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Systems for Conflict Resolution in Comparative Perspective

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Abstract

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Keywords

industrial relations theory, workplace conflict, Germany, Italy, United States, Australia

Disciplines

Dispute Resolution and Arbitration | International and Comparative Labor Relations | Labor Relations

Comments

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Systems for Conflict Resolution in Comparative Perspective

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**Conflict and its Resolution in the Changing World of Work: A Conference and
Special Issue Honoring David B. Lipsky**

Introduction

It is a cornerstone of industrial relations (IR) theory that the potential for conflict is inherent to the employment relationship. Across countries, forms of workplace conflict and methods of conflict resolution take a range of different forms. Yet aside from attempts to understand cross-national variation in strikes, there is little research examining systemic differences in the manifestation and management of workplace conflict (a notable exception is Roche et al. 2014). The following analysis seeks to fill this void by analyzing through a comparative lens practices for addressing employment related conflict in four countries: Germany, Italy, the US and Australia.

It is well established that within developed economies we find different industrial relations systems, clustering along dimensions such as the degree of centralization/decentralization of collective bargaining (Katz 1993; Traxler 1995, 2003), systems with strong or weak state-involvement (Hassel 2013, Ferner 1994), the division of interest representation in single and dual channel systems (Rogers & Streeck 1995), the nature of union identity (Hyman 2001), multi vs. single union confederation systems (Gumbrell-McCormick & Hyman 2013) or systems with or without board-level representation of workers (Waddington & Conchon 2015) to name just a few. While in general, national systems of interest representation¹ and collective bargaining have been analyzed quite comprehensively, we know much less about cross-national variation in the mechanisms for addressing work and employment related disputes.

¹ According to Dunlop (1958: 7) an industrial relations system “at any one time in its development is regarded as comprised of certain actors, certain contexts, and ideology which binds the industrial-relations system together, and a body of rules created to govern the actors at the work place and work community.”

In this paper we will seek to advance understanding of comparative workplace dispute resolution by looking at two general issues. First, we investigate specific dispute resolution practices and institutions in our four countries and seek to develop a system of classification that captures the variation between them. Second, we investigate the linkages between practices and institutions within each of these four countries and analyze the nature of complementarity in their systems of workplace dispute resolution.

Our classification of different practices and institutions for dispute resolution is informed by decades of scholarship on comparative industrial relations (Kerr et al. 1960, Hyman & Ferner 1994, Martin & Ross 1999, Bamber et al. 2011, Frege & Kelly 2013). While this research is diverse in its own right, the degree of state involvement and the level of centralization are two key dimensions that have frequently been used in this literature for classifying national systems of employment relations. We build on this literature in our analysis of systems for workplace dispute resolution by looking at two related dimensions.

Within our first dimension we look at the importance of state-level actors for resolving conflict. National patterns might – on one extreme – be subject to intense regulation by public authorities, be it the state and its agencies or the court system. At the opposite end of the continuum, in contrast, patterns might be dominated by private or voluntary procedures, whereby individuals or collective actors address conflict free of interference from public authorities. We refer to this as the regulated-voluntarist dimension

In a second dimension we ask whether conflict is to be addressed at the individual or collective level. We assume that conflict might be addressed individually by single employees and employers themselves or through collective actors such as

unions, works councils, employers' associations or alternative dispute resolution bodies. We refer to this as the collective-individual dimension.

We begin by setting out the framework for our comparative analysis. Then we turn to describe our four national system examples: Germany, the United States, Italy, and Australia. We follow with our comparative analysis and discussion of the implications of our findings.

Framework for the Analysis

In conducting a comparative analysis, it is necessary to define what it is that will be compared. Our general focus is on comparing systems for resolving workplace conflict. Given the substantial variation that exists between different national systems, an initial analytical problem is to identify common features of these systems that we can examine in each of our cases. Previous accounts on workplace dispute resolution systems have focused on different aspects or pillars of such systems.

The first pillar is the set of parties to the conflict. Traditionally in the labor relations field, the focus has been on labor and management as the key parties to conflict. However there is increasing diversity across countries in how these parties are constituted. Is labor organized collectively or acting as individual employees? Is management decentralized at the establishment level, acting at the firm level, or organized collectively through employers' associations?

The second pillar is the nature of the conflict between the parties. Are disputes mainly about wages and other terms and conditions of employment? Are operational and strategic decisions of the organization part of the terrain of labor-management

conflict or restricted to unilateral managerial authority? To what extent are disputes over employee rights a central manifestation of labor-management conflict?

The third pillar is the process of conflict resolution. What types of dispute resolution procedures are used to resolve conflicts between labor and management? Procedures may involve public mechanisms like labor courts and employment tribunals. Alternative dispute resolution procedures such as arbitration and mediation are used in many systems. In some countries, private adjustment of disputes through negotiated or organizationally established procedures are important.

The fourth pillar is the source and role of power in the system. Bargaining power is a central construct in labor relations theory. In analyzing dispute resolution systems it is important to identify and account for the sources of power for the parties in the system (Colvin 2016). How is labor able to bring pressure on management to achieve its goals in resolving conflicts? How is management able to resist pressure from labor? What is the source of authority and power for neutrals seeking to resolve disputes?

We build on these key pillars, the parties to conflict, subjects of conflict, conflict resolution processes, and power relations, to describe our four different national systems of conflict resolution. We then extend this analysis by comparing these systems cross-nationally along two axes: the regulated-voluntarist dimension; and the collective-individual dimension.

The regulated-voluntarist dimension captures variation in the role of state versus private actors in the system, thus giving center stage to the parties of conflict as well as the power relations between parties involved. On the regulated end of this axis, we find systems that feature a more direct role for state actors as key actors in

the resolution of work disputes, such as the use of public tribunals to resolve disputes. Public agencies in regulated systems are often important actors in dealing with specific work disputes, rather than just establishing the ground rules for the system. Built on the sovereignty of the state provides such agencies with substantial power resources as well as effective means to enforce their decisions. By contrast, in systems on the voluntarist end of the spectrum, private parties are the main actors in the system, developing their own dispute resolution processes with only limited or indirect involvement from state actors.

The collective-individual dimension captures the degree to which work disputes are individualized, thus involving the pillars of parties to and subjects of conflict. Work disputes typically involves only one employee or a small group, as key parties or are collectivized, involving employees acting as a group through unions, works councils or other collective structures. In addition to reflecting how labor is organized or not as actors in the system, this dimension also reflects the nature of the conflicts being resolved. In more collective systems, work disputes more typically concern conflicts over subjects such as the implementation of collective agreements negotiated by unions or other collective groups of employees. By contrast, in more individualized systems, conflicts increasingly involve disputes over general employment rights that are often established by legislation and belong to the individual employee rather than to a collective group of employees.

Put together, these two dimensions provide us with the comparative framework within which we will analyze our four cases. The framework is presented graphically in Figure One.

[figure 1 about here]

From what we know about our four industrial relations systems we predict the Italian and US cases to be more voluntaristic as state influence in labor relations is considered to be comparatively weak (see for example Locke 1995; Katz et al. 2007). In contrast, labor relations in Germany and Australia are considered to be more regulated, with the strong influence of the famous Award-system in Australia and statutes as well as court decisions in Germany (see for example Wright and Landsbury 2016; Keller and Kirsch 2016). Despite these similarities which lead us to place the regulated pair of Germany and Australia into the upper cells of Figure 1, whereas the voluntaristic pair of Italy and the US are in the lower two cells, our two country-pairs also have to be classified along the collective-individual dimension. With the dominant role played by unions and employers associations in Italy and Germany, these two countries share common ground in being more collectivist and can be located in the left (collective) side of Figure 1. In contrast, in Australian and the US, labor and employment relations are more individualized and so we would expect workplace conflict and conflict resolution to be more focused on the individual level, placing this pair of countries in the right-hand cells of Figure 1. Whether this classification based on their general systems of labor and employment relations also holds for systems of conflict resolution will be investigated in our comparative analysis of the four national systems.

