ARBITRATION AS THE IDEAL METHOD OF LABOR LAW DISPUTE RESOLUTION: A CASE STUDY USING *14 PENN PLAZA LLC, ET AL. V. STEVEN PYETT, ET AL.*

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I. Introduction

New York City has approximately 8.6 million people living within its boundaries with roughly 730,000 residential and non-residential buildings.[1] These buildings serve as the pillar which makes New York the largest city in the United States.[2] In order to make the city and these buildings operate at a high level, thousands of workers across the city are needed for each building for any number of labor intensive tasks. Many people that are working in and for the buildings in the United States, especially in New York City, are a member of a union.[3] The Bureau of Labor of the United States Department of Labor estimated in 2016 that nearly 25% of wage and salary workers in New York City are union members.[4] This is a very high percentage in comparison to the national average of workers within a union, which is just over 10%, and the percentage of union workers in New Jersey, a connecting state to New York, which has declined to slightly above 15%.[5] With such a high number of union workers living in New York, agreements and negotiations which ensure employment standards associated with these workers must be closely reviewed, and when disputes arise, the most effective methods of dispute resolution must be used.

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1 *New York City*, Emporis, https://www.emporis.com/city/101028/new-york-city-ny-usa (last visited Oct. 15, 2017).

2 *The Top 10 Largest U.S. Cities by Population*, Moving.com, https://www.moving.com/tips/the-top-10-largest-us-cities-by-population/ (last visited Oct. 15, 2017).

3 United States Dep't of Labor, Bureau of Labor Statistics, Union Members in New York and New Jersey—2018, https://www.bls.gov/regions/new-york-new-jersey/news-release/unionmembership_newyork_newjersey.htm (last visited Oct. 15, 2017).

4 *Id.*

5 *Id.*

Unions are important to workers who on their own would hold little negotiation power against wealthy business owners.[6] While a single employee would have very little ability to effectuate change within an industry, by connecting large numbers of employees through a union, the entire work force can be heard through the guidance of a union.[7] When a union and an employer can agree to the terms of a working agreement, the relationship between the two can be made much stronger as both sides feel as though they are benefitting from the deal they have entered into.[8] Before this strong relationship can be built, there are often hard-fought negotiations over the terms of the workers' services as the sides try to come to an agreement in a collective bargaining agreement.[9] One such term that is argued over is called an arbitration clause.[10] Depending on the negotiations and drafting of the collective bargaining agreement these clauses can become controversial or complimentary, beneficial or detrimental, or time-consuming or time-saving, and one's opinion of these clauses can change from one situation to the next based on the perspective of the ongoing dispute.[11] One of the most important cases of the legality and conflicts that arise from arbitration clauses was *14 Pennsylvania Plaza v. Pyett*. In hindsight, *Pyett* provides the ability to analyze the case and its positives and negatives from different angles to determine whether the court came to the best possible outcome, or whether an alternative resolution to the legality and enforcement of arbitration clauses within labor collective bargaining agreements should have been reached. Through the context of the *Pyett* case and the maintenance and operating employees of New York City, this Note will examine the positives and negatives that come with arbitration clauses. Ultimately, this Note will conclude that arbitration and the use of arbitration clauses is the ideal method of solving labor

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6 *Frequently Asked Questions About Unions*, INTERNATIONAL UNION OF OPERATING ENGINEERS, http://www.iuoe.org/about-iuoe/union-faqs (last visited Oct. 15, 2017).

7 *Id.*

8 Joseph Petrick, *How to Improve Working Relationships With the Employee Union*, CHRON, http://work.chron.com/improve-working-relationships-employee-union-23038.html (last visited Oct. 15, 2017).

9 *What is Collective Bargaining*, LAW DICTIONARY, https://thelawdictionary.org/collective-bargaining/ (last visited Mar. 21, 2018).

10 *What is an Arbitration Agreement?*, FREEADVICE LEGAL, https://law.freeadvice.com/litigation/arbitration/agreement_arbitration.htm (last visited Oct. 15, 2017).

11 Paul J. Masinter & Nicholas J. Wehlan, *Arbitration: the Good, the Bad, and the Ugly*, BUS. L. NEWSLETTER, http://apps.americanbar.org/buslaw/newsletter/0038/materials/pp8.pdf (last visited Oct. 15, 2017).

disputes, and mandatory arbitration of employment claims, within the context of the labor arbitration system, is most beneficial.

II. Background

The laborers and employers in any field are in a better position for continued success when both sides can work together.[12] By working together, employees should feel as though they are being well-compensated for their hard work and employers should also feel that the work being done for them is being done well and worth their financial commitment.[13] However, the employer-employee relationship is not always so simple and there is a natural division between the two groups which can lead to controversies and debates. Among the natural division between employers and employees is the fact that employers are often forced into relationships with unions who have infiltrated their presence into a business through an election to unionize by the employees.[14] Once a union has its employees in an organization, it is now up to the employers to bargain with the union and determine new standards for hiring, wages, and other working terms. Otherwise, if a compromise through bargaining cannot be reached, the ultimate threat that the employees could go on strike and stop the functionality of a company entirely hangs over the heads of management and ownership.[15]

To avoid a strike and ensure continued work, before the start of an employer-union relationship, or as a continuance of an already ongoing relationship, the union and the employer must negotiate the terms and conditions of how the relationship is going to work.[16] These terms and conditions are created in the form of a collective bargaining agreement which lays forth everything from wage compensation, on-duty responsibilities, and vacation days to

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12 Petrick, *supra* note 8.

13 *Id.*

14 Russ Brown, *A Deep Secret That Labor Unions Don't Want Workers to Know*, Forbes, https://www.forbes.com/sites/realspin/2012/08/16/a-deep-secret-that-labor-unions-dont-want-workers-to-know/#62782726c80c (last visited Oct. 15, 2017).

15 Ed Grabianowski, *Strikes and Unions*, How Stuff Works, https://money.howstuffworks.com/strike1.htm (last visited Oct. 15, 2017).

16 *Collective Bargaining*, Legal Information Institute, https://www.law.cornell.edu/wex/collective_bargaining (last visited Oct. 15, 2017).

procedures in how any disputes that may arise will be resolved.[17] These collective bargaining agreements are constructed through negotiation between the laborers, represented by a union, and the employers which can negotiate themselves or through a multi-employer association, which itself almost acts as a union for the employers to ensure that employers are not agreeing to conflicting agreements which could then be later used against them.[18] One of the most important decisions to be negotiated within the collective bargaining agreement is the determination of how disputes are to be resolved when one arises between an employee and an employer. Some agreements explicitly state the procedures and necessities negotiated between the sides in order to resolve a dispute while others have used vague wording and less defined practices or leave disputes up to the National Labor Relation Board or the judicial system.[19] For example, an agreement between the parties could be made that would compel the sides into a process that first attempts to resolve the dispute through a series of grievance negotiations and then, if no agreement can be made, through mandatory arbitration.[20]

In the past, the collective bargaining agreements made between employers and employees have not always been so clear as to what kinds of decisions should strictly be held in front of an arbitrator, whether the arbitration process is mandatory or whether claims could still be brought in court.[21] Recently, it has become increasingly more common that the court system will determine that a clause within a contract that compels arbitration, or other forms of alternative dispute resolution, are enforceable.[22] Making

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17 NATIONAL LABOR RELATIONS BOARD, EMPLOYER/UNION RIGHTS AND OBLIGATIONS, https://www.nlrb.gov/rights-we-protect/employerunion-rights-and-obligations (last visited Oct. 15, 2017).

18 *What is an Arbitration Agreement?*, *supra* note 10.

19 Bruce F. Mills, *Who Has Jurisdiction Over CBA Disputes*, Law360, https://www.law360.com/articles/241579 (last visited Oct. 15, 2017).

20 2016 CONTRACTORS AGREEMENT BETWEEN SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 32BJ AND THE REALTY ADVISORY BOARD ON LABOR RELATIONS, INC., at 15, (effective Jan. 1, 2016 to Dec. 31, 2019) http://www.rabolr.com/sites/default/files/2016_contractors_agreement.pdf.

