

# THE SOCIAL CONTRACT AND DISPUTE RESOLUTION: THE TRANSFORMATION OF THE SOCIAL CONTRACT IN THE UNITED STATES WORKPLACE AND THE EMERGENCE OF NEW STRATEGIES OF DISPUTE RESOLUTION

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*In recent years, a significant amount of public and academic attention has been devoted to the unravelling of the so-called 'New Deal' social contract and the emergence of a new social contract between workers and employers in the United States of America (US). In our paper, we will identify the forces of change that undermined the New Deal social contract during the post-World War II era and led to the reformulation of the workplace social contract in the US. It is our thesis that the transformation of the workplace social contract in the US significantly affected the resolution of employment disputes, giving rise to alternative dispute resolution (ADR) and other new approaches to conflict management. After briefly describing the origins of the New Deal social contract, we will assess the alignment of forces that resulted in the reformulation of the social contract in the 1990s. This new social contract has had historic consequences for most dimensions of the employment relationship, including job security, methods of pay, unionisation, and supervision, but its effects on workplace dispute resolution are especially noteworthy.*

## Introduction: Transformation of the Social Contract in the United States

In recent years, a significant amount of public and academic attention has been devoted to the unravelling of the so-called 'New Deal' social contract and the emergence of a new social contract between workers and employers in the United States of America (US). In this paper we will identify the forces of change that undermined the New Deal social contract during the post-World War II era and led to the reformulation of the workplace social contract in the US. It is our thesis that the transformation of the workplace social contract - what might be termed the social 'subcontract' - significantly affected the resolution of employment disputes, giving rise to alternative dispute resolution

(ADR) and other new approaches to conflict management. After briefly describing the evolution of social contract theory, the traditional workplace subcontract of the nineteenth and early twentieth century, and the characteristics of the New Deal social contract, we will assess the alignment of forces that resulted in the reformulation of the workplace social subcontract in the 1990s. This new social subcontract has had historic consequences for most dimensions of the employment relationship, including job security, methods of pay, unionisation, and supervision, but its effects on workplace dispute resolution are especially noteworthy.

The term 'social contract' has been defined as "the explicit and implicit agreements among the members of a political community that define the rights and responsibilities of people vis-a-vis their government" (Penner, Sawhill, and Taylor 2000: 16-17). The concept of a social contract has been applied to, employment relations, narrowing the focus of the contract to the rights and responsibilities of employees vis-a-vis their employer (*Business Week*, March 11, 1996; Rifkin 1995; Donaldson and Dunfee 1999). In the US, scholars and commentators of every political stripe have called for a new workplace social subcontract. On the left, for example, Jeremy Rifkin (1995), in *The End of Work*, predicts that technological change (especially in the realm of biotechnology) and 'hypercapitalism' will necessitate a new social contract that incorporates a radical reordering of workplace relationships. Paradoxically, perhaps the concept has been no less popular among many business executives. In a cover story, 'Writing a New Social Contract', *Business Week* discussed the longstanding division within the business community on the question of corporate social responsibility. On the one hand, according to the article, there were 'liberals' who believed in a 'stakeholder economy' that balanced the interests of managers, employees, customers, and communities. On the other hand, there were conservatives who maintained 'a faith in the restorative powers of the marketplace' and denied that corporations had the obligation to be socially responsible. *Business Week* described how certain elements of the business community were attempting to define a new position regarding the social responsibility of corporations:

In isolated pockets of Corporate America, a middle path is slowly emerging, one that reflects a new paradigm for business and society in a global market. It recognises that job security died with the 1980s-but concedes, too, that employers bear an obligation to help workers through transitions, and it attempts to align the interests of investors, managers, and employees, aiming to share both the risks and rewards of doing business (*Business Week*, March 11, 1996).

This paper is based on research the authors have been conducting for nearly seven years on the use of ADR and conflict management systems in American corporations. Our research has consisted of a

survey of the general counsel or chief litigators of the Fortune 1000 on topics related to ADR as well as field interviews and case studies we conducted (with considerable assistance from our colleagues) in more than fifty organisations across a broad spectrum of industries and sectors in the US (Lipsky, Seeber and Fincher 2003).

### **The Evolution of Social Contract Theory**

The theory of the social contract has its origins in the work of seventeenth and eighteenth century philosophers, most notably Thomas Hobbes, John Locke, and Jean-Jacques Rousseau. The Protestant Reformation and the decline in the authority of the Catholic Church had served to weaken the divine authority of the monarchic form of government. Europe had been ravaged by the wars of the Reformation, and philosophers recognised that the authority of the King, and more generally civil government, needed a new justification. "In their search, political theorists - and especially the Protestants among them - turned to the old biblical concept of a *covenant* or contract, such as the one between God and Abraham and the Israelites of the Old Testament" (*Encyclopaedia Britannica* 2002).

In classical philosophy a social contract can be embodied in an actual document (such as the Magna Carta or a constitution), but is more likely to be implicit or hypothetical. It is a compact between rulers and their people that defines their respective rights and duties. What distinguished the theories of Hobbes, Locke, and Rousseau was their attempt "to justify political authority on grounds of individual self interest and rational consent", rather than on divine authority. These theories "attempted to demonstrate the value and purposes of organised government by comparing the advantages of civil society with the disadvantages of the state of nature, a hypothetical condition characterised by a complete absence of governmental authority" (*Encyclopaedia Britannica* 2002; Hobbes 1651; Locke 1690; Rousseau 1762). By the nineteenth century, social contract theory had fallen out of favour. Other schools of philosophy (such as Kantian idealism, logical positivism, and Marxism) gained dominance. But in the twentieth century, social contract theory made a comeback, primarily because of the work of John Rawls. In common with his intellectual predecessors, Rawls attempted to justify governmental authority on the basis of ethical principles. In Rawls's view, a social contract codifies the legitimate and reasonable obligations of all citizens in a civil society. Rawls, in contrast to Hobbes, does not view social contract theory as an explanation for the origins of civil government, but rather as a means of analysing the legitimacy of political obligations (Rawls 1999; for a contrary view, see Nozick 1974).