Beyond the analysis of different national-level practices or institutions we also know very little on how they are interconnected at the national or sub-national level. Do they take the shape of distinct, coherent national systems or, alternatively, do different sub-national procedures or systems operate independently to address particular types of conflict? How do sub-national procedures or systems interact with

each other and do they do so in a way that enhances or reinforces the combined national system?

While recent scholarship has forcefully made the case for national industrial relations institutions or “varieties” (Hall & Soskice 2001, Hancké 2009) this view has been challenged by observations of prevailing if not increasing within country variation (Locke 1992; Katz & Darbshire 2000; Thelen 2014). When analyzing dispute resolution practices in our four country cases we also seek to investigate to what degree national practices are linked to each other forming national patterns which are based on institutional complementarities. Such complementarities can take the shape of two different forms. Complementarity, as a first form, emerges when one institution makes up for the deficiencies of the other (Crouch 2005). Synergy as the second form touches on the “mutually reinforcing effects of compatible incentive structures in different subsystems of the economy” (Deeg 2005: 3). We will investigate the extent of complementarity and synergy in conflict resolution practices in each of our four countries.

We next present our four national case studies, Germany, the United States, Italy, and Australia.

Germany

Much of German labor relations have been characterized by “juridification”, a term which refers to a dense web of statutory rules and procedures that restricts the behavior of key collective actors in an effort to reduce levels of conflict at work (Müller-Jentsch 1997: 303; Keller 2008: 66-7). While “juridification” is certainly emphasizing the regulated dimension of conflict resolution, within the second dimension of our analysis – individual vs. collective – outcomes turn out to be more

diverse. As will be shown in this section, different elements of the German conflict resolution system give room for individual action while other parts are heavily dominated by collective actors.

At the heart of the German system of conflict resolution is the so-called “dual system” of interest representation, which ensures that workers’ interests are represented through collective bargaining, conducted between trade unions and employers’ associations (or single employers), above the company level on the one hand, and at the plant-level through establishment-level works councils on the other hand. While employees are free to address their legal claims arising from their employment contract in a well-developed system of public labor courts, a major focus of the German system of dispute resolution is at the collective-level involving unions, works councils, employers and employers’ associations as key actors (Behrens 2014).

Collective bargaining

Collective bargaining is the responsibility of unions and employers’ associations. Agreements are mostly negotiated for an entire industry within a certain region (in most cases this is one of the 16 German states (*Länder*)), but a number of national-level agreements can be identified, for example, in banking and in the public sector. The German Collective Bargaining Act (*Tarifvertragsgesetz*), however, also allows for company-level agreements to be negotiated between a union and a company’s management. While the framework for collective bargaining is provided for by statute and by the German constitution, the latter guaranteeing the famous concept of “collective bargaining autonomy” free of government interference,

collective bargaining dispute resolution boards are – if created at all – to be voluntarily created by unions and employer associations (Weiss 2012: 805-6).

Most multi-employer agreements are negotiated between one of the approximately 700 employers' associations (most of them directly or indirectly affiliated with the Confederation of German Employers, BDA) and one of the eight affiliates of the German Trade Union Confederation, DGB. In 2015, 31 per cent of establishments in west Germany and 21 per cent in east Germany were covered by a collective agreement (both types: industry and plant-level) (Ellguth and Kohaut, 2016: 284). Because collective bargaining coverage rises along with company size, this leads to 59 per cent of all employees in west Germany and 49 per cent in east Germany being covered by a collective agreement (Ellguth and Kohaut, 2016: 284).

Conflict in the area of collective bargaining takes the shape of strikes and lockouts, both being guaranteed by section 9 III of the German constitution. While there is no designated law regulating strikes in Germany, several standards and restrictions have been established by major decisions of the Federal Constitutional Court (*Bundesverfassungsgericht*) and the Federal Labour Court (*Bundesarbeitsgericht*). Among other standards, the courts have established that strikes are to be called by a union, are only legal to pursue a goal which could be regulated by a collective agreement (implying that political strikes are considered to be illegal) and when a collective agreement has expired or when no agreement is existing (on a particular subject) at all. In addition, strikes should be a weapon of last resort (*ultima ratio* principle) and should not be excessively used (*Verhältnismäßigkeit*).

When compared to other OECD countries, strike activity in Germany is rather moderate. In terms of working days lost per 1,000 employees (averages for the years

2004-2007) Germany's strike activity is at the lower end of the distribution with only Austria, Sweden, Switzerland, the Netherlands and Poland having less strike activity (Dribbusch, 2010: 159). In recent years, lockouts by employers have been hardly used at all (Schroeder/Silvia 2014: 357).

Establishment level interest representation

Works councils, according to the Works Constitution Act (WCA), can be formed in establishments with more than five employees are elected by the entire workforce (rather than just by union members). They represent workers' day-to-day interests in areas such as hiring, transfers, dismissals, company restructuring, and discipline, but also work organization, working time regulation, overtime work, and the administration of company facilities such as cafeterias, childcare or housing. Yet the WCA also imposes limits on the scope of works council activities. In particular, works councils are not allowed to either bargain collectively (section 77 III WCA) or to call a strike (section 74 II WCA). In 2015, 42 percent of all west German employees in establishments with more than 5 employees were represented by a works council. In east Germany, only 33 percent of all employees were covered (Ellguth and Kohaut, 2016: 288).

While employees are entitled to address individual grievances directly to the employer, or to the works council, the most common dispute resolution procedure at the establishment-level are arbitration panels. Such panels are mostly used to resolve collective-level conflict between works councils and management. In cases of workplace conflict concerning "differences of opinion" an arbitration panel is required by the WCA to produce a legally binding decision (section 76 I WCA). In conflicts that

involve matters where works councils enjoy statutory co-determination rights (not just information or consultation rights), the arbitration procedures can be activated by one side, either the WC or the employer. Panels are composed of an equal number of works council and employer representatives, as well as a neutral chair. In practice, the chair is usually a professional judge from the local labor court. The decision taken by the arbitration panel has the character of a works agreement, which is an enforceable contract-like document. A recent study has found that about 11% of establishments (only private sector establishments with more than 20 employees possessing a works council) have used arbitration in the previous two years (Behrens 2007: 180). As in the case of collective bargaining, establishment-level interest representation is heavily emphasizing the collective over the individual level. The WCA is exercising strong regulatory powers over establishment level labor relations as well as conflict. While in the case of collective bargaining, the law is providing for a general framework based on which collective actors negotiate, the effect of the WCA at the establishment-level is much more immediate.

Statutory Employment Rights

A third level through which workers' grievances can be expressed is individual employment rights. While many aspects of the employment relationship are regulated by collective bargaining (between unions and employers) or through works agreements at the establishment level (negotiated between plant management and works council) German law provides for a variety of minimum standards in areas such as maximum length of the working day, minimum vacation days, safety and health standards, maternity leave and – enacted quite recently in 2015 – minimum wages. Statutory minimum standards are important because first, they provide for a minimum floor and second, more than a third of all German workplaces with more

than five employees are not covered by either collective bargaining or works councils. Employees can litigate their claims in a special labor court system, a branch of the public court system which is fairly easy to access, with a local court available in many localities with moderate court fees (Weiss 2012). It should be noted, however, that labor courts are also in charge of litigating individual and collective claims based on standards set by collective bargaining or by works councils.

When compared to the two other areas of dispute resolution, collective bargaining and establishment-level worker representation through works councils, the litigation of worker's claims is certainly the most individualized area. While – as the term “juridification” of German labor relations suggests – all three areas are regulated by statute or constitutional rights, the effect of regulation in collective bargaining (“framework regulation”) is less immediate when compared to the two remaining areas. This is not to suggest, however, that the three areas of conflict resolution are independent from each other, an aspect where the next section is turning to.