21 Brian S. Rauch & Rebecca L. Berkebile, *Arbitration in the Unionized Workforce: The Supreme Court Speaks in 14 Penn Plaza*, (last visited Oct. 15, 2017), Ahttp://www.proskauer.com/files/News/d1ed7ae4-adb7-4941-af42-85d14956e96f/Presentation/NewsAttachment/acfa6f77-0c09-4241-a372-69b0576c18e4/8-20-09%20Article%20Rauch-Berkebile.pdf.

22 Gregg A. Gilman & Shira Franco, *Recent Judicial Decisions Reinforce the Importance of Drafting Arbitration Agreements with Employees to Minimize Class Action Risks*, DAVIS & GILBERT LLP ALERT, http://www.dglaw.com/images_user/newsalerts/LbrEmp_Recent_Judicial_Decisions_Reinforce_Importance.pdf (last visited Oct. 15, 2017).

more and more arbitration provisions within collective bargaining agreements enforceable is in the best interest of the court and it also makes these agreements, which are being freely negotiated, stand even stronger.

The backdrop behind the case of *14 Pennsylvania Plaza v. Pyett* was in the building service industry.[23] The union jobs associated within the building service industry vary in title and function but include everything from doormen and elevator operators to security guards and superintendents.[24] It is important that unions are able to represent these positions because unions help set the working standards based on their market knowledge and experience, and provide the opportunity for working class people to band together against any potential wrongdoing from someone in a greater position of social, economic, or racial power.[25] Some of the standards workers can help set as a union, but would otherwise struggle to as an individual, are standards for education, skill level within positions, wages, working conditions, and quality of life.[26] Unions can also provide additional protections to its workers through negotiations that the state or federal governments have not provided.[27] In opposition to building service industry workers represented by unions are the various employers such as the building owners or managers. These owners and managers, by contrast, must look out for their own best interests in making sure that their properties are running effectively and efficiently, sometimes with their profits and expenses as a primary concern.[28] Because of the close interaction between the unions and its workers, and the employers, an understanding between them should be made that by working together and coming to common agreements on issues they will be in a more prosperous relationship.[29] However, inevitably, the two sides will not agree on the terms within the collectively bargained agreement, and there then must be a way to resolve these issues, such as an arbitration clause compelling the sides into arbitration.

The use of a clause that compels arbitration for each of the parties in a dispute has been historically controversial and spans

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23 14 Penn Plaza LLC v. Steven Pyett, 556 U.S. 247 (2009).

24 32BJ SEIU, http://www.seiu32bj.org/districts/new-york/ (last visited Oct. 15, 2017).

25 *Frequently Asked Questions About Unions*, *supra* note 6, at 1.

26 *Id.*

27 *Id.*

28 *About Us*, Realty Advisory Board on Labor Relations, http://www.rabolr.com/about-us (last visited Nov. 20, 2017) [hereinafter Realty Advisory Board on Labor Relations].

29 *Id.*

many different areas of law, including labor law, as seen in *Pyett*.[30] An example outside of labor would be in contracts cases.[31] Arbitration in a contract can be appealing to many companies and organizations who can use their vast resources and nearly limitless amounts of money to make it unreasonable for an individual to try and fight in arbitration.[32] If an individual did try to fight against an arbitration clause in a contract against a major corporation, they would often spend more money in attorney's fees and other expenses than they would had they just paid the initial charge from the beginning.[33] Additionally, because many companies pay the expensive charges to hire an arbitrator to litigate a controversy, there is often a fair question of partiality in an arbitration setting as it could be interpreted that because the company is paying for an arbitrator, the arbitrator is therefore more likely to decide for the side that is paying him or her.[34] Any time an arbitrator sides with the people who are paying for his or her services, it could be questioned that they were doing so in order to procure more business from the company at a later time.[35] Another area of law where the use of arbitration clauses is closely examined is that of employment law.[36] Because a lone employee may be "negotiating" the terms of their employment contract on behalf of themselves, they have very little power to actually change the terms of the agreement.[37] An employer in this position most likely has offered their terms as a "take it or leave it" type deal which could lead to unjust and improper conclusions stemming from the unconscionability of the contract from the beginning.[38]

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30 Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html.

31 Richard Stim, *Arbitration Clauses in Contracts: Should you include an arbitration clause in your contract?*, NOLO, https://www.nolo.com/legal-encyclopedia/arbitration-clauses-contracts-32644.html (last visited Oct. 15, 2017).

32 *Id.*

33 *Id.*

34 Neal M. Eiseman & Brian Farkas, *Stiffing the Arbitrators: The Problem of Nonpayment in Commercial Arbitration*, HARV. NEGOT. L. REV. (2015), https://www.hnlr.org/wp-content/uploads/sites/22/HNLR-Eiseman-and-Farkas-.pdf.

35 *Id.*

36 *Arbitration Agreements*, WORKPLACE FAIRNESS, https://www.workplacefairness.org/forced-arbitration-agreements (last visited Oct. 15, 2017).

37 *Id.*

38 *Id.*

Labor law is fundamentally different from that of employment law.[39] Labor law involves the workers or laborers to be represented by a union that has the sole purpose to look out for the best interest of the union members.[40] Deeply engrained within these best interests lie the heavily negotiated "arm's length" agreements between the sides.[41] These negotiations will eventually lead to a collectively bargained agreement from which the parties can then enforce as the guidelines and rules to govern over someone's employment. Generally, the sides in this kind of negotiation are on a more even playing field. Because of this ability to more easily bargain and negotiate, an arbitration clause found within a collective bargaining agreement may be more readily accepted as allowable.[42] If one of the sides was opposed to the clause within the contract, they could have tried to bargain to ensure that it would not be placed within the finalized agreement.[43] Subsequently, if an arbitration clause is found in the collective bargaining agreement it can be assumed that it was viewed by the parties and agreed upon, or that there were some concessions made by one of the parties in order to make sure that the clause remained in the agreement.

The practice of incorporating arbitration clauses into collective bargaining agreements is not new but has undergone a transformation as it pertains to their enforceability.[44] One of the first cases to discuss an arbitrators' role within a labor dispute was that of *Alexander v. Gardner-Denver* in 1974.[45] The Court held that an arbitrators' authority is confined to the resolution of contractual rights.[46] Additionally, it was determined that arbitrators are selected for

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39 Brian DeBelle, *Labor Law vs. Employment* Law, BEVERLY HILLS PATCH (Sept. 22, 2014), https://patch.com/california/beverlyhills/labor-law-vs-employment-law.

40 *Labor Laws*, BUSINESS DICTIONARY, http://www.businessdictionary.com/definition/labor-laws.html (last visited Oct. 22, 2017).

41 LAW.COM, http://dictionary.law.com/Default.aspx?selected=2433 (last visited Oct. 22, 2017).

42 PRACTICAL LAW LABOR & EMPLOYMENT, https://content.next.westlaw.com/Document/I0f9fbf38ef0811e28578f7ccc38dcbee/View/FullText.html?contextData=(Sc.Default)&transitionType=Default&firstPage=true&bhcp=1 (last visited Oct. 22, 2017).

43 Floyd D. Weatherspoon, *Incorporating Mandatory Arbitration Employment Clauses into Collective Bargaining Agreements: Challenges and Benefits to the Employ and the Union*, DEL. J. CORP. L. 1034 (2014), http://www.djcl.org/wp-content/uploads/2014/08/Incorporating-MANDATORY-ARBITRATION-EMPLOYMENT-CLAUSES-INTO-COLLECTIVE-BARGAINING-AGREEMENTS-CHALLENGES-AND-BENEFITS-TO-THE-EMPLOYER-AND-THE-UNION.pdf.

44 Bill C. Berger, *Thirty-Five Years of Litigating Over Arbitration in Employment Cases*, 61 COL. LAW. & COL. BAR ASS'N (2010).

