

The Importance of Adequate Procedures For Arbitration

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Employers often must consider conflicting objectives when deciding whether to include arbitration provisions in their employment agreements. On the one hand, employers may desire to arbitrate disputes with employees in a rapid, inexpensive, and confidential manner. On the other hand, employers must consider whether a court will find the arbitration provision to be enforceable under an increasingly complex and developing body of law.

The Second Circuit Court of Appeals recently considered the complexities in the law governing arbitration in a case addressing an arbitration requirement contained in the Constitution of the National Football League (“NFL”). In *Flores v. N.Y. Football Giants, Inc.*, 150 F.4th 172 (2d Cir. 2025), the Second Circuit declined to enforce the arbitration requirement in the NFL’s Constitution, which was incorporated into an employment agreement that football coach Brian Flores entered with the New England Patriots. Instead, the Court allowed Flores to pursue his claims of race discrimination in hiring against the Denver Broncos, the New York Giants, the Houston Texans and the NFL in federal court, though the NFL and these teams had moved to compel arbitration of these claims. These claims arose out of the Broncos’ failure to hire Flores as its head coach in 2019 and the Giants’ and Texans’ failure to hire him to fill head coaching positions in 2022.

In this article, we review the Second Circuit’s decision in *Flores* and analyze the need for employers to specify legally adequate arbitration procedures as a condition to the enforcement of their arbitration clauses.

Background

In an August 14, 2025 opinion, the Second Circuit held that Brian Flores, who has coached for multiple NFL teams, was not required to arbitrate his claims of racial discrimination in hiring against the Denver Broncos, the New York Giants, the Houston Texans, and the NFL pursuant to the NFL Constitution’s arbitration provision, to which

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Flores assented through an employment agreement with the New England Patriots. *Flores v. N.Y. Football Giants, Inc.*, 150 F.4th at 182-87. Although the parties did not dispute that the NFL Constitution's arbitration provision applied to Flores's discrimination claims, the Second Circuit agreed with Flores that the arbitration provision lacked protections required by Federal Arbitration Act ("FAA") and was, therefore, unenforceable. Specifically, the Court reasoned that the arbitration clause "fail[ed] to guarantee that Flores can 'vindicate [his] statutory cause of action in [an] arbitral forum.'" *Id.* at 182 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 637 (1985)). The Court found that the arbitration provision contained in the NFL's Constitution did not meet the requirements for enforcement under the FAA because it granted the NFL Commissioner unilateral procedural and substantive discretion over the arbitration proceedings, denying Flores an independent arbitral forum for bilateral dispute resolution. *Id.* at 183. It also failed to specify "the procedure to be used in resolving the dispute," meaning that there would be no way for Flores to predict how the arbitration would be conducted and that he would be at the Commissioner's whim. *Id.* at 184-85.

Separately, the Court found that the arbitration provision was unenforceable under "the effective vindication doctrine," established by the Supreme Court in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* The Court reasoned that enforcing the arbitration clause "would require Flores to submit his statutory claims to the unilateral discretion of the executive of one of his adverse parties, without an independent arbitral forum under contract and without a process for bilateral dispute resolution." *Id.* at 185-86. Accordingly, the Second Circuit affirmed the district court's holding that the NFL would be required to litigate against Flores in federal court. In an October 2025 order, the Second Circuit declined to reconsider its decision. *Flores*, No. 23-1185, ECF No. 200 (2d Cir. Oct. 6, 2025) (Order denying petition for rehearing).

FAA's Procedural Requirements

One concern driving the Second Circuit's analysis in *Flores* was the NFL Constitution's creation of an arbitral tribunal within the NFL itself. However, the larger and ultimately fatal problem with the NFL Constitution's arbitration provision was the lack of procedural specificity needed to ensure that Flores could effectively vindicate his rights through a bilateral dispute resolution process. Arbitral tribunals within an industry, or even within the larger organization against which a party seeks to bring a claim, are not in and of themselves fatal to having an enforceable arbitration clause. Rather, courts have held that such arbitration requirements may be enforced when the arbitration will be conducted in a manner that can be predicted based on the terms of the agreement, the proceedings are not one-sided, and they allow for substantive rights and statutory claims to be heard. *See, e.g., Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938-40 (4th Cir. 1999).

The Eleventh Circuit's decision in *Garcia v. Church of Scientology Flag Serv. Org., Inc.*, No. 18-13452, 2021 U.S. App. LEXIS 32601 (11th Cir. Nov. 2, 2021) illustrates this principle. In *Garcia*, former Church of Scientology members Luis and Maria Garcia brought claims for fraud, deceptive trade practices, and breach of contract against the

Church. *Id.* at *4. The Church moved to compel arbitration pursuant to an arbitration agreement within Scientology applications signed by the Garcias providing that disputes would be resolved through “Scientology’s Internal Ethics, Justice and binding religious arbitration procedures.” *Id.* at *6. According to the arbitration agreement, this binding religious arbitration would be conducted in accordance with established arbitration procedures of Church of Scientology International, which included “procedures for submitting a request for arbitration to the International Justice Chief of Scientology and the opposing party and for the selection of three arbitrators to hear and resolve the matter.” *Id.* at *6-7. Each party would designate one arbitrator, and those two arbitrators would select a third panel member, though all arbitrators had to be Scientologists in good standing, and if arbitrators were not appointed within a designated time, they would be appointed by the Scientology Justice Chief. *Id.* at *7. The district court held, and the Eleventh Circuit affirmed, that this arbitration agreement was enforceable—even though the very entity the Garcias were suing was conducting the arbitration—because it “included enough procedures to give the Garcias some idea of the matters to be arbitrated and the manner of effecting arbitration.” *Id.* at *7, 11-12, 25-27, 34-35.