The trail that connects the classical concept of the social contract with the contemporary and popular use of the term is a long and winding one. It is a 'stretch' to use the same term that was first meant

to describe efforts to justify the sovereign authority of government to justify, in current usage, the special interests of various stakeholder groups. What are the implications of these alternative concepts of the social contract for conflict resolution? In classical theory, a social contract was in the first instance a means of preventing conflicts from arising. Under a social contract, individuals exchanged their unlimited liberty for the safety and security provided by sovereign power. If conflicts arose, they would be resolved by the sovereign (Hobbes 1651).

The classical view of the social contract, in sum, justified the need for citizens to obey the law of the sovereign. Conflict, therefore, could not be tolerated if it was directed against the sovereign, who represented the will of the people. Some scholars see in Rousseau's emphasis on an all-powerful sovereign the roots of totalitarianism. Locke, on the other hand, maintained that if the laws of the state conflicted with natural law, natural law had to prevail. In the US, Locke's view provided a rationale for the supremacy of the judicial branch of government. The power of the judiciary to overturn acts of the legislature is based on the view that a statute should not be allowed to violate the natural rights of citizens (Rousseau 1762; Locke 1690).

### **The Workplace as a Social 'Subcontract'**

The social contract that governed the workplace-what might be termed the social subcontract-from the middle of the nineteenth century through the first four decades of the twentieth century was a compact fashioned out of the imperatives of industrialisation. Industrialisation strengthened the authority of management to make decisions regarding the products to be produced, the prices charged, the business location, the investments needed in new technologies, and the deployment and supervision of the work force. Almost all organisations had a hierarchical authority structure featuring top-down management. At the workplace, managers and supervisors had the authority to direct employees. In the absence of trade unions, that authority could not be questioned unless management violated the law.

Under the hierarchical authority structure that prevailed in US enterprise through the last half of the nineteenth century and the first part of the twentieth century, conflict was considered dysfunctional. Managers never thought of conflict strategically; if they considered it at all, it was usually a phenomenon they did their best to avoid, suppress, or ignore. If, despite their best efforts, they were forced to deal with conflicts with their employees, the remedy was to punish those responsible. There was little tolerance for dissent at the workplace. Certainly before the passage of the *National Labor Relations Act* in 1935 (known as the 'Wagner Act'), it was common for managers to deal with union-organising drives by firing the employees who led them. The paper now turns to the shift from this traditional

workplace subcontract to the New Deal social contract that emerged in the 1940s and endured until the 1980s. Under the workplace subcontract governing employment relations, managers gained a relatively free hand in controlling production and the work force and employees gained access to good jobs at good wages.

### **The Rise of Unionism**

Beginning in the depths of the Depression, unionism swept through the ranks of blue-collar workers. When Franklin Roosevelt became President in 1933, the union representation rate was about 5 per cent. When Dwight Eisenhower became President in 1954, it was nearly 35 per cent. The dramatic surge of unionism in the 1930s was often accompanied by strikes and picketing. Occasionally, the tug of war between employers and unions became violent. In the realm of industrial relations, the social contract was severely tested by conflicts between unions and employers in the 1930s (Lipsky, Seeber, and Fincher 2003: 63).

The turmoil and tumult of the 1930s motivated the US public and its elected representatives to search for policy measures that would foster fairness and equity in employment relations and remove the sources of disruption and violence. In industrial relations, President Roosevelt signed the Wagner Act into law in 1935. This law guaranteed the right of workers to organise and be represented by unions in collective bargaining, prohibited employers from discriminating against their employees on the basis of their union activity, and gave workers the right to vote in secret-ballot elections as a means of resolving union representation questions. The Wagner Act was significant on several dimensions. Not only did it deter violence in labour relations and encourage workers to join unions, it also represented a symbolic codification of the collective rights of workers in American jurisprudence. Under the Wagner Act collective rights took precedence over individual rights to an extent that would never again be matched.

### **Product Market Competition**

By the end of World War II, the US was indisputably the leading economy in the world. It had about 5 per cent of the world's population but produced nearly one-third of the world's goods and services. The core of its economic strength (autos, steel, chemicals, electrical machinery, and mining) was protected by restrictions on international trade, including high tariff walls, which had been heightened by Depression-era legislation designed to safeguard jobs and profits. Only about 5 per cent of the goods and services consumed in the US were imported from abroad (Lipsky, Seeber, and Fincher 2003: 40).

Throughout most of the twentieth century, product market competition in the US was limited by the existence of oligopolies. In 1960, for example, General Motors produced nearly half the cars

purchased in the United States; the number of cars imported from Europe amounted to a mere trickle and none were imported from Japan (MacDonald 1963: 4–14). The first imported Japanese cars, Datsuns, did not arrive in the United States until 1963 (Halberstam 1986). In several major industries, government regulation seriously constrained, or in fact prevented, product market competition. Regulation limited competition in telephones, airlines, railroads, over-the-highway trucking, intercity bus service, gas and electric utilities, and other industries (Cappelli 1987: 135-186).

