

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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[Negotiation and Drafting Issues in M&A: Encrusted Boilerplate and Indemnification Provisions](#)

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