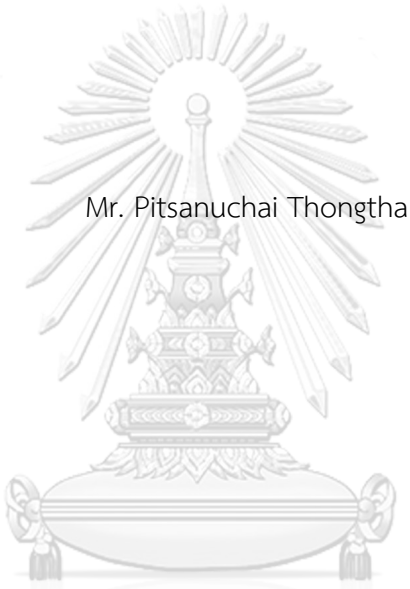
Legal Measures for Employer to Reach Fair Practice in Organizational Restructuring in Thailand

Mr. Pitsanuchai Thongtha



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บทคัดย่อและแฟ้มข้อมูลฉบับเต็มของวิทยานิพนธ์ตั้งแต่ปีการศึกษา 2554 ที่ให้บริการในคลังปัญญาจุฬาฯ (CUIR)
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มาตรการทางกฎหมายสำหรับนายจ้างเพื่อการปรับโครงสร้างองค์กรอย่างเป็นธรรมในประเทศไทย

นายพิษณุชัย ทองทา

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วิทยานิพนธ์นี้เป็นส่วนหนึ่งของการศึกษาตามหลักสูตรปริญญานิติศาสตรมหาบัณฑิต
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พิษณุชัย ทองทา : มาตรการทางกฎหมายสำหรับนายจ้างเพื่อการปรับโครงสร้างองค์กรอย่างเป็นธรรมในประเทศไทย (Legal Measures for Employer to Reach Fair Practice in Organizational Restructuring in Thailand) อ.ที่ปรึกษาวิทยานิพนธ์หลัก: ผศ. ดร. ศุภศิษฏ์ ทวีแจ่มทรัพย์, หน้า.

การปรับโครงสร้างองค์กร (Restructuring) เป็นกิจกรรมเชิงบริหารทั่วไป ที่ปกติสามารถนำมาปรับใช้ได้ในองค์กร เพื่อการยกระดับความสามารถด้านการแข่งขันในสังคมธุรกิจ การปรับโครงสร้างองค์กรจะทำให้เกิดผลกระทบต่อสิทธิด้านต่างๆ ของคนในองค์กร ทั้งนี้ไม่เพียงแต่บทบัญญัติกฎหมายและกฎเกณฑ์ต้องให้ความคุ้มครองที่เพียงพอกับลูกจ้าง แต่ยังต้องสนับสนุนให้เกิดความยืดหยุ่นแก่ภาคเศรษฐกิจด้วย ความสัมพันธ์ทางการจ้างแรงงานนั้นมีความเกี่ยวโยงกับการกระทำของทั้งสามฝ่าย ได้แก่ บรรดาลูกจ้าง บรรดานายจ้าง และรัฐบาล เพื่อร่วมมือกันอย่างจริงจังในการกำหนดกฎเกณฑ์ด้านแรงงานอย่างมีประสิทธิภาพ

กฎหมายแรงงานไทยที่วางหลักการเกี่ยวกับการปรับปรุงแก้ไขสภาพการจ้าง และเกี่ยวกับการเลิกจ้างแรงงาน ค่อนข้างมีความล้าสมัย กฎหมายแรงงานไทยได้ให้อำนาจกับศาลอย่างกว้างขวางในการพิจารณาและใช้ดุลพินิจในคดีเลิกจ้างแรงงาน ยิ่งกว่านั้นกฎหมายแรงงานไทยไม่ได้วางหลักการที่จะสามารถสนับสนุนเหตุผลทางธุรกิจ และไม่ได้เตรียมรับมือกับความเปลี่ยนแปลงในเชิงเศรษฐกิจ การขาดแคลนความสามารถการใช้ประโยชน์ในทางเศรษฐกิจนั้นอาจเป็นเหตุทำให้เกิดปัญหาทางด้านสังคมอย่างร้ายแรงในระยะยาว

ดังนั้นกฎหมายแรงงานไทยควรได้รับการแก้ไขเพื่อวางกฎเกณฑ์ในการสนับสนุนเหตุผลทางเศรษฐกิจ ซึ่งในต่างประเทศและตามคำแนะนำขององค์กรแรงงานระหว่างประเทศ (International Labor Organization) ได้รองรับมาตรการ และวิธีการการทางกฎหมายเพื่อรับมือกับการปรับโครงสร้างองค์กร ทั้งนี้มาตรการและวิธีการดังกล่าวสามารถเป็นแบบอย่างที่จะหยิบยกมาใช้ เพื่อวางเป็นหลักการและกฎเกณฑ์สำหรับรับมือกับปัญหาแรงงานเชิงเศรษฐกิจในกฎหมายแรงงานไทยได้เช่นกัน

สาขาวิชา กฎหมายธุรกิจ ลายมือชื่อนิสิต .....

ปีการศึกษา 2560 ลายมือชื่อ อ.ที่ปรึกษาหลัก .....

5786361834 : MAJOR BUSINESS LAW
KEYWORDS: CORPORATE RESTRUCTURING / COMPETITIVENESS / DISMISSAL

PITSANUCHAI THONGTHA: Legal Measures for Employer to Reach Fair Practice in Organizational Restructuring in Thailand. ADVISOR: ASST. PROF. SUPHASIT TAWEEJAMSUP, Ph.D., pp.

Restructuring, a normal managerial task of entrepreneurship, can lift up an enterprises' competitiveness potential in business societies. Restructuring will affect to the rights of all people in the enterprise. Labor laws and regulations not only provide adequate protection for employees, but also promote the flexibility to the business sectors. The employment relationships are involved with the actions of three parties - employees, employers and the government - that must substantially cooperate in order to establish efficient labor regulations.

Thai labor laws which relate to working condition adjustment and dismissal are obsolete. It provides too much power for the courts in making decisions over dismissal cases. Moreover, Thai labor laws do not lay the provisions necessary to support economic reasons and cope with the changes in today's business societies. Such insufficiency in economic functions might cause serious social problems in the long term.

Thus, Thai labor laws should be amended to lay the provision for supporting economic reasons. In other countries and upon the International Labor Organization (ILO) guideline, many legal measures and mechanisms are prescribed to handle restructuring. Those models can be adopted in to Thai law as the rules or measure to deal with all economic matters in labor problem in Thai labor laws.

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Chapter 1

Introduction

1.1 Introduction and Background

In the recession of the global economy, every investor or shareholder increases their expectation on their business activities in order to gain more profit and to achieve higher business targets. Otherwise, the business might lose its market share and run out of money, such circumstances are caused by the increasing economic competition around the world over the last decade. When economic competition becomes significantly aggressive in business societies, many existing business entities seek out improvements in management and profitability. To meet such higher expectations of the shareholders, an employer needs to change the style of management to achieve greater competitive potential[1]. According to the International Institute for Management Development's (IMD) World Competitiveness Yearbook 2015, the global economic trend from 2015 to 2050 will become more competitive because

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[1] Stephen P. Robbins, *Organizational Behavior*, ed. 10 (Upper Saddle River: Prentice Hall, 2003), 556-57, 77.

of growing innovation and new technology that is reshaping all industries[2]. Since the market shares are divided among the competing business units, many businesses suffer the depression from losing their market shares and become less attractive. Improvement of their competitive economic potential is crucial to make the business survive such events; however, there are many methods which can be deployed to gain competitive advantage, such as reducing the costs of the business or rearrangement of the production lines. Running a business with lower costs, or improving productivity, are great strategies for increasing profits steadily[3].

In order to survive such aggressive competition and maintain market shares, the business entities must change to be more competitive and achieve more financial liquidity. The enterprises are forced to “adapt or die”, so those businesses which intend to achieve their higher goals or their expected outcomes can change in response

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[2] Institute for Management Development, "Competitiveness and the Global Trends Roadmap: 2015 - 2050," IMD World Competitiveness Yearbook 2015 (IMD, 2014), https://www.imd.org/uupload/imd.website/wcc/Road%20Map_2015.pdf.

3 Jack B. Maverick, "For a Company, Is It More Important to Lower Costs or Increase Revenue?," Investopedia, LLC, http://www.investopedia.com/ask/answers/122214/company-it-more-important-lower-costs-or-increase-revenue.asp.

to the economic competition[4]. Restructuring, the operating framework is indicated to change the style of business management, will be generally applied to the strategic task of those enterprises. Rough restructuring plans might be deployed by spending large amounts of its fund without generating worthwhile returns; meanwhile, the employer expects greater returns or profits. Profits might be increased by performing some action such as increasing the amount of materials accessible to the manufacturer, finding new market opportunities, or engaging in promotions, advertising and sales activities. However, to achieve greater stability and competitive advantages, the employer should restructure all business function to operate with lower costs and more effective expenditure. One of the most significant expenditures in business operations is the cost of labor in the form of employee remuneration, welfare, and other benefits which an employer gives to an employee, including the promise of career opportunities. While the labor cost makes up a large percentage of the overall expenditure in an enterprise's balance sheet, some of this will be spent on the employees with inadequate skills, overlapping employment duties, unnecessary work allocation, or over-paid salaries. However, any changes that affect the security and stability of employment are rather sensitive, since such changes can have an effect on the employees' mindsets and relationships. Employers need to evaluate all actions in

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[4] Robbins, 556.

terms of learned strategies, while they also need to be aware of any adverse consequences. Thus, massive lay-offs or reductions of employee numbers is not the smartest way to proceed in situations where the employers' business must still run, manpower in manufacturing is still required, and there is considerable pressure from the employees' side to consider which can lead to serious adverse consequences[5].

Restructuring would be an effective strategy at any situation in the life of an enterprise, and not only when an enterprise faces insolvency but also when the enterprise is still running well. Hence, restructuring is incorporated as a mechanism used by the employers to improve the competitive potential of the business in the market. In order to create greater liquidity or reduce the cost of labor, the definition of restructuring must be clear in both the legal and business shades of meaning. Restructuring from a legal perspective is a business mechanism that should be limited and identified within the legal provisions in order to protect employees' rights, while restructuring from a business perspective helps employers to reach a better way of managing their business. For this reason, the comprehensive definition of restructuring should be defined to correspond to every purpose insofar as it should provide both

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[5] Nikolai Rogovsky, *Restructuring for Corporate Success: A Socially Sensitive Approach* (International Labour Organization, 2005), 19-21.

adequate labor protection and an effective management mechanism for employers at the same time.

Normally, restructuring can be applied to the enterprise for any reason under the sole decision of the employer because restructuring is included in the property right which is regarded as one of the fundamental right of humans[6], so it would be legal and rightful for an employer to make changes to their own properties. Conversely, the employees have the rights to work which entitles them to be protected by laws. The fundamental rights of humans were stipulated in the Universal Declaration of Human Rights[7] to affirm the inherent freedom, dignity and equality of every human on earth. In the essence of this thesis, the labor laws specify the rights of employers/ employees where they are bound in the employment relationship. The exercising of the employers' right to manage their own property directly affects the rights of the employees to protect themselves from uncertainties. Thus, any actions in employment relationship should be settled on the basis of fairness.

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In business societies, employers will be comfortable with the regulations and the customs which can promote an amicable atmosphere in the business sector and derogate any obstacles in business engagement, so it is necessary to make sure that

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[6] Refer to Chapter 2, Sub-chapter 2.2

[7] Refer to Chapter 2

the regulations or rules of the particular country will not incur adverse effect against business activity. Restructuring, as a normal business activity, includes many tasks behind such as retaliation in sensitive labor issue, modification of working condition, mitigation methods for unexpected labor dispute and reduction in force. The International Labor Organization (ILO) guides for the success in corporate restructuring. It indicates the framework that can achieve a substantial response to the employers' expectations and also handle with the consequences of the corporate restructuring. In Japan, United States and France, they formulate regulations and rules to support employers' action with economic purposes, such as restructuring. They stipulate different possible legal measures and procedures for handling restructuring framework. Labor and employment laws in such countries were developed to obtain and support more economic ideas and activities.

However, definitions, standards and legal measures for restructuring in Thailand are unclear and inadequate. First of all, the terms of implementing restructuring from the Labor Protection Act B.E. 2541 or from the Bankruptcy Act B.E. 2481 cannot cover all economic definitions and purposes of the restructuring. It might not be necessary to define the word "restructuring" into the laws, that it is too specific for economic activities, but it is very important to study its economic nature and characteristics. For example, section 75 of the Labor Protection Act B.E. 2541 can cover the part of partial employment that might be useful for the employers to continue their business with lower cost, while it also brings social problem and sustainability concern into the

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employees. The understanding of a restructuring definition will help the formation of targeted suggestions on restructuring regulations in this thesis. Secondly, Thai employment and labor laws are inadequate to support economic activities and protect employees from abuse of rights. The scope of economic matters in laws must be increasingly specified and provide the appropriate degree of flexibility at the same time. Finally, there are suggestions on other measures that will be used to support a restructuring process, avoid adverse effects, and mitigate and recover from damages.

1.2 Objectives

1.2.1 To understand the principles and characteristics of restructuring in economic terms and find the effects of applying restructuring in an enterprise.

1.2.2 To learn the international principles for supporting employers and employees regarding both economic matters and social interests.

1.2.3 To analyze the principles, provisions of laws or measures in Thailand regarding restructuring a framework for comparison and improvements.

1.2.4 To recommend and guide how to apply restructuring in Thailand with efficient legal measures, adequate employee protection, and effective methods.

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1.3 Scope

The scope of this thesis is limited to the concept of finding the principles of fairness in restructuring by studying the definition of restructuring from both legal and business perspectives and balancing between employers' and employees' rights in order to make legal measures and guidelines including studying any legal measures for restructuring in Thailand, Japan, the USA, France and for international standards in general.

1.4 Hypothesis

Faced with growing economic competition, restructuring is the mechanism to improve the balance between social interests and economic interests, in order to move a business forward. However, the measures and definitions of restructuring in Thailand are not explicit, which causes inadequate labor protection and inefficient business management. This thesis aims to collect and analyze the restructuring elements according to international standards and foreign countries (Japan, US and France), in order to stipulate legal measures and guidelines for restructuring in Thailand which would help to promote investment.

1.5 Methodology

Qualitative and documentary methods are applied to this thesis by gathering information from in-print materials, legal handbooks, articles, journals, law cases, statutes and other publications in relation to restructuring frameworks, fairness

considerations, and labor practices in Thailand, Japan, US, France and other countries. All information would be analyzed and considered in order to stipulate the legal measures and guidelines for solving the problems of inexplicit restructuring in Thailand.

1.6 Significance of the Study

1.6.1 This thesis serves the definition, necessity and effect of restructuring framework, in order to find out the actual characteristic of restructuring in economic society and in purpose of legal provision.

1.6.2 It serves the analysis of fairness considerations regarding the employment relationship that consisted of the relationship between employers' and employees' fundamental rights.

1.6.3 It also serves the appropriate labor practice following international standards and the appropriate legal measures in Japan, USA and France; moreover, it points out the problem from the inexplicit legal measures for restructuring in Thailand.

1.6.4 It serves the legal measures and guidelines to improve the standard of restructuring in Thailand.

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Chapter 2

Determination of Balance between entrepreneurships of the employers and workers' right to work with the theory of fairness in restructuring framework

From the background and introduction, the employers dedicate all of their resources, intelligence and abilities to run their business through intensive competition. In order to survive this competition, they are seeking for any measures or guidelines to properly create their management plan and working systems. Thus, this chapter indicates the concept of fairness in the performance of restructuring framework regarding the balance between employers' and employees' rights (2.1). The concept covers the scope of fundamental rights of human beings, the definition of restructuring (2.2) and the principle in consideration of fairness (2.3).

2.1 Definition and necessity of restructuring

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For extending the provision of law to cope with restructuring process, the study works deeply through the definition that includes meaning and purpose of restructuring in every aspect (2.1.1). Rational and necessity of restructuring will indicate the value of restructuring that might increases in accordance with economic climate (2.1.2).

2.1.1 Definition of restructuring

Changing the way of running business and the style of management are described in English by many words such as "Restructuring", "Reorganization", "Re-

engineering", "Downsizing", "Resizing", or "Rightsizing". Such changes can be explained by many short words, but each word has a different shade of meaning. The "Reorganization" will be avoided to use because it mostly uses to call a measure in bankruptcy proceeding. Reorganization in legal meaning is a well-known arrangement for handling debt of the enterprise facing bankruptcy and to prevent the occurrence of such situation that might lead the enterprise to the insolvency again[8]. Then, "Downsizing", "Resizing" and "Rightsizing" are used to call the changes in size of the enterprises more appropriate to their situation. When the company cannot continue the operation with the same costs, downsizing is performed by layoff or workforce reduction[9]. Resizing and rightsizing are mentioned in the terms of business as a euphemised word of downsizing, because they are the word that use to describe the process of making company into the efficient size, mostly included workforce reduction as well. Thus, aforesaid words in this paragraph cannot cover all scope of the concept. However, these two words, "Restructuring" and "Re-engineering", are closer to the whole scope of the concept, but they refer to different purposes. While

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[8] "Chapter 11 - Bankruptcy Basics," United States Courts, http://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-11-bankruptcy-basics.