The protections and privileges enjoyed by many US corporations gave them considerable discretion, if not total control, over price and wage setting. In protected and regulated markets, wage increases could be passed on to customers through higher prices, and prices could be raised without fear of losing too many customers. Of course, not all industries were insulated from the forces of the marketplace. Companies in industries such as textiles and apparel, wholesale and retail trade, and auto supply and repair attempted to survive in a 'dog-eat-dog' world. The garment-producing sweatshop, the 'mom-and-pop' grocery store, and the corner gasoline station were outside the scope of the New Deal social contract.

The work force in the 1950s and 1960s was dominantly blue collar. At the turn of the twentieth century, about 38 per cent of the work force was employed in agriculture and about 31 per cent in goods-producing industries such as mining, manufacturing, and construction. But by 1950, the proportion of the work force in agriculture had dropped to about 23 per cent, while the proportion in goods-producing industries remained about 31 per cent (US Department of Labor 2001: 3, 122, and 134).

### **The Characteristics and Coverage of the 'New Deal' Social Contract**

By the end of World War II, both labour and management in the US were eager to rationalise and bring order to a chaotic workplace. Both sides were willing to develop processes and procedures that would serve to regulate employment relationships. The New Deal version of the social contract was the consequence of these shared objectives. At many worksites, a broad, if fragile, consensus developed that would last more than thirty years. Managers would recognise the legitimacy of unions, unions would restrict their concerns to well-defined workplace issues and government would be the impartial arbiter, helping to ensure a level playing field. The foundation had been laid for the unionised version of the social contract in employment relations.

Conceptually, the New Deal social contract promised significant, tangible benefits to most (but not all) individuals, groups, and institutions in US society in exchange for their accepting certain responsibilities and obligations. The scope of the New Deal social contract was very broad — broader than the social contract had ever

been in the past - but clearly it did not include everyone. Its most novel feature was probably its (implicit) inclusion of trade unions.

For most workers, union and non-union alike, the New Deal social contract promised a comfortable middle-class standard of living - provided the worker was a law-abiding, English-speaking, heterosexual white male. After World War II, middle-class Americans were able to enjoy a level of material well-being that was unparalleled in world history. The quid pro quo for the middle-class lifestyle, which became the norm for a majority of Americans in the post-World War II period, was a set of fairly rigid obligations and responsibilities, not only on the job but off as well. Under the New Deal social contract, standardisation of the terms and conditions of employment was the norm for middle-income wage earners and conformity to accepted standards was the expectation.

The implicit terms of the New Deal social contract provided corporations with many benefits, including special tax advantages, subsidies, and an array of protections from the competitive pressures of the marketplace. In exchange, corporations were expected to provide the goods and services that would guarantee prosperity, avoid a resumption of the Depression, and (as symbolised by the *Full Employment Act* of 1946) maintain a tolerable rate of unemployment. In large part the corporate obligation centred on the provision of good jobs, adequate pay, and sufficient (but not perfect) job security. Until the 1970s, however, the corporate obligation did not include the provision of safe jobs, a guarantee of pensions, or the requirement to provide equal opportunity for minorities and women. Nor did the New Deal social contract prevent corporations from polluting the environment.

Under the New Deal social contract, unions enjoyed protections and privileges that had never previously existed and, to a degree, that may never again be duplicated. Indeed, with hindsight, the status of unions under the New Deal social contract increasingly appears to be an aberration in US history. Trade union influence expanded not only in the workplace but also in the political arena. After twenty years of jurisdictional rivalry and bitter feuding, the AFL and CIO merged in 1955.

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### **The Unravelling of the Workplace Social 'Subcontract' in the United States**

By the 1980s, the glue that had held together the New Deal social contract had come unstuck. The forces bringing about transformation included the increasing globalisation of business, the growth of multinational corporations, and the rapid pace of technological change. These factors, in turn, required corporations operating in international markets to accelerate the pace of their decision-making. No longer did managers have the luxury of tolerating any aspect of their business that dampened their ability to respond to market pressures.

### **The Rise of the Knowledge-Based Economy**

The transformation of the social contract, particularly with regard to workplace institutions, really began in the 1980s. In the 1960s, US economic strength was still based on its ability to produce and distribute manufactured products, but by the 1980s its strength was based on its ability to produce and distribute information. The US had become a knowledge-based economy. This historic change necessitated a reworking of the social contract.

By the 1980s, the 'industrialisation' of the United States was in full swing. In the economic battle against imported products from Germany, Japan, and elsewhere, US manufacturing was in full retreat. In autos, auto parts, steel, aluminium, apparel, and dozens of other industries plants were closed, jobs were permanently lost, and communities were abandoned. The industrial centres of the northeast and Midwest were left in shambles (Bluestone and Harrison 1982: 25-81). Computings and other high-tech industries were on a growth path, but no one could be certain in the 1980s that these industries would dominate world markets in the future. Indeed, many predicted that the Japanese would ultimately control the microchip and microprocessor markets, gaining success in those sectors as they already had in autos, steel, and electronic products.

Ronald Reagan's election to the presidency in 1980 signalled a distinct rightward shift in the nation's political climate. The new conservative political climate of the nation, a reaction in part to the excesses of the 1960s, helped accelerate the move to deregulate US industry. Deregulation had begun in earnest during the Carter presidency, starting with the passage of the *Airline Deregulation Act* in 1978, which virtually eliminated federal controls of the airline industry (Cappelli 1987: 135-86). During the Reagan years, it spread rapidly to telephone, telecommunications, trucking, and other heavily regulated industries, supported by Democrats and Republicans alike. Thus, the combination of globalisation, heightened competition, deregulation, and technological change served to undermine the terms and conditions of the New Deal social contract.

