

## SYSTEMS FOR CONFLICT RESOLUTION IN COMPARATIVE PERSPECTIVE

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A cornerstone of industrial relations theory is the idea that the potential for conflict is inherent in 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, little research has examined systemic differences in the manifestation and management of workplace conflict. The authors seek to fill this void by analyzing through a comparative lens practices for addressing employment-related conflict in four countries: Germany, the United States, Italy, and Australia. In contrast to the unidimensional varieties of capitalism approach, they analyze workplace conflict resolution systems across two dimensions: collective-individual and regulated-voluntarist. The analysis also emphasizes the importance of within-country variation and interactions between different conflict resolution subsystems.

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A cornerstone of industrial relations (IR) theory is the idea that the potential for conflict is inherent in the employment relationship. Across countries, forms of workplace conflict and methods of conflict resolution take a range of forms. Yet aside from attempts to understand cross-national variation in strikes, few researchers have examined systemic differences in the manifestation and management of workplace conflict (a notable exception is Roche, Teague, and Colvin 2014). The analysis in this article seeks to fill this void by analyzing through a comparative lens practices for addressing employment-related conflict in four countries: Germany, the United States, Italy, and Australia.

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A well-established fact is that within developed economies we find different IR systems, clustering along dimensions such as 1) the degree of centralization/decentralization of collective bargaining, 2) systems with strong or weak state-involvement, 3) the division of interest representation in single- and dual-channel systems, 4) the nature of union identity, and 5) multi- versus single-union confederation systems or systems with or without board-level representation of workers, to name just a few. In general, national systems of interest representation and collective bargaining have been analyzed quite comprehensively, but we know much less about cross-national variation in the mechanisms for addressing work and employment-related disputes.

In this article 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 the four countries of interest and seek to understand the variation among them. Second, we explore the linkages between practices and institutions within each of the countries and analyze the nature of complementarity in their systems of workplace dispute resolution.

Our classification of practices and institutions for dispute resolution is informed by decades of scholarship on comparative IR (Kerr, Harbison, Dunlop, and Myers 1960; Frege and Kelly 2013; Bamber et al. 2016; Baccaro and Howell 2017). 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 to classify 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.

The first dimension examines the importance of state-level actors for resolving conflict. At one extreme, national patterns might be subject to intense regulation (and intervention) by public authorities—be it the state and its agencies or the court system. At the opposite end of the continuum, 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 the second dimension, the analysis explores 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.

In comparing the four countries across these two dimensions, we test the assumption in the varieties of capitalism (VoC) literature of two dominant archetypes, liberal market economies (LME) and coordinated market economies (CME) (Hall and Soskice 2001), and question whether this approach accurately describes cross-national variation in conflict resolution

systems. We also depart from the VoC approach of emphasizing integrated, coherent national employment relations systems.

We also test the argument advanced more recently by Baccaro and Howell (2017) that IR systems in advanced industrialized countries are undergoing a convergence in a neoliberal direction. Although their analysis differs from the VoC perspective in arguing against the resilience of national institutions in the face of change, the authors also focus on national-level systems. They further argue that the common direction of institutional movement across countries is toward a neoliberal approach, which accords greater discretion to employers in the context of decentralized IR.

By contrast, our analysis explores various sets of institutions and practices within national systems that comprise distinct subsystems for conflict resolution. In doing so, we seek to identify the interactions between these subsystems and to explain how they relate to institutional change within national systems. The picture we draw is a more complex and messier one than either the CME/LME dichotomy posited in the VoC perspective or the convergence in a neoliberal trajectory posited by Baccaro and Howell (2017).

Using case studies, the article compares the four countries selected across the CME/LME dichotomy. Included are Germany and the United States, which are commonly used as the exemplars of the CME and LME models, respectively. Australia, which is also generally classified within the LME model, provides variation in the regulatory structure as compared with the United States. Similarly, including Italy in the analysis allows us to examine a country that, although not clearly on the CME side, belongs to those with higher coordination capacities than the LME, albeit of a substantially different nature from those of the German case. Italy also provides a second country on the CME side, but one that differs substantially from Germany in its regulatory structure. These four countries provide us with cases that, at least a priori, we would expect to each be oriented to a different one of the four quadrants in our framework (see Figure 1). These quadrants are collective-regulated (Germany), collective-voluntarist (Italy), individual-regulated (Australia), and individual-voluntarist (United States). That the countries have distinct national systems also allows us to examine the Baccaro and Howell (2017) hypothesis of convergence on a neoliberal trajectory. If their argument is correct, we would expect to see our four cases in the process of becoming more similar and characterized by more individualism and less regulation.

### **Framework for the Analysis**

Conducting a comparative analysis requires us to define what will be compared. Our general focus is on comparing systems for resolving workplace conflict, specifically in the private sector. In many countries, workplace conflicts in the public and private sectors are handled through different systems

Figure 1. Framework for Comparing Dispute Resolution Systems

	<i>Collective</i>	<i>Individual</i>
Regulated	Germany	Australia
Voluntarist	Italy	United States

because of the need to maintain essential public services and because of issues concerning the scope of governmental authority versus collective bargaining and other employment relations processes. Although of clear interest, the complex issues regarding workplace conflict resolution in the public sector are beyond the scope of this article. Although systems for workplace conflict resolution often differ between unionized and non-union workplaces, this analysis examines conflict resolution in both of these types. Indeed, one of our themes will be the interactions between subsystems focused primarily on the unionized sector versus those focused on the non-union sector or encompassing both sectors. Another common distinction in the conflict resolution literature is between interest disputes, which involve issues relating to the formation of labor and employment contracts, and rights disputes, which concern issues relating to the application or enforcement of these contracts. This analysis examines systems focused on each of these disputes, as well as some systems that encompass both interest and rights disputes.