[9] Zeinab A. Karake, *Organizational Downsizing, Discrimination, and Corporate Social Responsibility* (U.S.A.: Greenwood Publishing Group, Inc, 1999), 1-2.

these two words are used in change of business in the same way, “Re-engineering” is used in planning or thinking what the employers should implement to their business and the way of working at the fundamental issues or key operation such as cooperation between colleagues or time management[10]. “Restructuring” is used when the changes come to take place. Thus, “restructuring” might be the most appropriate word which will be used to describe actual changes of work force and labor issues.

The definition of restructuring can describe with two different meanings; the business aspects (2.1.1.1) and the legal aspects (2.1.1.2) for studying the difference, the purpose of each restructuring definition and the reflection of such purpose to the business as stipulated below.

2.1.1.1 Enhancing competitiveness and profitability; the meaning of restructuring in business aspect

Every enterprise must change in response with a competitive market. Successful businesses are represented by operating with significant costs that are cheaper than their rivals, and their business plans are efficient and stable. According to the business and industry policy forum of Organization for Economic Co-Operation and Development (OECD), “the restructuring process is an ongoing one, with successful

[10] James Champy, *Reengineering Management : The Mandate for New Leadership* (New York: HarperBusiness, 1995), 2.

firms constantly adjusting to shifts in competitive conditions in their markets[11]". Despite that, the enterprises might lose their market shares and profits if they cannot improve themselves matching with aggressively increasing competition. Restructuring is ongoing process to change and improve the way of doing business in order to raise quality, lower cost and speed up the production. Such non-profitable or unnecessary parts of the enterprise would be sold out or cut off to improve every function fundamental to the core of the business. The increasing competition results from both domestic economy and foreign competitors which allows joining the markets because of the progressive removal of trade barriers[12]. These improvements shall be carried out in response to an increasing competitiveness of the enterprise.

Restructuring is used as a mechanism to raise the competitive potential of a business to meet the increasing market competition level because economic change is unpredictable and unavoidable. From a study, enterprises will survive uncertainty of economic situations, such as changing environment not limited to changing in nature of the workforce, technology, changing interim of economic

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[11] OECD, "Global Industrial Restructuring," (2002), https://www.oecd.org/sti/ind/1947035.pdf.

[12] Thomas Carson and Mary Bonk, "Corporate Restructuring," in *Gale encyclopedia of US economic history* (Farmington Hills: Gale Group, 1999), 216.

climate and increasing competition in the market, so the enterprises are forced to improve themselves before the dead end[13]; in the other hand, the employers' equally legitimate interest to make more money through changing the work behaviours[14]. The enterprises need to maintain their market shares and improve their competitiveness. Many actions will apply to the organizations and might affect the employees too.

While the employers have interest to make more profit from their businesses or work procedures, the employees who take the effect of restructuring proceeding have interest over their jobs: remuneration security and stability. Most believe, that employees have very little or no opportunity working at a political level, in order to influence legislation, they can only protect jobs and income security through collective action in the form of a trade union[15]; as a matter of fact, only business definition of restructuring is not adequate for protecting employees, and this shade of meaning can only be for satisfying the expectations and the demands of employers.

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[13] Robbins, 556-7.

[14] Gus Edgran, "Restructuring, Employment, and Industrial Relations: Adjustment Issues in Asian Industries," (1989), http://staging.ilo.org/public/libdoc/ilo/1989/89B09_108_engl.pdf.

[15] Ibid.

2.1.1.2 Limitation of business activities and adequate labor protection; the meaning of restructuring in legal aspect

Following the ILO guidelines that restructuring is a profound change in the way of an enterprise operation, involving changes in its strategy, in its structure, and so on[16]. The term is also used when it comes to downsizing, though restructuring and has more far-reaching implications than just a decrease in the workforce. The enterprises should try to maximize economic benefits while attempting to minimize the social costs associated with restructuring.[17] Even the meaning of restructuring in the legal definition and business definition are resembled, but there is an element stipulated to show that the legal definition of restructuring is included the social interest concern.

The purpose of defining restructuring in the legal term is for protecting rights of employees. The legality concerns including the business framework suggested in the process of restructuring of ILO. The employers should reach fairness in restructuring framework regarding that "workforce reduction is a very complex issue in labor legislation, and companies should make sure they start from a secured legal basis. Furthermore, legal provisions differ substantially among countries, with

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[16] Rogovsky, 6.

[17] Ibid.

important implications for multinational enterprises. For example, countries such as the United States and some of the Asian economies have greater flexibility for workforce reduction than most of the western European countries. Even within a region, different national laws allow and require different actions, and domestic shifts in legislation can take place as well[18]." These show that the labor legislation might not be enacted to serve all of employers' demand in restructuring framework. The proof stipulates in the statistics in OEDC article by Michael and John that economic integration & technological progress grew rapidly, while regulations & institutions became weaker[19].

Thus, applying intensive labor protection to labor laws until it lacks flexibility to contain the employers' demand and to confront with the economic changes, it will lead the business dilemmas; for example, the news, topic is "China's labor law under fire as restructuring threatens jobs", wrote about the problem from

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[18] Ibid.

[19] Michael F. Förster and John P. Mertin, "Balancing Economic Efficiency & Social Equity," *Japan Spotlight* (Japan: Japan Economic Foundation, 2012), https://www.oecd.org/els/soc/JEF2012BalancingEconomicEfficiencyAndSocialEquity.pdf.

inflexible policy to be an obstacle in the investment or doing business in china[20]. Furthermore, inflexibility is an obstacle to investment that it is hard for employers to commit to restructuring in response to the competition and their expectations.

2.1.2 Rational and necessity

Growing competition makes restructuring unavoidable, since it is an essential mechanism to confront any change to the business. Many factors, such technology, commercial agreement or free trade, encourage new business rivals to reap the market share in a particular country. To maintain market share and reach expected income, employers need to manage the oppression that is happening from the changes of economy in the markets, and escalation of expectation in profits (2.1.2.1). However, employers should think about cost-benefits of restructuring because it is risky and expensive. Employers should weigh up between the costs spent to enhance performance of restructuring and the feasible results regarding efficiency and stability. They must make sure that the restructuring is substantially applied for solving economic incidents in their enterprises (2.1.2.2).

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[20] Pete Sweeney, "China's Labour Law under Fire as Restructuring Threatens Jobs," Reuters, http://uk.reuters.com/article/uk-china-economy-labour-idUKKCN0WD19W.

2.1.2.1. Enhancing the enterprises' competitiveness; Rational

Generally, employers want to strengthen their business immunity against any kind of negative and upcoming changes. They make an effort to last longer running their business with stability. From the world economic forum, a global GDP growth rate of 3.5%, the latest IMF forecast, is lower than the 4.5% average that preceded the decade before the great recession. This affect has derived from low investment levels and weaker productivity to coincide with the referendum on weak growth, choppy markets and china's reforms that made the economic situation in 2016 uncertain and hard to predict.[21] These are compatible with the Global Competitiveness Report. It stated that the economy would face higher unemployment and lower productivity growth in 2016, on the other hand, the 2016 economy was in recession[22]. From the aforesaid incidents, situation in global economic society will be uncertainty and unpredictable. The upcoming events can uncontrollably occur at any time. Any

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[21] Anders Borg, "6 Factors Shaping the Global Economy in 2016," World Economic Forum, https://www.weforum.org/agenda/2015/12/6-factors-shaping-the-global-economy-in-2016/.

[22] Klaus Schwab and Xavier Sala-i-Martin, The Global Competitiveness Report 2015-2016, (World Economic Forum, 2015), http://www3.weforum.org/docs/gcr/2015-2016/Global_Competitiveness_Report_2015-2016.pdf. xiii.

great event might affect overall economic society at many aspects. Some of them might cause to recession. The employers will be faced with turbulence in the markets. According to economic forecast 2018-2019, the consumer spending growth is obviously regressing from at five per cent last two years ago[23]. These economic situations would affect to the business fading away if the employers remained persistent doing business in the same way. Cultures and consumers' demands in markets have become different. The employers must handle these changes. Firstly, the enterprises seek to improve the ability of the organization to cope with changes. Secondly, the enterprises seek to change their employee behaviour.[24] While the economic competition progressively continuous and every business become stronger through the chaos, and therefore it is not smart for the employers to stick with the old-fashion management system, doing nothing, and let their business sink recklessly.

Not only economic competition makes business operating more difficult, it also affects the stability and security of the employees' career. It escalates the level of stress in the enterprises. "Stress is a dynamic condition in which an individual is confronted with an opportunity, constraint, or demand related to what he

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[23] Bill Conerly, "Economic Forecast 2018-2019: Consumer Spending Grows Slowly," *Forbes Contributors* (2017).

[24] Robbins, 576-85.

or she desires and for which the outcome is perceived to be both uncertain and important[25]." Stress affects employees in both negative and positive ways: it can lead to the pressure in the workplace, low performance, absence and turnover; it can also rise to the occasion and performance of the employees near their maximum. The economic competition is a source of stress which is regarded as one of the environmental factors. Environmental factors are environment uncertainties influencing the design of an organization's structure. Uncertainty from changes of business cycles makes people anxious about their job security. The environmental effect came from many factors such as economic uncertainties, political uncertainties, technological uncertainties and terrorism.[26] It is an opportunity for the employers to manage such stress and turn it into an advantage in raising their employees' performance. There are two approaches to manage stress which are individual approaches and organizational approaches. The individual approaches are individual strategies to handle their own task and life as time-management, relaxation techniques, physical exercise or social support network[27]. The organizational

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[25] Ibid.

[26] Ibid.

[27] Ibid.

approaches are used to control particular task, role demand and organizational structure[28].

Restructuring, in economic terms, can be applied to the business as a mechanism to fix and improve their business structure. It can enhance the competitiveness of the enterprise and guide how to handle employees' expectation. Related to this study, the characteristics of restructuring and should be planned in order to maximize the efficiency of the organization in volatile economic conditions and minimize the risk of social problems.

2.1.2.2 Efficiency and economic purpose of restructuring; Necessity

It is very obvious that if employers persist and carry on to do business in the same way, such business will not continue so well as discussed in the aforementioned paragraph. The necessity of restructuring can be estimated from, whether restructuring plans can make a significant impact to an enterprise and whether it would be the accurate solution for the problem. The study and preparation process in the restructuring framework will let the employers know what the real problem is within their enterprise and how far that the change can be extended in their enterprises' structure.

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[28] Ibid.

According to the Study of the "Strategies for Measuring Organization Change", there are three keys steps in measuring change. Firstly, planning, goals, realistic setting of goals, data, source of data and timeline need to be identified. Secondly, organizational records and documents, inquiries and interviews and observational techniques are implemented to identify methods for measuring change. Finally, analyzing results and dissemination of lessons need to be performed.[29] These measures within a restructuring framework will let employers analyzing big changes, performance of organization, and identify the best practice that they hopefully meet. Now, they can see all of the problems which have been undermining their business for a long time. When employers can plan everything that is necessary to be implemented to their business and everything that they need to be aware of, so they can monitor and are hopefully back in control; they gain more confidence and any risk can be taken as a precaution.

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Because restructuring might take many resources, time, budget or people's contribution including many possibilities of financial and social risks, the employers need to take such a study very seriously. According to Omni's Guide to

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[29] Brenda J. Bond, "Strategies for Measuring Organization Change," (2013), http://www.smartpolicinginitiative.com/sites/all/files/SPI%20Measuring%20Change%20Webinar%20FINAL.

Successful Restructuring indicates that “The aim of any restructuring should not just be to manage the redundancy program, or even to improve an organization’s immediate profitability. It should be to build a new structure that allows your organization to sustain and improve long-term profitability and be able to adapt more easily again as circumstances change”[30]. The employers must take the most dedicated work and the best measures to generate the most effective plan. The efficient changes in business must be big and affect the business in the long-term.

2.2 Encounter of rights among peoples in an organization; Fundamental right of humans

The word “organization”, in the meaning of Cambridge Dictionary, is a group of people who work together in an organized way for a shared purpose[31]. Such organized way is symbolic of something that is going together like a system. It brings the individuals together and “Individual” defines the right of human beings that is used to identify a person from others. Thus, an organization consists of rights and responsibilities of many people joining in the system. Then, restructuring of an

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[30] Omni, "Omni’s Guide to Successful Restructuring," https://www.omnirms.com /assets/uploads/files/Successful%20Restructure.pdf.

[31] Cambridge University Press, *Cambridge Advanced Learner's Dictionary*, ed. Colin McIntosh, 4 ed. (India: Replika Press Pvt. Ltd, 2013), 1083.

organization might affect and change the rights or responsibilities of people in that organization, consisted of the rights of employers (2.2.1) and the rights of employees (2.2.2), in some way or other. Studying on rights of people, in relation with the role of a person, becomes very important for consideration of proportion and boundary in the restructuring procedure.

2.2.1 Entrepreneurship rights

While an organization consisted of the exercising of two rights which are from employers and employees. The employers are empowered to manage, control, and develop their own enterprise to achieve their goal of wealth or economic purpose. The right of employers, as entrepreneurs, was recognized in the scope of freedom in economic prosperity which is lately implemented from the ideal of self-determination to be an absolute right of people all over the world. Right to self-determination means the rights that let peoples freely determine their political status and freely pursue their economic, social and cultural development[32].

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After the Great War, the idea of granting rights of self-determination to all peoples over the world was embodied. Every nation walked into a new era of peace

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[32] Hurst Hannum, "The Right of Self-Determination in Twenty-First Century," 55 vols., *Washingto and Lee Law Review* (1998), http://scholarlycommons.law.wlu.edu/wlulr/vol55/iss3/8/. 773.

after the collapse of the Austro-Hungarian, German, Ottoman, and Russian empires. The collapse caused the establishment of many ethnic groups which had no exact borders in the area of the collapsed empires.[33] To make peace and security, Woodrow Wilson, the president of the United States from 1913 to 1921, complimented self-determination as the essential part of the solution. The principle of self-determination showed up early in the Fourteenth points of Wilson's speech. Five from fourteenth points mentioned about principle of self-determination: firstly, establishment of covenants of peace make every diplomacy must proceed honestly in public view, without any private international understanding; secondly, there was promotion of freedom of navigating the seas where the restriction, in whole or in part, of such freedom might be made by international covenants; thirdly, it eliminated all economic barriers and established equality of trade upon consenting of each nations; fourthly, adequate guarantees would be given and taken in order to reduce armaments to the lowest point consistent with domestic safety; finally, it opened freely for the colonial claim, based upon a strict observance of the principle that in determining all such questions of sovereignty, where the interests of the populations concerned must have equal weight with the equitable claims of the government whose title is to be

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[33] Wolfgang Danspeckgruber and Anne-Marie Gardner, "Self-Determination," Princeton University, https://pesd.princeton.edu/?q=node/266.

determined.[34] In order to persevere peace work, the Covenant of the League of Nations was adopted to show the international co-operation for the first time; however, it was not included the right to self-determination. Almost all interpretations (not in words "Self-determination") of the rights were mentioned a lot in the terms of independence of the states, not much about the absolute rights of individuals. It first appeared to prevent minorities' rights and represented autonomy. After establishment of the United Nations (UN) in 1945, right to self-determination was recognized to the UN Charter. Nevertheless, there are many arguments. It is disputed whether the reference to the principle in these very general terms was sufficient to entail its recognition as a binding right, but the majority view is against this. Not every statement of political aim in the charter can be regarded as automatically creative of legal obligations.[35] Furthermore, H. Wilson points to the fact that the UN Charter did not refer to a right of self-determination and that it did not clarify "who" the "self' would be, that enjoys

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[34] Arthur S. Link, *The Papers of Woodrow Wilson* (Princeton, NJ: Princeton University Press, 1994), 536.

[35] Malcolm N. Shaw, *International Law*, 5 ed. (Cambridge: Cambridge University Press, 2004), 225.

this principle which should be respected by nations"[36]. Finally, representatives of four Great Powers - the United States, the United Kingdom, the Soviet Union and China - stated the rights of self-determination in the final version of United Nation charter at the San Francisco Conference in 1945. Unlike the Covenant of the League of Nations, they focused on defining rights to self-determination as the people's rights, instead of a minority system.[37] The principle of equal rights and self-determination were stipulated in Article 1(2) of UN Charter to develop friendly relations among nations[38]. The development of international co-operation rule made definition of self-determination more explicit. More descriptions and contexts were brought to constitute the internal aspects[39]. The International Covenant on Civil and Political

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[36] Heather A. Wilson, *International Law and the Use of Force by National Liberation Movements* (New York: Oxford University Press, 1988), 58-59.

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[37] Ibid.

[38] Ibid.

