment of more than 20% of the price as liquidated damages, the limitation of the amount for damages should also be increased.

ALOS 05 has for the normal case set a limit on damages of 20%, as the high exposure to damages generates costs.

16. Invoices may be issued in paper form or in electronic form. The public sector has designated its set of standards for electronic trade (order, invoice, etc., electronic messages) as SFTI (Single Face to Industry).

The Purchaser and Seller can agree on electronic invoicing. No requirements on form are imposed. For very extensive electronic trade it is recommended that an EDI contract is concluded (contract for exchange of electronic messages). There is a Swedish standard contract, AB EDI 2004.

17. The SFTI standard for electronic trade states that the due date is computed on the basis of the date on which the invoice is issued. The date on which an invoice arrives is unknown for the supplier's system; if the due date is based on this date, the Seller's system provides an insecure base for monitoring payments. If for any reason contract conditions that create uncertainty in the system are used, this would prevent efficient automated control, and thereby also limit the rationalisation sought with electronic trade. Bear in mind in this connection that the date of issue and the date of receipt are often the same. 'Self-invoicing' means that the Purchaser creates the invoice instead of the Seller doing so. Self-invoicing is used, if the parties have so agreed, in connection with well-defined products where prices are agreed and up-dated in the Purchaser's system.

18. Charges for reminders may be debited in accordance with the Compensation for Debt Recovery Costs, etc. Act (1981:739) and the Compensation for Debt Recovery Costs, etc. Ordinance (1981:1057).

19. A fault exists when the supply deviates from the agreed specification, namely, the nature, quantity, quality or other properties and packaging should comply with the provisions of the contract.

20 to 22. According to ALOS 05 a presumption applies whereby inadequate compliance with the contract appearing within one year of delivery or rectification of goods is deemed to have existed at the time of delivery. The presumption shall not apply when it is incompatible with the nature of the goods or fault. It should also be possible to overturn the presumption by proving the opposite. Moreover, the right to present a complaint shall expire after two years, unless a longer period for the presentation of complaints or warranty period or similar undertakings have been agreed between the parties. If the parties have agreed on a longer period of presumption/warranty period, it is important that the parties also stipulate an extended time limit for presenting complaints. If this is not the case, the Purchaser's opportunities to utilise the extended production times/warranty periods will lapse.

The parties can consider short complaint and time limits in order to affect the price and other conditions.

The Seller is under an obligation to supply fault-free goods. If a fault is pointed out, the Seller shall expeditiously implement the measure called for by the circumstances. In this case, the stipulation of a time limit is not possible, as the circumstances vary. If it is very important that any faults are rectified immediately, this should be agreed separately.

However, the main rule is that the Seller shall determine how the fault shall be rectified. The Purchaser's right to request redelivery is limited to the situation where the fault is of fundamental importance for the Purchaser and the Seller realised or ought to have realised this and a redelivery can be made without inconvenience to the Seller. In the case of purchase of specially manufactured goods, the appropriate measure will be the repair or exchange of parts.

24. In those cases where the goods do not amount to the agreed quantity but, according to what the Purchaser must assume, the Seller is in good faith, that is to say that the Seller believed that the goods were delivered in full, this shall be assessed as a fault in the goods and not as a delay in delivery.

25. Examples for grounds of release are labour market conflicts and every other *circumstance that a party cannot control*, such as fire, war, mobilisation and unforeseen military call-up of corresponding extent, requisition, seizure, currency and trade restrictions, civil commotion or riot, energy crisis and natural disasters.