### **The Litigation Explosion**

The forces affecting the nature of the social contract included not only globalisation and technological change but also the so-called 'litigation explosion'. The number of employment lawsuits grew dramatically following the passage of the many new statutes affecting employment relations in the 1960s. More and more dimensions of the employment relationship were brought under the scrutiny of the court system and of a multitude of regulatory agencies. The delays and costs associated with disputes - and particularly with litigation - became a factor US business needed to manage and control. Olson (1991) sees that the 'litigation explosion' that began in the 1960s was behind the emergence of ADR in the United States.



Proponents of the view that there has been a litigation explosion cite the fact that since the 1960s litigation increased approximately seven times faster than the national population. The US has about 5 per cent of the world's population but 70 per cent of the world's lawyers (Garry 1997: 15-16). A 1994 survey by Tillinghast-Towers Perrin estimated that tort liability cost the United States USD 152 billion per year (Gold 1997). Other data show that in the last two decades, the number of suits filed in federal courts concerning employment matters grew by 400 per cent (US Department of Labor 1994: 25-33). In the decade of the 1990s, the number of civil cases in US federal courts involving charges of discrimination alone nearly tripled. Plaintiffs who won their employment discrimination suits received a median award of USD200,000 in 1996; one in nine received an award of USD1 million or more (Litras 2000: 1-13).

The purported increase in business and employment litigation has been accompanied by delays in the settlement of such cases. According to the Dunlop Commission (established by the Clinton administration in 1993), "[o]verburdened federal and state judicial dockets mean that years often pass before an aggrieved employee is able to present his or her claim in court" (US Department of Labor 1994: 50). In 1994, a panel of nine federal judges commissioned by the Judicial Conference of the United States noted that the huge increases in the caseload of the federal courts had further slowed the already languid rate of processing civil cases (US Department of Labor 1994: 50). In sum, the litigation explosion clogged the dockets of federal and state courts in the US, leading to longer delays and higher costs in the use of traditional means of dispute resolution.

In our interviews with corporate managers and attorneys we found that almost all of our interviewees had the perception that their organisations are much more likely to be defendants in civil litigation of all types than they were a generation ago. That perception has translated into action for many businesses as they seek to gain more control over the litigation process and its results (Lipsky, \$Seeber and Fincher 2003).

### **Legal and Tort Reform**

Frustration with the growing burden of litigation led many in the business community, first, to oppose various federal measures to regulate the employment relationship and, second, to lobby for tort (or legal) reforms that would limit the ability of one party to sue another. The business community and its allies have often joined forces with the Republican Party to press for tort reform, although the issue has never been framed entirely along conventional political lines. The movement for tort reform reached a crest in 1994 with the election of a Republican majority in the 104th Congress. The Republican Party's 'Contract with America' contained a provision pledging party support for reform that would curtail the flood of "frivolous lawsuits and outlandish damage

rewards [that] make a mockery of our civil justice system" (Yilmaz 1998: 1-34). However, Congressional Republicans failed to achieve comprehensive tort reform, although piecemeal measures were passed and signed into law by President Clinton. President Bush has made achieving federal tort reform a major legislative priority and Congress is once again actively considering the issue. It is our contention, based on our interviews in the field, that the failure of tort reform is directly linked to the rise of alternative dispute resolution.

### **The Professionalisation of Human Resource Management**

Another factor that has played a significant role in transforming the social contract in the US has been the professionalisation of human resource management. As late as the 1960s, the personnel manager was on the bottom of the management ladder. The status of the personnel function was elevated significantly in the ensuing decades, along the way changing its name from 'personnel' to 'human resource management' as a symbol of its higher status.

In the 'Information Age,' attracting, retaining, and motivating a skilled and diverse work force has become a strategic issue for the corporation. The human resource function has been professionalised because the failure of the organisation to attract and retain the types of workers it needs could very well threaten not only its profitability but also its survival. As the twentieth century came to an end, in many corporations the executive in charge of the human resource function had become top management's business partner (Schuler 1994: 58-76). The professionalisation of human resource management has had significant effects on the social contract governing the workplace.

### **The Decline of Unionism**

From its peak of 35 per cent of total payroll in 1954, union density has steadily declined for nearly fifty years. By 2001, unions represented only 13.6 per cent of the US work force. Although the proportion of unionised employees in the public sector had risen to 37.4 per cent, the proportion in the private sector had fallen to only 9 per cent (US Bureau of the Census 1970; US Department of Labor January 2001).

Management opposition is clearly one important factor explaining this long-term decline, but there are others. Union membership had been concentrated in the smokestack industries, precisely the industries hit hardest by international competition and deindustrialisation. In addition, unions, headed mostly by ageing white men, found it increasingly difficult to organise the growing number of women, immigrants, and minorities entering the labour force. The shift from a manufacturing to an information economy also brought about an increase in the white-collar, service, and professional segments of the work force, segments the union movement has had difficulty reaching.

Still another factor was the weakness of US labour law. There was growing recognition by employers and unions alike that the

legal framework developed in the context of the Great Depression was steadily losing relevance in an increasingly information-based economy.

Both labour and management became more and more dissatisfied with the law. Labour complained that the law deterred their efforts to organise the unorganised and lacked adequate sanctions to deal with employer violations. Management asserted that the rights granted to unions interfered with efficient production and feared that the law would obstruct the shift toward team-based work. Although both sides were unhappy with the law, they could not agree on how to change it. In the face of this impasse, Congress could not successfully pass any significant changes in the nation's basic labour law during the last four decades of the twentieth century.

