

Clause 11.4

The same obligation, drafted three times. Each version moves money, and only one of them reads as though anything has changed.

8 min read

Before you read

- **indemnify** — to agree to compensate another party for a specified loss
- **liability** — legal responsibility for loss or damage
- **material** — significant enough to affect a decision or an outcome
- **qualifier** — a word or phrase that narrows the scope of an obligation
- **ambiguity** — capacity to be read in more than one way
- **foreseeable** — of a kind that a reasonable party could have anticipated
- **recourse** — the remedy available to a party when an obligation is breached
- **boilerplate** — standard wording reused across contracts with little scrutiny



Marked-up contract pages on a site office desk, Nairobi

¹ A drainage contractor in Nairobi is negotiating a subcontract with the main contractor on a road project. One clause is redrafted three times over four days. The substance under discussion never changes: who pays when the drainage fails. What changes is where the sentence puts its qualifiers.

Version 1 — as issued

11.4 The Subcontractor shall indemnify the Contractor against all loss, damage and expense arising from the Subcontract Works.

² This is boilerplate, and it is unbounded. Three absences do the damage. There is no cap, so the exposure is unlimited and may exceed the value of the subcontract many times over. There is no causation test — "arising from" is the loosest connector available in English drafting, and will capture loss to which the subcontractor contributed nothing. And "all loss" is not confined to foreseeable loss, which opens the door to consequential claims: not the cost of rebuilding the drain, but the revenue lost while the road was shut.

Version 2 — subcontractor's mark-up

11.4 The Subcontractor shall indemnify the Contractor against direct loss and expense to the extent caused by the Subcontractor's negligent performance of the Subcontract Works, provided that the Subcontractor's aggregate liability under this clause shall not exceed the Subcontract Sum.

³ Four changes, each pulling in the same direction. "Direct" excludes consequential loss. "To the extent caused by" replaces a trigger with a proportion — if the subcontractor is responsible for a third of the problem, it pays a third. "Negligent performance" imports a fault standard, so faultless failure is no longer indemnified. And the cap bounds the worst case at a number the subcontractor can price and insure against.

⁴ The drafting lesson sits in the second of these. "To the extent caused by" and "caused by" differ by three words and by the entire economics of the clause. The first apportions; the second is binary, and a binary trigger rewards whichever party can show the other crossed it. Phrases of this kind are where contracts actually operate, and they are the phrases most often read past, because nothing about them looks like a term of art.

Version 3 — agreed

11.4 The Subcontractor shall indemnify the Contractor against direct loss and expense to the extent caused by the Subcontractor's negligent performance of the Subcontract Works, provided that the Subcontractor's aggregate liability under this clause shall not exceed the Subcontract Sum, save in the case of a material defect notified within the Defects Liability Period.

⁵ The final version looks like a small concession. It is the largest single movement of risk in the sequence. The exception does not qualify the indemnity; it qualifies the cap, and a capped liability with an uncapped exception is an uncapped liability in every case that matters, since the cases that threaten the cap are overwhelmingly defect cases. The subcontractor has retained the protection in the scenarios where it was never needed.

⁶ "Material" compounds this. It is undefined in the subcontract, has no settled meaning across jurisdictions, and will be interpreted after a dispute has arisen, by a party with every incentive to read it broadly. An undefined qualifier in an exception is not a limit; it is a negotiation deferred to the moment of least goodwill.

⁷ Two general rules fall out of the sequence. First, read exceptions against what they attach to, not against the clause as a whole — the drafting here survives a reading of the indemnity and fails a reading of the cap. Second, treat every undefined adjective in an operative provision as a future dispute with a date on it. Neither rule requires legal training. Both require the assumption that the sentence was built, and that someone chose where each word went.

Part A **Select the best answer**

Circle the letter next to the answer best supported by the text.