45 Berger, *supra* note 44.

46 Alexander v. Gardner-Denver Company, 415 U.S. 36, 94 (1974).

their expertise in regards to labor contracts, and not federal discrimination laws.[47] Judge Winner of the US District Court for the District of Colorado summarized in his opinion, which was later reversed by the U.S. Supreme Court, the inherent problem with the inadmissibility of arbitration clauses in collective bargaining agreements.[48] Judge Winner stated, "[Alexander was] bound by the arbitration award just as is the employer" and that by allowing an employee a second method of resolution through court would "accept a philosophy which gives the employee two strings to his bow when the employer has only one."[49] However, when Judge Winner's opinion was reversed, the court was, in effect, giving the employee the second string to his bow and allowing an advantage that could later play out in favor of the union at the next negotiation.[50]

The Supreme Court was not ready to disallow required arbitration altogether. In 1991, *Gilmer v. Interstate/Johnson Lane Corp.* asked the Court the question, "whether a claim under the Age Discrimination in Employment Act of 1967 ("ADEA") can be subjected to compulsory arbitration pursuant to an arbitration agreement in a securities registration application."[51] The majority held that the Federal Arbitration Act ("FAA") reflects a "liberal federal policy favoring arbitration agreements."[52] The majority found that this case was not similar to *Gardner-Denver* and therefore held that in this case, the arbitration clause was enforceable.[53] In *Gardner-Denver*, the arbitrator was limited to contractual claims and could only interpret and apply the contract at stake.[54] Because the arbitration in *Gardner-Denver* was limited to contractual claims and the arbitrator's sole authority was to interpret and apply the contract, "*Gardner-Denver* and its progeny decided only the preclusive effect of arbitration of contractual rights on subsequent

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47 Stephen F. Befort, *Preclusive Effect of Arbitration Under Collective Bargaining Agreements*, 17 MINN. EMP. L. & PRAC. (2017).

48 Berger, *supra* note 44, at 8.

49 Alexander v. Gardner-Denver Company, 346 F. Supp. 1012, 1019 (9th Cir. 1971) (Not allowing employees the right to avoid arbitration after agreeing to an arbitration clause within a collective bargaining agreement), *Rev'd* 346 F. Supp. at 1012.

50 Berger, *supra* note 44, at 8.

51 Robert D. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

52 *Id.* at 1649.

53 Mark S. Matison & Bryan M. Seiler, *What 14 Penn Plaza LLC v. Pyett Means for Employers: Balancing Interests in a Landscape of* Uncertainty, 25 AM. BAR ASS'N J. LAB. & EMP. L. 173 (2010).

54 *Id.*

litigation in federal court of statutory rights."[55] With this distinction, the court allowed individual arbitration agreements of statutory discrimination claims in some cases.[56]

In 1998, *Wright v. Universal Maritime Service Corp.* contained a collective bargaining agreement ("CBA") between a union and employer with language that included "matters under dispute" were to follow a specific procedure of events that culminated in mandatory arbitration.[57] However, Wright, the employee, filed discrimination claims in the U.S. District Court for the District of South Carolina, which eventually found its way in front of the Supreme Court.[58] A unanimous Court decided that under a general arbitration clause an employee does not need to use the arbitration process found in their CBA for an alleged violation under the Americans with Disabilities Act of 1990 ("ADA").[59] The court held that because the broad language used in the arbitration provision of "matters under dispute" was general (not specific) and the union's waiver of a judicial resolution was not "clear and unmistakable" the clause failed to meet the standard required to hold the CBA enforceable.[60]

Later, in 2003, another case echoed many of the same sentiments found in *Gardner-Denver*. In *LaFee v. Winona County*, an employee brought a civil rights claim in court only after an arbitration decision had already been decided based on a separate discrimination claim.[61] The court allowed the suit to continue, despite an earlier arbitration hearing, because "federal statutory rights under Section 1983 exist independent from the CBA . . . the union grievance does not preclude [the employee's] Section 1983 claim."[62] The court also made sure that it was known that arbitration cannot be used to preclude a party from asserting its federal statutory right.[63]

Finally, in 2009, *14 Penn Plaza LLC v. Pyett* took place.[64] This case was a pivotal moment in arbitration cases putting a building and its ownership up against some of the employees working at the

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55 *Id.*

56 *Id.*

57 Wright v. Universal Maritime Service Corp., 525 U.S. 70 (1998).

58 *Id.*

59 *Id.*

60 Matison & Seiler, *supra* note 53, at 9.

61 Daniel LaFee v. Winona County, 655 N.W.2d 662 (Minn. Ct. App. 2003).

62 *Id.*

63 Befort, *supra* note 47, at 8.

64 14 Penn Plaza LLC v. Steven Pyett, 556 U.S. 247 (2009).

building under the collective bargaining agreement that had previously been negotiated.[65] In this case, employees sought to file a claim against their employers for age discrimination under the ADEA.[66] These employees were covered under a collective bargaining agreement that had been negotiated by the union that represented them, Local 32BJ, and the Realty Advisory Board on Labor Relations, a multi-employer association, representing 14 Penn Plaza and Temco services, the building ownership and service contractor, respectively.[67] After reviewing the case, the union refused to arbitrate the employment discrimination claim for their members, which then caused the employees to file a separate claim in court.[68] The court was then left with the decision whether to try the case, whether previous case law specifically precluded or allowed the case to be brought in trial, or whether the court would make a new ruling to take away the "second string to the bow" that Judge Winner had previously discussed in *Gardner-Denver*.

The ruling of *Pyett* would ultimately try to answer whether mandatory arbitration of employment claims through a collectively bargained agreement, within the context of the labor arbitration system, was acceptable. In other words, the issue was whether a union would be able to bargain a contract that would limit an employee's ability to take a claim to court, rather than be forced into the arbitration process determined through negotiation. If a union were able to limit an employee's right to bring a claim to court, a determination would also therefore need to be made on when this waiver would be acceptable and under what conditions. For example, under *Pyett*, the specific question to be answered was whether Local 32BJ was able to waive the right of its members to use a courtroom as a means to resolve disputes. In an employment law setting, *Johnson v. Circuit City* stood for the idea that an individual employee can waive their own right to use a forum other than arbitration for disputes that arise during their employment.[69] Because an individual is representing their own interests, it logically follows that they should be able to decide and negotiate how to fight any claims against the company that may come up.[70] However, although unions are tasked with making tough decisions for its members collectively, it would be a much larger leap to allow a union to

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65 *Id.*
66 *Id.*
67 *Id.*
68 *Id.*
69 Johnson v. Circuit City Stores Inc., 158 F.3d 742 (4th Cir. 1998).
70 *Id.*

determine how any individual would want to fight charges against an employer.

In a 5-to-4 split, the Supreme Court ruled that the scope of *Gardner Denver* should be narrowed.[71] The majority determined that *Gardner-Denver* was about whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims, not the enforceability of an agreement to arbitrate claims.[72] Because of this determination, the court found that *Gardner-Denver* was not applicable in this situation and they only needed to make a determination on the applicable arbitration clause within the collective bargaining agreement specific to this case.[73] The court held that a collective bargaining agreement clause requiring covered employees to arbitrate ADEA claims was enforceable as a matter of federal law when the provisions "clearly and unmistakably" waived access to a judicial forum.[74]

However, the four dissenting justices were not willing to accept the limitations on employees that the majority had set forward.[75] The dissenting opinion of *14 Penn Plaza v. Pyett* believed that the majority in *Gardner-Denver* stood for the idea that under no circumstances could a union undermine the federally protected rights of an employee by bargaining these rights, or the ability to fight for these rights in a court, out of an employment relationship.[76] To the dissenting justices, the ability to arbitrate contractual issues found within the collective bargaining agreement was allowable but individual rights were inherently different.[77] When it came to an individual and their ability to litigate statutory claims, the dissenting justices held that the ruling in *Gardner-Denver* was much more broad than the reasoning that the majority had given in their opinion, and individuals should have been able to maintain their right to sue.[78] Finally, by issuing an opinion that held broadly the decision in *Gardner-Denver*, the dissent refused to recognize that the language found within a collective bargaining agreement mattered to the extent whether it would allow arbitration to control individual rights because the dissent always believed that the

71 14 Penn Plaza LLC v. Steven Pyett, 556 U.S. 247 (2009).