### **The Reorganisation of the Workplace**

All of the forces of change described in this paper - globalisation, rapid technological change, the growing legislative regulation of employment, the decline of unionism - were associated with a significant reorganisation of the way work is performed in many US companies. A hallmark of the reorganisation of the workplace is the decline in the importance of hierarchy and the rise of team-based work. Many US employers have discovered that employee performance and productivity can be enhanced if employees are empowered to assume more responsibility for the manner in which they perform their work. In many US workplaces, management has removed layers of supervision and delegated substantial authority to teams of employees to control the direction of their activities. Virtually every corporation we visited in the course of conducting our field research purported to use a team-based system of production.

### **High-Performance Work Systems**

The ultimate form of team-based work is a so-called 'high-performance work system'. The elements of such a system always include both teams and delayering. In General Motors' Saturn plant in Springhill, Tennessee, for example, management and the union agreed to eliminate all first-line supervisors and, instead, have teams elect their leaders (Rubinstein and Kochan 2001). Another element of a high-performance work system is the elimination of job classifications, reversing Taylorism that had run rampant. Newer plants opened in the 1980s or later frequently had many fewer job classifications than older plants operating in a more traditional fashion (Verma 1983) as US companies realised that improved efficiency and performance could be achieved by recombining jobs and eliminating multiple job classifications. Instead of having workers perform a fixed set of tasks in a narrowly defined job, employers adopted the practice of having employees rotate across the jobs performed by the members of a team.

Job rotation gives rise to the concepts of 'multi-skilling' and 'multi-tasking'. It requires employers to have a commitment to training and retraining of the workforce on an ongoing basis.

Another feature of a high-performance work system is a contingent and flexible compensation scheme. In fact, as the twentieth century came to an end, many employers - even those not relying on team-based production - had abandoned their conventional pay practices and adopted more flexible compensation plans. A growing number of employers no longer increased their employees' base pay annually but instead made improvement in pay contingent on either employee performance and productivity or the profitability of the firm. In many organisations, performance-based pay, profit sharing, lump-sum bonuses, and other contingent pay schemes replaced automatic annual pay adjustments (Kochan, Katz and McKersie 1986).

In the last quarter of the twentieth century many employers came to believe there was a direct link between their employees' participation in workplace decision-making, and their companies' ability to compete in world markets. Employee participation went hand in hand with team-based production. Companies, often working cooperatively with their unions, experimented with a variety of workplace innovations designed to foster employee involvement in decision-making. As Kochan, Katz, and McKersie observed, these innovations had two basic objectives: one was to "increase the participation and involvement of individuals in informal work groups so as to overcome adversarial relations and increase employee motivation, commitment, and problem-solving potential"; a second was to "alter the organisation of work so as to simplify work rules, lower costs, and increase flexibility in the management of human resources" (Kochan, Katz, and McKersie, 1986: 147).

Teams, delayering, multi-skilling, multi-tasking, contingent pay, empowerment, and participation are all elements of a full-fledged, high-performance work system. Not all US employers embraced all of these elements, but a majority adopted one or more of them (Osterman 1994: 173-88; Osterman 2000: 179-96). The reorganisation of the workplace was a consequence of management's drive for increased flexibility in employment relations. To become and remain competitive, US employers realised they needed greater flexibility in the workplace. Flexibility would allow them to shed outdated work rules and practices, motivate employees, and enhance employee productivity.

The reorganisation of the workplace has also had pronounced implications for conflict management in that a workplace conflict management system is the logical handmaiden of a high-performance work system. In our survey of the Fortune 1000 and our fieldwork, we discovered that a company that had adopted advanced workplace practices was more likely to have a conflict management system. The correlation between the use of a conflict management system and the use of advanced human resource practices is not a perfect

one. Nevertheless, a growing number of managers have come to realise that delegating responsibility for controlling work to teams is consistent with delegating authority for preventing or resolving conflict to the members of those teams. Through most of the twentieth century, management had the authority, as we noted earlier, to direct employees in all aspects of their working life and to resolve conflicts arising in the workplace. As we also noted, even the rise of unionism did not fundamentally alter management's decision-making authority. But the ineluctable forces that have transformed US society are producing a new social contract at the workplace - a social contract that requires new strategies of managing workplace conflict (Lipsky, Seeber and Fincher, 2003).

### **Implications for Workplace Dispute Resolution**

For nearly three decades, a 'quiet revolution' has been occurring in the US system of justice: a dramatic growth in the use of ADR (such as arbitration, mediation, fact-finding, facilitation, and so forth) to resolve disputes that might otherwise have to be handled through litigation. The growth in its use in recent years clearly seems associated with the unravelling of the New Deal social contract and the emergence of a new workplace compact.

### **The Growth of ADR in the United States**

Many people are unaware of how widespread the use of ADR is in the US. As a consequence of its use, a significant shift in the resolution of many types of disputes from the court system to private forums has taken place. Some observers have claimed that this shift represents the *de facto* privatisation of the American system of justice. The declining trend in the use of trials in the United States to resolve disputes is an indicator of privatisation. Samborn reports a significant drop in federal trials over the last thirty years. In 1970, of the 127,280 civil and criminal cases filed in the federal courts, 10 per cent were resolved after either a jury or a bench trial; in 2001, of the 313,615 cases filed, only 2.2 per cent were resolved by either a jury or a bench trial. Evidence suggests similar trends in state courts. As Samborn notes, the growth of private dispute resolution is the principal cause of the declining use of trials, but its use "makes some jurists uneasy". Concerned jurists believe private dispute resolution "shields lawsuits from the imposition of public values about important concerns, such as discrimination in the workplace, price fixing or unsafe products" (Samborn 2002: 26-7). On the other hand, most jurists acknowledge that private dispute resolution reduces costs, minimises the use of scarce judicial resources, and produces reasonable results for the parties (Samborn 2002: 27).

