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Navigating the Tension Between State and Federal Arbitration Laws in California: Insights from *Berman v. Freedom Financial Network* and Global Trends in Consumer Contracts

Apoorva Vijh · Thursday, March 20th, 2025 · Young California Arbitration (Young CalArb)

Arbitration clauses in consumer contracts have recently become a flashpoint in legal debates, especially in California. A major development in this ongoing issue came with the California Supreme Court's ruling in *Berman v. Freedom Financial Network*, 13 Cal. 5th 763 (Cal. 2024) ("*Berman*"), which challenges the enforceability of arbitration agreements that may be seen as unfair to consumers. This decision highlights the growing tension between California's consumer protections and the federal policy favoring arbitration. In this blog post, we'll explore the significance of the *Berman* ruling and its impact on both local disputes and the broader landscape of international arbitration. This blog post discusses the implications of the *Berman* decision for California-based disputes and international arbitration, while also placing it within the broader global context of arbitration in consumer contracts.

The *Berman* Decision: A Snapshot of California's Consumer Protection Approach

In *Berman*, the California Supreme Court addressed whether an arbitration clause in a consumer contract was enforceable. The case involved a dispute between a consumer and a debt settlement company. The consumer argued that the arbitration clause was both procedurally and substantively unconscionable, and the court agreed, rendering the clause unenforceable.

The court's decision in *Berman* aligns with California's long-standing focus on consumer protection, particularly addressing hidden or overly burdensome terms in contracts. In this case, the California Supreme Court ruled that the arbitration clause in question was unenforceable due to both procedural and substantive unconscionability. Procedurally, the clause was embedded in fine print and drafted in a way that disadvantaged the consumer, making it difficult to understand or negotiate. Substantively, the terms were overly one-sided, favoring the company to the detriment of the consumer. This contrasts sharply with the [Federal Arbitration Act](#) ("FAA"), which strongly favors the enforcement of arbitration agreements, even in the face of state-level public policy concerns. The *Berman* ruling highlights the California Supreme Court's commitment to invalidating arbitration clauses that do not adhere to principles of fairness and transparency, reinforcing the state's pro-consumer stance.

Tension Between State and Federal Law: What It Means for Arbitration

The *Berman* decision highlights the ongoing tension between California's comprehensive consumer protection laws and the FAA's preference for arbitration. The U.S. Supreme Court has ruled in cases like *AT&T Mobility LLC v. Concepcion* 563 U.S. 333 (2011) ("*AT&T Mobility*") that the FAA establishes a broad mandate to enforce arbitration clauses, even when state laws seek to invalidate them on the basis of public policy concerns such as unconscionability.

In contrast, California courts have taken a more consumer-friendly approach, prioritizing fairness and transparency in arbitration agreements. This divergence has significant implications for both domestic and international arbitration. The FAA generally preempts state laws when arbitration agreements are part of contracts involving interstate commerce, as established in cases like *AT&T Mobility*, where the U.S. Supreme Court ruled that the FAA preempted California's Discover Bank rule, which deemed certain class action waivers in arbitration agreements unconscionable. However, California law applies in circumstances where the FAA does not explicitly preempt state consumer protection principles, such as when a contract is found procedurally or substantively unconscionable under state law, as seen in the *Berman* decision. As such, companies using arbitration clauses in consumer contracts in California must carefully draft their agreements to ensure they meet both FAA requirements and California's stricter standards of fairness, as they may face challenges that would not arise in other jurisdictions.

Global Perspectives: The Influence of California's Consumer-Protection Approach

California's pro-consumer stance is not unique to the U.S. Many other jurisdictions around the world are grappling with similar questions about the enforceability of arbitration clauses in consumer contracts. For instance, in the European Union, the *Consumer Rights Directive (2011/83/EU)* mandates that any arbitration clauses in consumer contracts must be fair, transparent, and easily understandable to the consumer. A notable case illustrating this is *Asturcom Telecomunicaciones SL v. Cristina Rodríguez Nogueira* (C-40/08), where the European Court of Justice held that national courts must assess the fairness of arbitration clauses even if the consumer has not explicitly raised the issue.

Similarly, in the United Kingdom, the *Consumer Rights Act 2015* introduced provisions to ensure that arbitration clauses do not disproportionately disadvantage consumers. In *Wilson v. Best Travel Ltd* [1993] 1 All E.R. 353 (Q.B.), the courts scrutinized arbitration terms to determine their fairness, emphasizing consumer protection within the context of travel contracts.

In other parts of the world, international arbitration frameworks, such as the *UNCITRAL Model Law on International Commercial Arbitration (2018)*, emphasize party autonomy while acknowledging the need to protect weaker parties, such as consumers, from unfair terms. These international trends show that while arbitration is a preferred method of dispute resolution globally, comprehensive consumer protection considerations are increasingly taking center stage.

Practical Implications for International Practitioners

For international practitioners, understanding the interplay between state and federal laws in the

U.S., and their relation to international trends is essential, particularly when advising clients on the enforceability of arbitration clauses in consumer contracts. The *Berman* decision is a critical reminder that even in jurisdictions with strong pro-arbitration frameworks like the U.S. and California, comprehensive consumer protection laws can impose significant limits on the enforceability of arbitration clauses.

International practitioners advising clients on cross-border transactions must be attuned to the interplay between the FAA and California's consumer protection laws, particularly in the context of arbitration agreements. The FAA applies broadly to contracts involving interstate or international commerce, setting a pro-arbitration baseline. However, California's consumer protection laws can come into play when arbitration clauses fail to meet the state's standards for procedural and substantive fairness. For instance, if an arbitration clause contains terms that are unduly burdensome, obscure, or exploitative of weaker parties, California courts may deem it unenforceable, even within the framework of FAA preemption. This dual-layered scrutiny underscores the importance of tailoring arbitration clauses to account for both federal enforceability under the FAA and compliance with California's specific legal requirements. Practitioners must consider these nuances to mitigate risks in drafting and enforcing arbitration clauses, particularly in contracts that span multiple jurisdictions.

Conclusion

The *Berman* case exemplifies the tension between state comprehensive consumer protection laws and federal pro-arbitration policies, a dynamic that international arbitration practitioners must navigate. California's proactive approach to invalidating arbitration clauses deemed unfair or unconscionable highlights the state's leadership in prioritizing consumer rights, even in the face of federal preemption under the FAA. This stance not only shapes arbitration practices within California but also influences broader trends in consumer contract disputes.

The implications of the *Berman* ruling extend far beyond California, serving as a critical touchpoint for practitioners drafting arbitration clauses in a global context. As legal systems worldwide increasingly prioritize transparency, fairness, and the protection of weaker parties in contractual relationships, arbitration agreements in consumer contracts are likely to face heightened scrutiny under diverse legal frameworks. International practitioners must remain vigilant, balancing the pro-enforcement ethos of arbitration treaties and laws like the FAA with jurisdiction-specific consumer protection mandates.

Moving forward, the interplay between national laws and international arbitration standards will demand a nuanced approach to contract drafting and dispute resolution strategy. The *Berman* decision underscores the importance of aligning arbitration practices with evolving legal norms and consumer expectations, ensuring both enforceability and equity. By staying informed and adaptable, legal professionals can better support their clients in navigating these challenges, fostering arbitration agreements that withstand legal scrutiny and promote fair outcomes.

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A graphic for a survey report. It features a dark background with a circular inset showing a gavel on a glowing digital circuit board. The text is white and blue. A blue button with white text is present. Logos for Wolters Kluwer and Future Ready Lawyer are included.

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