72 Befort, *supra* note 47, at 8.

73 *Id.*

74 *Id.*

75 Berger, *supra* note 44, at 8.

76 *Id.*

77 *Id.*

78 *Id.*

individual should maintain these rights.[79] With such a divided court, and reasonable justifications between both the majority and dissenting opinions found in *Pyett* for the rationale of their opinions, it bears a closer examination to determine why and when arbitration should be allowed, how arbitration clauses should be enforced in this labor context, and whether the use of an arbitration clause is even worthwhile to be included in a collective bargaining agreement in a labor setting.

III. DISCUSSION

Within a labor dispute concerning the enforceability of an arbitration clause, both the employer and employee would have different reasons for wanting the ability to resolve all disputes via arbitration, or, in contrast, to reserve some rights to be decided in a court setting. Additionally, some may argue that employment arbitration should not exist at all and that all claims should always be brought before a court. While the decision in *Pyett* expanded the ability of the building owners to use arbitration to settle claims under their specific collective bargaining agreement, there are many arguments to be made whether employers and employees still even want to arbitrate claims and the positives and negatives that could arise out of such highly utilized arbitration clauses.[80] In the wake of *Pyett*, two extremist viewpoints have emerged.[81] The first of these opinions is that there "appears to see no possible scenario where arbitration could be a viable alternative for an employee seeking vindication pursuant to a statutory discrimination claim."[82] The other opposing viewpoint believes that "no real concern exists when an agreement to arbitrate between an employer and an individual employee was agreed to by the employee as a condition of employment without certain fairness issues being addressed because it is better for employees."[83] The determination of

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79 *Id.*

80 Michael Z. Green, Reading Ricci and Pyett to Provide Racial Justice through Union Arbitration, 87 IND. L.J. 367 (2012).

81 *Id*. at 414.

82 *Id. See, e.g.*, David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247 (2009) (attacking essentially all arguments raised that may make arbitration more palatable as non-responsive to broader concerns about fairness for employees subjected to agreements to arbitrate).

83 Green, *supra* note 80, at 414. *See Arbitrational ADR*, INST. FOR LEGAL REFORM (2010), http://www.instituteforlegalreform.com/component/ilr issues/29/item/ADR.html. The Institute

an employer or employee to try to effectuate an arbitration clause within a collective bargaining agreement may also still have their benefits and deterrents.

While many employers use arbitration clauses, there is still a greater analysis that needs to be done to truly understand the positives and negatives that may come with trying to negotiate such clauses into a collective bargaining agreement in a labor setting.[84] One such determination that an employer may have to understand is the cost of actually getting the arbitration clause into an agreement. Before an arbitration clause is agreed upon, while bargaining the entirety of an agreement, an employer might have to concede other valuable negotiation points in order to then be allowed to insert such a clause into a collective bargaining agreement.[85] Depending on the circumstances, and when viewed in conjunction with some of the below points, the negative aspects regarding the implementation of an arbitration agreement might end up not being worth the hard-fought negotiations that it would have taken to ensure that the arbitration clause be in the agreement. Additionally, because the majority in *Pyett* put such a strong emphasis on the specific language that was found in their collective bargaining agreement, negotiations could also become contentious based on the wording within the arbitration clause.[86] Because of this emphasis, both the employer and the employee may fight over every word within the clause with the hope that it may or may not later be found enforceable and under what circumstances or situations the clause will be enforceable.[87] With the potential that adding the arbitration clause will become an arduous and burdensome task for employers, they may make a determination that it is better to proceed without it altogether.

Additionally, even with an arbitration clause in a collective bargaining agreement, there is not a guarantee that an employer will stay out of court. One way that an employer could find himself in court, despite the presence of an arbitration clause, would be a question of whether the wording of the clause reaches the "clear

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for Legal Reform is an affiliate of the U.S. Chamber of Commerce that collects information supporting the use of arbitration.

84 Jean Murray, *What are the Benefits and Drawbacks of Arbitration?*, BALANCE, https://www.thebalance.com/what-are-the-benefits-and-drawbacks-of-arbitration-398535 (updated Nov. 20, 2017).

85 Matison & Seiler, *supra* note 53, at 9.

86 *Id.*

87 *Id.*

and unmistakable" standard needed under *Pyett*.[88] Because this standard can be subjectively interpreted there remains the possibility that going to court may still be needed to decide on this wording question.[89] Due to this subjective standard and analysis, it is almost certain that if a ruling was held against an employee, they would try to bring a claim to court under the idea that the clause was in fact not a clear and unmistakable waiver and they should maintain their individual rights to pursue action in court. Additionally, an employer may find himself in court due to statutory provisions precluding resolution through arbitration.[90] Some statutory regulations prohibiting resolution through arbitration include certain claims under the Fair Labor Standards Act, enforcement actions brought by the Equal Employment Opportunity Commission ("EEOC"), and various state law claims.[91] While an arbitration clause may limit the ability to bring judicial actions in court because of these alternative issues and inabilities to negotiate around trials, an employer may still find himself in court, and therefore having to fight legal battles in different settings.

Another important idea for employers to consider in determining the value of using an arbitration clause are the implications and the big picture scope of what an arbitration clause may cost an employer. In a short-sided view, arbitration may provide quick and easy results without some of the headaches and hassles that are associated with bringing claims into court.[92] However, it is possible that this could backfire. Because of the ease and lower costs with which claims can be brought using arbitration, there is the possibility that this will encourage employees to come forward with more claims, thus actually increasing costs and time.[93] If more employees are bringing claims, the union might feel obligated to take on more cases as well, especially given the fact that the employee would have no other form of recourse due to the arbitration clause which may forbid separate action on the employee's part.[94] The facts of *Pyett* provide a perfect example where this type of situation may occur. Because the union in *Pyett*, SEIU Local 32BJ, believed under the holding of *Gardner-Denver* that the employees would

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88 14 Penn Plaza LLC v. Steven Pyett, 556 U.S. 247 (2009).

89 Matison & Seiler, *supra* note 53, at 9.

90 *Id.*

91 *Id.*

92 Jon Stride, *Arbitration: Quick, Easy and cheap—Or Is It?*, PORTLAND BUS. J. (Nov. 4, 2004), https://www.bizjournals.com/portland/stories/2004/11/08/focus10.html.

93 *Id.*

94 *Id.*

still have a right to sue in court for their statutory claims, the union could therefore drop the case guilt-free.[95] However, once the Supreme Court ruled on *Pyett*, the union did not have the same safety net and may feel obligated to see more claims through to the end.[96]

Because of the unreviewable nature of using an arbitrator, once an arbitrator has reached a decision, there is no safety net to appeal or have the judgment heard in another forum.[97] Arbitrators are free to make their rulings with very little consequence and only in rare circumstances can these decisions be overruled.[98] Because of this, arbitrators' rulings are binding, and if a decision goes against the employer there is no recourse for change.[99] If an arbitrator applies the law in a way that is unfavorable to the employer, or issues a decision granting a large damage award, the employer is stuck with the decision and must abide by it.[100] While there is some assurance that this will not happen due to the nature of both sides being able to agree to an arbitrator that is fair, it is not a certainty and opposing rulings and judgments can be held against employers.[101] The setting of an arbitration may also become undesirable due to the lack of procedural protections that many arbitration hearings entail. Employers may have additional grounds to fight employee claims in a court setting, which may be limited through arbitration.[102] A few examples of these kinds of claims include the untimeliness of a claim or a summary dismissal due to preclusion of a claim for a number of reasons.[103] So, while the forum of using an arbitrator may provide an employer with some benefits, there are certainly a number of downsides as well that should be viewed when determining if an employer wants to pursue an arbitration clause.

An employer would need to weigh the above issues with incorporating an arbitration clause into a collective bargaining agreement with the potential benefits that they may attain by having the clause included. The first thing that companies find appealing in including arbitration clauses into collective bargaining agreements

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95 14 Penn Plaza LLC v. Steven Pyett, 556 U.S. 247 (2009).

96 *Id.*

97 Matison & Seiler, *supra* note 53, at 9.

98 *Arbitration Award Vacated*, FindLaw, http://corporate.findlaw.com/litigation-disputes/arbitration-award-vacated.html (last visited Nov. 19, 2017).