Given the substantial variation that exists between national systems, an initial analytical problem is to identify common features that we can examine in each of our case studies. Previous accounts of workplace dispute resolution systems have focused on various aspects, or pillars, of such systems. We concentrate on four such pillars.

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, countries have become increasingly diverse in how they constitute these parties. Is labor organized collectively or individually? 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 the 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, such as 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. 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 the 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 serving to establish the ground rules for the system. Building on the sovereignty of the state provides such agencies with substantial power resources as well as an 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 involve only one employee or a small group as key parties, or are collectivized and involve employees acting as a group through unions, works councils, or other structures. In addition to reflecting how labor is or is not organized as an actor in the system, the collective-individual dimension reflects the nature of the conflicts being resolved. In more collective systems, work disputes typically concern conflicts over issues 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 that 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 1.

From what we know about our four IR systems, we predict that the Italian and US cases will be more voluntaristic, as state influence in labor relations is considered to be comparatively weak (see, for example, Locke 1995; Katz, Kochan, and Colvin 2017). By 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 Lansbury 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 and the voluntaristic pair of Italy and the United States into 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 Australia and the United States, labor and employment relations are more individualized. Therefore, we would expect workplace conflict and conflict resolution to be more focused on the individual level (Colvin and Darbishire 2013), placing this pair of countries in the right-hand cells of Figure 1. We will investigate whether this classification based on their general systems of labor and employment relations also holds for systems of conflict resolution.

Beyond the analysis of different national-level practices or institutions, we know very little about 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 some scholarship has forcefully made the case for national IR institutions or "varieties" (Hall and Soskice 2001), this view has been challenged by observations of prevailing—if not increasing—within-country variation (Katz and Darbishire 2000). In analyzing dispute resolution practices in the four country case studies, we also seek to investigate to what degree national practices are linked to each other, thereby forming national patterns based on institutional complementarities. Such complementarities can take the shape of two forms. Supplementarity, the first form, emerges when one institution makes up for the deficiencies of the other (Crouch 2005). Synergy, 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 supplementarity and synergy in conflict resolution practices in each of the four countries.

We next present our four national case studies: Germany, the United States, Italy, and Australia. For each case, we describe the main workplace conflict resolution subsystems of that country. The descriptions are organized using our two-dimensional framework, beginning with collective-regulated and collective-voluntary subsystems, followed by individual-regulated and individual-voluntary systems. None of the four countries include subsystems in all four of these quadrants; the case studies describe the major subsystems in each country.

### Germany

Much of German labor relations has been characterized by “juridification,” a term that 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 (Keller 2008: 66–67). While juridification certainly emphasizes the regulated dimension of conflict resolution, within the second dimension of our analysis—individual versus collective—outcomes turn out to be more diverse. As will be shown in this section, certain elements of the German conflict resolution system leave room for individual action whereas other parts are heavily dominated by collective actors.

At the heart of the German system of conflict resolution is the “dual system” of interest representation. This system 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 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 and involves unions, works councils, employers, and employers’ associations as key actors (Behrens 2014).

#### **Collective-Regulated Subsystem: 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*]). The German Collective Bargaining Act (*Tarifvertragsgesetz*), however, also allows for company-level agreements to be negotiated between a union and management. While the framework for collective bargaining is provided for by both statute and 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).

The majority of multi-employer agreements are negotiated between one of the approximately 700 employers' associations and one of the eight affiliates of the German Trade Union Confederation (DGB). Most of the employers' associations are directly or indirectly affiliated with the Confederation of German Employers (BDA). In 2017, 57% of all employees in West Germany and 44% in East Germany were covered by a collective agreement (Ellguth and Kohaut 2018: 300).

Conflict in the area of collective bargaining takes the shape of strikes and lockouts, both of which are guaranteed by the German Constitution. While no designated law regulates 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. Strikes are only legal to pursue a goal that 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 exists (on a particular subject). Compared with other Organisation for Economic Co-operation and Development (OECD) countries, strike activity in Germany is rather moderate and lockouts are very rare (Vandaele 2016: 280).

While there is no mandatory mediation/conciliation of collective bargaining disputes in Germany, several multi-employer agreements include voluntary mediation agreements (*Schlichtungsabkommen*), for example, agreements for the construction industry and the public sector (Behrens 2014: 368). Collectively agreed-upon procedures frequently establish a mediation committee, which usually consists of an equal number of representatives from the union and the employers' side with a neutral chair having the casting vote.

### **Collective-Regulated Subsystem: Establishment-Level Interest Representation**

Works councils (WC), according to the Works Constitution Act (WCA), can be formed in establishments with more than five employees 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 in work organization, working time regulation, and overtime work. The WCA also imposes limits on the scope of works council activities. In particular, works councils are not allowed to either bargain collectively (WCA, Section 77 III) or call a strike (WCA, Section 74 II). In 2017, 40% of all West German employees in establishments with more than five employees were represented by a works council. In East Germany, only 33% of all employees were covered (Ellguth and Kohaut 2018: 303).



Employees are entitled to address individual grievances directly to the employer or to the works council, but the most common dispute resolution procedure at the establishment level is the arbitration panel. Such panels are mostly used to resolve collective-level conflict between works councils and management. For conflicts that involve matters in which 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 (Behrens 2007: 180). 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. As in the case of collective bargaining, establishment-level interest representation heavily emphasizes the collective over the individual level. The WCA exercises strong regulatory powers over establishment-level labor relations as well as conflict resolution. In the case of collective bargaining, the law provides for a general framework based on which collective actors negotiate; the effect of the WCA at the establishment level is much more immediate.

### **Individual-Regulated Subsystem: Statutory Employment Rights**

A third level through which workers' grievances can be expressed is individual employment rights. Many aspects of the employment relationship are regulated by collective bargaining or through works agreements at the establishment level. 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 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 that is fairly easy to access, with a local court available in many localities that charges moderate fees (Weiss 2012). Thus, this subsystem covers all employees and is not confined to operating within the union-represented sector.