Conflict, Complementarities and Change in German Labor Relations

As we have argued in the introduction, complementarities first include that both set of institutions are not just the same. As the brief description of Germany's dual system of industrial relations suggests, both elements of the system are based on different general principles. First, the two arenas are dominated by different actors: works councils and plant management at the establishment-level, and labor unions and employers' association (in some case individual employers) in the case of collective bargaining above the establishment level. Also, different laws apply to regulate the two pillars: the WCA in case of the establishment-level and the

Collective Bargaining Act and Section 9 of the German constitution in the case of labor relations above the establishment. As for the different key tasks to be pursued by the actors at both levels are concerned, the differences are also quite striking: The WCA prohibits works councils from negotiating collective agreements, while section 2 of the Collective Bargaining Act assigns the sole responsibility for concluding agreements on wages, hours and working conditions to unions, employers and employers' associations.

As we have also argued, complementarities might come in different forms, either as institutions supplementing each other (compensating for each others shortcomings) or by providing for synergies (providing for mutually reinforcing effects). As the case of the dual system clearly shows, there is much room for synergies. The – de jure – rigid separation of responsibilities has important consequences for potential employment-related conflict. As responsibility for matters such as wages, hours and working condition is mostly removed from the establishment level and assigned to collective bargaining parties, conflict arising from “distributive bargaining”, to use the term introduced in Walton and McKersie's (1965) seminal work, has been largely removed from the plant level.

Being, at least to some degree, relieved of the task of having to negotiate over wages, plant-level management and works councils are freed to address other issues and problems. To use another of Walton and McKersie's (1965) concepts, “integrative bargaining” matters dominate their deliberations, with the focus very much on problem solving rather than on distributing a ‘cake’ of a fixed size. Working together to solve problems strengthens a collaborative ethos between plant level-management and works councils. As a result of these synergies there is not an end to conflict, it is just regulated or “bounded”. There is still plenty of space for diverging

interests at the establishment level. To mention just one example: while the length of the working week is to be regulated by collective bargaining, the distribution of these hours over the working week, rules determining the beginning and end of the working day, overtime work, the introduction of working time accounts (whereby hours could be banked to take time off at a later point in time) as well as procedures for the measurement and documentation of working time are all the responsibility of the works council.

Such complementarities, however, do not imply different levels of conflict compensating for each other. As previous research has shown, different conflict relationships such as conflict between works council (WC) and management (“class-conflict”), between WC and the workforce (“representational conflict”) or even union-WC conflict (“conflict of solidarity”) are positively correlated with each other. So, for example, a high level of conflict in a works council’s relationship with management is not associated with comparatively low levels of conflict of solidarity between the WC and unions, rather high levels of WC-management conflict is associated with high levels of WC-union conflict (Behrens 2017).

Complementarities are also affected by major developments within the larger system of German labor relations institutions. First, coverage by both works councils and multi-employer bargaining has been on a decline for more than 20 years (Keller and Kirsch 2016) as has union density (Dribbusch/Birke 2016). This ongoing decline reduces the areas within the German political economy for which complementary institutions are effective and, in turn, increases the size of those unregulated areas which are subject to voluntarist and more individualized modes of dispute resolution. In addition, a strong and enduring tendency for the decentralization of collective bargaining (mostly through opening clauses which empower firm level actors to

derive from standards agreed upon at industry level) is reducing the system's power to keep distributional bargaining (and conflict coming along with it) away from the establishment-level (Traxler 2003; Bispinck/Schulten (2003). By way of bringing works councils back into collective bargaining, complementarities within the wider system of regulating work related conflict have been weakened.

United States

Workplace dispute resolution in the U.S. operates through three distinct subsystems. Union represented workplaces feature elaborate contractual grievance procedures that culminate in binding arbitration by private neutral labor arbitrators. Statutory and common law employment rights are enforced through a complex and highly conflictual court litigation system. Meanwhile, nonunion workplaces feature a range of procedures and systems for conflict management adopted and managed unilaterally by employers. These three distinct subsystems produce a fractured landscape for workplace dispute resolution in the U.S. that is characterized by its individualistic focus and privatized structure.

Unionized Workplace Conflict and Grievance Procedures

Dispute resolution in unionized workplaces in the U.S. is shaped by the distinctive American system of labor relations that has its origins in the Wagner Act model dating back to the 1930s. A key characteristic of the Wagner Act model of labor relations is the system of exclusive representation, where workers in a workplace collectively decide whether or not to be represented by a union based on majority rule. This sets up a sharp distinction between workplaces as being either

union represented or completely nonunion. In workplaces that are union represented, collective bargaining takes place on a decentralized basis, usually at the level of the firm or, most commonly, at the level of the individual establishment.

Historically under the Wagner Act model, there was a strong emphasis on the use of the strike weapon in support of bargaining demands, though in recent years strike rates have declined dramatically (Katz et al 2007). At the same time as accepting the use of the strike weapon in contract renewal disputes, there was a concern in U.S. labor relations about the disruptive effects of industrial conflict over workplace issues during the term of the collective agreement. This led to the widespread adoption of grievance procedures culminating in binding arbitration to resolve workplace disputes involving the application of contract. This labor arbitration system received a major boost during the 1940s when the War Labor Board encouraged its adoption as part of its efforts to avoid wartime strikes. During the postwar period, grievance-arbitration procedures became effectively universal in unionized workplaces as a quid pro quo for industrial peace clauses in collective agreements under which the union agreed not to engage in strike action during the term of the contract.

The standard grievance-arbitration procedure in a unionized workplace in the U.S. is a multi-step procedure, typically involving 3-5 steps, in which a grievance filed by the union is discussed by successively higher levels of union and management representatives. The parties attempt to negotiate a resolution to the grievance at each step, with the dispute becoming more formal and serious as it escalates to higher levels. Ultimately if the grievance is unresolved, it is submitted to arbitration, where the arbitrator conducts a hearing and renders a binding decision on the outcome of the grievance.

The final labor arbitration step is central to this system of workplace dispute resolution. It provides both parties with finality of resolution of disputes about interpretation and application of the contract. Employers benefit by avoiding the disruptive effects of industrial action in the workplace. Employees and their unions benefit from the provision of industrial justice, including the important role of labor arbitrators in applying the just cause rule for discipline and dismissals, which is found in the vast majority of contracts.

The U.S. labor arbitration system is a privatized system of workplace dispute resolution. It is established by the collective agreement negotiated by the parties. The labor arbitrators are private, third-party neutrals, selected by the parties. A key feature of the success of the system is that over time there developed a strong professional cadre of neutral labor arbitrators, accepted by both employers and unions. Since the parties jointly select and pay for the arbitrators, the arbitrators have a strong incentive to be even-handed and responsive to the needs of the parties.

The system of grievance-arbitration in U.S. unionized workplaces has proved remarkably successful and resilient. One indicator of this is that while many aspects of U.S. labor relations have undergone major transformations in recent decades (Kochan, Katz, and McKersie, 1994), grievance-arbitration procedures remain nearly universal in unionized workplaces and retain the same basic structure and function as they have since the 1950s. The most salient change in regard to these procedures as a result is their declining reach with the shrinking rate of union representation in the U.S., which by 2015 had declined to only 12.3% of the workforce (BLS, 2016).