99 *Id.*

100 Matison & Seiler, *supra* note 53, at 9.

101 *Id.*

102 *Id.*

103 *Id.*

is the speed and efficiency in which they believe disputes could be resolved.[104] These two factors are intertwined as the longer a case may be, the more expensive it may become as well.[105] While it may take years in court to resolve cases, a determination in an arbitration setting can be accomplished in significantly less time.[106] One reason for this difference in time is the backlog that a court may have, while an arbitrator can more easily set his or her own schedule to remain less busy and therefore make faster decisions on quicker timeframes.[107] Additionally, arbitration hearings are not restricted to many of the processes which can slow down cases in a court setting.[108] While a court is forced to use the many rules of civil procedure including various motions, a timely discovery process, and the potential of multiple appeals on multiple grounds, an arbitration setting can have significantly less formal rules and the rules that are put into place can be limited based on the desires of the parties.[109] While arbitration clauses may make unions and employees more likely to take grievances to arbitration therefore causing more hearings and additional costs, because of the informality as compared to a court hearing and the likelihood that there would be a quicker turnaround of cases, arbitration may still be more valuable to an employer.

Additional benefits of the inclusion of an arbitration clause contain the specific procedural advantages encompassed within the use of the forum.[110] The first procedural advantage is the finality of decisions.[111] Because of cases like *Pyett*, arbitration is an accepted forum for resolving disputes and courts will not overturn an arbitrator's ruling, outside of rare circumstances.[112] Because these decisions are valid and final, appeals may be limited under the arbitration agreement and with nowhere else to turn to, decisions are

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104 Edna Sussman & John Wilkinson, *Benefits of Arbitration for Commercial Disputes*, DISP. RESOL. MAG., https://www.americanbar.org/content/dam/aba/publications/dispute_resolution_magazine/March_2012_Sussman_Wilkinson_March_5.authcheckdam.pdf (last visited Nov. 19, 2017).

105 Matt Hoffman, *The Advantages and Disadvantages of Arbitration vs. Court* Litigation, TUCKER ARENSBERG NEWS, MEDIA, BLOGS (Feb. 13, 2015), http://www.tuckerlaw.com/2015/02/13/advantages-disadvantages-arbitration-vs-court-litigation/.

106 *Arbitration Pros and Cons*, http://adr.findlaw.com/arbitration/arbitration-pros-and-cons.html (last visited Nov. 19, 2017).

107 Hoffman, *supra* note 105.

108 Matison & Seiler, *supra* note 53, at 9.

109 *Id.*

110 *Id.*

111 *Id.*

112 *Id.*

generally concrete.[113] Additionally, because an arbitration clause can include statutory claims, this further limits the ability of fighting actions in different forums where everything can be freely negotiated to be included or limited in a collective bargaining agreement and narrows the range of circumstances where employers might have to defend suits in multiple venues.[114] Lastly, within a collective bargaining agreement the rules and arbitrators themselves can be negotiated.[115] These rules set the grounds and procedures for a hearing and can be negotiated in the best interest of the employee and employer. The arbitrators in specific provide an advantage to normal court proceedings as the arbitrators are usually experts in the field they are arbitrating for.[116] The sides can agree to a negotiated list of approved arbitrators or they can each agree to pick one for a panel of three, and the third arbitrator in the panel is picked by the two that each of the sides had picked.[117] Because these arbitrators are experts in the field they are making a ruling for, they are more likely to "understand the applicable law and possess the power to fashion a solution [that] may well have the potential to revolutionize the resolution of employment disputes."[118] These experts are more likely to resolve disputes more fairly than the court with a judgment that is most in line with the industry because of their deep knowledge and experience in the field.

Employers looking to add arbitration clauses into their collective bargaining agreements may have reputational and future working relationship decisions to factor into their decisions. Because many of the union and employer relationships are relationships that must last over the course of many years, employees, and situations, it can be important to make sure that these relationships are not strained during the process of settling a dispute in any forum.[119] The nature of the relationship can be long lasting and therefore it is important to make sure that the relationship remains strong. The relative informality involved with arbitration, as compared to a trial, may help to preserve a relationship between the

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113 *Id.*

114 Matison & Seiler, *supra* note 53, at 9.

115 *Id.*

116 *Arbitrators & Mediators*, AM. ARB. ASS'N, https://www.adr.org/ArbitratorSelection (last visited Apr. 30, 2019).

117 *Arbitration*, JUSTIA, https://www.justia.com/trials-litigation/alternatives-to-court/arbitration/ (last visited Nov. 20, 2017).

118 Matison & Seiler, *supra* note 53, at 9.

119 *Id.*

parties so that they are able to continue to work together and can also work to renew the collective bargaining agreement for future years as well.[120] *Pyett* has demonstrated the lasting connection that can occur in a union and employer relationship.[121] Even after the litigation that ensued because of the *Pyett* case, the Realty Advisory Board, most of the employers they represent, and Local 32BJ remain in a working relationship and deal with labor disputes and new contract negotiations on nearly a daily basis.[122] Despite the fact that this was brought to trial, and not completely solved through arbitration, the longevity between the parties shows the importance of these relationships; and, if arbitration allows the parties to remain cordial to one another, then it will be worthwhile to include the ability to arbitrate.[123]

Included in the lasting relationships between the parties is the ability for the information that may come out during arbitration to remain confidential.[124] Much of the information that may be used during an arbitration hearing can be sensitive or confidential and private arbitration can protect the parties from unwanted public disclosure.[125] Additionally, "privacy may facilitate reasonable settlements, since the parties are less apt to feel pressure publicly to vindicate their position."[126] One final consideration in regard to ensuring lasting relationships between the parties is the idea that an arbitrator's ruling with damages will be protected from "aberrational jury verdicts or punitive damages awards."[127] The threat of large and unfair payments going from one party to the other could also cause a strain on the union-employer relationship. This can be offset when a knowledgeable arbitrator with experience in the field is ruling on the case.

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120 *Id.*

121 Realty Advisory Board on Labor Relations, s*upra* note 28.

122 *Id.*

123 *Id.*

124 Ronald Ravikoff, *Your Arbitration is Private But is it Confidential?*, DAILY BUS. REV. (May 26, 2015), https://www.jamsadr.com/files/uploads/documents/articles/ravikoff_abritration-private-confidential_dbr_2015-05-26.pdf.

125 Matison & Seiler, *supra* note 53, at 12.

126 *Id.*

127 Christopher R. Drahozal & Quentin R. Wittrock, Is There a Flight from Arbitration?, 37 HOFSTRA L. REV. 71, 78 (2008).

IV. PROPOSAL

It is the assertion of this Note that the most effective way to solve labor disputes is through the use of arbitration and that well-written arbitration clauses written into the terms of a collective bargaining agreement are the most effective means of ensuring arbitration clauses will be enforceable and beneficial to both parties. Also, arbitration should be the primary means of resolving labor disputes that arise out of collectively bargained agreements and should be the only final, binding conclusion in a labor dispute. However, the Supreme Court's split decision found in *Pyett*, and the majority's unwillingness to unilaterally expand arbitration to statutory claims not found in an agreement, limits the applicability of arbitration clauses in labor disputes.[128] Additionally, the usefulness of these clauses can also be considered in cases when statutory claims not described in a contract are brought before a court, such as was the case in *Gardner-Denver*.[129] These problems brought out by the *Pyett* decision could be resolved through an even broader ruling in a case like *Pyett*. Recently, courts have leaned towards the use and benefits of arbitration; and, the solution to these problems lies in further emphasizing the importance of arbitration clauses in labor disputes.[130] These issues can be resolved by first expanding the union's ability to represent its members, using alternative dispute resolution methods through collective bargaining drafting methods, pre-arbitration meetings such as mediation consultations and grievance discussions, and the expanded use and recognition of arbitration.[131] These methods will help to limit the possibilities of judicial trials to the parties involved and further emphasize the importance and benefits of arbitration in labor disputes, resolving some of the conflicts and discrepancies currently allowing cases to be heard in court.[132]

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128 14 Penn Plaza LLC v. Steven Pyett, 556 U.S. 247 (2009).

129 Alexander v. Gardner-Denver Co., 415 U.S. 36, 94 (1974).

130 *Mandatory Employment Arbitration: Weighing the Pros and Cons*, THE "EMPLAWYERologist" FIRM (Nov. 29, 2012), http://theemplawyerologist.com/2012/11/29/mandatory-employment-arbitration-weighing-the-pros-and-cons.