Compared with the two other areas of dispute resolution (collective bargaining and establishment-level worker representation through works councils), the litigation of workers' claims is certainly the most individualized area. As 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 than the two remaining areas. This is not to suggest, however, that the three areas of

conflict resolution are independent of each other, an aspect that will be discussed in the next section.

### **Conflict, Complementarities, and Change in German Labor Relations**

As we argued in the beginning of the article, complementarities first include that both sets of institutions are not just the same. As the brief description of Germany's dual system of IR suggests, both elements of the system are based on diverse 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 instances, individual employers) in the case of collective bargaining above the establishment level. Also, different laws apply to regulate the two pillars: the WCA in the 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 far as the key tasks to be pursued by the actors at both levels are concerned, the dissimilarities 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 other's shortcomings) or by providing for synergies (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 wages, plant-level management and works councils are free to address other issues and problems. Working together to solve problems—"integrative bargaining," according to Walton and McKersie's (1965) concept—strengthens a collaborative ethos between plant-level management and works councils. As a result of these synergies, conflict does not end but is just regulated or "bounded." There is still plenty of space for diverging interests at the establishment level. To mention just one example: The length of the workweek is regulated by collective bargaining, but the works council is responsible for the distribution of these hours over the workweek, rules determining the beginning and end of the work day, overtime work, working-time accounts (whereby hours can be banked to take time off at a later point in

time), as well as procedures for the measurement and documentation of working time.

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 declining for more than 20 years, as has union density (Keller and Kirsch 2016). The same is true for employers' associations, as their decreasing membership as well as the introduction of a new bargaining-free membership status has contributed significantly to reduced collective bargaining (Behrens and Helfen 2018). 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 toward the decentralization of collective bargaining (mostly through opening clauses that empower firm-level actors to deviate from standards agreed upon at the industry level) reduces the system's power to keep distributional bargaining (and the conflict that comes along with it) away from the establishment level (Traxler 2003). By 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 United States operates through three distinct subsystems. First, union-represented workplaces feature elaborate contractual grievance procedures that culminate in binding arbitration by private neutral labor arbitrators. Second, statutory and common law employment rights are enforced through a complex and highly conflictual court litigation system. Third, non-union 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 United States that is characterized by its individualistic focus and privatized structure.

#### **Collective-Voluntarist Subsystem: Unionized Workplace Conflict and Grievance Procedures**

Dispute resolution in unionized workplaces in the United States is shaped by the distinctive American system of labor relations, which originated in the Wagner Act model dating back to the 1930s. Historically, under this 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. 2017). Governmental assistance in resolving interest disputes in collective bargaining is provided by the Federal Mediation and Conciliation Services, which offers mediators to help the parties reach negotiated settlements. For interest disputes over the terms of a

new labor contract, the government has no provision for direct intervention to resolve the conflict by imposing terms. These features reflect the strong emphasis in the US system on encouraging the parties to resolve collective labor-management disputes voluntarily.

At the same time they accepted the use of the strike weapon in contract renewal disputes, US labor relations were concerned 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 a contract. The standard grievance-arbitration procedure in a unionized workplace in the United States typically involves three to five steps. A grievance filed by the union is discussed by successively higher levels of union and management representatives and, if unresolved, is submitted to arbitration. The final labor arbitration step, central to this system of workplace dispute resolution, avoids the disruptive effects of industrial action in the workplace and provides industrial justice.

The US labor arbitration system is a privatized system of workplace dispute resolution established by the collective agreement negotiated by the parties. The labor arbitrators are private, third-party neutrals, jointly selected by the parties. This system has proved remarkably successful and resilient. One indicator of this is that while many aspects of US labor relations have undergone major transformations in recent decades, grievance-arbitration procedures remain nearly universal in unionized workplaces and retain the same basic structure and function as they have since the 1950s. As a result, the most salient change in regard to these procedures is their declining reach: By 2017, the rate of union representation in the United States had declined to only 11.9% of the workforce (BLS 2018).

### **Individual-Regulated Subsystem: Employment Rights Litigation**

Employment law in the United States is 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 gives American employers free rein to manage their workplaces and makes the United States a strongly employer-favorable system compared with other countries. In recent decades, however, there has been an expansion of statutory and common law protections for employees, including anti-discrimination laws, wage and hour laws, and other exceptions to the employment-at-will rule. These protections have led to a growth in the number and importance of individual employment rights conflicts (Colvin 2012). An important characteristic of how these disputes are resolved in the United States is that they are mostly litigated by private parties in the general courts, rather than through a specialized employment tribunal or government agencies. For example, the Equal Employment Opportunity

Commission brings less than 2% of the claims in court under the Civil Rights Act, with the remainder being brought by private parties (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 approximately two years to resolve through a trial (Colvin 2011), before which complex preliminary procedures take place. But employees who can reach trial win many cases and have the opportunity to collect sizable damages. 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 US 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 US employers goes beyond the settlement of individual cases. Many employers therefore 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.

### **Individual-Voluntarist Subsystem: Dispute Resolution in Non-Union Workplaces**

The United States lacks any direct legal or policy requirements for organizations to have workplace dispute resolution procedures. In practice, however, many US companies do have internal organizational dispute resolution procedures, some of which are elaborate and include due process protections.