[39] The internal aspect of right to self-determination provides the ability for a people to have a democratic voice within the legal system of the state populated by the "people", further to have control over natural resources, proper ways of preserving and protecting the culture and the way of life of the people and least but not last,

Rights (ICCPR) and the International Covenant of Economic, Social and Civil Rights (ICESCR) were used to contain a characteristic form of internal self-determination. ICCPR and ICESCR, were adopted by the United Nations General Assembly on December 16th, 1996, including the right of self-determination in Article 1 that "All people have the right of self-determination. By virtue of the right they freely determine their political status and freely pursue economic, social and cultural development"[40].

The International Covenant of Economic, Social and Civil Rights (ICESCR) was adopted to recognize internal definition of self-determination as materialization. There is development of the rights to emphasize more about peoples' rights other than decolonization matters. ICESCR mostly focuses on the protection of labor rights while hardly stipulated the economic rights of those who have freely chosen to become opportunistic entrepreneurs or have been unable to obtain employment in the formal economy and have thus been forced to make a living as necessity

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the ability to be a visible partner or participant with strong power within the overall political sphere of the state.

[40] Office of the High Commissioner for Human Rights (OHCHR), International Covenant on Economic, Social and Cultural Rights, (Office of the High Commissioner for Human Rights (OHCHR), 1966), http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx.

entrepreneurs[41]. To explicitly define the entrepreneurs' rights, seventeenth goals to develop entrepreneurship were discussed in United Nations General Assembly Resolution 67/202 (UN 2012a). The seventeenth goal mostly encouraged the member countries and international co-operation to promote development in financial matters, technologies and education, eliminate business barriers, increase the access to international trade, exchange and communication, and support cooperation in business contributions and practice sustainably. These are emphasizing rights of entrepreneurs (Employers). Entrepreneurship was recognized as the legal right for people who are self-employed. This right legally allows them to manage or deal with their business. However, the fourth goal of the United Nations General Assembly Resolution 67/202 contains the rule for Entrepreneurs to concern themselves with issues as "Emphasizing that partnerships with the private sector play an important role in promoting entrepreneurship, generating employment and investment, increasing revenue potential, developing new technologies and innovative business models and enabling high, sustained, inclusive and equitable economic growth, while protecting

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[41] Ibid.

the rights of employees"[42]. Entrepreneurs can exercise their right over their businesses, but they need to respect the rights of employees as well.

After adoption of United Nations General Assembly Resolution 67/202, to empower and emphasize the provision under such resolution, Jeremic, the President of the 67th session of the General Assembly, convened a one-day high level thematic debate (HLTD) on "Entrepreneurship for Development" at the United Nations Headquarters on 26 June 2013[43]. The practical means of supporting entrepreneurship was discussed. To empower entrepreneurship, these following issues, in summary, were emphasized in 8 parts:

I. Entrepreneurship helps building and developing societies and individuals around to raise their voice and visibility,

II. It creates economic benefit to dedicated lines of financing and break out of poverty,

III. Giving youths the opportunities to be a productive member of their society,

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[42] United Nations General Assembly, "Entrepreneurship for Development " A/RES/67/202 (2013), http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/67/202.

[43] "High Level Thematic Debate on "Entrepreneurship for Development"," (2013), http://www.un.org/en/ga/president/67/pdf/Summary%20Final.pdf.

IV. Earning education for improving population's technical skills and building an entrepreneurship culture,

V. Triple bottom line entrepreneurship - directed towards the simultaneous provision of economic, social and environmental welfare,

VI. Enhancing partnerships between entrepreneurs, private sector, governments and research institutions for sustainability and strength,

VII. Giving women and youngsters a voice and decision-making power to define their own future, and

VIII. Encouraging enabling sustainable communities.[44]

Succession of Entrepreneurs' business would contribute many benefits to society. They play in the role of jobs creation, make opportunities, earn economic benefit and enhance knowledge and skill of its people. There are 6 basic qualities that an entrepreneur needs to possess in order to be able to succeed in the business environment:

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I. Planning and strategizing the business on the path of success,

II. Taking risk from starting a new business outfit or expanding an existing in an optimized way that the business would succeed,

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[44] "Entrepreneurship for Development ". 2-4.

III. Improving the old way of doing business and creating a new way of product and service,

IV. Devoting time and resources towards the actualization of business,

V. Responding to the change of market needs, and

VI. Achieving goals set and being a leader who sets examples for employees[45].

2.2.2 Right to work

The large step that made a big change to the rights of worker was from the conflagration event in New York. The Triangle Shirtwaist Factory fire, was the deadliest industrial disasters of U.S. history, took place in New York City on March 25, 1911. The fire claimed the lives of 146 people caused from unsafe working conditions in factories and sweatshops. The Triangle Shirtwaist Factory was in the top three floors of the building. The Triangle company used subcontractor who paid workers very low wages and required them to work long hours in unsafe conditions to produce women's clothing. Most workers were Italian or European Jewish immigrants and ranged in age from 15 to 23. They earned $6 per week and worked six days a week in order to earn a little more money. They worked 13 hours per day with one half-hour break for lunch. The dangerous sewing machines were operated by foot in rooms which were dirty,

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[45] Suleiman E. Bogoro, "Entrepreneurship for Development," in *2nd Convocation Ceremony of the Kaduna State University* (2015), 11-12.

dim, and poorly ventilated. They were locked in the room on the theory that locked doors prevented the workers from stealing materials. Poor work conditions led the local union to call for a strike against the Triangle Shirtwaist Company in November 1909, estimated 30,000 women workers went on strike. The fire started on Saturday on the eighth floor as flames began to leap over the piles of rags. With the narrow single fire escape and crowds of people, many workers were locked down in the building whilst on fire. The corpses were found at the sewing machines, useless elevator, locked exit doors or a collapsed escape way and some workers jumped from ninth floor to their death.[46] The work place lacked safety precautions that had led to the massive loss of life. This was the event that alerted everyone about humanity. Decent working condition, fair wages and bargaining power of workers were then realized. This Triangle fire had a strong influence on people around the world. It initiated changes in social interests and working condition. From the past, the workers were treated to work like slaves. They were forced to work for low wages, in a place that was unsafe or risky to their health or work too long hours. After the tragedy, people sought protection in economic interests and insisted their rights of having a decent living. Such ideals have their root in the thought of people and used to

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[46] Jeffrey Lehman and Shirelle Phelps, "Triangle Shirtwaist Company Fire," in *West's Encyclopedia of American Law* (Gale Group, 2005), 109-11.

implement drafting the international human rights. The right to work was recognized in the International Covenant of Economic, Social and Cultural Right (ICESCR). In the Part III, the ICESCR focuses on the protection of labor rights. The right to work was stipulated in the Part III, Article 6 of ICESCR that "The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right...."[47] and lay down the provision of labor protection about fair wages, decent working condition and limitation of working hours in Part III, Article 7 of ICESCR. In detail of Article 7 of ICESCR, the parties to the covenant shall recognize the right of everyone to enjoy just and favorable condition of work which ensure these four conditions of work:

I. As a minimum, all workers shall receive fair wages and equal remuneration without discrimination; specifically, women shall not be paid less than men for equal work, and all workers and their families shall have a decent living;
II. All workers shall work in safe conditions and remain healthy;
III. All workers have equal opportunity to be promote to the higher level in accordance with their seniority and competence; and

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[47] Office of the High Commissioner for Human Rights (OHCHR).

IV. Everyone entitled to rest, leisure and reasonable limitation of working hours, periodic holidays with pay and paid remuneration for public holidays"[48]

Moreover, the vision that "The premise that universal, lasting peace can be established only if it is based upon decent treatment of working people" emerged by the International Labor Organization (ILO), established in 1919. The ILO was established to be tools for government seeking to draft and implement labor laws and social policy in conformity with internationally accepted standards. ILO standards came out in various labor matters as guidelines or drafts to their law and policy[49]. ILO led the nations to the labor standard under ILO's provisions of justice and decent treatment of working people.

From the International Labor Organization (ILO)'s standard and The International Covenant of Economic, Social and Cultural Right (ICESCR), the rights of workers were improved and developed to respond with current economic, social situation and globalization. Workers' right protection in the fundamental provision of

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[48] Ibid.

[49] International Labour Organization, "How International Labour Standards Are Used," International Labour Organization, http://ilo.org/global/standards/introduction-to-international-labour-standards/international-labour-standards-use/lang--en/index.htm.

ILO standard and ICESCR were also important, while some new protections were applied for improving more decent standard of living and or for economic concerns in broad terms. There are 7 substantial protection for workers;

I. Fair remuneration and wages

This provision was recognized in the part III, Article 7 of ICESCR that the workers shall be paid not less than the proper minimum wages, be paid equal for the equal work and be provided rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays[50]. This is included the provision made under The General Convention of the ILO at Geneva, 34th International Labor Conference (ILC) session on 29 June 1951 that remunerations or wages should be considered without any discrimination based on sex[51].

II. Freedom to choose the way of living and work

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As recognizing in Article 6 of ICESCR, everyone has the opportunity to gain their living by work which they freely choose or accept[52]. In the other hand,

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[50] Office of the High Commissioner for Human Rights (OHCHR).

[51] International Labour Organization, "Discrimination (Employment and Occupation) Recommendation," 42nd ILC session (1958).

[52] Office of the High Commissioner for Human Rights (OHCHR).

everyone gains their quality of living by work which they can choose such work or opportunity by themselves without interference by another.

III. Non-discrimination and Equality of opportunity and treatment in employment and occupation

Once, the provision was firstly purposed in the Declaration of Philadelphia that "all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity".[53] Then, the seven grounds of discrimination were prevented by Recommendation (No. 111) of 1958 Discrimination (Employment and Occupation). Article 1 of the recommendation purposes the term of discrimination including any distinction exclusion or preference made on the basis of race, color, sex, religion, political opinion, national extraction or social origin[54].

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IV. Freedom of association

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[53] International Labour Organization, "Ilo Constitution," International Labour Organization (International Labour Organization).

[54] "Equal Remuneration Convention," 34th ILC session (1951).

Freedom of association is the right of workers to establish or join an organization that they choose on their own without any distinction, freely appoint their representative, make their own rule and perform any activities under the laws[55].

V. Collective bargaining

The collective bargaining was adopted in Article 2 of the Collective Bargaining Convention (No. 154) that the collective bargaining utilized to all negotiations between employer(s)' side and worker(s)' side; in order to consider the working condition and terms in employment contracts, relations between employers and workers and relation between their organizations[56]. According to the provision of the ILO, collective bargaining gives employers and workers opportunities to appoint their representatives joining together for negotiation. The negotiation is settled over the employment conditions and relations of them to seek a collective agreement. This collective agreement will bind all people who were represented.

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[55] Fundamental Rights at Work and International Labour Standard, (Geneva: International Labour Office, 2003), http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@normes/documents/publication/wcms_087424.pdf.

[56] "Collective Bargaining Convention No. 154," 67th ILC session (1981).

VI. Favorable condition of work and abolition of forced or compulsory labor

Article 7 of ICESCR protect workers by stipulating the right to have favorable conditions of work, such as safety, health, limitation of working time and leave must be taken to determine the conditions of work[57]. The main provisions are in the Forced Labor Convention, 1930 (No. 29), adopted under 14th ILC session of ILO. Forced or Compulsory labor means "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily"[58].

VII. The prohibition of arbitrary dismissal

Termination of employment by workers in some cases might cause inconvenience to the employer; vice versa, when employment is terminated by employer, it might affect the worker and his family in insecurity and create poverty[59]. From the problem found among countries around the world, the recommendation of ILO was made to prevent massive layoffs with economic

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[57] Office of the High Commissioner for Human Rights (OHCHR).

[58] International Labour Organization, "Forced Labour Convention No. 29," 14th ILC session (1930).

[59] Protection against Unjustified Dismissal, (Geneva: International Labour Office, 1995), http://www.ilo.org/public/libdoc/ilo/P/09661/09661(1995-82-4B).pdf.

reason or economic change. The Termination of Employment Recommendation, 1963 (No. 119) was adopted for the termination process of employment contracts. Employers need to assign a valid reason for terminating the employment, perform choice with suggested criteria and need to follow the procedure of notification[60].

2.3. Fairness consideration in Labor practice

The employers must be confident with the restructuring plan so that it will be capable of adding prosperity to the business. Such restructuring plan should be carefully studied and indicated for all perspectives of the business functions. A good structure and effective working procedure are the crucial parts in business development in order to strengthen company's status and to define possibility of further development potential. The productivity of the restructuring plan will be evaluated by the depth of the changes applying to the core of the business. Cost of labor which takes the largest portion of all capital will be affected from such change and are unavoidable. The employers need to progress the restructuring plan and maintain sensitive employment relationships at the same time.

Because changes of employment condition crucially affect the employment relationships, an employer must be aware at every single step of the restructuring

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[60] "Termination of Employment Recommendation No. 166," 68th ILC session (1982).

process complying with laws and the standards that are described and protect the fundamental rights of the employees. Such laws or the standards define the non-negotiable limitation for exercising employer's rights, thus employers can continue the restructuring plan without illegally harmfulness to employees' fundamental rights. Unnecessary costs just like the settlement of cases, fines, compensation or kickbacks will not be incurred from the restructuring process if employers do not break such limits and can reach mutual agreements in work modification with employees. The following chapter's content will stipulate the wide principles of fairness in employment relationship where imbalance of power is aggregated in the essence of the bargaining process (2.3.1), and fairness in procedure of change in employment relationship (2.3.2).

2.3.1 Fairness in Employment Relationships

Nowadays many societies develop employment relationship on the ideology of freedom of contracts. Employers and employees can freely set working conditions, commitments, remunerations, wages, working times, leave, employment duration, and termination methods to their employment relationship. Since the freedom of contracts need to be created on the basic of non-abusive of parties' rights and applicable regulations, fairness of the agreements become a substantial subject for bargaining. Employment agreements will conclude legal obligations that are influenced from two kinds of terms and conditions: firstly, an agreement which has

occurred through offers and acceptances in negotiation of both parties (2.3.1.1). Either party will explicitly or implicitly express their interest to the other, or the agreement will be made when the promisor agrees to be bound with legal obligations at the actual state of mind[61]. The fairness of employments agreement will be evaluated from the agreed terms and conditions where to find the middle of imbalanced bargaining power; secondly, terms and conditions that are contained within the employment agreement upon the requirement of applicable laws and regulations will be considered fair and will become legally enforceable (2.3.1.2).

2.3.1.1 Asymmetric bargaining power in employment relationships

With the different standing point of negotiations, employers recruit new employees for fulfilling business functions and maximizing business capacity. Employers pay attention to collective views of a business entity in order to get the right man in the right place. Specific qualifications and specific conditions are always set before the recruitment. On the other hand, employees seek jobs with personal concerns, like professional experience, salary and other benefits such as self-esteem, etc. Employees need to improve their abilities so to meet the qualifications that will be set for expected jobs. Sometime employees need to give up some of their

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[61] Randy E. Bernett, "A Consent Theory of Contract," *Columbia Law Review* (Georgtown Law Librery, 1986). 272-73.

expectation to get the job. Employment relationships are often created on the grounds of inequality of bargaining power.

There is the argumentation on feasibility of employment relationships, including some evidence on fact of employment relationship in business society. Employment relationships will be considered fair as long as the employment agreement made between employer and employee still is valuable for economic purpose[62]. If such economic viability of employment relationship has ceased, the performance of the other party will disappear. An employment agreement arises as a result of the different economic aspects of both parties; however, it is rare to find supporting information on imbalanced problems or social problems. Upon information in economic terms, increasing and rigorous levels of employment and labor market legislation will cause dangerous consequences, such as the level of unemployment, lower employment and population ratio, actual wages reduction, and incurrence of unexpected financial liabilities to employees.[63] There are more information on imbalanced bargaining power in employment relationships.

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[62] Geoff Hogbin, *Power in Employment Relationships: Is There an Imbalance?* (Wellington: New Zealand Business Roundtable, 2006), 1-3.

[63] Ibid.

Firstly, there is opposition to the employment at-will. Even the doctrine provides a lot of flexibility and easy termination for employment relationships; it incurs a problem to both parties. At-will employment allows employers to terminate employment agreements at any time with or without assigning good or bad reason as long as such termination does not go against the restriction. On the contrary, the employee who is bound with an at-will employment agreement can also resign from the employment agreement at any time upon his decision. Such resignation cannot be controlled, it also wastes money that employers invest into human resourcing.[64]

Secondly, the study on the percent of gross domestic product (GDP) showed that the strictness of employment and labor regulations do not affect to the GDP of the particular country.[65]

Finally, the matching of people with jobs can be complex because of characteristics, skills, ability, qualifications, expectations and preference of people are different. Employees tend to find a new job that suits or matches their needs. Some job was created and some job vanished in accordance with economic development and innovation. The study showed the match of the figure of

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[64] Ibid.

[65] Ibid.

employment turnover and the number of creation and elimination of jobs[66]. These mean that the labor will also be supplied to new jobs for maximizing the level of job matches and that people also seize the advantages of job life cycle from economic growth.[67]

In summary, an employee also owns some power that can be used in negotiations for the establishment of employment relationships. An employee will use such advantages to maximize the extension of employers' expectation. According to an employer who owns the power that derives from some capacity or ability to intercept an employee's resistance, to incur demand on employee. In return, an employee owns the same kind of power to impose the demand on an employer too[68].