The research we have conducted over the last seven years strongly suggests that ADR is now firmly institutionalised in a majority of

US corporations, at least for employment and commercial disputes. We believe the United States passed the 'tipping point' in the use of ADR at some point in the last decade. In our field research we discovered the fact that few, if any, organisations that adopt the use of ADR ever go back to older methods of resolving disputes. Indeed, our research revealed that when organisations begin to use ADR, rather than going back they tend to go forward. They move beyond the *procedures* and *techniques* of ADR and toward the use of a *system*, at least in the workplace. They begin their journey by attempting to manage litigation; they then expand their concern to the management of disputes; and ultimately they reach the point of systematically managing conflict (Lipsky, Seeber and Fincher 2003).

### **Dispute Management versus Conflict Management**

It is our belief that conflict management is much more comprehensive than dispute management. At the root of this conclusion is the distinction between conflicts and disputes. Conflicts can be seen as nearly any organisational friction that produces a mismatch in expectations of the proper course of action for an employee or a group of employees. Conflicts do not always lead to disputes - sometimes they are ignored, sometimes suppressed, and sometimes deemed unimportant enough to be left alone. Disputes, on the other hand, are a subset of the conflicts that require resolution, activated by the filing of a grievance, a lawsuit against an organisation, or even a simple written complaint.

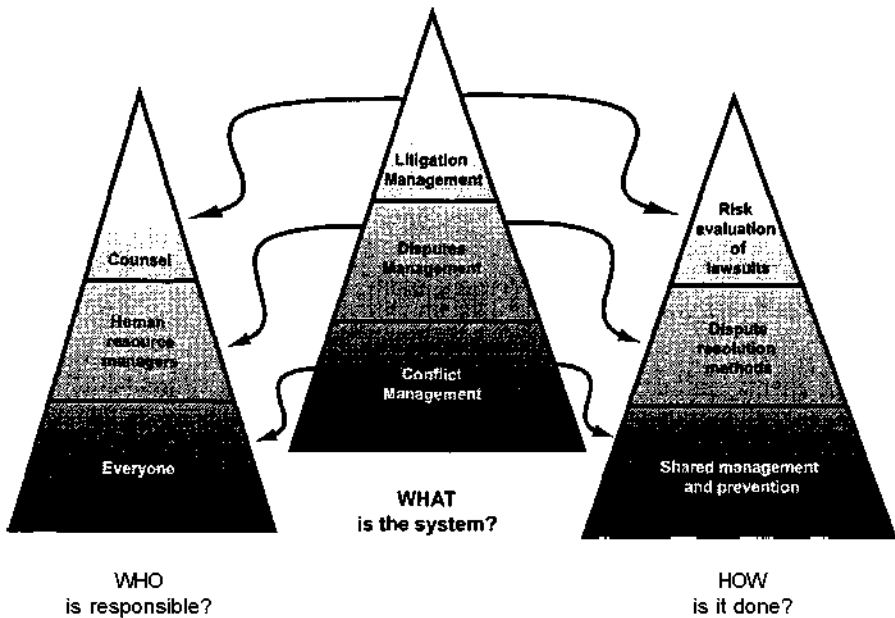
Accepting this distinction between conflicts and disputes allows the argument naturally to progress to a distinction between attempts to manage them. The management of disputes, which after all represent only the tip of the iceberg of conflict, is a significantly less complex problem. To manage disputes successfully, the organisation need only manoeuvre the dispute into a forum most to its advantage to attain lower costs (transactional and outcome), a quicker speed of resolution, or simply a higher probability of a better outcome. Such activities can constitute the effective management of disputes. Thus, much of what we see of dispute management looks like 'forum shopping'.

### **Conflict Management Systems**

Organisations that desire to manage conflict must go well beyond this smaller set of processes and into more facets of organisational life, encompassing a much wider range of questions, the involvement of more parts of the organisation, and a more complex system. The goals of a conflict management system are broader and more numerous. Conflict management systems attempt to channel conflict in productive directions, for example, not just to manage their resolution. Conflict management systems spread the responsibility for conflict and its resolution to the lowest levels of the organisation. Thus they require

training to be widespread. They seek to transform the organisation, not just a set of processes. This distinction among dispute and conflict management systems, and litigation, is graphically depicted in Figure 1. These three types of conflict management differ in terms of the depth of their involvement in the organisation, the people responsible for the management of the system, and the functions involved in the creation and maintenance of the system. Dispute management is always more complex than litigation management, and conflict management more complicated than both.

**Figure 1**  
**The Conflict Pyramid**



There is no general agreement on the precise definition of a conflict management system, even among experts (Eostantino and Merchant 1996; Ury, Brett and Goldberg 1993; Slaikeu and Hasson 1996). Clearly, though, an authentic system is not merely a practice, a procedure, or a policy. It is something more encompassing, which may incorporate all three: practice, procedure, and policy. Our understanding of systems more generally is rooted in the classic works on the system concept (Von Bertalanffy 1951:302-61; Boulding 1956:197-208). Of the several attempts that have been made to extend the systems concept to conflict management, we prefer the definition contained in a report prepared for the Society for Professionals in Dispute Resolution (SPIDR).<sup>1</sup>

The report says that an integrated conflict management system has five characteristics. We summarise these characteristics in Exhibit 1.