Individual Employment Rights Litigation

Historically, employment law in the U.S. has been based on the doctrine of employment-at-will, under which an employer is entitled to dismiss an employee for good reason, bad reason, or no reason at all, with no need for notice, severance payment, or any possibility of reinstatement. This rule gave American employers free reign to manage their workplaces and made the U.S. a strongly employer-favorable system compared to other countries. The broad reach of the employment-at-will rule began to be curtailed in the 1930s with the Wagner Act's prohibition of dismissing workers for union organizing activity and the Fair Labor Standards Act's establishment of wage and hour standards. It was further restricted beginning in the 1960s with the passage of a wave of civil rights laws banning discrimination in employment, including the Civil Rights Act of 1964, the Age Discrimination Act of 1967, and later the Americans with Disabilities Act of 1990. Additional limitations on the stark terms of the employment-at-will rule were also developed, particularly in the 1980s, by state courts that recognized certain motivations for dismissals as violating public policies or contractual terms found in employee handbooks or representations made in hiring.

The result of the expansion of these statutory and common law protections in recent decades has been a growth in the number and importance of individual employment rights conflicts. During the 1990s alone, there was a 270% increase in the number of employment discrimination cases brought in the federal courts (Colvin 2012). An important characteristic of how these disputes are resolved in the U.S. is that they are mostly handled through litigation by private parties in the general courts, rather than through specialized employment tribunal or government agencies. Although government agencies responsible for enforcing employment statutes exist in the U.S., they play a relatively small role. For example, the Equal Employment

Opportunity Commission brings less than 2% of the claims under the Civil Rights Act, with the remainder being brought by private parties, usually plaintiff attorneys acting on behalf of employees (Colvin 2016).

The American litigation system for resolving employment disputes is distinctive in the complexity of its procedures and the high risk, high reward nature of outcomes. The average case takes around two years to resolve through a trial (Eisenberg and Schlanger 2003), before which there are complex preliminary procedures including extensive pre-trial discovery of information from the other side and the ability to argue preliminary motions seeking to dismiss cases without a hearing. Employers are able to have many cases dismissed on preliminary summary judgment motions, making arguments such as that a dismissal while arguably unfair did not involve discrimination (Clermont and Schwab, 2004). But employees who are able to reach trial win many cases and have the opportunity to collect sizable damages. A study of federal court discrimination cases found that employees won 36.4% of cases and recovered median damages of \$150,500 and mean damages of \$336,291 (Eisenberg and Hill 2003), while a study of California state court wrongful dismissal cases found that employees won 59% of cases and recovered median damages of \$296,991 (Oppenheimer 2003).

The complexity of defending employment law cases as well as the uncertainty of outcomes with the potential for large damage awards, provides a source of bargaining leverage for U.S. employees in individual employment rights cases (Colvin 2016). Most cases settle, with those that can survive summary judgment motions receiving particularly large settlements. The impact of the threat of employment litigation for U.S. employers goes beyond settlement of individual cases as many employers take internal organizational measures to avoid litigation, including training

and monitoring managers to avoid discriminatory behaviors and establishing internal complaint procedures to resolve problems before they result in litigation.

Dispute Resolution in Nonunion Workplaces

The U.S. lacks any direct legal or policy requirements for organizations to have workplace dispute resolution procedures. By contrast, the continued adherence to the employment-at-will doctrine empowers employers with to manage the workplace unilaterally with the need for any form of employee voice or due process. However, in practice many U.S. companies do have internal organizational dispute resolution procedures, some of which are elaborate and include due process protections.

What explains the adoption of dispute resolution procedures in nonunion workplaces in the U.S. in the absence of legal mandates to do so? One major category of explanations are institutional pressures on organizations from the threats of union organizing and litigation (Colvin 2003). Given the all or nothing structure of union representation under the exclusive representation system, U.S. employers have a strong incentive to adopt measures that reduce the likelihood of successful union organizing campaigns. Nonunion dispute resolution procedures are one commonly used union substitution practice that many employers adopt to at least partially replicate the benefits of unionized workplace grievance procedures. U.S. employers also have strong incentives to adopt practices that reduce the threat of employment litigation. Nonunion dispute resolution procedures can help do this by resolving workplace conflicts before they develop into employment law disputes involving lawyers and lawsuits. These procedures may also help reduce the threat of

litigation by allowing employers to more readily identify and address problematic behavior by managers that may lead to future workplace conflicts.

Another category of explanations for the adoption of nonunion dispute resolution procedures by U.S. employers are efforts to enhance workplace conflict management as part of human resource strategies, particularly those with focused on high commitment and high involvement practices. By enhancing employee perceptions of due process and fairness in the workplace, these dispute resolution procedures can increase employee commitment to the organization and enhance willingness to participate in workplace decision-making. Research has found that adoption of dispute resolution procedures is associated with use of participatory practices such as self-managed work teams (Colvin 2003).

The lack of specific legal mandates and diverse motivations for adoption has led to a wide range of experimentation in forms and structures for nonunion dispute resolution procedures in the U.S. One area of experimentation is in who decides the outcome of complaints under the procedure. Whereas most companies have procedures with management decision-makers, some have adopted peer review procedures where lower level employees who are peers of the complainant sit on a panel that reviews and decides the outcome of the dispute (Colvin 2003). There is also variation in the process of dispute resolution, with some procedures including arbitration-like hearings and others including steps that involve some form of mediation to attempt to achieve a negotiated resolution of the dispute. Some companies have set up organizational ombudsman offices that use a range of consensual methods to attempt to resolve workplace conflicts. In addition, whereas some organizations have simple stand-alone procedures, others have adopted more elaborate conflict management systems with multiple elements and methods of

resolving a range of workplace conflicts (Lipsky et al 2003). Meanwhile, in contrast to these various organizational experiments in conflict resolution, many U.S. nonunion workplaces continue to have no dispute resolution procedures at all and workers in them have to rely on the goodwill of management for fair treatment in the workplace.

Interactions between the Subsystems in the U.S.

Each of the three dispute resolution subsystems in the U.S. has its own distinct domain and mode of operation. In some respects they can be distinguished by the contrasting realms within which each of them operates. The hard distinction between union and nonunion workplaces in the U.S. deriving from the exclusive representation system produces a corresponding strong distinction between workplace dispute resolution systems in union and nonunion workplaces. The employment litigation system is built around resolution of legal claims through the public courts, whereas nonunion workplace dispute resolution systems have arisen in the absence of legal mandates and are private procedures, internal to the organization.

Despite these distinct realms, there are also important interactions between the three subsystems. As already described, institutional threats from both the unionized workplace systems and the employment litigation systems are key factors leading to the development of procedures in the nonunion workplace dispute resolution system. Although not directly linked together by public policy, these interactions are a type of indirect synergistic relationship that has strengthened nonunion workplace dispute resolution procedures.

Recent years have seen an intensification of the interactions between the subsystems. Most notably, since the 1990s many nonunion employers have adopted arbitration procedures to resolve employment law disputes with employees. Under these procedures, known as mandatory arbitration, employees are required to enter into an agreement as a condition of employment stating that they will resolve any legal complaints against the company through binding arbitration without the option of going to court or appealing the arbitrator's decision. These mandatory arbitration procedures have become very controversial in the U.S. as research indicates that arbitrators are less likely to rule in favor of employees and award much lower damages than the courts (Colvin 2011). In addition, mandatory arbitration procedures have been criticized for having due process deficiencies and arbitration decisions have been found to evidence a repeat player bias in favor of employers who are more frequent participants in arbitration (Colvin and Gough 2015). In contrast to the synergistic complementarities involved in the encouragement of adoption of nonunion workplace dispute resolution procedures, this is an instance of a negative complementarity where the expansion of mandatory arbitration has undermined the effectiveness of the employment litigation system for resolving workplace disputes.

Another synergistic complementarity that has emerged recently is the use of collective labor law rights, originally focused on unions, in relation to employment law and nonunion workplace conflicts. Under Section 7 of the National Labor Relations Act, all employees have the right to engage in concerted action for mutual aid and protection. Although this right was traditionally applied to protect union activity in the workplace, it is written broadly to encompass any form of concerted action, whether union related or not and whatever the union status of the employees. In recent years, Section 7 rights have been applied more broadly to deal with conflicts like the

disciplining and dismissal of employees for discussing workplace problems on Facebook. An important current application concerns attempts to use Section 7 to bar employers from including in mandatory arbitration agreements bans on employees bringing class action claims, which if enforced would substantially limit employee ability to effectively litigate many legal claims.

