

12TH ANNUAL
MERGERS & ACQUISITIONS INSTITUTE

**Encrusted Boilerplate in M&A Agreements:
Rethinking the Common Wisdom**

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Encrusted Boilerplate (What is it?)

What is Boilerplate?

- The so-called standard terms typically found at the end of the contract under headings like “Miscellaneous” or “Other Provisions.”
- Standard or not, miscellaneous or not, these provisions are generally enforced by courts as written. Many boilerplate provisions are in fact substantive and can be outcome-determinative.

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Encrusted Boilerplate (What is it?)

- Boilerplate provisions appear in one-off agreements and standardized forms.
- Boilerplate merits careful review.
- Frequently used forms should be reviewed by outside counsel periodically to ensure compliance with judicial decisions that could impact interpretation.
- **IT REALLY MATTERS!**

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"But this is the way we've always done it."

4

Encrusted Boilerplate (What is it?)

- Encrusted Boilerplate is:
 - Standardized terms that long ago became a part of a form because someone at some time said this is the way we always do it and no one remembers exactly why or whether that reason, if known, remains valid.
 - These provisions have since become “encrusted” because they have remained unexamined and unchanged.

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Encrusted Boilerplate (What it is?)

- Encrusted Boilerplate can also be the product of cutting and pasting provisions from one contract to another.
- If you think that will make it any less enforceable – even when the clause makes no sense in the contract into which it was pasted—think again.

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