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ABA Publishes Brian E. Cohen's Article on Amendable Arbitration Clauses

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Brian E. Cohen

An article by Novack and Macey LLP attorney Brian E. Cohen on illusory amendable arbitration clauses has been published by the American Bar Association Section of Litigation, Alternative Dispute Resolution.

In the article, Mr. Cohen explains that agreements to arbitrate disputes are contracts and contracts require consideration. “An illusory promise, ‘a promise merely in form, but in actuality not promising anything. . . cannot serve as consideration. . . it would impose no obligation since the promisor always has it within his power to keep his promise and yet escape performance’,” Mr. Cohen writes, citing 3 Williston on Contracts § 7:7 (4th ed.).

Mr. Cohen then discusses recent decisions, including *Peleg v. Nieman Marcus Group, Inc.*, in which a California court “held that an arbitration clause in an employment agreement was illusory because the employer retained the ability to amend the clause to cover claims that had already accrued.” On the other hand, a later decision by a Texas Court of Appeals, *Nabors Drilling USA, LP v. Pena*, determined that a similar provision was not illusory.

“It is too early to know the long-term impact of *Peleg* and *Nabors*,” Mr. Cohen concludes. “Neither case has been cited for their holdings related to potentially illusory arbitration clauses.”

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