Another emerging area of positive complementarity involves the role of unions in employment law conflicts. Unions have historically enhanced the effectiveness of enforcement of employment law rights, such as health and safety standards and wage and hour rules, in unionized workplaces (Weil 1999). In the past, however unions showed little or no interest in representing nonunion workers apart from the context of union organizing campaigns where they sought to obtain representation status for the whole workforce under the exclusive representation system. In the last few years, some unions have begun focusing their efforts on using employment law reforms to obtain benefits for all employees, not just those in union represented workplaces. The most prominent and significant example of this is the efforts to substantially increase the minimum wage in the “Fight for \$15” campaign, which received its signature breakthrough success in Seattle in 2013 under the leadership of S.E.I.U. Local 775.

Despite these interesting recent developments, the overall structure of workplace dispute resolution in the U.S. remains characterized by fragmentation, decentralization, privatization, and individualization. There is a lack of strong collective structures, which is being exacerbated by the low and declining level of union representation in the U.S. The system of employment litigation that has expanded in its wake is one characterized by predominantly individual claims by workers. Similarly, nonunion workplace dispute resolution procedures are structures

designed to resolve individual worker complaints and disputes and in many cases established with a primary goal of avoiding collective representation of the workers. Workplace dispute resolution in the U.S. is also characterized by voluntary and privatized structures and systems. Unionized workplace grievance and arbitration procedures are established by contract and operated by unions and management with private neutral arbitrators. Although employment litigation occurs through the public courts, the vast majority of cases are brought by individual employees represented by private plaintiff attorneys. Nonunion workplace dispute resolution systems are private, internal organizational procedures. The rise of mandatory arbitration further intensifies this individualized, private structure of workplace dispute resolution in the U.S. as even public employment law claims are shifted to a privately designed and administered dispute resolution system.

Italy

The Italian system of conflict resolution is based on two different subsystems, the collective bargaining and the employment rights litigation system. Within the framework adopted in this paper, the first is voluntarist and collective in nature, while the second is mostly individual and regulated.

Collective bargaining

The Italian collective bargaining system is characterized by a high level of voluntarism and a minimal degree of legal intervention (Regalia and Regini 1998)².

2

According to Treu, “the major feature in the Italian bargaining system is its lack of any specific legal provisions for the bargaining procedure, scope and content of the agreements and, in general, for the conduct of the parties to the negotiation and application of collective agreements, with the exception of provisions of civil law concerning contracts in general” (Treu 2007: 183). Art.39 of the Italian Constitution which defines the conditions under which collective agreements would have acquired general efficacy (*erga omnes*) was never enacted. Hence, in the Italian system, collective agreements are acts among private actors and therefore apply to the members of signatory employers’ associations and trade unions. A significant exception is related to wages, which have been considered by the jurisprudence as the reference point for the principle of “fair pay” as foreseen by Art.36 of the Italian Constitution. Still, even if highly voluntary, Italian sectoral collective agreements are widely applied by Italian companies. Indeed, collective bargaining coverage is estimated at 80% in 2010 and shows a remarkable stability over time (ICTWSS 2016).

The articulation of the collective bargaining system is also based on the agreement between the parties. Historically, the sectoral and enterprise levels have often vied for primacy, depending on shifting power relations among the actors (Regalia and Regini 1998), but generally the sectoral level set minimum standards which could be improved at enterprise level (Baccaro and Pulignano 2016). This bipolar structure was formalized by a framework agreement negotiated by the social partners and the government in 1993. The agreement introduced a division of labor between the two levels, with the national industry level setting minimum

The following discussion deals only with the private sector. In the public sector, a different (highly formalized) system is at play, in which both the process to negotiate and the validity of collective agreements is regulated.

homogeneous standards for the industry and keeping up with inflation, and the company level improving conditions in the workplace and distributing productivity. In more recent years, pressures for reform produced divisions among the parties. One of the main issues has been the introduction of so called opening (or derogatory clauses), i.e. the possibility for lower level agreements (company or territorial) to derogate *in pejus* sectoral agreements. In 2009, a new framework agreement introducing opening clauses was signed by the employers' association Confindustria, and by two of the three confederal unions, CISL and UIL, with the strong opposition of CGIL. This was substituted in subsequent years with unitary agreements foreseeing more moderate derogatory possibilities. Still, an unprecedented intervention by the government aiming at decentralizing the collective bargaining structure took place in 2011. Indeed, decree law 138/2011 now enables enterprise bargaining to derogate sectoral agreements and even certain aspects of statute law (Pedersini and Regini 2013: 21).

Procedures for resolving interest disputes or for defining the negotiating procedure are not part of the formal structure of the system. Historically, however, the Ministry of Labor (in its central and peripheral articulation) has frequently played a role of mediator among the parties in case they were unable to agree on a collective agreement (Treu 2007). The sole exception are contractual clauses that stipulate a peace obligation during the initial phase of negotiations (three months before and one after the expiration of a collective agreement). No other peace clauses are included in Italian collective agreements, though a discussion over such provisions reemerged in recent years (Falsone 2015).

Conciliation procedures for dealing with the respect of standards set in the collective agreements are present in almost all collective agreements, but they are

voluntary procedures. Still, the enforcement of agreements is secured in the first place by the parties itself through a process of continuous bargaining and, ultimately, through strikes (Lassandari 2014: 310). In the workplace, employee representatives exercise vigilance over standards set by law or by collective agreements. Still, this mechanism of dispute resolution is available to only a minority of Italian employees in the private sector. Indeed, controlling for the numerical distribution of employees in companies of different sizes, the share of employees working in workplaces with elected employee representatives in the private sector can be estimated at around 27% (Istat 2016), mostly concentrated in bigger companies (only around 8% of companies with 10 to 40 employees has an employee representatives).

The absence of a clear definition of mutually accepted procedures for dealing with both interests and rights disputes within the collective bargaining system, encouraged recourse to conflict as a way to test and demonstrate power relationships (Colombo and Regalia 2016). According to the Italian Constitution, “the right to strike is exercised within the limits of the laws regulating it”. However, no legal intervention has regulated it, with the significant exception of laws regulating strikes in essential public services. The limits of the right to strike have been set by ordinary courts and by the Constitutional Court. The dominant view among Italian law scholars is that the right to strike is an individual right exercised collectively. This view has prevented its regulation through collective agreements. Indeed, the (albeit very limited) peace obligations entailed in collective agreements only bind signing organizations and not individual workers. A significant exception, again, is represented by the collective agreements of those sectors belonging to the so called “essential public sectors” in which the law required social partners to identify mechanisms and procedures for preventing the escalation of conflict.

Even if formally almost unrestricted and still quite high in comparative perspective, strike activity declined significantly over the last four decades. Indeed, while working days lost per 1,000 employees were on average more than 1,000 per year in the period 1970-1979 (Bordogna and Cella 2002), they were around 40 in the 2005-2009 period (Vandaele 2016: 282). The peculiar characteristics of strike activity in Italy, i.e. its being comparatively less related to the unions' bargaining activity and more to their political activity and, hence, the fact that strikes in Italy are generally of short duration, is still apparent (Bordogna and Cella 2002).

Employment rights litigation

The second subsystem of the Italian conflict resolution system is constituted by the litigation system. This subsystem is highly regulated, with a strong role of labour courts and a very limited relevance of alternative instruments, such as alternative dispute resolution systems or arbitration, and deals with both individual and collective rights. In Italy, no specialized labor courts exist, but the presence of specialized chambers within the civil court system provides a functional equivalent to specialization. The system is based on three levels, the Tribunal, the Court of Appeal and the Supreme Court. Judges are professional and career judges and no lay members are used in the Italian system. Employment claims follow a special procedure, different from ordinary civil practice and based on the principles of orality, immediacy and concentration. These principles were introduced in order to speed up the adjudication process. Still, according to the data reported by Comandé, they are quite long in Italy, ranging from 536 days for the private to 604 for the public sector for a case being adjudicated in first instance (Comandé 2014: 121). It is important to note, however, that significant variation is reported across different

Tribunals and this variation is especially marked between the North and the South of the country.