2.3.1.2 Regulatory compliance and non-negotiable standards

Consideration of fairness in employment relationship is dominated with two standing points of justification. One, mostly justified in contractual

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[66] Ibid.

[67] Ibid.

[68] Ibid.

terms, based on efficiency or welfare considerations[69]. It justifies the rule that addresses the problem, arisen from the governance of the contract of employment, in relation with coercion and opportunism, and the desirability of promoting productive efficiency and competitiveness through a well-coordinated and flexible division of labor[70]. This efficiency-base justification, stipulates that fairness can be justified by the experiment of freedom of contract, the failure in the labor market and the assessment of risk in contracting by employees themselves[71]. The other, discussing as the main point in this paragraph, is justification for the labor law which considers a fair distribution of wealth, power, and other goods in a society[72]. Upon the concept of social justice, the justification supports the idea of collective bargaining and the basis of labor standards[73]. Most standards and regulations to employment relations are

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[69] Guy Davidov and Brian Langille, "The Idea of Labour Law," *Theories of Rights as Justification* (Oxford: Oxford University Press, 2013), https://www.lse.ac.uk/collections/law/staff%20publications%20full%20text/collins/ch9.pdf. 137.

[70] Ibid.

[71] Ibid.

[72] Ibid.

[73] Ibid.

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formulated from individual interest of workers. According to Rawls analysis, five interests of workers consist of (1) civil and political liberties such as freedom of thought; (2) Freedom of movement and free choice of occupation against a background of diverse opportunities; (3) powers and prerogatives of offices and positions of responsibility; (4) income and wealth; (5) the social base of self-respect[74]. They are regarding as the fundamental rights that are guaranteed and justified as the principle of justice. These are set as a minimum protection to workers from threat or interference of other's rights. To affirm the existence of right, they were variously recognized upon it nature.

Firstly, the idea of labor rights is contained in Article 23 and 24 of The Universal Declaration of Human Rights (1948) as mentioned in aforesaid chapter. Moreover, International Labor Organization (ILO), will explain the importance of this organization in perspective of international labor principles and standards in the next chapter, and will set the international labor standards about rights at work which are identified in eight conventions. Eight conventions cover the fundamental principles[75];

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[74] Ibid.

[75] International Labour Organization, "Introduction to International Labour Standards; Conventions and Recommendations," International Labour Organization,

freedom of Association and the effective recognition of the right to collective bargaining (Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87) and Right to Organize and Collective Bargaining Convention, 1949 (No. 98)); the elimination of all forms of forced or compulsory labor (Forced Labor Convention, 1930 (No. 29) and Abolition of Forced Labor Convention, 1957 (No. 105)); the effective abolition of child labor (Minimum Age Convention, 1973 (No. 138) and Worst Forms of Child Labor Convention, 1999 (No. 182)); and the elimination of discrimination in respect of employment and occupation (Equal Remuneration Convention, 1951 (No. 100) and Discrimination (Employment and Occupation) Convention, 1958 (No. 111))[76].

2.3.2 Fairness in procedure of change in employment relationships

In the era of business recession, production and manufacturing was reduced, some departments which are no longer necessary or too extravagant to be maintained were closed down in order to remain the core operation, or some part of

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http://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm.

[76] The International Labour Organization's Fundamental Conventions, (International Labour Office, 2003), http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_095895.pdf. 7-8.

the production base was relocated to another country. It becomes unavoidable for an enterprise to cut off a significant portion of its financial effort in order to increase its liquidity and competitiveness. The restructuring plan including reduction of force was taken into actual performance. Every jurisdiction has various measures and provides different degrees of flexibility in balancing between efficiency system to meet economic interests and protection to individual interest (employee's interest).

However, the ILO established the Convention and Recommendation concerning Termination of Employment to enhance the employment standard and to mitigate such damage from workforce reduction. There is the Termination of Employment Convention no. 158 (1982) (the "Convention") and the Termination of Employment Recommendation no. 166 (1982) (the "Recommendation"). The concept of the main idea in the Convention that justifies fairness in termination of employment can be separated into two main points: valid reason grounded for termination (2.3.2.1) and justified procedure prior to or at the time of termination (2.3.2.2).

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2.3.2.1. Valid reason grounded for termination

According to Article 4 of the Convention "The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational

requirements of the undertaking, establishment or service[77].", it states that employers cannot dismiss a employee without cause and it also ground for those that does not constitute a valid reason in Article 5 of the Convention. There are five grounds that are prohibited to constitute a valid reason;

I. The workers are union membership or participate in union activities outside working hours or within working hours upon the employer's consent;

II. seeking office as, or acting or having acted in the capacity of, a workers' representative;

III. the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities;

IV. race, color, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin; and

V. absence from work during maternity leave.[78]

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[77] "Termination of Employment Convention No. 158," 68th ILC session (1982).

[78] Ibid.

Moreover, other invalid grounds for dismissal are stated in Article 6 as temporary absence from work because of illness or injury where medical certification shall be required[79]

2.3.2.2. Justified procedure prior to or at the time of termination

Consistent with national regulation and practice, the procedure to deal with termination of employment both before and at the time of termination will be justified to comply with national labor governance and to be supporting background of such valid reason[80]. Provided the employers did not take actions as required by national law or practice, or that need to be performed due to make sense of such termination reason, termination would be classed unfair. According to Article 7 of the Convention, it states that "The employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity[81]." The Recommendation also explained in practical ways about termination if repeated on

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[79] Ibid.

[80] "Termination of Employment Recommendation No. 166."

[81] "Termination of Employment Convention No. 158."

occasions after written warnings are given, providing a chance of improvement, statement of the reason of termination, and concerning of collective termination. The Convention and Recommendation cover appealing against termination, period of notice, certificate of employment and severance allowance and other income protection at the time of termination.

In the third part of the Convention, it states the provision concerning termination for economic, technological, structural or similar reasons. The employer should consult and closely work with employees' representatives for the reason of minimizing as far as possible the termination of employment. The Recommendation also suggests performing reduction of force in various ways, setting fair criteria for selection for termination and mitigating the effects of termination.

In this chapter, the thesis lay down the neutral meaning of restructuring to get a legally and economically functional meaning. This meaning will be used to create mutual advantage approaches for every party in employment relationship. Moreover, fundamental rights of employers and employees were described to make the minimum standard to the basis of fairness. It will indicate the necessity in serving fair legal provision to both employer and employee; in both economy and social interest. Finally, fairness consideration is the conclusion that will support the idea that every party in employment relationship should receive the neutral degree of protection. In the next chapter, this thesis will analyze the applicable approach that use to handle restructuring framework in international level and in particular countries.

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Chapter 3

Fairness restructuring under International Law and Foreign law; ILO guideline and legal measures in Japan, United States and France

In the global business recession, restructuring is a normal practice in the terms of business management which is no longer avoidable. The employers liberally use any measures for reducing costs upon their knowledge in management. Three parties involved to such changes need to cooperate to acquire a solution compatible and in favor to their own interests. In other words, the employees' sustainability in working life is diminished and they seek for adequate protection and fair recovery. The employers, as the second party, are responsible for their own working life, to shareholders' expectation and even to employees in survivability of the enterprise, so they need legal protection when they exercise managerial power or make a managerial decision. The last party is the national government who is responsible for controlling the business activities in every enterprise far from making problems to society, to intervene in the economic and labor system for maintaining social good, and to set the appropriate degree of rules and enforcement that can create balance between labor protection and flexibility in business society. In this chapter, fairness restructuring upon ILO guideline will be discuss as a principle (3.1), and legal approaches for handling restructuring in those countries, Japan, United States, and France, will be studied to constitute the expected outcome (3.2).

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3.1 The main pillar of restructuring under ILO guideline

The International Labor Organization (ILO) was established in 1919 as a part of the Treaty of Versailles in order to promote social justice and internationally recognized human and labor rights[82]. The ILO works to set the labor standard, represents social needs and sound, and ensure the outcome of standards, policies and programs by bringing together the tripartism – employers, employees and member states[83]. Thus, ILO performs an important role in social development. It keeps every step to serve social interests.

In a progressive economic competition, every enterprise counts day by day improving itself more competitively in a particular market. A business strategy which is selected to apply to its business model becomes the trigger point of the biggest change for survivability and future growth. It is unavoidable that the largest capital like human resources will be taken into account. ILO provides guidelines to Restructuring for Corporate Success (the "Guideline"). The Guidelines suggests the strategy to avoid any possible adverse effects including unexpected costs and suggests employers another

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[82] "Origins and History," International Labour Organization, http://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm.

[83] "How the Ilo Works," International Labour Organization, http://www.ilo.org/global/about-the-ilo/how-the-ilo-works/lang--en/index.htm.

option in avoiding termination of employment. All ILO suggested restructuring will be concluded. Firstly, restructuring plans must be carefully prepared and the employer must be confident that the plan is worth for the time allocated and safe for dealing with sensitive labor issues (3.1.1). Employers need to be sure that every step to make efficient restructuring is followed correctly. Secondly, all hidden costs and adverse effects will be indicated and discussed (3.1.2), and necessary precaution measures to avoid or minimize such hidden costs and adverse effects will be obtained (3.1.3).

3.1.1 The principle; efficiency expectation

To constitute the most efficiency plan of restructuring framework, ILO imply all substantial elements of the whole process. It consists of characteristic of restructuring (3.1.1.1), the guideline for restructuring framework in every step (3.1.1.2), and performance of reduction in force (3.1.1.3).

3.1.1.1 Characteristic of restructuring

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The degree of improvement capability of an enterprise is limited by its own outdated structure, operation and poor management. Restructuring can break through such limitations to be cheaper in operation with higher efficiency. A restructuring plan that is consisted with legitimate procedures, delicate performance and formal operation, provides an enterprise the confidence to face with any problem from economic competition. Restructuring is a form of change that management applies to the structure of an enterprise in order to alter the way of work and

operation. Many tools are included in restructuring plans for enhancing employees' performance and avoiding employment termination. The Guideline strongly suggests how to make restructuring in the most efficient way to avoid social cost. Restructuring emphasizes 3 issues: i) the importance of consultations between employees and employers before, during, and after the period of restructuring; ii) creation of the most preferential conditions for the affected employees, so that they are able to continue their professional careers; and iii) policies and practices in restructuring with non-discriminatory actions, based on such characteristics as age, gender, union membership, and so on.[84]

From the experience of the ILO project on Socially Sensitive Enterprise Restructuring (SSER), they also suggest the steps of restructuring that an enterprise might go through[85]. It starts with planning and action in restructuring which become unavoidable. Then, a joint agreement would be achieved when restructuring goes smoothly. If downsizing is necessary, employers must continue the restructuring process with alternative options to mitigate the damage that might occur, or give employees a less painful measure. In many cases, restructuring often appears in the form of layoffs, early retirements, decreasing payrolls, reducing working time or

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[84] Rogovsky, 7.

[85] Ibid.

downsizing. In response to economic competition, workforce reduction might be the answer most in favor to the enterprise in the situation where the enterprise is first considering cost-efficiency. According to the Guideline, stated reasons for workforce reduction which are numerous and are as follows: firstly, heightening competitive pressure can force enterprises to fight for their position in the market, or even in extreme cases for survival; secondly, immediate cash-flow improvement may be necessary to ensure liquidity; thirdly, shareholder expectations may also put pressure on management, which can lead to a redefinition of strategy in favor of short-term gains in profit and market value; fourthly, overcapacity or even poor management can force an enterprise into a situation in which lay-offs are unavoidable; and last but not least, privatization and other macro-level-induced changes may call for substantial reductions[86]. However, Reduction in force might make some trouble that will be mentioned in the next part of this chapter[87].

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3.1.1.2 The Guideline presents the four appropriate phases of restructuring.

The first phase, *Study and action planning*, which is regarded as a first step for managing and decisions making for the further plans, begins with the

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[86] Ibid.

[87] See 3.1.2 Below

statement of a clear long-term strategy. A long-term strategy can be formulated when management set the objective or goal with a clear vision. The strategy includes the importance of announcements and makes all relevant parties to agree upon the plan. Employers have to set specific time frames and prepare budgets in accordance with such time frames and other costs (e.g. severance payment). Such setup of time frames and budget preparation must always be on a feasible and motivating basis. Necessary legal advice should be obtained for establishing the plan in order to comply with national law and practice. Other items on the to-do list are consultation with social partners which is the most effective way to find the perfect solution in financial terms, reputation and status of the enterprise including social responsibility. Employers need to prepare a budget for the costs that possible flow from some scenarios like site closure or headquarter repositioning during the restructuring process. Moreover, employers should calculate the amount of money for managerial matters such as Return of Investment (ROV), Achievement of shares and choice making[88].

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Second phase is *preparation*. It starts at detailing the plan from the beginning until the targeted form of the organization, expected outcomes or objectives are reached. Employers must duly check that the amount of money in the budget and the time left are in the long-term strategy plan and the target is on the

[88] Rogovsky, 39.

basis of reality that it remains possible to be achieved. Then, a committee must be appointed to control, monitor, consult, make decisions and report all relevant matters of the restructuring progress. Finally, employers must initiate the tools carefully selected for decreasing social costs from employees who lost their job, motivating survivors, preventing negative atmosphere in workplace and increasing efficiency. Such tools are counseling, skill assessment, training/employability, internal job search, external job search, creation of SMEs, mobility, early/partial retirement, alternative work schedules, and severance packages[89].

The third phase, this is the phase of *action*. The restructuring plan or layoff plan will be applied to the work place. Employers need to communicate to their employees about exact amounts and name of who will be affected, including offering the tools developed to help them. While the restructuring process continuous, employers should pay attention to every individual case as much as possible. Employers have to try to relax their stress, communicate to help them passing on from their possible mood, like angry or upset, and help them to access the helping tools. Employers keep follow-up and update each case[90].

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[89] Ibid.

[90] Ibid.

The final phase is *evaluation* of all frameworks whether every change is responding to the plan or the goal set. This is for maximizing enterprise's benefit and keeping record of all studies and patterns for the further occasion. On the other hands, it is regarded as the proactive measure of people management[91].

3.1.1.3 Performance of reduction in force

In case that workforce reduction is required, there are the following elements that employers need to take into their consideration for establishing restructuring plan. These six elements are stipulated as the framework of the workforce reduction process.

I. The workforce reduction performed to the enterprise need to be viable. Employers must ensure that a workforce reduction exercise will substantially affect the business because the restructuring will be effective when the changes apply to all of the business functions[92].

II. Because of the limitation of resources like budgets, times and opportunities, employers need to be more careful when they set the goals or targeted form

[91] Ibid.

[92] Ibid.

of the enterprise. Unrealistic goals cannot be achieved and will lead to failure[93]. Restructuring plan should be created from sufficient research and data that have been studied carefully.

III. Cooperation with all stakeholders (employees, unions, employers' representatives, and government) will help employers understand the different prospects of the concerns and problems from the restructuring process, so the employers can establish a restructuring plan that has less impact on social costs[94].

IV. Every selected performance during the restructuring process cannot be carried out in any discriminatory way. Employers will not classify their employees on the basis of race, color, sex, religion, age, political opinion, national extraction or social origin which has the effect of nullifying or impairing equality of opportunity or treatment in employment and occupation. Decisions of employers should be made on the basis of business analysis only. Additional discriminatory practices may exist at national level (e.g. HIV/AIDS).[95] In addition, upon the Termination of Employment Convention no. 158 (1982) and the

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[93] Ibid.

[94] Ibid.

[95] Ibid.

Termination of Employment Recommendation no. 166 (1982), the performances of workforce reduction shall be obtained in accordance with the concept of fairness as mentioned in (2.3.2) herein. The performance need to construe these two elements; Firstly, valid reason grounded for termination shall not include the reasons that the employees are the members of labor union, the employees act as workers' representative, employees filed against the employers relating with violation of applicable laws or regulations, employees are dismissed on the ground of discrimination as aforesaid, and employees absence in maternity leave; and secondly, justified procedure prior to or at the time of termination, meaning that employers cannot make a legal dismissal if they do not perform the procedures required by laws, such as prior notification, providing the reason of dismissal and giving employees a chance for defending themselves.

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V. In reality, every individual has their own interests and responsibilities. They bear the social cost upon their personal matters. When workforce reduction takes place in the enterprise and affects them, they need to figure out the way to respond with such social impact and cost. Employers should help them by creating opportunities in that situation. Opportunity creation will support laid-

off employees to move on with their life and help survivors to manage additional responsibilities[96].

VI. Workforce reduction is a very complex issue in labor legislation, and companies should make sure they start from a secure legal basis. Furthermore, legal provisions differ substantially among countries, with important implications for multinational enterprises. Even within a region, different national laws allow and require different actions, and domestic shifts in legislation can take place as well[97].

However, it need to be cautioned that if the enterprise decides to make the dismissal, and their financial scenario is regarded as insolvency, the affected employees will be regarded as creditors who will be granted the privilege to get paid before those non-privilege. This provision is contained in the Protection of Workers' Claims (Employer's Insolvency) convention, 1992 (No. 173). It was made to minimize the adverse consequence of enterprises' insolvency and to provide safeguard to employment. The principle of the convention grants a privilege to employees' claims to get paid out of

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[96] Ibid.