What explains the adoption of these procedures? One major category of explanations is institutional pressure on organizations to avoid the threats of union organizing and litigation (Colvin 2003). Given the all-or-nothing structure of union representation under the exclusive representation system, US employers have a strong incentive to adopt measures that reduce the likelihood of successful union-organizing campaigns. Non-union dispute resolution procedures are a commonly used union substitution practice that many employers adopt to at least partially replicate the benefits of unionized workplace grievance procedures. US employers also have strong incentives to adopt practices that reduce the threat of employment litigation. Non-union dispute resolution procedures can help accomplish 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 non-union dispute resolution procedures by US employers involves efforts to enhance workplace conflict management as part of human resource

strategies, particularly those focused on high-commitment and high-involvement practices (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 non-union dispute resolution procedures in the United States. One area of experimentation is who decides the outcome of complaints under the procedure. Whereas most companies have procedures for management decision-makers, some have adopted a peer review system in which lower-level employees who are peers of the complainant sit on a panel that reviews and decides the outcome of the dispute (Colvin 2003). The process of dispute resolution varies, with some procedures including arbitration-like hearings and others incorporating 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, Seeber, and Fincher 2003). Meanwhile, in contrast to these various organizational experiments in conflict resolution, many US non-union workplaces continue to have no dispute resolution procedures in place, forcing workers to rely on the goodwill of management for fair treatment in the workplace.

### **Interactions between the Subsystems in the United States**

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

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

Recent years have seen intensified interactions among the subsystems. Most notably, since the 1990s many non-union 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. This agreement states 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 United States, as research indicates that arbitrators are less likely to rule in favor of employees and are more likely to award much lower damages than the courts award, and may evidence a repeat player bias to the advantage of employers (Colvin 2011). In contrast to the synergistic complementarities involved in encouraging the adoption of non-union workplace dispute resolution procedures, this is an instance of a negative complementarity. The expansion of mandatory arbitration has undermined the effectiveness of the employment litigation system for resolving workplace disputes. This development represents a major change in workplace conflict resolution in the United States, as indicated by a 2017 survey showing that 56% of private-sector non-union employees are now subject to mandatory arbitration procedures (Colvin 2018).

Another synergistic complementarity that has recently emerged is the use of collective labor law rights, originally focused on unions, in relation to employment law and non-union 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 broadly encompasses any form of concerted action, whether union related or not and regardless of the union status of employees. In recent years, Section 7 rights have been applied more broadly to deal with conflicts such as the disciplining and dismissal of employees for discussing workplace problems on Facebook.

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 the workplace. Unions have shown little or no interest, however, in representing non-union 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 past 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 is the effort to substantially increase the minimum wage in the "Fight for \$15" campaign, which achieved its signature breakthrough success in Seattle in 2013 under the leadership of S.E.I.U. Local 775.

Despite these recent developments, the overall structure of workplace dispute resolution in the United States remains characterized by fragmentation, decentralization, privatization, and individualization. The lack of

strong collective structures is exacerbated by the low—and declining—level of union representation. The system of employment litigation that has expanded in its wake is characterized predominantly by individual claims by workers. Similarly, non-union workplace dispute resolution procedures are structures designed to resolve individual worker complaints and disputes and, in many cases, established with the primary goal of avoiding collective representation of workers. Workplace dispute resolution in the United States 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. Non-union workplace dispute resolution systems are private organizational procedures. The rise of mandatory arbitration further intensifies this individualized, private structure of workplace dispute resolution in the United States 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 subsystems: collective bargaining and employment rights litigation. Within the framework adopted in this article, the first is voluntarist and collective in nature, whereas the second is mostly individual and regulated.

#### **Collective-Voluntarist Subsystem: Collective Bargaining**

A high level of voluntarism and a minimal degree of legal intervention characterizes the Italian collective bargaining system (Regalia and Regini 1998). 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. (2007: 183)

In Italy, collective agreements are acts by private actors and therefore apply to the members of signatory employers' associations and trade unions. A significant exception is related to minimum wage levels set by collective agreements, which have been considered by the jurisprudence as references 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% by international sources (Visser 2016) and 99% by national sources (Istat-CNEL 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). Generally, however, the sectoral level set minimum standards that 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 national sectoral level should set minimum homogeneous standards for the industry and keep up with inflation, while the company level should improve conditions in the workplace and distribute productivity. In more recent years, pressures for reform produced divisions among the parties, particularly concerning the possibility for lower-level agreements (company or territorial) to derogate *in pejus* sectoral agreements. In 2009, a framework agreement introducing opening clauses was signed by the employers' association Confindustria and by two of the three confederal unions, CISL and UIL; CGIL was strongly opposed. This framework agreement was substituted in subsequent years with unitary agreements foreseeing more moderate derogatory possibilities. Still, an unprecedented intervention by the government in 2011 enabled company-level bargaining to derogate sectoral agreements and even certain aspects of statute law (Colombo and Regalia 2016).

Procedures for resolving interest disputes or for defining the negotiating procedure are not part of the formal structure of the system, even if historically the Ministry of Labor (in its central and peripheral articulation) has frequently played a mediating role in case the parties were unable to arrive at an 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 month after the expiration of a collective agreement). Italian collective agreements do not include any other peace clauses, though discussion about such provisions has re-emerged in recent years and the inclusion of stricter peace obligations into sectoral collective agreements was agreed upon by the social partners in a 2014 interconfederal agreement (Baccaro and Pulignano 2016).

Conciliation procedures for dealing with the respect of standards set in the collective agreements are included in almost all collective agreements, but they are voluntary procedures. Still, the enforcement of agreements is secured in the first place by the parties themselves through a process of continuous bargaining and, ultimately, strikes (Treu 2007). Being strongly dependent on the presence of employee representatives in the workplace, this mechanism of dispute resolution is available only to a minority of Italian employees in the private sector. Only 20.7% of private-sector workplaces have employee representatives (Istat-CNEL 2016). Yet the number of workers covered is surely significantly higher, since they are more likely to be found in bigger companies.

The absence of clear and mutually accepted procedures for dealing with both interests and rights disputes within the collective bargaining system has encouraged recourse to conflict as a way to test and demonstrate power relationships (Regalia and Regini 1998). The right to strike is set in the Italian Constitution, and the (comparatively few) rules regulating it were set not by law but by ordinary courts and the Constitutional Court. Moreover, since the right to strike is considered an individual right, collective agreements refrained from regulating it, and the (albeit very limited) peace obligations they set only bind signing organizations and not individual workers.