### **Exhibit 1** **The Five Characteristics of an** **Integrated Conflict Management System**

**Scope:** A system should have the broadest feasible scope, providing options for all people in the workplace, including employees, supervisors, professionals, and managers to have all types of problems considered.

**Culture:** A system should 'welcome dissent' (or tolerate disagreement) and encourage resolution of conflict at the lowest possible level through direct negotiation.

**Multiple Access Points:** Users of a system should be able to identify, and have access to, the person, department, or entity most capable (in terms of authority, knowledge, and experience) of advising the individual about the conflict management system and managing the problem in question.

**Multiple Options:** A system should allow users the choice of more than one option for resolving a problem or dispute; more specifically, a system should contain both rights-based and interest-based options for addressing conflict.

**Support Structures:** A system requires support structures that are capable of coordinating and managing the multiple access points and multiple options; the structure should integrate effective conflict management into the organisation's daily operations.

Designers of systems need to pay particular attention to questions of fairness. The Association for Conflict Resolution (ACR) committee, after considerable debate, reached agreement on eight essential elements of a fair conflict management system:

1. to the extent possible, participation in a system should be voluntary;
2. the privacy and confidentiality of the processes should be protected to the fullest extent allowed by law;
3. 'neutrals' (mediators, arbitrators, ombudspersons, and so forth) should be truly neutral and impartial;
4. 'neutrals' should be adequately trained and qualified;



5. the legitimacy of a system will be enhanced to the extent that it is "characterised by diversity in [its] core of neutrals, including mediators and arbitrators";
6. a system should have policies that specifically prohibit any form of reprisal or retaliation;
7. a system must be consistent with an organisation's existing contracts, including collective bargaining agreements; and
8. a system must not undermine the statutory or constitutional rights of the disputants.

Our own research has shown that some organisations claiming to have conflict management systems could not meet all the criteria prescribed by the ACR committee. In fact, in contemporary US organisations today, a system as prescribed by ACR is more the ideal than the reality. Our studies of organisations that we believe have systems, even though they may fall short of the ideal recommended by ACR, reveal several other characteristics these organisations share:

1. *Proactive.* The organisation's approach to conflict management is proactive rather than reactive: that is, the organisation has moved from waiting for disputes to occur to preventing (if possible) or anticipating them before they arise.
2. *Shared responsibility.* The responsibility for conflict (or litigation) management is not confined to the counsel's office or to an outside law firm, but is shared by all levels of management.
3. *Delegation of authority.* The authority for preventing and resolving conflict is, therefore, delegated to the lowest feasible level of the organisation.
4. *Accountability.* Managers are held accountable for the successful prevention or resolution of conflict; the reward and performance review systems in the organisation reflect this managerial duty.
5. *Ongoing training.* Education and training in relevant conflict management skills are an ongoing activity of the organisation.
6. *Feedback loop.* Managers use the experience they have gained in preventing or resolving conflict to improve the policies and performance of the organisation.

Systems also vary in the procedures they employ for conflict resolution. We have investigated systems that include ombudspersons, peer-review panels, facilitated discussions, mediation, arbitration, and multiple variations on these basic procedures. The choice of procedures can reflect the values underlying the system itself. Some conflict management systems place value on participation in the conflict resolution process, some on resolving disputes as quickly as possible, some simply value bringing conflict to the surface. The solutions

created to reach these fundamental goals will be reflected in the procedures used within the system.

We believe it is also important to identify and analyse the participants in the conflict management system. One simple distinction is the amount the system relies on outsiders - neutrals and consultants, for example - to feed and maintain it. But it is important to go beyond the use of outsiders and into the organisation itself. The extent to which line managers are involved and responsible for resolving conflict is an important distinction between systems. Finally, it is important to analyse what is judged by an organisation to be critically important by looking at the features of the system they choose to measure and evaluate. Therefore, evaluation is another important feature of a well-functioning system.

### Conclusions: A New Equilibrium?

In this paper we have traced the evolution of the social contract and its implication for workplace dispute resolution. Table 1 provides a summary of the various conceptions of the social contract discussed in this paper and the implications of these conceptions for workplace dispute resolution.

The classical conception of the social contract served to justify the authority of the sovereign, or more generally the state, to control and resolve conflict. In classical theory the use of private forums to resolve public claims was scarcely imagined. It was the rise of capitalism and democracy that eventually gave new meaning to the concept of a social contract. First in Europe and later in the newly formed US, the growth of private enterprise and reliance on free markets resulted in private parties assuming more responsibility for the resolution of conflict. Governments recognised the sanctity of private contracts, and private parties could negotiate those contracts with little interference from the state. Disputes arising under such contracts could be resolved in the courts, but in the United States and most western countries the use of private negotiation, mediation, and commercial arbitration to resolve such disputes came to be recognised as legitimate forms of conflict resolution.