The number of new cases brought in front of Tribunals every year has been relatively stable (or even decreasing) over the past two decades. In 1995, the number of new labor cases brought in front of the courts was 195,649, while in 2013 there were 132,305 new cases (Istat 2016). Still, in recent years, reducing the number of claims has been a significant element in the political discussion. This goal has been pursued in multiple ways. First, there has been an attempt to subtract increasing areas of the employment relationship from the scrutiny of the judge, by transforming legal requirements for using specific types of employment contracts (such as the need to specify reasons for using fixed-term contracts) or introducing economic penalties instead of other types remedies (as in the case of unfair dismissals). Second, the labor trial itself was reformed, with the introduction of shorter deadlines for accessing justice and the introduction of fees. This last element has, according to several observers, made it more difficult for workers to adhere the judge. Lastly, attempts to promote alternative dispute resolution mechanisms were envisaged, but, as we will see below, with scarce effects (Menegatti 2015: 275).

Extra-judicial dispute resolution mechanisms are not widespread in Italy. Apart from the period between 1998 and 2010 in which a preventive attempt of conciliation was mandatory before litigation, workers are free to lodge claims in front of a tribunal, with the sole exception, since 2012, of cases concerning individual dismissals for economic reasons. Two types of voluntary forms of conciliation exist: administrative conciliation, which is carried out by a special board at the Provincial Labour Directorate (the territorial office of the Labour Ministry), and trade union conciliation (*conciliazione sindacale*). Administrative conciliation is carried out by a tripartite

conciliation committee - composed of an official of the Labour Directorate, a trade union representative and a representative of the employee association. If the conciliation is successful, a legally enforceable agreement is produced. Meanwhile, trade union conciliation takes place before a trade union official, following the relevant procedure provided for by collective agreements. If successful, the report entailing the terms of the agreement must be deposited at the Provincial Labour Directorate. Data on conciliation is collected by the Ministry of Labour only with regard to administrative conciliation. In 2013, 70,079 attempts of conciliation were issued. Of these, 41,206 were settled, 3,752 not settled and 20,126 not dealt with due, in many cases, to the absence of one of the parties (Ministero del Lavoro e delle Politiche Sociali 2013).

Arbitration is even rarer in Italy. Two forms of arbitration are used in Italy: ritual and irritual arbitration. The main distinction between the two rests in the nature of the award. In the case of ritual arbitration, the award itself is a legally enforceable decision, while in the case of irritual arbitration the award has the force of an agreement (and in case of non-compliance, the aggrieved party has to file a claim in order to obtain enforcement). Ritual arbitration can take place only in very limited instances: it has to be provided for by law or by collective agreement, both parties need to agree to arbitration, and not all statutory rights can be dealt with through this method. Attempts to promote irritual arbitration were enhanced in recent legislation (in particular, by law 183/2010). In particular, the law introduced the possibility to include a clause demanding future disputes go to arbitration in the individual employment contract (Comandé 2014: 126). However due to pressure from trade unions, this possibility was strongly limited. The introduction of such a clause is possible only under certain conditions: if it is foreseen in a collective agreement, it is

certified by a specific commission, it does not refer to dismissals, and it is not signed within the first 30 days of the validity of the employment contract (i.e. it cannot be signed at the moment of hiring). Hence, the efforts made to boost the use of arbitration for labor law disputes did not bring many results and the use of arbitration remains very limited.

Interactions between the subsystems

The two subsystems which characterize the Italian conflict resolution system are autonomous, but closely interact in a supplementary way. On the one hand, the wide coverage of collective agreements, stipulated within the highly voluntarist and collective system of collective bargaining, makes them a still very important source of regulation of employment. Even if statutory employment rights constitute a minimum floor in the absence of collective regulation, uncovered areas are much less widespread in Italy than in other countries, at least for what concerns dependent employees. Hence, employment rights are not only individual, but still largely collective in nature. Moreover, collective actors play a crucial role in the expression of individual grievances, since individual workers are often assisted by trade unions in dealing with them (Treu 2007: 198) and unions play a significant role in making workers wary of their rights. On the other hand, the public system of labour courts supports the functioning of the collective bargaining system by ensuring the compliance with the rights it sets. The declining presence of trade unions at the workplace level reduces their capacity to autonomously deal with compliance issues by the traditional instruments of continuous bargaining and collective conflict and makes litigation increasingly important. Moreover, labour courts support collective bargaining by dealing with collective rights disputes and sanctioning anti-union

behavior (i.e. a behavior aimed at “preventing or limiting the exercise of freedom and trade union activity as well as the right to strike” according to Art.28 of the so called Workers' Statute, law 300/1970). The supplementary role of the employment rights litigation subsystem has acquired growing importance in recent years, due to the developments taking place within the collective voluntarist bargaining system. Growing inter-union conflict, the spread of so called separate agreements, and the disruptive autonomous action of individual agents (such as Fiat's exit from the employer association Confindustria in order to avoid the application of the sectoral collective agreement) have pointed to the limits of voluntarism in dealing with disputes emerging within the collective bargaining system. Since 2009, labour courts found themselves called to solve, with the scarce instruments provided by a highly unregulated system, numerous judicial disputes on key functioning principles of the system, such as the titolarity of the right to bargain collectively and to set representation bodies at the plant level (Lassandari 2014). Still, the (often undesired) role played by judges could only put a provisional remedy to the problems deriving by growing inter-party disagreements in a voluntarist system, urging several commentators to ask for statutory regulation of industrial relations (Romagnoli 2013, Scarponi 2016).

Australia

Introduction

Workplace dispute resolution in Australia is highly regulated and has both individual and collective elements. For much of the 20th century, the defining feature of Australian IR was its system of compulsory conciliation and arbitration (C & A), a

form of 'delegated regulation' (Bray and Stewart, 2013). Industrial tribunals at the state and federal level were charged with resolving industrial disputes between unions and employers through conciliation and, where necessary arbitration. Settlements were contained in enforceable 'awards' which established the minimum terms and conditions of employment for the majority of industries and occupations. As at November 2005, prior to a process of 'modernisation', there were an estimated 4053 different awards in Australia (Bray, 2011). Collective bargaining played a secondary role (Gahan and Pekarek, 2012) and individuals enjoyed very few statutory employment rights (McCallum, 2011). In short, the system was collective and regulated.

Today, as a result of extensive and transformational legislative change since the 1990s, the state remains closely involved in IR, although the role of tribunals and awards is very different to the past. Workers now enjoy a range of statutory employment rights, as well as the minimum conditions set out in revamped 'modern awards' – now made and varied through an administrative process rather than to settle industrial disputes (Bray and MacNeil, 2011). The system retains a collective element through the role afforded to unions both in collective bargaining and the enforcement of individual workers' rights, although ongoing membership decline and the recent contraction in bargaining coverage (Nicholson et al, 2017) suggest the balance will continue to shift towards greater individualism.

As this brief characterization suggests, the terms of employment in Australia can derive from different but interconnected sources, including common law contracts, legislated standards, and regulatory instruments such as modern awards or enterprise agreements (McCallum et al, 2012). The procedures for resolving workplace disputes can vary depending on how a particular employment relationship

is regulated. Because of the extent of statutory employment regulation in Australia, and the typically prohibitive costs of litigating contractual claims in common law courts for all but high-income employees (McCallum et al, 2012), the focus here is on the statutory workplace dispute resolution system.