Even if formally almost unrestricted and still quite high in comparative perspective, strike activity declined significantly over the past four decades. Working days lost per 1,000 employees were on average more than 1,000 per year from 1970 to 1979 (Bordogna and Cella 2002) and around 40 between 2005 and 2009 (Vandaele 2016: 282).

### **Individual-Regulated Subsystem: Employment Rights Litigation**

The second component of the Italian conflict resolution system is the litigation system. This highly regulated subsystem deals with both individual and collective rights. Labor courts have a strong role and the use of alternative instruments, such as alternative dispute resolution mechanisms or arbitration, is limited. In Italy, no specialized labor courts exist, but specialized chambers within the civil court system provide a functional equivalent to specialization. Employment claims follow a special procedure, different from ordinary civil practice, in order to speed up the adjudication process, which is quite long in Italy—536 days for a case being adjudicated in first instance (Comandé 2014: 121).

The number of cases dealt with in this subsystem has been decreasing for the past two decades. In 1995, the number of new labor cases brought in front of the courts was 195,649, while in 2014 there were 120,720 new cases (Istat datawarehouse 2018). Still, in recent years, reducing the number of claims and their length has been a significant issue in the political discussion. This goal has been pursued in multiple ways. First, there have been attempts to subtract areas of the employment relationship from the scrutiny of the judge, as in the case of the new discipline of unfair dismissals introduced in 2015 (Colombo and Regalia 2016). Second, the labor trial itself was reformed, with the introduction of fees and shorter deadlines for accessing justice that made it more difficult for workers. Last, attempts to promote alternative dispute resolution mechanisms were envisaged, but, as we will see below, with scarce effects (Comandé 2014).

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 court, 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 the trade union conciliation (*conciliazione sindacale*). Administrative conciliation is carried out by a tripartite conciliation committee and, if successful, produces a legally enforceable agreement. Trade union conciliation takes place before a trade union official and is regulated by collective agreements. If successful, the report entailing the terms of the agreement must be deposited at the Provincial Labour Directorate. In 2017, only 7,407 disputes were settled through administrative conciliation (Ministero del Lavoro e delle Politiche Sociali 2018). Although no systematic data are available, trade union conciliation seems to be more widespread. A relatively high trade union density rate (34.4% in 2016 according to OECD data) ensures that the resolution of individual employment disputes outside the judicial realm—which, in the United States assumes a highly individual and anti-labor character—maintains a close link to collective actors and has a lower risk of negative outcomes for workers.

Arbitration is even rarer in Italy. Two forms are used: 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, whereas in the case of irritual arbitration, the award has the force of an agreement; noncompliance requires the aggrieved party to file a claim to obtain enforcement. Ritual arbitration can take place only in very limited instances: It must 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 and, in particular, by Law 183/2010, which allowed clauses deferring future disputes to arbitration into the individual employment contract (Comandé 2014: 126). Because of strong pressure from trade unions, however, this possibility was extremely limited. It is permissible only if it is foreseen by a collective agreement, is certified by a specific commission, 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), and does not refer to dismissals. Hence, the efforts made to boost the use of arbitration for employment disputes did not bring many results and the use of arbitration remains very limited.

### **Interactions between the Subsystems in Italy**

The two subsystems that characterize the Italian conflict resolution system are autonomous but closely interact in a supplementary way. The wide coverage of collective agreements, stipulated within the highly voluntarist and collective system of collective bargaining, continues to make them a very important source of regulation of employment relations. 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). In addition, unions play a significant role in making workers aware of their rights. This means that the distinction between union and non-union workplaces that is important in other countries is not as significant in the Italian system. At the same time, the public system of labor courts supports the functioning of the collective bargaining system by ensuring compliance with the rights it sets and by sanctioning anti-union behavior.

The supplementary role of the employment rights litigation subsystem has acquired growing importance in recent years, which is attributable to the developments taking place within the collective voluntarist bargaining system. First, 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 strikes, and it makes litigation increasingly important, even if not necessarily in quantitative terms. Second, 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, labor courts have 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 titularity of the right to bargain collectively and to set representation bodies at the plant level. Still, the (often undesired) role played by judges could only provide a provisional remedy to the problems derived by growing inter-party disagreements in a voluntarist system, urging several commentators to ask for statutory regulation of IR (Colombo and Regalia 2016). However, the movement of the traditional collective-voluntary system in a direction toward stronger regulation has still not taken place.

### **Australia**

Workplace dispute resolution in Australia is highly regulated and has both individual and collective elements. From a VoC perspective, Australia is often classified as a liberal market economy (LME) and, like the United States, is a common law country; however, historically its distinctive award system of IR has meant that it has diverged dramatically from practices in the archetypal LME case of the United States.

### **Collective-Regulated Subsystem: The Traditional Award System**

For much of the 20th century, the defining feature of Australian IR was its system of compulsory conciliation and arbitration (C&A). Industrial tribunals at the state and federal level were charged with resolving disputes between unions and employers through conciliation and, where necessary, arbitration. Settlements were contained in enforceable “awards”—regulatory instruments that established the terms and conditions of employment for the majority of employees and that were effectively “policed” by unions using both formal and, more commonly, informal means. Collective bargaining played a secondary role and individuals enjoyed very few statutory employment rights. In short, the system was collective and regulated.

Today, the state remains closely involved in IR; extensive and transformative legislative changes since the late 1980s, however, have significantly altered the role of tribunals and awards (see Van Gramberg, Bamber, Teicher, and Cooper 2014). Workers 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. The system retains a collective element by providing scope for union involvement in collective bargaining and the enforcement of individual workers’ rights. However, in Australia, the distinction between union and non-union workplaces is blurred because collective agreements can be made with or without unions. Moreover, unions have suffered an ongoing membership decline and collective bargaining coverage has fallen markedly (Gahan, Pekarek, and Nicholson 2018), suggesting that the balance will continue to shift from collectivism toward greater individualism.