[97] Ibid.

the assets of the insolvent employer[98]. The privilege will cover to payment included but not limit to wages, paid holiday, paid absence and severance payment[99]. The convention also suggested the national laws and regulations to establish the guarantee institution of the payment for workers' claim[100] and arranged the privilege rank of claim that it shall be higher than the State and the social security system, in case of paid by employers, but it might be lower than the State and the social security system, in case of protected by guarantee institution[101]. From this point of view, this protection should be in the consideration of employers as the procedural fairness that they need to achieve before dismissal.

3.1.2 Adverse effect and Hidden cost avoidance

The restructuring plans are set for long-term development and make changes to the substantial parts of the business. Thus, if the plan is failing or deficient, it would directly affect the enterprise and cause the greatest damage. The enterprise would waste a lot of money that were set for the restructuring plan. It would lose the

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[98] International Labour Organization, "The Protection of Workers' Claims (Employer's Insolvency) Convention No. 173," 79th ILC session (1992): Article 5.

[99] Ibid., Article 6

[100] Ibid., Part 3

[101] Ibid., Article 8

opportunity costs for the time it spent, and it might entitle to pay out all problems from labor issues. According to the Guideline, workforce reduction, which aim to meet employer's expectation, might adversely affect employees' mindset and behavior including the negative atmosphere in workplace, result of restructuring might alter from employers' expectation[102] (3.1.2.1). It entails the following problem; reduced productivity, decline in quality, higher staff turnover, increased absenteeism and sick leave, loss of key talent, decreased creativity, decreased entrepreneurship and risk taking, poor external image, and increased legal and administrative costs[103] (3.1.2.2). However, it still has a chance for management to recovery such disadvantages and mitigate those damages (3.1.2.3).

3.1.2.1 Employers' expectation and employees' mind set

On the first day the employment relationship was started, an employer gave a worker the promise of job sustainability, fair increasing payroll, bonus, high hierarchy of career path and other incentives. Thus, it is easy for employees to get upset when restructuring plans are announced (literally downsizing), they may also feel being betrayed. According to the experience of the Majestic Enterprises, it started with the peak profile in mid-1990s, it got the reputation as well-managed company

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[102] Rogovsky, 19.

[103] Ibid.

and an excellent place to work. In 1995, Majestic made an opportunistic acquisition and its management, Justin Jourdan, CEO, realized that there was some redundancy, but he assured that there would be no layoffs. Majestic did some cost saving such as eliminating bureaucratic procedures and introducing new products to the market. Finally, Majestic management hit rock bottom so that reduction-in-force program was announced in the 2000, but through voluntary selection. After announcement of such program, Jourdan's premier-company tried to pump up employee morale and organizational effectiveness. He tried to enhance the leadership skills of the managers but they never did as they had learned[104].

The process of recovery after restructuring is one of the most important steps. Trauma and more responsibilities pile up to the routine tasks of survivors. They fear losing their job and are confronted with the next wave of layoffs. The enterprise loses workers' trust and motivation in working. The survivors get stress and anxiety in the fear of job loss[105]. Stress from the negative environment, like gloomy workplace and the fear climate spread around from workload, decreased the workers' performance. It consumes more of their energy and positive feeling for their work.

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[104] Mitchell L. Marks, *Charging Back up the Hill: Workplace Recovery after Mergers, Acquisitions, and Downsizings* (San Francisco: Jossy-Bass A Wiley Imprint, 2003), 14-15.

[105] Ibid.

Robbins P. had described the potential sources of stress. The potential sources of stress can be categorized into three factors; *Environmental Factors* represent the uncertainties of economy and politic, replacement of technologies, and the risk of terrorism; *Organizational Factors* are defined with the nature of the particular job, work overload, the appropriation of workplace, co-workers' expectation, length of working time, personality, relationship with others, enterprise's rule and regulation, characteristic of team leaders, high demand bosses, and organizations' life stage, etc.; *Individual Factors* are about personal responsibilities and economic concerns which an individual uses to motivate their working life, or workers' personalities and attitude that an individual uses to manage their stress[106]. Moreover, the survivors will initiate questions of self-worth and what they are doing in the enterprise. They are going to suffer from "Burnout" because they are suffering from the large workload and minimal resources contributed[107]. They repeat their working life over and over with less work-life balance. They must handle a long list of tasks and work so hard without supporting staff. Not only they work hard throughout day by day, but also, they need to give up their expectation such a bonus and other incentives that were cut in accordance with the enterprise's situation.

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[106] Robbins, 580.

[107] Marks, 8.

3.1.2.2 Reflection and behavior change

The negative perceptions like stress, burnout and anxiety of workers do not well affect their performance. They are likely exhausted and may even faint at work before the end of the day. They have no motivation in their work, and lack interest to improve themselves. There are six reflection and behavior entailed from such negative perception. Firstly, the worker trend to decrease their ability and performance. More than half of 1,468 downsized companies surveyed by the Society for Human Resource Management reported that employee productivity either stayed the same or deteriorated after the lay-offs and 74 per cent of senior managers at recently downsized companies said their workers had lower morale, feared future cutbacks and distrusted management[108] In addition, productivity might be reduced in according with their changed behavior; such as smoking, alcoholism, rapid speech, fidgeting and insomnia[109]. Secondly, the survivors are required to hold more responsibilities and cover the parts of displaced workers. They are required to handle

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[108] International Labour Organization, Socially Responsible Enterprise Restructuring: A Joint Working Paper of the International Labour Organization and the European Bahá'í Business Forum, (International Labour Office, 2001), http://staging.ilo.org/public/libdoc/ilo/1999/99B09_459_engl.pdf. 35.

[109] Robbins, 582.

more works than usual. They cannot perform with the same degree of quality without experience and training. An example on the case involving an automobile company. An order was placed for the wrong kind of steel by the surviving worker instead of the worker who accepted the early retirement package. This resulted in a US$2-million loss for the company in down time, rework and repair.[110] Thirdly, with such kind of working atmosphere, the workers trend to decreasing in morale, lower commitment, and a lack of trust and loyalty.[111] These will entail another problem, like loss of key talent, higher staff turnover, increased absenteeism and sick leave. Fourthly, a study by McGill University and the Wharton School found that downsizing interfered with the networks of informal relationships that innovators use to win support and resources for new products[112], in the other hand, the abilities of creativity, entrepreneurship and risk taking are decreased. These might be obstacle for the employers in order to develop or adapt to the better business model. Fifthly, reputation is the most valuable asset of the enterprise and that recovery of such a bad name can be a long, painful and expensive. The serious injured four people, including two teenage girls who needed leg amputations, from roller-coaster crash at UK theme park Alton Towers cost

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[110] Rogovsky, 20.

[111] Ibid.

[112] Ibid.

a £5 million fine. Mr. Ward showed the fact that value of corporate reputation for all UK-listed companies could be worth as much as £1.7 trillion, or 28% of companies' collective market value[113]. The poor external image is serious issue for business continuity. Last but not less, workers whose jobs have been made redundant may try to sue their former employer or may even commit sabotage to express their discontent[114]. It increased legal and administrative cost.

3.1.2.3 Recovery

Even it entails the consequence and expensive costs, restructuring or downsizing is still necessary to achieve and meet competitiveness. Enterprises might help their workers to recognize how business challenges and new opportunities can be used positively and, shared with each other, creating a sense of direction to do new things, assign involved managers to help their team and take care of their team member's mental health, and help the workers understanding the situation and get over it[115].

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[113] Peter Shadbolt, "How Can a Company Repair a Damaged Reputation?," news release, 2016, http://www.bbc.com/news/business-37630983.

[114] Rogovsky, 21.

[115] Marks, 17.

3.1.3 Suggested tools for minimizing social impact

These eight recommended tools might be used to minimize social cost or other cost from adverse effect that might occurred from change of employment relationship.

3.1.3.1 Counseling.

When the redundancy is made in the workplace, people experience trauma and they feel fear, anger and depressed. Counseling will let them express their concerns, not only for affected employees, but for survivors too. It helps an employee to regain their self-confidence and security and helps attain a comfortable atmosphere.[116]

3.1.3.2 Skill Assessment.

It is a way that companies can help their employees to improve and strengthen their skills. The concept is to provide employees with realistic points of view and skill assessments to identify the gap between their skills and labor market expectations.[117]

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[116] Rogovsky, 50.

[117] Ibid.

3.1.3.3 Training/employability.

To make a valuable employee to the enterprise, an employer needs to provide an effective training program with sufficient financial support to educate the employee. Educational programs will increase the number of internal candidates because it will prepare them for any upcoming challenges and opportunities. Employees will gain the abilities to shift any change upon demand of the company.[118]

3.1.3.4 Internal job search.

It might be financially more desirable if the company can rotate an employee into a suitable position as hiring new might lead to extra cost and time consuming like more paperwork or development of new employee.[119]

3.1.3.5 Job mobility/Transfer.

Job mobility is a change in job that might be facilitated with other tools like skill assessments and training. Transfer is the geographical change or change in the place of work that employees might think of and can have many concerns. It includes financial concerns, paid days off to conduct the move, residence

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[118] Ibid.

[119] Ibid.

and housing, cost of living, language and culture, and the applicable administrative costs.[120]

3.1.3.6 Early/partial retirement.

It is the extension of full benefits of a retirement package before the actual retirement age. This strategy needs to be attractive enough for employees to take such advantage.[121]

3.1.3.7 Alternative work schedule.

This is the way that makes the company able to maintain their workforce with flexibility in management. The company can be faster in the high season and slow down when facing recession. The company might create some kind of employment that provides the flexibility in adjusting workforce e.g. part-time employment, subcontracted workers or flexible leave with partial salary.[122]

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[120] Ibid.

[121] Ibid.

[122] Ibid.

3.1.3.8 Severance package.

This is a direct response to the major concern of employee. The company can set the amount and may exceed the rate that is set by law[123] , but as the aforementioned, the company must plan and evaluate according to its financial capacity.

3.2 Legal approaches for handling restructuring in another jurisdiction: Japan, U.S., and France

This thesis aims to indicate all possible measures that each country use to handle with restructuring process in accordance with the general practice of the particular country, so the thesis is here to conclude such measures from the minimum labor standard provided in laws and practices in order to show and stipulate the intensive degree of those. The labor approach in each country are taken to form comparative study and such countries have different ground of culture, business system and labor approach. Japan have much practical labor custom and it rarely make a dismissal (3.2.1). United States have the approach that aim to promote business activities. Most of employment relationship rely on individualism (3.2.2). In France, the economic ground for adjusting labor relation is obtained in the law. It provides flexible provision to cope with economy as legal right (3.2.3).

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[123] Ibid.

3.2.1 Legal approaches for handling restructuring with the unique labor customary under the Japanese labor system

Japanese labor and employment law was influenced by two factors. Those factors reflect the basic system of the Japanese labor market. The first one is *Japanese Employment Customs* that developed from time to time through the terms of agreement among the members of the Japanese employment system. The other is the *Japanese Labor Law* that was included into the system to set the minimum protection and fix the problem in the unbalance of bargaining power.[124] Before the 1990, Japanese Employment Customs was developed through the terms of private agreement among the members of the Japanese employment system. It provided efficiency to economy with positive contributions. Private bargaining was a good choice at that time, instead of engineering the desired result directly through legal regulations. After the collapse of economy bubble in the early 1990s, Japan went into economic recession. The number of atypical or non-regular employees was increasing that made

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[124] Takashi Araki, "The System of Regulating the Terms and Conditions of Employment in Japan," *The mechanism for establishing and changing terms and conditions of employment: the scope of labor law and the notion of employees: 2004 JILPT Comparative Labor Law Seminar* (Tokyo: Japan Institute for Labour Policy and Training, 2004). 3.

the dual-standard of labor protection in Japan between regular workers and non-regular workers. Labor law is experiencing dramatic reforms.[125] There are 6 parts for describing the characteristic of Japanese labor approaches; the labor standard and relevant sources of labor law that was lay down for stipulating as basis (3.2.1.1), derogation of minimum requirement (3.2.1.2), unique characteristics of Japanese employment custom (3.2.1.3), unique pre-measure for avoiding dismissal (3.2.1.4), flexibility characteristic in Japanese employment relationship (3.2.1.5), and very effective training system (3.2.1.6).

3.2.1.1 Labor standard and relevant sources of labor law

Japanese labor law system that handles Japanese labor relations consisted of three kinds of legislative subjects; individual labor relations law, collective labor relations law and labor market law. Regarding these as the fundamental social rights set out in the Japanese Constitution of 1946, Article 25 of the Constitution stated Right to maintain the minimum standards of wholesome and cultured living, and the state support the promotion of welfare[126], Article 27 applies to the individual labor relation and reflects the characteristics of both state and

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[125] Ibid.

[126] The Constitution of Japan, (July 7, 2017).

workers in the labor market, and Article 28 states about collective power.[127] In Japan, minimum standard of working conditions was specified by a bunch of statues like Labor Standard Act, the Minimum Wage Law, the Security of Wage Payment Law, the Industrial Safety and Health Law, the Workers' Accident Compensation Insurance Law, the Equal Employment Opportunity Law, and the Worker Dispatching Law. The most important law is the Labor Standards Act (LSA) that sets the fundamental rights of workers, payment of wages, working hours, paid leave, special protection of young workers and pregnant women, workers compensation for work-related accidents and work rules, etc.[128] The LSA will apply to all establishments except family business, domestic workers and other employment relations for which special regulations apply[129]. Those statutes can be mentioned by separation of three groups.

Employment contract is regulated under article 15 of the LSA that requires employers to clearly indicate in writing the entire individual's working conditions[130]. Such working conditions should be clarified pertaining to the fixed-term

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[127] Ibid.

[128] Ibid.

[129] Ibid.

[130] Labor Standards Act No. 49, (July 7, 2017).

contract, place of work, nature of work, work hours, rest period, leave, days off, payment of wages, retirement, other benefits, safety and health, training, compensations, and commendation and sanctions as detailed in article 5 of the Ordinance for Enforcement of the Labor Standard Act[131]. However, it is rare that employers and workers will specify working condition in writing; mostly they do it orally and clarify the content of work with work rules. To provide flexibility to employers in accordance with socio-economic changes, the specific terms of the agreement will not include the place of work and type of work which are not required workers' consent to change. Employers reserve the rights to modify working conditions, like transfer or reposition, by adjusting the work rule. However, modification of place or type of work must be reviewed for validity by the court because such change causes workers significant personal inconvenience.[132]

Rule of employment requires an employer who continuously employs ten or more workers to draw up and submit to the relevant government agency by article 89 of the LSA[133]. The rule of employment must be drawn up with the following matters; (1) the time at which work begins and ends, rest periods, rest

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[131] Ordinance of the Ministry of Health and Welfare No. 23, (July 7, 2017).

[132] Ibid, 7-8.

[133] Labor Standards Act No. 49.

days, leave, and matters pertaining to change shifts, (2) the method of decision, computation and payment of wages, date of payment of wages and matters pertaining to wage increases, (3) retirement including dismissals, and retirement allowances, (4) extraordinary wages and minimum wage, (5) cost of food or supplies for work, (6) safety and health, (7) vocational training, (8) accident compensation, (9) commendations and sanctions, and (10) other items applicable to all workers at the workplace[134]. At the drawing up stage or when changing the rules of employment, employers must submit new work rules to the relevant government agency according to article 89 of LSA[135]. Such announcement of rules of employment must be accessed by workers by methods as mentioned in article 52-2 of the Enforcement Order of LSL[136]. These requirements for drawing up the rules of employment are incorporated with criminal sanctions as specified in article 120 of LSA[137]. Though, employers' duty is to draw up work rules it is also required to ask the opinion of a labor union but does not require

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[134] Ibid, 8.

[135] Ibid.

[136] Ordinance of the Ministry of Health and Welfare No. 23.

[137] Labor Standards Act No. 49.

any workers' consent since such work rules has been valid by the competent Labor Standards Inspection Office.[138]

Collective agreement. According to article 16 of Labor Union Act No. 174 of 1949, collective agreement takes preferential implementation over the individual agreement; in case that it conflicts with the treatment set out in the collective agreement and also in cases that the provision in individual agreement does not cover such matters[139]. Collective agreements not only supersede individual contracts but also invalidate work rules that contravene a collective agreement.[140] However, because collective agreements in Japan are developed by unions which are organized on company basis, the parties to collective agreements can adjust and determine working conditions in a particular company swiftly and appropriately. Some modification of working condition might be reviewed by the court, and some modification might be invalidated upon the courts' decision that considers unfavorable working conditions.[141] According to article 2 of Labor Union Act, it states the main

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[138] Ibid, 8.

[139] Labor Union Act No. 174, (July 7, 2017).

[140] Ibid, 10.