131 DAVID A. HOFFMAN, MASSACHUSETTS SUPERIOR COURT CIVIL PRACTICE MANUAL CH. 10, MASSACHUSETTS CONTINUING LEGAL EDUCATION, INC. (2017), Westlaw CIVP -MA-CLE 10-1.

132 *Id.*

A. *The Law After Pyett and a Union's Ability to Bargain for its Members*

On one hand, the majority in *Pyett* envisioned a rule of thumb where if a collective bargaining agreement states an arbitration provision that clearly and unmistakably waives access to a judicial forum, then the arbitration provision will be enforceable.[133] However, the majority's holding did not go as far as to say they were commenting or making changes to the applicability of the *Gardner-Denver* decision which the majority determined was about whether a contractual claim brought to arbitration then subsequently precluded a judicial resolution of statutory claims.[134] Additionally, the four dissenting justices in *Pyett* read *Gardner-Denver* to mean that individuals should always be allowed to bring subsequent actions of their federally protected rights.[135] The dissenters believed that the union should not be able to bargain away these individual rights, and individual employees should therefore retain these rights, and thus use judicial action to correct any violation of these rights on the part of their employers.[136] The problem therein lies with the continued availability and potential use of judicial court hearings in labor disputes and the belief that laborers need judicial conclusions in certain circumstances while allowing arbitrators to control all aspects of a case in other situations.[137] In other words, if an arbitrator is able to rule on both contractual and statutory claims if they are "clear and unmistakable" in the contract language, why doesn't an overarching arbitration clause always rule, thus allowing unions to make important statutory decisions on behalf of their employees.[138]

In order to expand the use of arbitration entirely, thus believing the outcome of *Gardner-Denver* should have been held to preclude judicial resolution of statutory claims after contractual claims had previously been determined through arbitration, one must first accept the benefits of arbitration as the best way of resolving labor disputes.[139] Similarly, an appreciation of the work of unions to re-

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133 14 Penn Plaza LLC v. Steven Pyett, 556 U.S. 247 (2009).

134 Ivan D. Smith, *Discrimination Claims in the Unionized Workplace*, City Bar Center for Continuing Legal Education, Mar. 11, 2016, 2016 WL 20160311A NYCBAR 698.

135 *See* 14 Penn Plaza LLC 556 U.S. at 247 (2009).

136 *Id.*

137 Smith, *supra* note 134, at 22.

138 *Id.*

139 Laura G. Boyer, *The Potential of Expanded Arbitration in Resolving Title VII Claims in Light of Alexander v. Gardner Denver and New Equal Employment Opportunity Commission*

present their members in contract negotiations should also be emphasized, thus negating the *Pyett* dissenting opinion, which would allow the ability to contract away judicial resolution of statutory right claims.[140]

While the deterrents of incorporating arbitration clauses into agreements as discussed above may give brief pause to their use, the positives of such clauses effectively outweigh these negatives, making arbitration the most effective means of dispute resolution in the labor setting.[141] For example, the negatives of the arbitration clause include the difficult negotiations to put an arbitration clause into a collective bargaining agreement, the possibilities of winding up in court despite the use of an arbitration clause, the costs of having more cases brought to arbitration than there would be in court, the possible procedural deterrents, and the finality of decisions of arbitrators.[142] These concerns can be countered by the ideas that effective bargaining, compromise, and contract drafting can set the rules of arbitration thus creating a beneficial atmosphere to both parties involved.[143] While difficult negotiations may always be a part of labor relations and collective bargaining agreement drafting, in the end, these negotiations mostly result in an agreement that both sides are happy with, or are at least willing to work with.[144] Therefore, with the use of strong contract drafting, both sides will be aware of the possibility of more arbitration hearings, different procedural rules, and finality of decisions, and still choose to move forward with negotiating arbitration into the agreement.[145] Outside of the fact that the terms of the arbitration clause are agreed upon, the additional benefits such as the speed of hearings as compared to in a court, the benefits of the finality of arbitration decisions, and, maybe most importantly, the continued strength and good will needed to maintain good employee-employer relations, make the use of the arbitration clause an important aspect when determining labor disputes.[146]

Policy, 7 LOY. U. CHI. L.J. 334, 334–42 (1976) (Discussing the preclusion of arbitration when statutory claims are brought in front of an arbitrator).

140 Smith, *supra* note 134, at 22.

141 Weatherspoon, *supra* note 43, at 8.

142 Murray, *supra* note 84, at 13; Stride, *supra* note 92; Matison & Seiler, *supra* note 53, at 6; 14 Penn Plaza LLC v. Steven Pyett, 556 U.S. 247 (2009).

143 Sussman & Wilkinson, *supra* note 104, at 17; Matison & Seiler, *supra* note 53, at 6; Ravikoff, *supra* note 124, at 20.

144 Teresa J. Tschida, *Unions and Management: A Blissful Marriage?*, GALLUP NEWS (Mar. 9, 2006), http://news.gallup.com/businessjournal/21727/unions-management-blissful-marriage.aspx.

145 Weatherspoon, *supra* note 43.

146 *Id.*

Additionally, to further effectuate the ability to use arbitration clauses, more weight in the authority of the unions should be given for them to do what is best for their members, and more trust and deference should be given to arbitrators to make determinations regarding statutory claims.[147] The majority in *Pyett* agreed that when the language of a collective bargaining agreement was "clear and unmistakable" unions were able to negotiate arbitration as a proper setting, even for statutory disputes.[148] Additionally, at the same time, the *Pyett* majority was inherently furthering the encouragement of the use of arbitrators by reinforcing the idea that as long as unions and arbitrators are not limiting or dismissing statutory rights altogether, an arbitrator can make statutory decisions without the help of a judicial court ruling.[149] The court emphasized this decision in *Mitsubishi Motors Corp v. Soler Chrysler-Plymouth, Inc.* when it stated, "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."[150] Therefore, not only must arbitration clauses use the "clear and unmistakable" standard brought forward by *Pyett*, but an underlying standard that none of the employees' substantive rights be infringed upon also applies in the wording and writing of a collective bargaining agreement.[151] With these principles guiding the drafting of collective bargaining agreements, this now helps to set the standard for what is required to ensure that all labor disputes be adjudicated in an arbitration setting, and left out of a court room.

Additional arguments against allowing unions to negotiate on behalf of its members, including the ability to negotiate mandatory arbitration, are clear. The most obvious argument aligns with *Johnson v. Circuit City* in that while an individual in a contract negotiation is able to decide for themselves whether they agree to terms in a contract, a union member is at the will of the union.[152] A union member may not agree with the means agreed upon to resolve disputes such as arbitration and it can easily be argued that a union should not have such strong capabilities to determine seri-

147 Smith, *supra* note 134.

148 14 Penn Plaza LLC v. Steven Pyett, 556 U.S. 247 (2009).

149 *Id.*

150 Weatherspoon, *supra* note 43.

151 *Id.*

152 Johnson v. Circuit City Stores Inc., 158 F.3d 742 (4th Cir. 1998).

ous results such as a potential breach in federal discrimination laws.[153]

The benefits of allowing a union to negotiate for its members, especially the ability to use arbitration as the only method to resolve disputes, is the most effective method of ensuring lasting relationships between employers, unions, and employees, and if done correctly can still be favorable to employees. Unions are designed to represent all the members of the bargaining unit and may do so as they see fit, whether that means by taking cases to arbitration or not.[154] In the case of *Pyett*, Professor Michael Z. Green of Texas A&M Law argues that the clear and unmistakable language that the union allowed to be included in the CBA was fairly bargained.[155] In return for the clear and unmistakable language, the union, Local 32BJ, was able to provide a fairer arbitration procedure for its diverse set of members.[156] According to Green, this CBA language provided:

> . . . a forum where [the union members'] complaints can be heard by a diverse decision maker, while being provided legal representation, and a much better chance of a favorable resolution. Accordingly, in an agreement like the one agreed to by SEIU Local 32BJ, the interests of employees in vindicating their race discrimination claims can converge with their union's interest in fairly representing all their members' workplace concerns and their employer's interest in having a productive mechanism to resolve race discrimination complaints.[157]

The use of mandatory arbitration is not just better procedurally for lasting relationships, but is arguably better functionally as well since it allows employees without knowledge of the judicial system to be ushered through a defined process (arbitration) by its union where, otherwise, employees may not know how to navigate a confusing and complex judicial system that would require additional money, effort, and knowledge that an employee may not have.[158]

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153 Michael Z. Green, *Reading Ricci and Pyett to Provide Racial Justice Through Union Arbitration*, 87 IND. L.J. 367, 395 (2012).