The principal statute governing industrial relations (IR) in Australia is the Fair Work Act (2009) (FWA). The FWA establishes a comprehensive regulatory framework for IR covering most Australian workplaces, with key features including a range of minimum employment standards contained in both legislation and ‘modern awards’, detailed rules for collective bargaining, and dedicated public agencies tasked with administering the system. In this context, workplace disputes might arise over the interpretation and application of existing entitlements (‘rights disputes’) and over the creation of new rights through collective bargaining (‘interests disputes’) (Provis, 1993). In seeking to resolve rights disputes, individual employees can generally bring complaints against employers directly, or they can seek the support of a union. Although interest disputes are (still) predominantly the domain of unions, the FW systems affords them few exclusive responsibilities in the management of workplace conflict. In both these spheres of conflict, the FWA either requires or enables the involvement of public agencies. Specifically, an industrial tribunal called the Fair Work Commission (FWC) is central to the operation of the FW system and performs a range of functions including dispute resolution, while a separate agency, the Fair Work Ombudsman (FWO), is tasked with ensuring compliance with industrial legislation.

Individual employment rights

The FWA provides employees with a range of protections and entitlements that might be the subject of employment rights disputes. At the heart of these provisions is a 'safety net' of minimum terms and conditions which comprises a set of ten 'National Employment Standards' (NES; e.g. maximum weekly working hours, guaranteed leave entitlements), a national minimum wage, as well as 122 'modern awards'. These modern awards set out the minimum terms and conditions (e.g. minimum pay) applicable to different industries (e.g. retail, banking) or occupations (e.g. aircraft cabin crew, nurses), and cover almost all employees. While the NES are contained in legislation, the national minimum wage and modern awards are made by the FWC. While unions can still initiate modern award proceedings, the legislative scope for making new modern awards is very limited, and the FWC enjoys significant discretion in making or varying awards (Bray and MacNeil, 2011).

Importantly, all modern awards include a dispute resolution clause regarding matters arising under the NES and the modern award. This clause sets out a procedure requiring that the parties first attempt to resolve the dispute through discussions at the workplace, before they may refer it to the FWC for resolution through mediation, conciliation, or where agreed by the parties, arbitration.

Further, the FWA provides the parties with 'general protections' from various forms of unfair treatment, discrimination, and victimization in the workplace. Specifically, the general protections prohibit the taking of 'adverse action' against people in relation to their 'workplace rights' (e.g. making a complaint or inquiry about one's employment), industrial activity (freedom of association), and particular attributes (anti-discrimination). General protection matters involving dismissal are first heard by the FWC and may proceed to court if unresolved, while applicants in non-dismissal disputes can take the matter directly to court. Since 2014, the FWA also

contains anti-bullying provisions allowing workers to seek the FWC's intervention to prevent bullying.

Finally, the FWA offers employees protection from unfair dismissal subject to certain eligibility requirements. In particular, employees have to be employed for at least 6 months (12 months in businesses with fewer than 15 employees) before they can seek a remedy for being unfairly dismissed, and high income employees are excluded. Unfair dismissal cases are decided by the FWC. In 2015/2016, unfair dismissal applications amounted for more than 40 per cent of the FWC's workload (FWC, 2016).

Australian workers enjoy additional employment protections by virtue of other legislation, most notably in the areas of discrimination and workplace health and safety, however these are beyond this scope of analysis.

Ultimately, the enforcement of provisions in the Fair Work Act happens through the courts. Standing to initiate proceedings depends on the type of breach. For example, an employee, a union, or a government inspector can seek redress for breaches of the NES, while this list swells to include employers and their organizations for contraventions of provisions in modern awards.

Collective bargaining

For much of the 20th century, collective bargaining played a secondary role in Australia's system of conciliation and arbitration. From the mid-1980s, however, new wage-fixing principles and legislative changes have seen enterprise-level collective bargaining emerge as an important mechanism for setting wages and conditions of employment (Gahan and Pekarek, 2012). As at May 2016, an estimated 36.4 % of

employees were covered by collective agreements, down from 41.1 % in May 2014, and seven percentage points below its peak of 43.3 % in 2010 (Peetz and Yu, 2017). As different governments have pursued their industrial relations agendas, the rules for enterprise bargaining have become increasingly elaborate. The enterprise bargaining framework of the FWA is characterized by a number of key elements.

As already noted, the legislation places emphasis on collective bargaining at the enterprise-level. Although there are limited provisions for multi-employer bargaining, employees are not permitted to take industrial action (e.g. strike) in pursuit of multi-employer agreements. The majority of enterprise agreements (EA) are applicable only to a single employer and some or all of their employees. Employees are only allowed to take industrial action during bargaining, and subject to detailed procedural requirements (e.g. secret ballot).

Unions lack the exclusive right to represent employees in enterprise bargaining. Rather, employees can appoint a person of their choice (including themselves) as their bargaining representative for a proposed enterprise agreement. However, where an employee is a union member, the union is taken to be the employee's default bargaining representative unless they specify otherwise. In practice the majority of enterprise agreements are union agreements. However, even where unions are involved in negotiations, an employer can put agreement offers directly to an employee vote, against union recommendations. Unions have suffered a long-term decline in membership, with density decreasing from around 40% in 1990 to the current 15%. Together with a recent decline in the level of agreement-making and coverage, this raises questions about the future of collective bargaining as a pillar of IR regulation in Australia (Pekarek & Gahan, 2016).

The legislation regulates both the procedural and substantive content of enterprise agreements. In particular, some provisions are mandatory for all agreements (e.g. clauses relating to dispute resolution, change consultation) while certain claims are unlawful (e.g. bargaining services fees). Importantly, the mandatory dispute resolution clauses in enterprise agreements can specify either the FWC or an alternative dispute resolution (ADR) provider to assist the parties with the settlement of disputes (Forsyth, 2012). With the FWC providing free dispute resolution, uptake of ADR has been very limited. The content of agreements is vetted by the tribunal, with approval subject to an agreement leaving employees 'better off overall' ('BOOT') than the relevant 'modern award' (see below).

As this suggests, the legislation provides a significant role for the FWC to facilitate bargaining and resolve disputes (Pekarek et al, 2017). The tribunal can compel reluctant employers to bargain where the majority of employees wish to negotiate an enterprise agreement (majority support determinations), and resolve disputes between parties over the appropriate coverage of a proposed enterprise agreement (scope orders). Moreover, the legislation requires bargaining in good faith, and enables the tribunal to redress tactics that breach good faith bargaining obligations. Finally, the tribunal can assist the parties with resolving bargaining disputes if so requested. However, there is only very limited scope for the FWC to arbitrate, in contrast with earlier periods in Australian IR.

Coverage by collective agreements is far higher in the public sector than in the private sector, and there are also differences in coverage across industries, reflective of union density levels. For example, coverage is relatively high in transport, postal and warehousing (29.4 %) and financial and insurance services (23.3 %), but lower in

retail trade (10.1 %) and construction (9.5 %) (Peetz & Yu, 2017). The level of industrial disputation has declined significantly in recent decades and remains low.

Complementarities, variety, and change in workplace dispute resolution

In Australia, there is some interaction between the systems of individual employment rights and collective bargaining in the management of workplace conflict. In particular, modern awards create a floor for enterprise bargaining, in that the FWC is tasked with ensuring that enterprise agreements submitted for approval pass the BOOT – the better off overall test. The FWC applies the BOOT to assess whether the terms of an enterprise agreement leave employees better off overall than if they remained under the terms of the relevant award. Through this provision the collision of competing standards is avoided, and a potential source of conflict in the form of downward pressure on pay and conditions is removed from negotiations between workers and employers. The interaction of these systemic features constitutes a synergistic complementarity.