The principal statute governing 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. Conflict resolution under the FWA encompasses both rights disputes over the interpretation and application of existing entitlements and interest disputes over the creation of new rights through collective bargaining. 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 FWA systems afford them few exclusive responsibilities in the management of workplace conflict. Further, 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 FWA system. It performs a range of functions such as setting minimum wages, making and changing modern awards, overseeing collective bargaining, and resolving disputes. A separate agency, the Fair Work Ombudsman

(FWO), is tasked with promoting and ensuring compliance with workplace legislation. The FWO's "strategic enforcement" model emphasizes voluntary dispute resolution, with more coercive sanctions and litigation reserved for more serious noncompliance (Hardy 2014).

### **Collective-Voluntarist Subsystem: Collective Bargaining**

For much of the 20th century, collective bargaining played a secondary role in Australia's system of conciliation and arbitration. Beginning in the mid-1980s, however, new wage-fixing principles and legislative changes saw enterprise-level collective bargaining emerge as an important mechanism for setting wages and conditions of employment (Gahan and Pekarek 2012). As of June 2016, an estimated 21.0% of employees were covered by current (federal) collective agreements, down from a peak of 28.8% in June 2011 (Peetz and Yu 2017).<sup>1</sup> This downward trend is expected to continue in line with an ongoing decline in the number of agreements made (Gahan et al. 2018).

As federal governments have pursued their IR agendas, the rules for enterprise bargaining have become increasingly complex.

As noted, pertinent legislation emphasizes collective bargaining at the enterprise level. Although there are limited provisions for multi-employer bargaining, employees are not permitted to take industrial action in pursuit of multi-employer agreements. The majority of enterprise agreements apply only to a single employer and some or all of their employees. Industrial action can only be taken during bargaining and is subject to detailed procedural requirements (e.g., secret ballot). The level of industrial disputation has declined significantly in recent decades and is at a historical low.

Unions lack exclusive representation rights in bargaining, with employees able to appoint a person of their choice (including themselves) as bargaining representative. In practice, most enterprise agreements are union agreements, and these provide a wage premium over non-union agreements. However, even when 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 13.2%. This trend, along with a recent decline in the level of agreement-making and coverage, and several years of wage stagnation, raises questions about the future of collective bargaining as a pillar of IR regulation in Australia. Whatever its consequences, the FWA does not appear to provide unions with the support necessary to organize or bargain effectively. Indeed, Australian unions have declared the enterprise bargaining system "broken"

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<sup>1</sup>The figure is higher when using a different estimate that includes agreements made under residual state-level IR jurisdictions and those agreements that have nominally expired but continue to apply. On this basis, an estimated 36.4% of employees were covered by collective agreements as of May 2016, down from a peak of 43.3% in 2010 (Peetz and Yu 2017).

and are calling for broader reforms to the industrial framework (Gahan et al. 2018).

The legislation regulates both the procedural and substantive content of enterprise agreements. Some provisions are mandatory for all agreements (e.g., dispute resolution, change consultation) while certain claims are unlawful (e.g., bargaining services fees). Dispute resolution clauses in enterprise agreements can specify either the FWC or an alternative dispute resolution (ADR) provider to assist the parties with settling disputes. However, with the FWC providing free and independent assistance, uptake of ADR has been very limited (Forsyth 2012). The content of agreements is vetted by the tribunal, with approval subject to an agreement leaving employees “better off overall” than the relevant modern award. Agreements can have a maximum nominal term of four years; however, formally expired agreements continue to operate unless terminated or replaced by a new agreement. Where the FWC grants an application to terminate an expired agreement, employees revert back to the minimum conditions set out in modern awards. Although there are restrictions on the unilateral termination of agreements, there are now numerous prominent examples of employers succeeding in their termination bids in the context of bargaining disputes, and the propensity of employers to invoke this tactic appears to be growing (Gahan et al. 2018).

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 in cases for which the majority of employees wish to negotiate an enterprise agreement and can resolve disputes between parties over the appropriate coverage of a proposed enterprise agreement. Moreover, the legislation requires bargaining in good faith and enables the tribunal to redress tactics that breach good-faith bargaining obligations. Note that 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 to earlier periods in Australian IR. In this respect, the shift from the traditional award model to a greater emphasis on enterprise-level bargaining represents a move in the Australian system from a collective-regulated subsystem toward a more collective-voluntarist subsystem, albeit within a highly prescriptive legal framework.

### **Individual-Regulated Subsystem: Individual Employment Rights**

The FWA provides employees with a range of protections and entitlements that might be the subject of rights disputes. At the heart of these provisions is a “safety net” of minimum terms and conditions comprising 10 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 most employees. While the NES are contained in legislation, the national minimum wage and modern awards are made by the FWC. The tribunal reviews the minimum wage rates set by modern awards annually and reviews all modern awards every four years.

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 to by the parties, arbitration. Generally, to bring a dispute or make a claim under an applicable instrument, such as a modern award, the applicant must still be in employment with the employer concerned.

Further, the FWA provides the parties with general protections from various forms of unfair treatment, discrimination, and victimization in the workplace and also contains anti-bullying provisions.

Finally, the FWA offers employees protection from unfair dismissal subject to certain eligibility requirements (e.g., minimum qualifying periods). Unfair dismissal cases are decided by the FWC. In 2016–2017, there were 14,135 unfair dismissal applications, making it the most common type of application and accounting for 43% of the FWC's caseload (FWC 2017). Over time, the tribunal has seen a significant shift in its work from collective disputes to more individual rights-based disputes.