154 *Id.*

155 *Id.* at 402–03.

156 *Id.*

157 *Id.* at 404.

158 *Id.*

B. *Collective Bargaining Agreements: Negotiating and Drafting*

In order to ensure labor disputes are decided in an arbitration setting, the "clear and unmistakable" standard must be adhered to while also making sure that employee statutory rights are not limited.[159] One step in ensuring that arbitration is the forum in which labor disputes are decided is to create a collectively bargained agreement that is both suitable to both parties and makes sure to adhere to the standards needed to maintain the arbitration clause's enforceability.[160] In order to ensure the agreement is one that will avoid court, agreements must be negotiated and then subsequently drafted with precision to keep labor disputes out of court and remain in arbitration, where, in this Note's opinion, they belong.[161]

One particularly relevant article entitled *Drafting Arbitration Clauses: Avoiding the 7 Deadly Sins* by John M. Townsend notes first how the use of "equivocation," or ambiguous language, can derail the ultimate goal of agreements that strictly enforce arbitration clauses.[162] True to *Pyett*, this first "sin" would deviate from the "clear and unmistakable" standard required for enforceability, thus potentially leading to a court determination. Two other related sins are "over-specificity" and "inattention" in contract drafting.[163] Overly specific arbitration clauses can create unnecessary hurdles to arbitration by providing terms that are unrealistic or so specific that the details make it increasingly difficult to create the arbitration forum or resolve disputes effectively or efficiently.[164] Conversely, while a clause written inattentively or using basic boilerplate language may have worked in other labor contracts, it is not certain to have the same effect or meaning in every aspect and therefore may not be enforceable or deter court proceedings.[165] Closely related to inattentive drafting is the sin of "omission." Collective bargaining agreements must have the terms needed to clearly lay out arbitration procedures so that the parties are not

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159 *Id.* at 395.

160 John M. Townsend, *Drafting Arbitration Clauses: Avoiding the 7 Deadly Sins*, 58 DISP. RESOL. J. 28 (2003) (discussing the common mistakes made in drafting a collective bargaining agreement).

161 *CBA Negotiation Checklist*, FINISHING CONTRACTORS, (last visited Jan. 14, 2018), http://www.finishingcontractors.org/sites/default/files/uploads/CBA%20Negotiation%20Checklist%202016%20—%20FCA%20International_1.pdf.

162 Townsend, *supra* note 160, at 25.

163 *Id.*

164 *Id.*

165 *Id.*

forced into court to resolve issues such as when, where, or how the arbitration hearing is supposed to occur.[166] Counter to the sin of omission is that of "litigation-envy."[167] Litigation-envy can occur when the designated rules agreed upon in an agreement are too finely detailed and too similar to that of the rules of civil procedure.[168] Each individual arbitration process may need its own specific rules as the federal rules may not coincide with the desired aims of the litigation issues at stake.[169] Next, the sin of "unrealistic expectations" occurs in drafting and negotiating when either one or both of the sides of a collective bargaining agreement set standards to arbitrate that will be too difficult to realistically occur.[170] This can happen by setting timelines that are too quick to be achieved or procedures that are too onerous.[171] Finally, the sin of "overreaching" occurs when a writing drafter tries to improperly favor the side of the writer.[172] The result of an agreement that unfairly weighs the arbitration rules to one side is that the agreement can be brought to trial to determine whether the duty of good faith and fair dealing in contract negotiations was breached.[173] The negotiations to the drafting process used to create collective bargaining agreements can ensure, with proper construction, that labor cases end up in arbitration as intended, rather than additional hearings in a courtroom due to a failure of drafting due to one of the "deadly sins."

C. *Collective Bargaining Agreements: Mediating Labor Disputes*

The nature of labor disputes creates a setting of two parties that are inherently opposed to one another, but at the same time rely on each other for continued success and prosperity.[174] While in other legal settings parties may only have to deal with one another one time, when an employee and employer set up a collective

166 *Id.*
167 *Id.*
168 Townsend, s*upra* note 160.
169 *Id.*
170 *Id.*
171 *Id.*
172 *Id.*
173 *Id.*
174 *Good Labor Relations—Imperative in Today's Economy*, RISI TECH. CHANNELS, https://technology.risiinfo.com/mills/north-america/good-labor-relations-imperative-todays-economy (last visited Jan. 14, 2018).

bargaining agreement together, they are signifying that they want the relationship to last and for there to be unity in the decisions and determinations with the employees involved in the agreement.[175] With any dispute, contracts can be read and interpreted differently, and each party obviously wants the interpretation that most favors their position. It is with these competing interests (that of continued prosperity on one hand, and the potential for collective bargaining agreements to be interpreted in different ways on the other) that the importance of non-hostile labor resolutions are exemplified.[176] As both employers and employees ultimately want the same thing, continued working relationships in the face of a daunting work stoppage or strikes, the relationships of both unions and employers, as well as the attorneys working for either side, must remain intact and must maintain a good working rapport.[177] One solution aimed at maintaining the peace between each side while simultaneously attempting to resolve issues, both before and after CBA agreements are made, is through the use of grievance mediation.[178]

Mediation is when a third-party mediator helps the sides in reaching a settlement or compromise through structured negotiations.[179] The difference between arbitration and mediation is that a mediator does not provide a decision, but rather works with both sides to help them come to a conclusion, rather than an arbitrator who issues an opinion that the sides must then abide by.[180] While arbitration may be the most effective means to definitively assure that a resolution to an agreement will be determined, mediation can be used as an effective means to help resolve issues before ever needing the use of an arbitrator for a variety of reasons. Some of the reasons that mediators are able to get results are because of

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175 *Id.*

176 Jesse Molina, *Broken Promises, Broken Process: Repairing the Mandatory Mediation Conciliation Process in Agricultural Labor Disputes*, 21 SAN JOAQUIN AGRIC. L. REV. 179 (2012) (discussing the importance of mediation to ensure a more effective bargaining process in an agricultural labor setting).

177 *Id.*

178 May Olivia Silverstein, *Introduction to International Mediation and Arbitration: Resolving Labor Disputes in the United States & the European Union*, 1 AM. U. LAB. & EMP. L.F. 101 (2011) (discussing the use of mediation in labor disputes and the importance of trying to resolve issues in mediation prior to arbitration).

179 Deborah A. Schmedemann, *Incorporation Mandatory Arbitration Employment Clauses into Collective Bargaining Agreements: Challenges and Benefits to the Employer and the Union*, 9 INDUS. REL. L.J. 523 (1987).