The predictability of the composition of the arbitration panel and the procedures the forum will follow distinguishes *Garcia* from *Flores*. In contrast to the arbitration provision in *Garcia*, the arbitration provision in *Flores* provided “for no independent arbitral forum, no bilateral dispute resolution, and no procedure.” 150 F.4th at 183.

This emphasis on procedural predictability may at first blush appear to be a departure from the Second Circuit’s prior decision regarding internal NFL arbitrations related to the Tom Brady “Deflategate” dispute. In *NFL Mgmt. Council v. NFL Players Ass’n*, 820 F.3d 527 (2d Cir. 2016), the Second Circuit held that the NFL’s disciplinary arbitration proceedings (which are governed by the Labor Management Relations Act (“LMRA”), not the FAA) were permissible. In *NFL Mgmt. Council*, the Court reasoned that the NFL Commissioner properly exercised his authority to serve as the hearing officer for Brady’s arbitration proceedings, because the Commissioner was granted broad discretion to resolve intramural controversies between the League and players in the Collective Bargaining Agreement (the “CBA”) between the League and the NFL Players Association. 820 F.3d at 532-34. While the relevant CBA article governing arbitration may appear to be at odds with the Second Circuit’s reasoning in *Flores*, in *Flores* the Second Circuit reconciled this apparent inconsistency by noting that in *NFL Mgmt. Council* it had conducted only a “very limited” post-arbitration-award review that concerned contractual, not federal statutory, rights. *Flores*, 150 F.4th 172, 186 n.72 (2d Cir. 2025). Although the relevant CBA article in *NFL Mgmt. Council* “[did] not articulate rules of procedure for the hearing, except to provide that ‘the parties shall exchange copies of any exhibits upon which they intend to rely no later than three (3) calendar days prior to the hearing,’” *NFL Mgmt. Council*, 820 F.3d at 537, the Court held that the NFL provided Brady sufficient notice of the prohibited conduct and potential discipline. Brady’s only other arguments against arbitration did not refute the existence of such notice. Rather Brady argued only that the equipment violations at issue should have been punished only with a fine under the Player Policies, that the Commissioner wrongfully analogized the “Deflategate” dispute to steroid use, and that “no NFL policy or

precedent provided notice that a player could be subject to discipline for general awareness of another person's alleged misconduct" (referring to the individual who actually deflated the game balls). *Id.* at 538-42 (citing *NFL Mgmt. Council v. NFL Players Ass'n*, 125 F. Supp. 3d 449, 466 (S.D.N.Y. 2015)). The Court also disagreed that the exclusion of the NFL General Counsel's testimony and denying Brady's counsel access to certain investigative files amounted to fundamental unfairness. *Id.* at 546-47.

Practical Considerations

Within the Second Circuit and New York state case law, there are many examples of organization-specific and industry-specific arbitration bodies that provide for sufficient procedures and thus maximize the likelihood that a Court will find that such arbitration clauses comport with either the FAA or LMRA. These examples include arbitrations according to the Rules and Constitution of the New York Stock Exchange, *e.g.*, *Salvano v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 85 N.Y.2d 173 (1995), arbitrations under the National Association of Securities Dealers Code of Arbitration Procedure, *e.g.*, *Thomas James Assocs. v. Jameson*, 102 F.3d 60 (2d Cir. 1996), and various arbitration procedures set forth in collective bargaining agreements, *e.g.* *Germosen v. ABM Indus. Corp.*, No. 13-cv-1978 (ER), 2014 U.S. Dist. LEXIS 119092 (S.D.N.Y. Aug. 26, 2014).

Post-*Flores*, employers operating within organizations or industries with arbitration requirements analogous to those of the NFL may wish to clarify the procedures that will govern their arbitrations. For example, employers may spell out in as much detail as practicable how the arbitration will proceed such that an arbitrator can simply read the agreement and know how to manage the arbitration proceedings. To the extent feasible, employers may consider providing for an arbitration panel, rather than a single arbitrator, as was the case in *Garcia*. In *Garcia*, each party appointed an arbitrator and then the two appointed arbitrators selected the third panel member. Having a multi-arbitrator panel may mitigate allegations of arbitrator partiality such as the claims made about the NFL Commissioner in *Flores*. Of course, employers may seek to opt out of such organization or industry arbitration regimes and instead agree upon the procedural rules of an arbitral institution like AAA or JAMS, which have well established procedures and rules to govern arbitration.

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