### **Complementarities, Variety, and Change in Workplace Dispute Resolution**

In Australia, some interaction occurs 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, as the FWC is tasked with ensuring that enterprise agreements submitted for approval pass the “better off overall test” (BOOT). This provision seeks to prevent employers from undercutting minimum employment standards through collective bargaining. The interaction of these systemic features constitutes a synergistic complementarity.

Further, the parties can seek intervention by 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 in resolving protracted and intractable disputes. Thus, a synergistic complementarity is in place across the 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. Restrictions on the tribunal's capacity to arbitrate disputes, however, arguably limit the more complete realization of this complementarity.



Because most 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 “wage theft” and other breaches of workplace laws by employers (Healy 2016). Similarly, audits and investigations by the FWO have highlighted significant levels of noncompliance with workplace laws by employers in industries such as hospitality, fast food, and retail. The considerable extent of noncompliance stands in contrast to the relatively small number of disputes lodged with the FWC under dispute resolution clauses in awards and enterprise agreements.

Although many disputes may be resolved within workplaces before they reach the FWC, and employers may adopt additional internal grievance procedures to discourage the use of formal provisions, 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 when employers fail to follow the law, or that employees—particularly those in non-union workplaces, small firms, or migrant workers—might be reluctant to invoke formal procedures against their employer for fear of reprisal (Hardy 2014). This concern raises questions about the enforcement of statutory employment standards and the capacity of individual employees to avail themselves of their legal rights.

In the evolution of the Australia system of IR and conflict resolution, a critical question thus arises over the issue of enforcement. Union density continues its longer-term decline, and this has reduced the capacity of unions to resolve disputes and enforce labor standards as part of their traditional functions. As Hardy (2014) observed, grievances by former employees account for the bulk of complaints to the FWO, which in part reflects a lack of effective voice mechanisms, such as unions, to help resolve disputes while still employed. 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 grow between institutional design and functioning in practice, leaving potential complementarities unrealized.

## Discussion

In the beginning of this article, we predicted that the dispute resolution practices and institutions of four selected countries could be classified along two major dimensions: regulated-voluntarist and individual-collective. We also suggested that within each of these countries, practices and institutions

Figure 2. Bounded within-Country Variation by Subsystem (Empirical Findings)

	<i>Collective</i>	<i>Individual</i>
Regulated	<p><b>Germany</b> (works councils and collective bargaining dual representation)  <b>Australia</b> (Traditional Award System)</p>	<p><b>Australia</b> (NES and modern awards)  <b>Italy</b> (individual dispute resolution)  <b>US</b> (individual employment rights litigation)  <b>Germany</b> (statutory employment rights)</p>
Voluntarist	<p><b>Italy</b> (collective bargaining)  <b>US</b> (unionized sector)  <b>Australia</b> (collective bargaining)</p>	<p><b>US</b> (non-union dispute resolution)</p>

would be closely linked to each other, potentially leading to institutional complementarities between the set of subsystems composing a national system of dispute resolution.

As our analysis of the German, US, Italian, and Australian cases reveals, dispute resolution practices and institutions varied not only among countries but also within them. While our two dimensions turned out to be a fruitful heuristic with which to classify different dispute resolution practices and institutions, we also found evidence that in many cases elements or subsystems within a given country provide for substantial variation in terms of the regulated-voluntarist and individual-collective dimension. Unlike what the standard literature on comparative labor relations leads us to expect (see Figure 1), we found different subsystems follow different key principles. As shown in Figure 2, the German dispute resolution system, which was initially classified as highly collective and regulated, combined 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 found a highly regulated but individualized subsystem as well. The enforcement of

individual statutory employment rights gained importance as collective bargaining and works council coverage are on the decline.

Diverse subsystems were also found in our Italian case. 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 that is highly regulated and individual, a classification that also applies for the Australian “modern award” and National Employment Standards system, a highly regulated system administered by the industrial tribunal. For Australia, however, we also uncovered a collective bargaining system with the so-called BOOT resolving disagreement between state regulation (modern award) and collectively agreed standards. Finally, three different sub-patterns emerged for the case of the United States. While the system of grievance-arbitration (collective and voluntarist) was found to be declining along with collective bargaining coverage (as well as union density), we observed a growing pattern of non-union dispute resolution that is highly voluntarist and individual. Finally, we also found a highly regulated and individualized system based on the litigation of individual employment rights.

We began with national-level systems as the unit of analysis for our cases. With the identification of variation in subsystems within national systems, however, an important question is to what degree these subsystems represent regional variations in conflict resolution. Subnational regional variation was more pronounced in some of our cases than in others. In the United States, substantial variation emerged in patterns across states. The size and importance of the unionized sector varied widely, from a high in union representation of 25.3% of the workforce in New York State to as low as 3.9% in South Carolina, one of the many right-to-work states exhibiting greater institutional, social, and political hostility toward organized labor (BLS 2018). In the individual litigation subsystem, there was also substantial regional variation in the United States, where, despite the existence of federal laws prohibiting workplace discrimination, state laws regulate many aspects of employment relations and state courts are a major site of litigation (Colvin 2012). Historically, Australia has also had regional variation in the regulation of employment relations and conflict resolution due to the jurisdictional division between federal and state parliaments in IR. A major part of the changes in the Australian IR system in recent years, however, was a shift to the national level of regulation based on a new use of the constitutional corporations’ power by federal governments (Wright and Lansbury 2016). By contrast, Germany and Italy featured less variation in their systems at the regional level, despite Germany also having a federal system of government and negotiation of agreements at the state level. Although regional variation is of interest, it is not the central organizing structure behind the subsystems we have identified. Rather we found the different conflict resolution subsystems to be operating at the same time as other subsystems in the same space within national systems. This co-location

of subsystems with different focuses and different functions was one of the findings of our study.

So far, practices and institutions of national dispute resolution systems might appear to be diverse, if not chaotic. Yet, this empirical analysis revealed important ties between them. Some of those ties might provide for institutional complementarities.