[141] Ibid.

purpose of the union that “maintaining and improving working conditions and raising the economic status workers”. Such interpretation makes a hard time to union’s function in industrial relations because sometime it cannot determine what is exactly advantageous or disadvantageous to union members. The court tends to maintain the autonomy of collective bargaining while protecting individual union member’s interests. It chooses to confine its own intervention except when the collective agreement violates public policy, a union attempts to usurp and individual’s vested rights, or where there exists evidence of a violation of the internal procedure for decision making.[142]

3.2.1.2 Derogation of minimum requirement by the labor-management agreement

Flexibility and purpose, the LSA provides the provision to allow a written agreement between an employer and the representative of majority of workers deviate from the minimum standard. Such agreement named “labor-management agreement” or “Majority-representative agreement”. The derogation of the minimum standards will be allowed only when the law clearly stipulates so. Even through, the labor-management agreement has no normative affect and has not created rights or obligations, but it creates merely immunity from criminal sanction and

[142] Ibid.

earns employer the position to compel workers to do so.[143] Under inspection of the labor inspection officer, there is no limit of working hours extension except for dangerous work. The provision of Labor-management agreement is contained in article 36 of the LSA[144]. Each of the derogations is specified in the articles: taking charge to employees' for savings entrusted (article 18), part of wages deduction (article 24), working hour flexibility (article 32-2, 32-4, 32-5 and 32-3), rest-period (article 34), paid leave in lieu of payment of overtime premium (article 37), outside working hours

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[143] Ibid.

[144] Labor Standards Act No. 49, Article 36(1). "If an Employer has entered into a written agreement either with a labor union organized by a majority of the Workers at the workplace ... and has notified the relevant government agency of such agreement , the Employer may, notwithstanding the provisions with respect to working hours stipulated in Articles 32 through 32-5 or Article 40 ("Working Hours") or the provisions with respect to days off stipulated in the preceding Article ("Days Off"), extend the Working Hours or have Workers work on Days Off in accordance with the provisions of said agreement; provided, however, that the extension of Working Hours for belowground labor and other work particularly harmful to health as stipulated by Ordinance of the Ministry of Health, Labour and Welfare shall not exceed 2 hours per day."

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presumption (38-2), professional work scheme discretionary (article 38-3), less than a day paid leave on request (article 39, section 4), extra paid leave (article 39, section 6), and method of payment on taken leave (article 19, section 7).

3.2.1.3 Unique characteristics of Japanese employment custom

Japanese Employment Custom (JEC) was established by taking influence of outstanding characteristics of the Japanese economic system; such as, the main bank system, mutual shareholding among group firms, and various interventions by bureaucracy in the market economy which are usually characterized by permanent employment and seniority[145]. There were five outstanding characteristics of JEC. Beginning with the first JEC, lifetime employment relationship means that enterprises recruit employees, even after graduating, after probation, becoming permanent employees in the sense that they can expect to stay in the enterprise until they reach retirement age.[146] Such permanent employees can rely on ordinary increasing

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[145] Atsushi Tsuneki and Manabu Matsunaka, "Labor Relations and Labor Law in Japan," 3 vols., vol. 20, *Pacific Rim Law & Policy Journal* (Pacific Rim Law & Policy Journal Association, 2011), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1312982. 530.

[146] Johannes Schregle, "Dismissal Protection in Japan," in *International Labour Review* (International Labour Organization, 1993), 510-11.

remuneration and advancement, incorporating with training programs provided by the enterprise all over their entire working life in the enterprise. It provides guaranteed permanent employment, welfare facilities (such a housing, family allowance, medical and recreation facilities, etc.), pension upon retirement under public social security schemes, a substantial lump sum calculated according to the number of years of service.[147] The Lifetime employment is a general understanding and accepted and honored by all, due to it is not mentioned in legislation nor agreed in the form of an agreement.[148] Secondly Employees also experience a wider range of mutually related jobs than worker in other countries. The older skilled workers are entrusted to provide on-the-job training to the younger unskilled workers for the purpose of improvement to the enterprise's production system[149]. This kind of employment experience is affected by a lifetime employment system, merits assessment and working formation based on seniority. The third JEC is wage the payment system that is calculated based on seniority, and promotion to a higher tier of hierarchy dependent on merit

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[147] Ibid.

[148] Ibid.

[149] Tsuneki and Matsunaka, 532.

assessment[150]. The fourth JEC, not similar to many of European countries, unions in Japan is Company-based, not industry-based, that make the long and close relationship between management and the members of union. The union has indirect power to influence management decision through discussions between labor and management.[151] Fifth, After the 1990s, the number of non-regular workers including subcontractors has substantially increased. There are many times of the regular worker in Japanese labor market; however, they are clearly distinguished. Once, such non-regular workers were only entitled to inadequate protection.[152]

3.2.1.4 Cut-off management salary

Japanese management has a different method to deal with reduction of labor costs. They trend to promote job security and the prosperity of the individual's life. The characteristics of labor relations are very unique in accordance with sustainable working life. Japanese management will take the following two measures to avoid layoffs or collective dismissal. The first measure is to suspend the

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[150] Ibid.

[151] Ibid.

[152] Ibid.

payment of dividends and cut the salaries of top management[153]. In Europe and North America management, will attempt to reduce labor costs by directly applying changes to workers, resulting in limitation and/or reduction of the number of the workforce; for example, early retirement, stop recruitment, golden handshakes, or voluntary departure. The Westerner will think first of their shareholders while Japanese will think of their employees first. Those were, unlike in Japan where the relation of workers (management and labor) is just like a close family (familyism). The interdependent society of workplace can be expressed in egalitarian income distribution and their life style.[154] These decreases of management salary can be assumed a distribution of income among workers upon economic year. Japanese management tend to take responsibility in difficult financial situations.[155]

3.2.1.5 Internal job rotation and job transfer

This is a special characteristic of the Japanese labor market. It provides the flexibility of workers and internal mobility in order to modify an enterprise's restructuring in response to financial and economic situations the same as

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[153] Schregle, 514-15.

[154] Ibid.

[155] Ibid.

maintaining job security. Any dismissal is hardly accepted whether there is possibility of job mobility in an enterprise. Mobility in the same enterprise is regarded as job rotation that a worker can move from job to job including transferring from white-collar to blue-collar.[156] In any case, the Japanese labor system has a dominant feature to facilitate such internal mobility because the seniority system or familyism logic can provide an efficiency training system in each working line[157]. Notwithstanding, workers might be moved to subsidiary or other relevant enterprises if internal transfer of jobs was insufficient to avoid reduction in force. Mostly, such external transfers can be achieved by two forms; *Shukka* and *Tenseki*.[158] *Shukka* is formed when the workers maintain their employment relationship with the original enterprise but carries out work at the premises of the receiving enterprise. It continued workers' wages and working conditions from the original enterprise.[159] *Tenseki* is formed when the workers' relationship with their original enterprise is severed and replaced by an entirely new agreement with the receiving enterprise. Sometime it is made for a definite duration

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[156] Ibid.

[157] Ibid.

[158] Ibid.

[159] Ibid.

with a guarantee of return to the original enterprise.[160] However, *Shukka* provides the higher degree of job security, it is used where managerial positions from subsidiary enterprises would be provided to senior workers, in case of no available position in the original enterprise, as a pre-retirement measure. The court would validate a *Shukko* or *Tenseki* decision by determining the personal circumstances on the ground of abuse of rights, and rarely invalidate such decision.[161]

3.2.1.6 Training system

From the background in Japan, the training system was established after the end of World War II. The purpose of establishment was to turn army resources to be workers in industries chain. At the time, workforces were very insufficient. The war was take too many years, so getting people back to the starting point of the whole educational process would take too much time. Training system will prepare people to get ready for the jobs and make economy recovery. Training system in Japan will make the workers improve abilities and capabilities in their vocations. It maximizes the capacity of workforce. Enterprises can expect the standard or higher quality of the outcomes from the same or less amount of investment in human resources. In the time of business change, training system will help dismissed

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[160] Ibid.

[161] Ibid.

employees to prepare themselves to move on. It will improve such employees' skills and abilities to get ready for new jobs. It also helps survived employees to handle more loads of works or to work cover the part of dismissed colleague. In the normal time, training system is tools that used to pass through skills and knowledge of senior skilled employees to the new entrants or just graduated. These are very valuable investment for sustainability in business development.

In addition, these other two reasons indicate why training system is work more efficient than another country. Firstly, the employment sectors worked closely with educational institution, both specialized and general educational institutions. Most of enterprise emphasizes and invest in human development. they provide knowledge in technologies and innovation to education institution. Some enterprise invests in special training program in workplace or establishes their own specific educational institution for training and educating the new generation. Thus, all knowledges or basic skills will be grounded for the students in the educational institution and create human resource with right attitude that might be developed in the future. Secondly, as aforesaid paragraph, most of employees in Japan are employed under the lifetime employment. They were bonded with enterprises in the long term, in the other hand, the enterprises can assure that they can invest and count on their training system to develop their human resources for expected outcome in the long term too.

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Beside the informal on-job-training program that might be perform in particular enterprise, the Japanese government invested to establish the big training system. The Human Resources Development Promotion Act is the important legislative body to empower the training system. It regulates all employer to provider their employees the opportunities in improving or developing their vocational skills by training[162]. It also regulates that employers need to provide the opportunities for training both on-job and off-job[163]. In the other hand, the training program shall be acquired to the employee who voluntarily accept and join the training program for improving their technical and professional abilities and the worker who decide to seek for a new job. Employers need to ensure the opportunities to receive training by indicating some measure for employees and assistance, such as granting paid leave or long-term leave[164]. The law also indicated the establishment of public training center, training facilities and institutions in order to provide the course for basic vocational training and vocational training for handicaps.

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[162] *The Human Resources Development Promotion Act No. 64*, (July 18, 1969), Article 4.

[163] Ibid., Article 10 and 9, 15-6

[164] Ibid., Article 10-4

3.2.2 Legal procedure for handling restructuring with individualism culture under American labor system

It is the normal practice in the business world in which an enterprise would eventually apply the unexpected change to employee's job or workplace. Some changes require an internal allocation of jobs, geographical allocation of the factory or reduction of workforce. It can be for employers keeping the promise, such a sustainability or security of a job, to a worker, the same as the day of recruitment. Moreover, the employment system in U.S. is likely set up around a system of individualistic management and personal selection, based on the evaluation of performance, American management can freely and professionally make quick decisions in business. They assess an upcoming situation with cost-benefit in favor of an enterprise, shareholders and themselves, other than individual interests or their workers. In engagement of labor cost cutting, line workers are thrown overboard to the sharks, while those still safe in the lifeboat[165]. Furthermore, the U.S. legislative system would explain why the labor regulation was very flexible and supports any changes.

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[165] Bruce D. Fisher and Francois Lenglart, "Employee Reductions in Force: A Comparative Study of French and U.S. Legal Protections for Employees Downsized out of Their Jobs: A Suggested Alternative to Workforce Reductions," vol. 26, *Loy. L.A. Int'l & Comp. L. Rev.* (2003), http://digitalcommons.lmu.edu/ilr/vol26/iss2/1/.

Because the United States had dual sovereigns – federal and states - where every state intends to relax and facilitate incorporation of an enterprise (so called “race to the bottom”). With the legal friendliness, an enterprise can form itself under state law other than the one where they are physically located and qualify itself as a foreign corporation in the state in which its operations are physically situated.[166] These following four parts can describe flexible labor approach of U.S. and extremely accommodate its business system. The four parts consisted of revolution and derogation of collective bargaining (3.2.2.1), business judgement rule (3.2.2.2), employment at-will doctrine (3.2.2.3), and collective dismissal (3.2.2.4).

3.2.2.1 Revolution and derogation of collective bargaining

The employment system in the United Stated promotes individual negotiation and individual employment transactions. The system was influenced by the “freedom of contract” provisions binding tight in the common law. The individual negotiation allows the parties to express their own interests and provides occasion to address their needs with low administrative costs.[167] However,

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[166] Ibid.

[167] Kenneth G. Dau-Schmidt and Carmen L. Brun, "Individual Bargaining, Collective Bargaining and Protective Legislation: Determining the Terms and Conditions of Employment in the Modern American Employment Relationship," *The mechanism for*

with the nature of the employment relationship, workers generally are in negotiation with less bargaining power. The labor system in United States is also mixed with collective bargaining, with federal and state regulation to fix deficiencies of individual negotiations[168]. The purpose of rebalancing the bargaining power of the parties to employment relationship, rights to organize was adopted and granted to workers for negotiating expected employment relationship with employers collectively. Rights to organize and collective bargaining were stipulated in Section 157 that "employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection...[169]" Moreover, Section 158 specifies the employer's conduct which is regarded as unfair labor practice and the misconducts of the labor organization.[170]

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establishing and changing terms and conditions of employment: the scope of labor law and the notion of employees: 2004 JILPT Comparative Labor Law Seminar (Tokyo: Japan Institute for Labour Policy and Training, 2004). 21.

[168] Ibid.

[169] National Labor Relations Act, (U.S.), 29 U.S. Code § 157.

[170] Ibid.

Section 159 contained the procedure of selection of employees' representative and Section 160 empowered the National Labor Relations Board to prevent, from and to handle with unfair labor practices.[171] At first, the number of union members grew substantially under the Norris-LaGuardia Act and the Wagner Act. The union became a strong powerful organization in an economic society. The Norris-LaGuardia Act provided members with the power to interfere in trade for expressing their demands and the legal mechanisms or immunities in litigation. Moreover, the Wagner Act regulated provisions for labor representatives and procedures of collective bargaining to all employees and enterprises.

The union was empowered as far as being in violation to non-unionist, being obstructive to business activities and unbalancing the labor court power until it was becoming an obstacle of the continuance of many businesses or industries. However, the collective bargaining in U.S. had been turned to decrease in accordance with changes in the 1940s. Global economy influenced the culture of the labor market from traditional union-heavy manufacturing industries to traditional non-union service industries. Such culture changed the intension of younger workers in less favor to the purpose of the union, including increasing of the number of female workers and minorities which traditionally not supported unionization. The U.S. regulation also

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[171] Ibid.

supported the short-term employment, like contractors and part-time workers, and casual workers who had only modest attachment to the workplace.[172] Finally, the increase of the union organizing cost and employer's resistance were included in consideration of a collective bargaining decline in the United States. In response to the global trend, there was the idea that the employees could earn benefits from a collective voice. Accordingly, workers were the first in-charge in the operation, their voice improved quality, safety, production, and the working environment. The ILO strongly suggested eliminating the employment-at-will provision to promote job security. Just like Japan, many companies implied the program called "employee involvement plans". The employee involvement plans encourage employers and employees to rid themselves of the traditional adversarial relationships and instead adopt one that is more cooperative, providing benefits to all parties.[173]

3.2.2.2 Business judgment rule

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In promoting flexibility and managerial decisions, the courts developed the provision of the business judgment rule. The courts have held that the business judgment rule is "a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith, and in the honest

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[172] Ibid, 30-31.

[173] Ibid.

belief that the action taken was in the best interests of the company."[174] The business judgment rule would give management the protection or release from liabilities in enterprise losses if the employer's action was carried out under the duties of care and none of conflict of interest. Such managerial action was also used to rid the organization of negligence, fraud, and criminal acts in the scope of corporation duties. The court cannot make a business decision for what was the best solution that was perceived as fitting to the kind of situation of an enterprise, whereas a business person could. In a restructuring framework, the business judgment rule worked as a tool for protecting managements' decision from court's interference. In case that downsizing plans must be engaged, the business judgment rule empowered the management to cope with situations in which action they deemed appropriate. The management had not to process restructuring plan neither in favor of shareholder nor in favor of social interest.[175]

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3.2.2.3 Employment At-will doctrine

With influence of the common law, employment in the United States is based on contract theories. Employment agreements may specify the employment duration and for termination with "good cause" or "just cause". It may

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[174] Fisher and Lenglart, 191-92.

[175] Ibid.

stipulate the cause of authorized termination, such as a change in control of the company or an act of gross misconduct by the employee, and also set the compensation and severance provision. However, employment in the U.S. is rarely made in written agreement, workers were mostly employed with the "at-will" doctrine. Written or oral agreements were mostly made for employment of the employees who need to work under the particular terms and conditions, like senior-level management, and At-will employment cannot cover such specifications. In case of a claim made, workers may discharge such claim with the recovery in breach of contract provision. On the other hand, the government implemented constitutional protection in order to support the legal environment for presumption of the freedom of contract. Thus, the employment-at-will doctrine was developed with support from both federal and states statutes. The at-will agreement was the employment agreement without a definite term and a working condition. It favored most towards the employers who tend to terminate such employment agreements for good, bad, or no cause. The difference between employment-at-will contract and regular employment contracts was shown in the "Labor & Employment Law Text and Cases" that quoted Rooney v. Tyson (1998) for distinguishing.[176] The rule of employment-at-

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[176] David P. Twomey, *Labor & Employment Law: Text and Cases*, 15 ed., South-Western Legal Studies in Business (Cengage Learning International Offices, 2007), 598;

will was set in Payne v. Western & Atlantis R.R. Co.[177]. Moreover, it pointed out that an employer is not liable in a tort action for failure to investigate an at-will employee's alleged misconduct with ordinary care prior to termination, by interpreting the court's decision in Texas Farm Bureau Mutual Insurance Cos. V. Sears.[178]

Kevin Rooney, V. Michael G. Tyson, 697 N.E.2d 571, 91 N.Y.2d 685, 674 N.Y.S.2d 616 (1998).