Within the realm of collective bargaining itself, the parties can seek the intervention of the FWC to help ensure bargaining proceeds in good faith. Although the parties use these provisions strategically, their existence has also had a strong ‘shadow effect’ in promoting more orderly bargaining behavior (Pekarek et al, 2017). In other words, the FWC plays an important role in facilitating bargaining and resolving protracted and intractable disputes. There is thus a synergistic complementarity across the private/public (or regulatory / voluntarist) divide in that the legislative provisions for the involvement of a public third party can help address conflict between the private parties in bargaining. Because the majority of Australian

employees are covered by modern awards or enterprise agreements, and these instruments must include dispute resolution clauses, it might appear that individual employees can readily seek redress should disputes arise. However, there is a difference between the availability of legal provisions and their use in practice. In recent years, there have been a number of high profile, egregious examples of employers underpaying workers and breaking other workplace laws (Healy, 2016). Similarly, audits and investigations by the FWO have highlighted significant levels of non-compliance with workplace laws by employers in industries such as hospitality, fast food, and retail. The scale of non-compliance stands in contrast to the number of disputes lodged with the FWC under the mandatory dispute resolution clause in awards and enterprise agreements (s. 739), which stood at 2,033 in 2015/2016 (FWC, 2016). Although many disputes may be resolved within organizations before they reach the FWC, the extent of illegal work practices uncovered in some sectors suggests that potential employee grievances are either not aired or not addressed. In short, dispute resolution clauses in regulatory instruments may not be a sufficient deterrent to employers adopting illegal work practices. It may be that workers are not aware of their legal entitlements and avenues for redress where employers fail to follow the law, or that employees, particularly those in small firms, might be reluctant to invoke the formal procedure against their employer. This raises questions about the enforcement of statutory employment standards and the capacity of individual employees to avail themselves of their legal rights (See below).

Patterns of dispute resolution practices may also vary across sectors due to differences in unionization and collective bargaining. Given the need for employees to vote in support of proposed collective agreements, they may be more aware of their terms and conditions of employment, including procedures for dispute

resolution. Due to the association between union density and bargaining coverage, employees working under a collective agreement are also more likely to have access to union support in resolving grievances. As noted above, there are sectoral differences in collective bargaining coverage, which in turn suggests scope for significant variety in the practices of conflict resolution across workplaces.

In the evolution of the Australia system of IR and conflict resolution a critical question arises over the issue of enforcement. Union density continues its longer-term decline, and this has reduced the capacity of unions to widely enforce labor standards (Hardy and Howe, 2009). Although the FWO plays a proactive role in monitoring and enforcing compliance with workplace law, limited resources mean intervention is selective. In the absence of a massive increase in public funding, or a reversal of union decline, it remains to be seen whether an 'enforcement gap' will emerge to highlight a discrepancy between institutional design and functioning in Australian IR.

Discussion/Conclusions

In the introductory section of this paper we predicted that dispute resolution practices and institutions of our four countries could be classified along two major dimensions: regulated-voluntarist and individual-collective. We have also suggested that within each of our four countries, practices and institutions will be closely linked to each other, potentially leading to institutional complementarities between those elements composing a national system of dispute resolution.

As our analysis of the German, US, Italian and Australian cases reveals, dispute resolution practices and institutions vary not only between countries but also

within. While our two dimensions turned out to be a fruitful heuristic to classify different dispute resolution practices and institutions we have also found evidence that in many cases elements or sub-systems within a given country provide for substantial variation in terms of the regulated-voluntarist and individual-collective dimension. Different from what the standard literature on comparative labor relations leads us to expect (see Figure 1), we find different subsystems to follow different key principles. As shown in Figure 2, the German dispute resolution system, which was initially classified as highly collective and regulated, is combining diverse logics. While the dual system of multi-employer collective bargaining and establishment-level interest representation through works councils fits our initial assumption by combining a strong influence of collective actors with a high level of regulation (albeit state-regulation being more important in the case of works councils than in collective bargaining), we also find a highly regulated but individualized subsystem as well. The enforcement of individual statutory employment rights gains importance as collective bargaining and works council coverage are on decline.

Diverse sub-systems can also be found in our Italian case. While the collective and voluntarist subsystem of collective bargaining fits our original perception of the Italian dispute resolution system, we also found a subsystem in the area of individual dispute resolution which is highly regulated and individual, a classification which also applies for the Australian “modern award” and National Employment Standards system, a highly regulated system which is administered by the public Fair Work Commission. For Australia, however, we also find a collective bargaining system with the so called BOOT-test resolving disagreement between state regulation (modern award) and collectively agreed standards. Finally, we find three different sub-patterns for the case of the USA. While the system of grievance-arbitration (collective and

voluntarist) is declining along with collective bargaining coverage (as well as union density), we find a growing pattern of nonunion dispute resolution, which is highly voluntarist and individual. Finally, we also found a highly regulated and individualized system based on the litigation of individual employment rights.

While so far, practices and institutions of national dispute resolution systems might appear to be diverse if not chaotic, in our empirical analysis we have also found important ties between them. Some of those ties might provide for institutional complementarities.

At a basic level, we have found regulated and individual systems of dispute resolutions to serve as sub-systems of final resort. With union density, collective bargaining and works council coverage being on decline in all the countries under observation, employment rights guaranteed by law provide for a minimum floor available to those workers who do not benefit from collective regulation of labor relations. Working time laws or statutory minimum wages apply even to those workers, who are not covered by a collective agreement. Beyond this function of “supplementarity” where one institution makes up for the deficiencies of the other (Crouch 2005), we have also observed examples of “synergies” whereby effects of different sub-systems mutually enforce each other (Deeg 2005: 3). The classic example in Germany is the way in which the reservation of distributive issues of wages to the collective bargaining system facilitates the focus of establishment level works councils on integrative negotiation issues with the potential for joint problem solving. However in the US also, we find that the individual employment rights litigation system provides a source of employee power that encourages the growth of nonunion dispute resolution systems incorporating some elements of fairness protections.

We also observe that as systems have changed over time there is an element of institutional lock-in that appears to influence or constrain the subsystems that emerge and the pathways of change. In Germany, the declining coverage of the dual system of collective representation has occurred in conjunction with an expanding system of statutory employment rights, but both reflect the juridification of Germany's more regulated system of conflict resolution. Similarly in Australia, modern awards made by tribunals continue to set industry-specific minima, but there has also been an expansion in statutory individual employment rights. Unions remain central to collective bargaining but the system also provides for non-union agreement-making.

By contrast in the US, as the more voluntarist collective bargaining subsystem has declined in its reach, there has been an expansion of a similarly voluntarist system of individualized nonunion dispute resolution. However both Italy and the US present some additional complexity to this picture in exhibiting growth in subsystems that involve regulated, individualized resolution of rights based conflicts, despite the voluntarist nature of other subsystems in those countries. Indeed, a striking finding across all four of our national systems is the growth of individualized, regulated conflict resolution subsystems.

The picture that we are left with from our analysis is more complicated than the coherent national systems that have come out of some comparative research, such as the positive complementarities based systems seen in the varieties of capitalism literature. By contrast, analyzing workplace conflict and its resolution comparatively leads us to an understanding of national systems as involving complex interactions among subsystems that have their own institutional logics, as well as important synergies, complementarities, and even in some instances negative complementarities.

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Figure One: Framework for Comparing Dispute Resolution Systems

	Collective	Individual
Regulated	Germany	Australia
Voluntarist	Italy	United States

Figure Two: Bounded within Country Variation by Subsystem (Empirical Findings)

	Collective	Individual
Regulated	<p>Germany (works councils & collective bargaining dual representation) Australia (Collective bargaining, BOOT-test)</p>	<p>Australia (NES & modern awards) Italy (individual dispute resolution) US (individual employment rights litigation) Germany (statutory employment rights)</p>
Voluntarist	<p>Italy (collective bargaining) US (unionized sector)</p>	<p>US (nonunion dispute resolution)</p>