At a basic level, we found regulated and individual systems of dispute resolutions to serve as subsystems of final resort. With union density, collective bargaining, and works council coverage declining in all of the countries under observation, employment rights guaranteed by law provided for a minimum floor available to those workers who did not benefit from collective regulation of labor relations. Working-time laws or statutory minimum wages applied even to those workers who were 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 also observed examples of “synergies” whereby the effects of different subsystems mutually enforced each other (Deeg 2005: 3). The classic example in Germany was the way in which resolving distributive issues of wages through the collective bargaining system facilitated the focus of establishment-level works councils on integrative negotiation issues, with the potential for joint problem solving. In the United States also, however, we found that the individual employment rights litigation system provided a source of employee power that encouraged the growth of non-union dispute resolution systems incorporating some elements of fairness protections.

We also observed that as systems have changed over time, an element of institutional lock-in appeared to influence or constrain the subsystems that emerged and the pathways of change. In Germany, the declining coverage of the dual system of collective representation occurred in conjunction with an expanding system of statutory employment rights, but both reflected the juridification of Germany’s more regulated system of conflict resolution. Similarly, in Australia, modern awards made by tribunals continued to set industry-specific minimums, but there was also an expansion in statutory individual employment rights. Unions remained central to collective bargaining, but the system also provided for non-union agreement-making.

Both Italy and the United States presented some additional complexity to this picture. They exhibited the growing importance of subsystems that involve regulated, individualized resolution of rights-based conflicts, despite the voluntarist nature of other subsystems in those countries. In both cases, this was connected to the fact that the reach of the more voluntarist collective bargaining subsystem has decreased. In the United States there was an expansion of a similarly voluntarist system of individualized non-union dispute resolution. This was not the case in Italy though, where the voluntary resolution of individual disputes maintained a close connection to the collective dimension through the importance of trade unions in assisting workers.

Figure 3. Directions of Change within Country Subsystems

	<i>Collective</i>	<i>Individual</i>	<i>Collective</i>	<i>Individual</i>
Regulated	<b>Germany</b> Collective Bargaining and Works Councils → Statutory Employment Rights		<b>Australia</b> Traditional Award System → NES and Modern Awards ↓ Collective Bargaining	
Voluntarist				
Regulated	<b>Italy</b> Collective Bargaining ↗ Individual Dispute Resolution		<b>United States</b> Unionized Workplace Procedures → Non-union Workplace Procedures ↗ Individual Rights Litigation ↓	
Voluntarist				

Notes: Arrows in boldface indicate greater extent of change in the indicated directions.

Nevertheless, a striking finding across all four of our national systems was the decline in collective conflict resolution subsystems and the growing importance (albeit not always reflected in a quantitative growth) of individualized, regulated conflict resolution subsystems. This finding supported arguments that individual employment rights are becoming a more central component of IR systems, and bolstered suggestions that these subsystems need to become a more prominent focus of IR research and policy development (Piore and Safford 2006; Colvin 2012).

Figure 3 shows the direction of change between subsystems across each of our four national cases. There were some similarities across the cases. In all four, there has been a move toward individual-regulated subsystems. In the two countries with collective-regulated subsystems, Germany and Australia, these have been in decline. In the three countries with collective-voluntarist subsystems—Australia, Italy, and the United States—there was a shift from these toward individual-regulated subsystems. But an individual-voluntarist subsystem has become a substantial new component only in the United States. In this respect, we continue to see an aspect of American exceptionalism.

### Conclusion

This analysis provides a more complicated picture than those of the coherent national systems that have come out of some comparative research, such

as the positive complementarities-based systems seen in the VoC literature (Hall and Soskice 2001). 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. These subsystems do not fall into a neat dichotomy of CME and LME models posited by the VoC perspective. All too often we find individual and collective, as well as regulated and voluntarist, institutions for dispute resolution side by side within a single country. Even more important, we find multiple incidents of changes in dispute resolution practices in all the countries we studied. This process increases the diversity and complexity of institutional arrangements rather than, as suggested by proponents of the VoC approach, providing for disincentives for change (Hall and Soskice 2001: 64).

Yet our findings also contradict the picture of a uniform trend in a neoliberal direction toward greater employer discretion through decentralized IR suggested by Baccaro and Howell (2017). Although we found some commonality in the decline of collective dispute resolution subsystems and the growth of individual regulated ones in all four of our cases, these conflict resolution subsystems did not always reflect an enhanced employer discretion but rather, especially in the United States, a growing recognition of individual employee rights. In other cases, such as Italy, these subsystems maintained a close connection with the collective dimension, since trade unions are key in assisting individual employees. Moreover, subsystems based on an individualized, voluntarist model, which would represent the epitome of a neoliberal movement, were only found to be growing substantially in the United States among the four countries examined.

The results of the four country case studies in this analysis also lead us to identify a peculiar process of institutional change that closely resembles the “layering” model of institutional change as formulated by Streeck, Thelen, and Mahoney (Streeck and Thelen 2005; Mahoney and Thelen 2015). As they highlighted, we did not find institutional change in conflict resolution systems occurring through a sharp disjuncture with wholesale replacement of existing systems, as in the punctuated equilibrium model of institutional change (Erickson and Kuruvilla 1998); instead, this change took place incrementally. Unlike other recent contributions highlighting incremental processes of transformation of existing institutions through conversion—that is, through changes in their function or mode of operation (Baccaro and Howell 2017)—we found that institutional change in conflict resolution is occurring through layering. In our cases, new subsystems gained growing importance, while older ones showed a declining relevance, even as these old and new subsystems continued to operate in parallel as components of the same national system. This process of evolution of the institutional ecology has implications for how we think about public policy. It suggests that rather than focusing just on the older subsystems that have been the

traditional domain of industrial relations, policy strategies need to encompass the range of newer, expanding subsystems.

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