180 Silverstein, *supra* note 165, at 28.

their impartiality and neutral perspective.[181] Because the mediator is not giving a ruling, parties can feel safer around the mediator to cut through some of the legal repercussions about misspeaking, knowing that the mediator is there to try and help come to a just solution.[182] Additionally, the mediator can use his or her expertise in resolving issues by using methods that they have previously used or tactics that can help the negotiation process from becoming stagnant if discussions get stalled.[183] These methods can further grow the trust between the parties and help establish a dialogue in order to come to fair conclusions.[184]

Because of the strengths that mediation can provide, mediation can be especially important in the labor setting. In a labor dispute, the parties must continue to work together throughout the duration of a collectively bargained agreement and mediation generally will not allow for a relationship to become so strained as to not allow the parties to continue to work together.[185] Additionally, mediators are outside of the dispute, allowing for the sides to try to "please the mediator," rather than giving into their opponent.[186] At the conclusion of mediation, if the sides are able to come to an agreement, the negotiators can take the credit, while alternatively, they can place the blame on a mediator if no settlement or compromise can be reached.[187] The *Pyett* case provides a great example of the importance of maintaining relationships and how the use of a mediator could be beneficial in that kind of labor situation. Two of the primary players in *Pyett*, specifically, the Realty Advisory Board on Labor Relations and the union, Local 32BJ, have been able to maintain a good working relationship for nearly ten years after the *Pyett* decision was determined and today still work together on an almost daily basis.[188] While mediation in this context may not have been able to bring about a solution to the workers in question, the open dialogue and relationship of the parties, which is essential during mediation, both prior and after the Supreme Court's ruling, surely helped maintain a good working relationship and allowed the two sides to have continued strong relationships despite their differences. The downsides to mediation may be that

181 Schmedemann, *supra* note 166, at 28.
182 *Id.*
183 *Id.*
184 *Id.*
185 Silverstein, s*upra* note 165, at 28.
186 Schmedemann, *supra* note 166, at 28.
187 *Id.*
188 Realty Advisory Board on Labor Relations, *supra* note 28.

if the sides are unable to come to a conclusion, it may feel like the parties wasted time and effort in trying to resolve a problem without having the means to make a ruling as an arbitrator would.[189] However, while this Note still believes that arbitration is the ideal way to handle disputes in the labor setting because of the ability to make rulings, because of the need to maintain relationships, the ability for the sides to be open and have meaningful discussions, as you would find in mediation, can still be a useful tool in the labor context.

D. *Collective Bargaining Agreements: Arbitration to Decide Arbitration*

Another method into securing arbitration as the preferred method of resolving labor disputes is actually using arbitration to make the determination of whether an issue is in fact arbitrable. The question of whether a court or an arbitrator has the jurisdiction to preside over the question of whether an issue is arbitrable is one that can lead down a wormhole of questioning how to decide if a case should be arbitrable in the first instance.[190] It is with this situation in mind that the positives and negatives of using arbitration should again be weighed and ultimately determined that, in a labor setting, arbitration (even to decide if arbitration is the proper forum for a decision to be made) is still the superior choice.

It has never been a question as to whether courts are able to determine the arbitrability of a case or a collective bargaining dispute.[191] However, the opposite proposition, whether arbitration can decide if arbitration is the correct forum for the resolution of a dispute, is a different story entirely. Additionally, individual states have created specific rules and procedures as to answering whether arbitration is the proper forum and the ability to then appeal those decisions to either a state court or even an appellate court.[192] Brian D. Kennedy's article, *An Arbitrator's Jurisdiction to Determine Arbitrability of Labor Disputes Under Public Sector Collective Bargaining Agreements: Is the Arbitrator's Jurisdiction to Decide*

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189 Schmedemann, s*upra* note 166, at 28.

190 Brian D. Kennedy, *An Arbitrator's Jurisdiction to Determine Arbitrability of Labor Disputes Under Public Sector Collective Bargaining Agreements: Is the Arbitrator's Jurisdiction to Decide Arbitrability in the First Instance the Worst of Both Worlds?—McLaughlin v. Chester Upland School District*, 1996 J. DISP. RESOL. 237 (1996).

191 *Id.*

192 *Id.*

Arbitrability in the First Instance the Worst of Both Worlds?, explores many of the issues and arguments when arbitration should be used to decide if arbitration is the proper forum to hear a dispute.[193] This creates one of the primary arguments against the use of an arbitrator to decide arbitrability. The idea is that because the issue of arbitrability is appealable, either to state or appellate court, there may be a potential waste of time for the parties involved who would have to litigate all the issues in front of an arbitrator, only for the potential for a court to rule the arbitrator should not have heard the case first at all.[194] However, this opinion forgets that regardless of who is deciding the arbitrability of a case (either an arbitrator or a judge) the possibility of a forum change is always possible given that the arbitrator or judge could always rule that the other forum is more suitable.[195] Therefore, if both a courtroom or an arbitration hearing has the same issue that forces the decision into the other setting, the setting that should hear the case in the first instance is the one that makes the most sense given the parties.[196] Thus, given that the parties in a labor dispute are well known to arbitrators who are experts in the subject matter, it should be up to the arbitrators to decide if the case and language of the collective bargaining agreement should be heard in front of the arbitrator himself or at a separate court hearing.

Additionally, there are those who object to arbitrators deciding if arbitration is the proper forum because they believe the ability to appeal to a court creates an opportunity to prolong decisions and possibly get a second shot at a hearing based on conducting the hearing in an improper setting.[197] However, this undermines the ability of the arbitrator and suggests that judges will not rely on an arbitrator ruling and give deference to the arbitrator's insights on collective bargaining agreements and labor disputes in general. Also, both the judges and arbitrator's ruling on the same topic of arbitrability should come to the same conclusions the majority of the time anyway.[198] These same opponents say that because there remains the ability to appeal to the court system, this makes leaving the possibility of arbitration up to the arbitrator a waste of time and very inefficient.[199] It is possible that trying the entire case, in-

193 *Id.*
194 *Id.*
195 *Id.*
196 *Id.*
197 *Id.*
198 *Id.*
199 *Id.*

cluding the arbitrability of the case, in front of the arbitrator, only then for the one issue to be brought in front of the court, is still more efficient than holding the entire case in a judicial setting where procedural rules and court availability can delay awards considerably.

Finally, the intersection between *Pyett* and the idea that arbitration should determine whether arbitration clauses are enforceable are particularly relevant in assuring that arbitration is the primary outlet for resolving labor issues. In other words, the "clear and unmistakable" language that allowed the arbitration clauses found in the *Pyett* collective bargaining agreement to be upheld can also help to establish that arbitration should resolve the question whether a case should be heard in front of an arbitrator at all.[200] In any instance that there is ambiguity or confusion as to whether the collective bargaining agreement should be interpreted through an arbitrator or a judge, the clear and unmistakable language of the collective bargaining agreement pushing towards arbitration will be able to determine arbitration as the proper forum.[201]

After the *Pyett* decision came out, the importance of the use of arbitration as a means of resolving labor disputes was further emphasized by the parties involved. In what is now called the "Post-*Pyett* Protocol" between the Realty Advisory Board and Local 32BJ, the two sides agreed that even when the union does not decide to follow through with defending their member-employee in arbitration, the member-employee must still use arbitration as a means of resolving their discrimination dispute.[202] This commitment to the arbitration system in the agreements after *Pyett*, even when the union does not take the case to arbitration itself, shows just how important arbitration is to labor relations and, in the case of the Realty Advisory Board and Local 32BJ as previously stated above in Section A, provides employees with an opportunity to present their claim where otherwise they may not have been able to.[203]

The continuity of arbitration in labor disputes will further help to retain positive labor relations by not furthering hostilities in multiple settings and trying to resolve issues quickly as to make

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200 14 Penn Plaza LLC v. Steven Pyett, 556 U.S. 247 (2009).

201 *Id.*

202 Michael Z. Green, *A Post-Pyett Collective Bargaining Agreement to Arbitrate Statutory Discrimination Claims: What Is It Good For–Could It Be Absolutely Nothing or Really Something?*, *in* THE CHALLENGE FOR COLLECTIVE BARGAINING: PROCEEDINGS OF THE NEW YORK UNIVERSITY 65TH ANNUAL CONFERENCE ON LABOR (Michael Z. Green ed., 2013).

203 *Id.*

sure that any lingering disputes do not lead to a stoppage of work. The ability of arbitrators to know and understand the issues within a collective bargaining agreement they are hearing, the quick resolution of disputes, and the importance of maintaining great labor relations are just a few of the important reasons as to why all matters, including whether a case is arbitrable in the first place, are better left for arbitration hearings.[204]

V. Conclusion

It is clear that arbitration is the most effective means of resolving disputes in the labor context. In order to assure that these disputes are heard at an arbitration hearing, as opposed to a judicial resolution, the lessons of *Pyett* remain key. By using the standard of "clear and unmistakable," parties to a collective bargaining agreement can be sure to have their disputes heard in front of an arbitrator. The great time and expense of litigating in court as opposed to in arbitration, that arbitrators are experts in this field, and the importance of maintaining strong labor relations are all important factors in determining that arbitration should be the primary vehicle in which labor disputes are able to be resolved.

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[204] Weatherspoon, *supra* note 43, at 8.