The Employment relationship of the parties was considered from the parties' intention and the presumption of employment at-will. The employment agreement was considered as permanent employment term that it is definite term. It cannot form the infinite term of At-will agreement.

[177] ; *Payne V. Railroad Company*, 81 Tenn. 507 (1884).

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"[M]en must be left, without interference to buy and sell where they please, and to discharge or retain employment at will for good cause or for no cause, or even for bad cause without thereby being guilty of an unlawful act per se. It is a right which an employee may exercise in the same way, to the same extent, for the same cause or want of cause as the employer."

[178] ; *Texas Farm Bureau Mutual Insurance Companies V. James Sears, Et Ux.*, 84 S.W.3d 604 (2002).

In order to maintain the degree of job security and social interest, the exemptions were produced to limit the employment-at-will doctrine from unjustified discharge. Legislative power played the main role to produce an exemption and many state adopted the affirmed exemption by legislative power only. These following were four exemptions to employment-at-will contracts; (i) recovery in tort might be sought by the worker who was dismissed in violation of public policies, (ii) a worker can be recovered in tort when he can prove abusive action of an employer caused discharge of his employment, (iii) a worker showed proof of an implied promise upon contract theory that the promise was clear enough and reasonable to rely upon and reasonable to believe that such promise had been offered and accepted by an employer, and (iv) Consideration to a covenant of good faith and fair dealing justified that the discharge was not for depriving other the party's right of expected benefits in the employment relationship. [179]

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3.2.2.4 Collective dismissal

According to most employments in the U.S. that are based on At-will doctrine, employment relationships will be terminated at any time and with no reason upon the employer's discretion. Anyway, massive layoffs and plant closing can make trouble and make a lot of social impact. Thus, U.S. federal law provides the

[179] Dau-Schmidt and Brun, 24-26.

protection under the Worker Adjustment and Retraining Act (WARN Act). The closure of a single site of employment unit with effect of losing fifty or more employment positions, excluding any part-time employees during thirty days period is considered as “plant closing”, and employment loss of a single site of at least 33 percent of the employees and at least 50 employees, or at least 500 employees during thirty days period are considered as “Mass Layoff”[180]. An employer is required to serve notice to employees or their representatives, designated state units and local government before plant closing or mass layoffs at least sixty days prior. If the plant closing or mass layoff involves with members of the union, the National Labor Relation Act (NLRA) provides a further degree of protection. The employer needs to be sure that such plant closings or mass layoffs based on the ground that does not form a kind of unfair labor practice.

3.2.3. Legal procedure for handling restructuring with strong and effective legislative power under the French labor system

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Labor law developed in the era of globalization based on social consciousness. It was born and developed in the large-scale industrialized and mechanical age in order to enhance legal sphere and morality among the working

[180] The Worker Adjustment and Retraining Notification Act of 1988 (Warn Act), (U.S.), 29 U.S. § 2101.

society[181]. Labor laws criticized from three main sources. (1) Statutes: The codification is very important in the French labor law due to the civil legal system. Many statutes had been together in the labor code since the 1910. Labor law became more technical and laid down the essential regulatory rules, while the fundamental principle was reaffirmed in the constitution. (2) Constitution: It granted the constitutional value to the labor law. The right of social and economic dimension, such a right to work, right to strike, right to collective bargaining, were constituted in the preamble of the constitution of 1946, which is referred by France's constitution of 1958[182]. (3) Judicial Decisions: The decision-making process in each case was later embodied in the statutes. Even, though it is not the formal source of labor law, but it is essential for evolution in the legal system.[183] (4) International law: As a guideline or

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[181] Michel Despax and Jacques Rojot, *Labour Law and Industrial Relations in France* (Kluwer Law and Taxation Publishers, 1987), 34.

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[182] Ibid.

[183] Pascal Lokiee, "The Framework of French Labour Law and Recent Trends in Regulation," *The mechanism for establishing and changing terms and conditions of employment: the scope of labor law and the notion of employees: 2004 JILPT Comparative Labor Law Seminar* (Tokyo: Japan Institute for Labour Policy and Training, 2004). 74.

recommendation, international law, treaties, and agreement was developed to promote[184] and elevate labor standards in each member nation. For describing French labor approach, it is separated into 4 parts; minimum requirement to understand and form the basis (3.2.3.1), Influence of collective bargaining (3.2.3.2), provision for dismissal on economic ground (3.2.3.4), and employment contract modification with economic motivation (3.2.3.4).

3.2.3.1 Minimum requirement in French Labor law

a) Standard wages

France guarantees the minimum hourly wage in the law of 'Salaries Minimum Interprofessional de Croissance' (SMIC) that might be revised from time to time. Employers are required to pay at the specific or above rate of money per hour while it guarantees the minimum monthly payment for regular employees. For example, the Decree no. 2016-1818 dated 22 December 2016 of SMIC heightens the minimum wages 0.93 percent in the 2017[185]. On the other hand, the minimum wages might be negotiated in the three levels of collective bargaining – national level, sector or branches level, and company level. The highest minimum wage will take priority from collective bargaining at company level. If the minimum

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[184] Despax and Rojot, 34.

[185] Decree No. 2016-1818 of 22 December 2016, Increasing of minimum wages (France).

wage of higher level of collective bargaining or of SMIC is higher, it will be applied. Other benefits, like in-kind benefits, profit sharing funds, bonus or premium, will be various upon negotiation in collective agreement.

b) Maximum working hours

The maximum working hours per week was recreated by the 'Aubry I' law of 13 June 1998[186] and 'Aubry II' law of 19 January 2000[187]. It was set up to 35 hours per week. The other details like overtime limit or working time reduction will be provided in the collective agreement at each level. The working time will be counted in accordance with the actual working time; "The time during which the employee is at the disposal of the employer and must comply with his directives being disabled to his personal business"[188] . The overtime provision was regulated in the Section 2 legal duration and overtime (L3121-27 to L3121-31) of the French labor

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[186] Law No. 98-461 of 13 June 1998, Guideline and incentive for working times Reduction (Aubry law) (France).

[187] Law No. 2000-37 of 19 January 2000, Negotiated reduction of working time (Aubry II law) (France).

[188] The France Labour Code, Art. L3121-1. "La durée du travail effectif est le temps pendant lequel le salarié est à la disposition de l'employeur et se conforme à ses directives sans pouvoir vaquer librement à des occupations personnelles"

code[189]. However, the working time for senior management is extraordinary and different from that of than the normal staff[190]. Finally, a part-time worker is defined in the Article L3123-1 of French labor code.

c) Leave

As usual, the French labor code provides employees various types of leave, e.g. holidays (jours fériés) in the Article L3133-1, sick leave (absences de travail pour maladie) in the Article L1226-1 et seq., paternity leave (congé de paternité) in the Article L1225-35 et seq., annual leaves (congé annuels) in the Article L3141-3 et Seg., and maternity leave (congé de maternité) in the Article L1225-17, etc. [191]

d) Non-discrimination law

The principle of non-discrimination is developed in both constitution and French labor law together. The preamble to the constitution of 1946 affirms the right for citizens not to be degraded based on race, religion or belief, the

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[189] Ibid.

[190] Ibid.

[191] see more, Secretary General of the Government, "Legifrance.Gouv.Fr," The General Secretariat of the Government (SGG), https://www.legifrance.gouv.fr/.

right to sacred, and inalienable right[192]. The constitutional value under constitution of 1946 includes the equality of gender and collective action of unions[193]. It is reaffirmed in the constitution of 1958 the equality of all citizen without regarding race or religion that such provision contained in the premier article of the constitution[194]. The extent of such affirmation, French labor law clarifies that no employee will be disqualified from recruitment, internship or training, and no employee will be penalized, dismissed, or tolerated any form of discrimination based on gender, manners, sexual orientation, sexual identity, age, marital status, pregnancy, genetic appearance, economic status, family background, appearance, being or not member of ethnic group, nation, race, political opinion, being member of an union or similar association, religion, residential, status of his nation, disability, or language[195].

3.2.3.2 Strong influence of collective bargaining

From a historical point of view, the legislative power for collective agreements was affirmed in the law of March 25, 1919 with establishment

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[192] The Constitution of 1946.

[193] Ibid.

[194] The Constitution of 1958.

[195] The France Labour Code, Art. L1132-1.

of the Congress of the Confédération Générale du Travail (C.G.T.) in Lyon to bargain collectively. At the end of 1921, there were establishments of the following unions: the Communist-led Confédération Générale du Travail Unitaire (C.G.T.U.), company unions and the Catholic Trade Unions, the Confédération Française des Travailleurs Chretiens (C.F.T.C.). With a reduced power status in collective bargaining causing weaker numbers, the law of 1936 gave the power to the minister of labor to extend collective agreements to all enterprises. Such extended agreements were empowered by legislative power and functioned as public tools. With this legal system, the concept of "representative union" was established to solve the problem of monopolies by unions. In 1946, the return of collective bargaining, the wages, a very sensitive feature in the labor market, was within the authority of the minister of labor. Every collective agreement at every level would be validated upon approval by the minister of labor.[196] The substantial change was performed again in the French labor law reform in 1982-1983. The five pieces of legislation, collectively called "Auroux laws", and the French labor code were rewritten to the form of code in the Mitterrand government. It encouraged the direction of high degree of centralization and direct state intervention. In the effort to encourage centralization and avoiding the negotiation under crisis

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[196] Adolf Sturmthal, "Collective Bargaining in France," in *Industrial and Labor Relations Review* (International Labour Organization, 1951).

situations, the government imposed the duty to bargain annually and retain the extension of collective bargaining agreements.

Collective Bargaining in France can be negotiated in three levels: at national level, at industry level and at company level. Collective bargaining at national level will be indicated for promoting participation of representatives of the union and employers. Article L1 of the French labor code imposes that any implementation to labor relation in relation to the national scale and inter-professional negotiation is subject to prior negotiation with trade unions and employers' representative[197]. Trade unions that are entitled to negotiations at any level need to meet the requirements of "representative" provision. Such representativeness of the trade union can be determined upon the criteria indicated in article L2121-1[198]. The main level of negotiations will be performed at industry level. This is imposed by article L2241-1 the obligation to negotiate on wages at least once a year for a signed agreement[199]. The job classification on wages will be reviewed every 5 years and industry level agreements will include matters such as: equality of gender, aged

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[197] The France Labour Code, Article L1.

[198] Ibid.

[199] Ibid.

workers and disabled and professional training[200]. The collective bargaining in an enterprise firstly introduced in the law of November 13, 1982 in order to promote decentralization of the collective bargaining process[201]. The obligation to negotiate is imposed in the article L2242-1 of the French labor code. The law of 20 August 2008 recorded the modification in article L3121-24 that allows company level agreement to alter working hour from what was indicated in the industry level agreements[202].

3.2.3.3 Effective provisions for dismissal based on economic grounds

There are two valid grounds considered for dismissal cases: (1) personal reasons and (2) economic reasons. For both reasons, employers are in the position to prove the reality and seriousness of a dismissal[203]. The personal reasons for dismissal are justified from the basis of an employee's action e.g. poor performance,

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[200] Antoine Mazeaud, *Droit Du Travail*, 7 ed. (Montchrestien Lextenso éditions, 2010), 209.

[201] Ibid.

[202] Law No. 2008-789 of 20 August 2008, The renovation of social democracy and the reform of working time (France).

[203] The France Labour Code, Art. L1232-1.

gross or serious misconduct or negligence. The dismissal for economic reasons will be justified from technological changes and economic difficulties included, other reasons allowed by the criticism of case law, and the necessity to prevent the competitiveness of the business and the modification in substantial elements of employment rejected by the employee. Such article L1233-3 of the French labor code includes the presumption of the significant loss for each type of enterprise[204]. There are general procedures that an employer has to follow in order to validate such a dismissal. The employer must create the criteria which will be used to select employees to be dismissed. The criteria are in the article L1233-5 of the French labor code considering family responsibilities, seniority, social characteristic like age or disabilities and professional qualities. The employer has duty to provide employee the meeting before making the decision for dismissal. The invitation of a meeting should be given to the employee 5 days prior to the meeting[205]. After the meeting, the employee must be given the notification of the dismissal and concluding details of the economic reasons, any alternatives, and benefits provided by the employer. Finally, the notification of such dismissal will be submitted to the "Direction Régionale des Entreprises, de la Concurrence, de la Consommation, du Travail et de l'Emploi" (DIRECCTE).

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[204] Ibid.

[205] Ibid.

In case of collective dismissal, if affected employees are up to 2 people, but not exceed nine people within a thirty-day period in at least fifty employees-company, an employer is required to comply with more legal obligations. The employer needs to invite employees' representative to the meeting. The employer should comply with a requirement for invitation method to the meeting and comply with a requirement to provide useful information as the followings; number of affected employees, date of implement, and criteria of selection. In the meeting, the employer is liable to inform the economic reasons of dismissals, and alternative or assistance programs indicated by the employer to their employees. Then, within the same period of such thirty-day, the employer must notify such dismissal to DIRECCTE.[206] There also have additional obligation if the employer decides to dismiss more than nine employees within the same thirty-day period. On the time frame legally set at three months, the employer is required to reach the collective agreement which indicates the employment protection plans with trade union in the enterprise. Then, the redundancy or restructuring plan and such employment protection plan will be given an opinion on by the works council.[207] If the restructuring plan is considered abusing the safety and health of the employees, the plan must get the opinion from

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[206] Ibid.

[207] Ibid.

the committee of health, security and working condition (des comités d'hygiène, de sécurité et des conditions de travail (CHSCT)).[208] Finally, the employment protection plan should be approved by the DIRECCTE[209].

Moreover, to maintain the freedom of the enterprise, it indicates the provision in consideration of dismissal for economic reasons. The employer must show the judge that the managerial decision is made in response to the economic difficulties and dismissal still is the only solution for this circumstance[210].

3.2.3.4 Employment contract modification with economic motivation

Generally, an employer can change the terms and conditions of the employment agreement whether an employee express their consent and accept. The refusal of the proposal by employees will not be considered to be a justified reason for dismissal. Except the employment modification motivated from an economic reason is expressly refused by the employee, the dismissal that is as a consequence from this modification will be regarded for economic motivation. In order

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[208] Ibid.

[209] Ibid.

[210] Ibid, 473.

to propose a change to employment conditions, an employer must comply with article L1222-6 that rule states that a notification letter must be sent at least one month in advance of the proposed modification to the employment conditions. If the employee does not express their intention to refuse within the timeframe, it will be deemed as accepted. It will be the same for modification of more than ten employees. If the modifications are refused and entails to dismissal, it will fall in the regard of collective dismissal for economic reason, whereby some legal obligations are applicable[211].

In conclusion, ILO have created the guideline and suggest the well management for the whole process of restructuring framework. It invents the framework that control the action before, during and after process of restructuring. In part two, the particular countries provide different degree of protection and approach that apply to restructuring framework in different ways. They create legal approaches that used to protect social interest, avoided public crisis by provide employers others alternative measures more than dismissal, or facilitated economic activities by expand the limitation of managements' power to deal with their business. The next chapter will identify and explain problems and insufficient point in Thai labor law in order to handle with restructuring framework. Moreover, it will point out feasible mechanism from particular countries that might apply to Thai labor law.

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[211] The France Labour Code, Art. L1233-25.

Chapter 4

Insufficient measure for restructuring in the Thai labor laws and implementation of possible measures from the particular country.

Thai labor laws extremely protect the employees from the abusive of rights, any forms of discrimination, unfair labor practices and unfair employment termination, caused the laws lack flexibility and other characteristics in which are necessary to regulate economic environment. In fact, laws and regulations are one of the most concerned factors in decision of establishing a business unit or investing a project. Therefore, the great labor protection of Thai labor law and lack of economic functional provision might create disadvantages to the employers' side. In the event of economic necessity, the employers might less in alternative options for handling with labor and employment issues. Improvement of economic efficiency in Thai labor laws could be carried out as the following: it is important to understand the characteristic of restructuring as a business activity (4.1), learns and recognizes the provision of Thai labor laws which are used to handle with any activities contained in restructuring framework (4.2), manifests the possible impacts from inadequate legal measures (4.4), and applies and adopts new legal and managerial measures for handling with restructuring from international standard and other countries (4.4).

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4.1 Inexplicit definition of restructuring in the Thai labor law, implied definitions in other countries and suggestions.

The definition of restructuring was defined variously in each country. Some countries defined the definition of restructuring into the national statutes but implied the definition of restructuring was interpreted and laid down as the yardstick by the courts in some country. As explained in the Chapter 2 about the meaning of restructuring in terms of business administration, restructuring was used to widely call the different degree of business management from the change of working structure to the most intensive labor issues, like massive layoffs. The law was used to uplift the intensive levels of social security by the meaning of limitation of employers' rights and determination of management duties. Restructuring was mostly used as an excuse for the termination of employment or change of working conditions. Such results were caused as every country tried to add some flexibility to their labor regulations or relaxation to their legal environment in order to cope with global economic competitiveness. Economic necessity of employers was taken into consideration by the courts as a valid reason for termination of employment or massive layoffs. Restructuring was included. Economic reason was broadly enacted to labor laws in accordance with business nature where changes applied day to day. On the other hand, legal protection would be worthless if the courts agreed to every alleged

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business reason. The employers would also get a hard time in management if there was no standard for classification of a valid business reason.