1. The principal objection to "arising from" in Version 1 is that it
 - A is ambiguous as to which party is indemnified
 - B imposes no requirement that the subcontractor caused the loss
 - C limits recovery to foreseeable loss
 - D conflicts with the Defects Liability Period

2. The change from "caused by" to "to the extent caused by" matters because it
 - A raises the standard of proof required
 - B transfers the burden of proof to the contractor
 - C converts a binary trigger into an apportionment
 - D removes the fault requirement

3. The author describes the final amendment as "the largest single movement of risk in the sequence" because the exception
 - A reinstates liability for consequential loss
 - B disapplies the cap in precisely the cases likely to exceed it
 - C extends the Defects Liability Period indefinitely
 - D removes the negligence qualifier

4. In paragraph 6, the objection to "material" is chiefly that it
 - A appears in the wrong operative provision
 - B has a settled meaning the subcontractor has overlooked
 - C will be construed after a dispute begins, by an interested party
 - D duplicates the effect of "direct"

Part B **Analyse and explain**

Answer in continuous prose. Refer to the text by paragraph number where it strengthens your point.

5. Set out the three absences the author identifies in Version 1, and explain the exposure each one creates.

6. Explain why a cap is described as something the subcontractor "can price and insure against". What does that imply about the function of caps generally?

7. Explain the first of the two general rules in paragraph 7, using Version 3 to demonstrate it.

8. The passage says such phrases are "read past, because nothing about them looks like a term of art". Analyse what this observation adds to the argument.

9. Compare the register of paragraphs 2–3 with that of paragraph 7. What does the shift accomplish at the close of the passage?

Part C **Argue a position**

There is no single correct answer. Take a position, and make the reasoning that supports it visible.

10. Redraft the exception in Version 3 so that it protects the contractor's genuine concern about defects without reopening the cap. Explain each choice you make.

11. The passage implies the subcontractor conceded without understanding the concession. Where should responsibility for that sit — with the drafter, the signatory, or the structure of the negotiation? Argue a position.

12. Undefined words give parties flexibility as well as exposure. Make the strongest case for leaving "material" undefined, then say whether you accept it.

13. Is boilerplate a failure of drafting or a reasonable economy? Defend your answer with reference to Version 1.

14. The author claims neither rule requires legal training. Test that claim against a document you have actually signed.

Answer key

For parents and teachers

Part A

1. B | 2. C | 3. B | 4. C

Part B

5. No cap — exposure is unlimited and may exceed the subcontract value; no causation test — "arising from" captures loss the subcontractor did not cause; no limit to foreseeable or direct loss — consequential claims such as lost road revenue become recoverable. One mark per absence correctly paired with its exposure.

6. A capped maximum is a quantified risk, so it can be costed into the price and transferred to an insurer; an unlimited one cannot be quantified and so cannot be priced or insured. The implication is that caps do not principally reduce risk — they make it tradeable, which is why their erosion by exception matters so much.

7. The rule is to read an exception against the provision it attaches to. In Version 3 the exception follows and modifies the proviso containing the cap, not the indemnity, so the indemnity still reads as narrowed while the cap has been hollowed out. Reading the clause as a whole conceals this; reading attachment reveals it.

8. It explains the mechanism of the failure rather than merely asserting it: parties scrutinise language that signals technicality and skim language that does not, so the decisive words are protected by looking ordinary. It also supports the final paragraph's claim that attention, not expertise, is the scarce resource.

9. Paragraphs 2–3 are forensic and clause-specific; paragraph 7 is prescriptive and general. The shift converts a worked example into a transferable method and widens the audience from drafters to anyone who signs — which is what the closing sentence about training then claims explicitly.

Part C

These answers vary. Mark the reasoning, not the conclusion.

10. Workable solutions include a separate, higher cap for defects, a time limit, or defining "material" by value threshold. Mark the reasoning: the student should show awareness that the exception must bite on something bounded.

11. Any allocation is defensible if argued. Strong answers notice the structural feature — the concession arrived last, framed as minor, under time pressure.

12. The strongest case appeals to the cost of negotiating every term and the value of standards that courts have already interpreted. Look for engagement with who bears the risk of the flexibility.

13. Reward recognition that boilerplate economises on drafting cost while exporting risk to whoever reads least carefully — an economy for one party, not for both.

14. Any genuine example counts. Prompt rather than correct: which adjective in that document would you now want defined?

EyeQBoost builds thinking skills in young learners through cognitive training, reading and gamified online classes.
More free reading sets at eyeqboost.com/resources.