In US employment relations, the integrity of private employment contracts was highly respected under the traditional social contract. However, the imbalance of power between employers and employees meant that, in most instances, employers could effectively dictate the terms and conditions under which employees worked. Moreover, employers had the authority unilaterally to change the terms and conditions of employment. They could, for example, terminate employees at will. The employment-at-will doctrine, borrowed from British common law, allowed US employers to discharge employees for virtually any reason whatsoever. The implicit social contract governing the workplace did not recognise the legitimacy of worker participation

**Table 1**  
**Conceptions of the Social Contract and Their Implications**  
**for Workplace Dispute Resolution**

<b>Social Contract</b>	<b>Classical</b>	<b>Traditional</b>	<b>New Deal</b>	<b>Emerging</b>
Era	17 <sup>th</sup> and 18 <sup>th</sup> Century	19 <sup>th</sup> and early 20 <sup>th</sup> Century	1930s to 1980s	1990s and beyond
Forces of Change	Decline of authority of the Church and Monarch	Industrialisation and the rise of the market economy	Great Depression, challenge of communism, strikes and violence in labor disputes	Globalisation, technological change, decline of unionism, and rise of information economy
Breadth of Coverage	Very narrow: rulers and property-holding subjects	Narrow: Owners of capital, managers and the state	Broad: Owners, managers, many workers (but not all), and the state	Very broad: All stakeholders and most segments of society
Purposes and Objectives	Justify authority of the Sovereign and civil government	Justify capitalism, free markets, and authority of owners and managers	Justify capitalism and continuing authority of owners and managers but recognise legitimacy of unions	Justify global capitalism, free markets and competition; achieve balance between management authority and stakeholder rights
Effect on the Workplace	Supports authority of employer and 'master-servant doctrine'	Supports hierarchical structure of workplace and management's authority and prerogatives	Supports management's authority and prerogatives except where modified by collective bargaining contracts	Hierarchy replaced by team-based work; professionalisation of human resource function; growing use of high-performance work systems; employee participation in decision-making
Disposition Toward Conflict and Dissent	Conflict prevented or stringently controlled; dissent limited or suppressed	Conflict considered dysfunctional; some tolerance of dissent; strikes generally unlawful	Recognition of some positive aspects of conflict; strikes lawful but regulated	Conflict legitimate, but needs to be managed; dissent tolerated and even encouraged; strikes lawful but less effective
Effect on Workplace Dispute Resolution	Reinforces authority of the Sovereign, courts, and employers over workplace disputes	Heavy reliance on authority of employers and courts to control and resolve workplace disputes	Recognition of union and employee role in workplace dispute resolution; fosters use of mediation and arbitration, especially in union-management disputes	Institutionalisation of ADR and emergence of workplace conflict management systems

in any aspect of decision-making at the workplace, unless employers on their own volition invited employees to play such a role. Throughout the nineteenth and early twentieth century, neither federal nor state courts in the US were inclined to side with employees in disputes they might have with their employers. The courts enforced the employment-at-will doctrine and respected management's authority in the workplace.

The rise of unionism modified the traditional social contract, at least for those employees who successfully formed unions. The New Deal social contract, the consequence of both the rise of unionism and the passage of legislation during the Roosevelt era, provided employees with protections and privileges they had never before enjoyed. The growth of collective bargaining changed the handling of workplace disputes. It made the use of mediation in new contract disputes and arbitration in grievance disputes the standard practice in many industries. The use of these dispute resolution techniques, in turn, fostered the development of a skilled cadre of professional arbitrators and mediators. The successful use of arbitration and mediation to resolve labor disputes proved to be a benchmark for those who later championed the use of alternative dispute resolution. Although collective bargaining amended the traditional social contract and led to the introduction of new methods of dispute resolution, the New Deal social contract did not diminish management's ultimate authority in the workplace.

In this paper we have described the forces of change that have brought about the transformation of the workplace social contract. Globalisation, competition, technological change, the growing regulation of employment, and the litigation explosion, are some of the critical environmental factors that have brought about a new social contract at the workplace. The rise of human resource management, the decline of unionism, and the reorganisation of the workplace are some of the critical organisational factors associated with the new social contract. All of these forces, we maintain, have caused a transformation in workplace dispute resolution in the US. Under the traditional social contract, management's authority to manage and control conflict was largely unquestioned. Under the New Deal social contract, unions were given the right, under certain conditions, to challenge management's authority. Under the still-emerging new social contract, entirely new strategies and techniques are being used to manage and resolve conflict.

An intriguing question is whether the emerging social contract in the US will constitute a new and stable equilibrium, matching in endurance the traditional and New Deal versions of the social contract, or whether it represents merely a transitional phase to other societal arrangements that can scarcely be imagined. Are the reorganisation of the workplace and the emergence of conflict management systems more or less permanent phenomena, or are they simply passing fads?

Put in broadest terms, has the United States - as Francis Fukuyama (1992) might argue - reached 'the end of history' or can it expect further evolution in both the general social contract and the workplace social subcontract? Recall that Fukuyama argued more than a decade ago that the modernisation process ultimately led to liberal democracy and market-oriented economies, dominating national and cultural forces. In his view, "the process of modernisation was a universal one that would sooner or later drag all societies in its train" toward the western model (Fukuyama, 2002). September 11, 2001 caused even Fukuyama to question whether the world was heading toward the universal acceptance of western values. If the past is any guide to the future, it seems to suggest to us that the new social contract is not the end of history, although it may be a significant stage in our evolution. But does the future lead to new societal arrangements we have not yet experienced or back to the resurrection of old arrangements we seem to have abandoned?

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### Notes

- 1 *Designing Integrated Conflict Management Systems: Guidelines for Practitioners and Decision Makers in Organisations* (see Gosline et al., 2001). It should be noted that in 2001 SPIDR, the Academy of Family Mediators, and CRENet (Conflict Resolution Education Network) merged to become the Association for Conflict Resolution (ACR).

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