These followings will explain how inadequate meaning for coping with economy of restructuring in Thai legal system (4.1.1) and stipulate the effect of such inexplicit definition (4.1.2). Finally, it will suggest the meaning of restructuring that might be used to implement into an approach in accordance with current economic climate (4.1.3).

4.1.1 The inadequate implied meaning of restructuring in the Thai legal system.

According to section 49 of the Act on the Establishment of and Procedure for Labor Court, B.E. 2522 (1979) stipulated that "In dismissal cases, where the labor court thinks the dismissal is unfair, it shall order the employer to reinstate the employee at the same level of wages at the time of dismissal. However, if the labor court thinks that such employee and employer cannot work together, if shall fix the amount of compensation to be paid by the employer whereby the labor court shall take into consideration that age of the employee, the working period of the employee, the employee's hardship when dismissed, the cause of dismissal and compensation the employee is entitled to receive"[212], this section gives a full and

[212] The Act of the Establishment of and Procedure for Labor Court, B.E. 2522, (Thailand).

wide range of power in decision making in dismissal cases. The trend of results was various upon the particular fact of each case. However, in the era of intensive economic competition, we should question the exercise of such power for what its boundaries are and which a court decision can reach. This unclear scope of decision making of the courts provided an unreliable legal environment and obstacles to business development.

The closest idea of restructuring, ever shown in the Thai labor law, is contained in section 121 of the Labor Protection Act. B.E. 2541 and stipulates that "When a boss wishes to terminate the employment of an employee because the boss is restructuring the work units, production, distribution or service processes, as a result of mechanization or changes in machinery or technology, thus making it necessary to reduce the number of employees, paragraph two of Section 17 shall not apply, and the boss shall inform the Labor Inspection Officer and the employees whose employments are to be terminated of the date of termination of employment, the reasons for termination of employment and the names of the employees not less than sixty days before the date of termination of employment...."[213] Such restructuring definition contained in this section covers in cases involving mechanization or changes in machinery or technology only; moreover, this section was enacted for extending the

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[213] The Labor Protection Act. B.E. 2541, (Thailand).

notification period that is specified in the section 17 to sixty days or specifying special compensation payments in lieu of notice in addition to the compensation payment in lieu of notice in section 118[214]. The definition of restructuring in this paragraph still was not the same as the studied model of restructuring in this thesis.

The Bankruptcy Act B.E. 2483 provided the definition of "reorganization" which can be considered as a synonym of restructuring but reorganization in the terms of the Bankruptcy Act contained the deferent purpose from the restructuring in this question. Section 90/2 of the Bankruptcy Act B.E. 2483 stipulated that "The creditor, the debtor or a State agency under section 90/4 may file a petition for the reorganization of the debtor's business in accordance with the provisions of this Chapter, regardless of whether a bankruptcy action has been instituted against the debtor or not.[215]" This reorganization was not the normal practice in the terms of business administration. It was presented in the time of an enterprise became a debtor and was in the proceeding of the court. The enterprise becomes insolvent and goes bankrupt. On the other hand, restructuring in this thesis was a normal practice that can happen anytime in the life of an enterprise, even in profitable situations, upon a managerial decision. If we derived the meaning of reorganization

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[214] Ibid.

[215] The Bankruptcy Act B.E. 2483 (Thailand).

from the Bankruptcy Act B.E., the question for a restructuring plan would also change from how the enterprise develops or gains competitiveness and how the enterprise survived from bankruptcy.

4.1.2 Effect of inexplicit definition and implied definitions in international law and other countries

Some provision in Thai labor laws attempt to conclude all possible scenarios in labor market and to specify the results of such activities or actions into contents of the laws. All known too specific provision of laws cannot cope with the changing economic societies. Thus, some provisions of the Thai law extend the juridical power of the court, other than implying the law, to dismiss the case with its own estimation and opinion. Such conclusions of the court will become a yardstick for further cases. Section 49 of the Act on the Establishment of and Procedure for Labor Court, B.E. 2522 (1979) applied to all dismissal cases - both individual and collective cases – allows courts to justify the validity fairness of dismissal reasons with its own consideration. From the collective results of the achieved cases in dismissal for economic purpose, the criteria that the court used to verify the dismissal can be divided as follows. Firstly, economic loss of the enterprise must be regarded as a substantial loss in capital, not just loss in profit. The court will not give much weight to the employers' defense of economic loss, especially any economic loss suffered in

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the early years of the enterprises. Thai court tries to keep the degree of job security.[216] Secondly, the court must ensure that employers have tried every possible alternative option before occurrence of dismissal[217]. It allows the employers to show their intension to mitigate and avoid such reduction in force. Thirdly, classification measures that have been used for selecting workers is reasonable, fair and non-discriminatory[218]. Finally, the procedure before and during dismissal must be legal and fair[219]. Most of the Thai courts uphold that restructuring might take place only in economic downturn. The focus point of management turned from profitability to survivability regarding far away from competitiveness in the market. They got a hard time in running business, management and financial capacity. Moreover, in some situations, reduction in workforce is not the last choice, but it can be the best solution for management tasks to improve competitiveness.

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[216] Kasemsan Wilawan, *Labor Law and Human Management*, 1 3 ed. (Bangkok: Winyuchon Publication House, 2017), 190-93.

[217] Ibid.

[218] Ibid.

[219] Ibid.

Restructuring in understanding of ILO indicates a normal practice in the terms of business management in order to cope with changes in economic societies and it will become necessary and an effective solution for the survivability of an enterprise in business recession. Restructuring represents the cumulative business activities, such as job mobility, transfers, mitigation, dismissal and layoffs. Some of its plans might a take long time to apply to an enterprise and some of it is required to apply at the beginning of the plan.

In the United States, the courts developed the business judgment rule that supports the exercise of managerial power. The business judgment rule seeks to engender and protect from court interference[220]. Explanation of how business judgment rules apply in the context of employment is in Pogostin v. Rice (Del. 1984)[221]. Even in the case of the employment at-will, business judgement rule might be applied. For example, the Kumpf v. Steinhaus (779 F.2d 1323 (1985)), William A. Kumpf, plaintiff, the employee of Lincoln Wisconsin, was dismissed at the time of Lincoln Wisconsin being in the scenarios of merger into Lincoln Chicago. Kumpf is one of two board of Lincoln Wisconsin who dissent the merger decision. At the time, Orin A. Steinhaus, defendant, is responsible to reorganization of all sale agency of Lincoln Life, so Lincoln

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[220] Fisher and Lenglart, 192.

[221] Pogostin V. Rice, 480 A.2d 619 (1984).

Wisconsin is one of the Lincoln family firms. Kumpf is an at-will employee. he alleged that his dismissal is on the ground of tort that is one of the exemption of at-will doctrine, and Steinhaus acted on the self-interest, he called "Greed".[222] Thus, corporate restructuring and reduction of force were based on the understanding of business person or management. The implied definition of restructuring was extended much more than in Thailand. It might be applied in any perspective of business as far as an employer can satisfy a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith, and in the honest belief that the action taken was in the best interest of the company[223].

In France, the labor code extends the justified economic reason for dismissal included a dismissal which applies to an employee for maintaining the competitiveness of the enterprise. It is increasing the range in exercising of management power of the enterprise. It shows that such legislative power provides the flexibility to the law in order to cope with the economic activities. Moreover, the indicated presumption that will be used to justify such economic reason aims to test the intention and effort of an employer or a manager much more than let the court

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[222] Kumpf V. Steinhaus, 779 F.2d 1323 (1985).

[223] Ibid 191.

who might not regard as a sophisticated business person makes the decision over the fact of the case.

4.1.3 Suggestions on restructuring definition with enhancing economic purpose

In the purpose of development of the Thai labor law, understanding of restructuring upon a present of this thesis will make the law cope with the change in economic society. It will generate the flexibility to the business sector. From the study, legislative power might enact the meaning of restructuring into the law or just specify the presumption or justified reasons for dismissal into the law. On the other hand, according the Thai legal system still applies the common law style and that the court still makes decisions over cases by referring to the standards made in the case before. The meaning of restructuring might be suggested in the form of presumption contained in the secondary law like act, decree or recommendation in order to use an interpretation in each case.

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4.2 Handling restructuring with legislative power in Thailand

Rights and duties bring every person, both employers and workers, in an enterprise to form each business function that works compatibly with each other every day. The law functions to specify the duties of each role and to limit the exercise of rights. Even employers fundamentally entitled to the freedom to establish and manage their own business, but restructuring was an exercise of power that affected others.

Restructuring also regulated and controlled by the law. Just like every country in the world, Thailand used legislative power to primarily define the rights and duties of an employer. These following statues related how Thai laws cope with restructuring which is described in two parts: the minimum standard that was set in Thai labor law (4.2.1) and inflexible working condition adjustments and unpredictable results in dismissal cases that trend to serve much on labor protection (4.2.2).

4.2.1 Set minimum labor standards in Thai labor law

Employment relationship starts from the section 575 of the Civil and Commercial Code which specifies the formation of employment agreement that an employee agrees to render service to an employer in exchange for remuneration payment for the duration of the service[224]. Sometime they might be bound together orally, because the section did not require forming the employment agreement in writing. However, such agreement, in whole or in part, will be regarded as invalid if it provides less favorable conditions to an employee than the minimum requirements set out in the laws. Most of the minimum requirements were defined in the Labor Protection Act B.E. 2541 (1998). Firstly, the Section 23 limited regular working hours at 8 hours per day and 48 hours per week, and 7 hours per day and 42 hours per week for hazardous work. The limited working hours are various upon the kind of work that

[224] Civil and Commercial Code of Thailand.

was specified in the applicable ministerial orders.[225] The general conditions of leave, breaks, holidays, annual leave, overtime work, and weekend work were defined in the other sections in Chapter 2 of the Labor Protection Act B.E. 2541 (1998). Chapter 3 and 4 regulated issues concerning women and young worker orderly. The rule for general remuneration payment, like wages, overtime pay and holiday pay, are in Chapter 5. Secondly, before the formulation of the Labor Protection Act B.E. 2541 (1998), the provision of notification for termination was contained in section 582 and 583 of the Civil and Commercial Code. Later, the Labor Protection Act B.E. 2541 (1998) placed such provision to section 17 that the notice for termination shall be given before or at the pay date to affect the following pay date. Thirdly, the national minimum wage was specified in the wage committee announcement on minimum wage rate that will be amended each year. The minimum standard is a formed function as the boundary of power exercising of employer.

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4.2.2 Inflexible working condition adjustments and unpredictable results in dismissal cases

In case of employers intended to adjust the working condition, an employer's action would be limited with the following provisions. Section 575 of the Civil and Commercial Code specifies the formation of employment agreement. The

[225] The Labor Protection Act. B.E. 2541.

law provides employers and workers an occasion to negotiate and establish an employment relationship upon their real intension wherever not against any laws. New working condition will form as employment relationships upon mutual agreement by both parties. However, most employment in Thailand is rarely created with written agreements. There is section 108 of the Labor Protection Act B.E. 2541 (1998) that regulated the duty to post the initiated work rule in the workplace and consisted of eight matters. The work rule will contain most of details and working conditions which is applied to all employees in the workplace. To amend such working rule, employers had to comply with Section 110 of the same act. Employers have to be cautious for such amendments because section 20 of the Labor Relations Act B.E. 2518 (1975) determined that any working condition between employer and individual employee shall become enforceable, except if it is more favorable to the employee, after the agreement relating to conditions of employment (Collective agreement) came into force. Provided that an employer demanded to amend the agreement relating to conditions of employment, he needs to follow the procedure specified in Section 13 of the Labor Relations Act B.E. 2518 (1975). Section 10 of the Labor Relations Act B.E. 2518 (1975) perceived work rules as an agreement relating to conditions of employment, announced work rules were compatible with the agreement relating to conditions of employment and if amendment had to comply with Section 13 of the Labor Relations Act B.E. 2518 (1975) as the same. Such conflicting problems between

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work rule and the agreement relating to conditions of employment was clarified and held in judgment no. 8396-8399/2550 of the Supreme Court.

In case of termination of employment cannot be avoided, the following provisions would be taken into consideration. Section 582 of the Civil and Commercial Code set the notification procedure for terminating of an individual's employment contract. Section 17 of the Labor Protection Act B.E. 2541 (1998) stipulated in accordance with the Section 582 included notification for specified period contract and the result of failure to state the reason upon Section 119 of the same act. The exemption to employers from severance payment was contained in Section 119. Section 43 grounded the protection for termination caused through pregnancy. Section 75 allowed employer to temporary suspend their business with remaining fifty percent payment of wages. Section 118 contained the classified rate for severance payment upon working period of an employee. Section 120 showed the reason of employment termination for relocation of workplace that entitled to special severance payment. Section 121 showed the reason of employment termination for mechanization. It extended the normal notification period and determined the special compensation in lieu of advance notice in case those employers fail to notify. Section 31, 52 and 121 of the Labor Relation Act., B.E. 2518 (1975) give protection from dismissal to employees, representative of employees, committee members or sub-committee members or members of the labor union, or labor federation during the consideration of submitted labor issues upon section 13, or dismissed because of obstructing them

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in performance of duty, or dismissed because they were in such duties or intension was to prevent them to perform their duties respectively. Section 49 of the Establishment of and Procedure for Labor Court, B.E. 2522 (1979) give the courts power to make the decision over the dismissal case whether it was considered fair or unfair. These showed an employee still to be entitled to bring the dismissal case to the court under the protection of section 49, although employers completely followed the rule of law and performed all legal requirements. Ultimately, the fairness of the dismissal will be considered by the court upon the power given by section 49.

4.3 Effect from insufficient protection and mechanism in the Thai labor law

From 4.2 Handling restructuring with legislative power in Thailand, the following parts will describe the effect of such insufficient provision to minimum labor protection standard (4.3.1) and court decision (4.3.2). In addition, the effect of inadequate labor protection for collective dismissal will be included (4.3.3).

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4.3.1 Strict minimum standards

Like many other countries, the Labor Protection Act B.E. 2541(1998) assured all minimum standards in employment relationships e.g. the minimum wage, working hours limitation, and other protection. The law tried to specify the boundary of exercising of employers' power and laid down free zones above the minimum standard for negotiation between parties. In accordance with the principle of 'Freedom of Contract', the agreement should contain whatever possible promise and commitment that will not abuse any other's rights and will not go against any rule of

law. However, employers put a lot of effort into maintain minimum requirements in business recession; they need some release and relax in such requirements. We need to admire that employment relationships are in consideration of triparties – employers, workers and government. Once employers who create the existence of placement in particular countries can face problems in trying to meet the law's requirement in labor protection or contain expensive cost of administration, it will affect all systems and all counterparts in the labor market. The number of available jobs in the countries will decrease and the figure of unemployment will increase accordingly. Working condition adjustment seemingly affects working life in negative matters, but in from another perspective, it is a compromised way to cutoff the enterprise's expense and to avoid layoffs.

4.3.2 Court decision

Section 49 of the Labor Protection Act B.E. 2541(1998) provides the labor court very wide powers in considering dismissal cases. Judgments that contained the court decision in restructuring excuses can be found in the case in which the judge applies section 49 of the Establishment and Procedure for Labor Court, B.E. 2522 (1979). The judgment of the court was in favor of which party upon various facts of each case. The court tended to test the employers' defenses with these following criteria; (i) in the time of recession, sometimes dismissal is the only way that can solve the problem in the enterprise. It needs to manifest the necessity in applying dismissal

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methods that dismissal can substantially reflect the essence of an enterprise's problem. The sample case for this criterion was shown in judgment no. 96-98/2544 of the Supreme Court that the employer defended an unfair dismissal claim, whereby he had dismissed the employee because of the economic necessity. It is necessary to cope with global economic competition; by the way of restructuring and reengineering. The fact and the evidence showed that after the dismissal, the employer newly recruited the same number of dismissed employees. The court made the decision in favor to employee that the dismissal was unfair.[226] (ii) Economic loss of the enterprise had to be a substantial loss to the capital, not just loss in profit. An employer had to prove that such economic loss was not in nature of business and affected to the enterprise's survivability. The example of judgment no. 7797-7807/2553 is that the plaintiff, eleven employees, bring the suit against their employer on the ground of unfair dismissal with demanding for compensations at THB 5,000,000. The defendant, an employer, acted on behalf of the company, states that the company was faced with loss in business and the salaries of eleven employees being too high than the company's effort. The employer need to do restructuring and perform work internal work rotation that will affect to the position of those eleven employees. However, the employer has considered to dismissal of eleven employees with their performance

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[226] Judgment No. 96-98/2544.

and the necessity of company financial effort. The court held that the financial loss of defendant is not enough. It is just loss in profit that is not substantial to make dismissal of their employees.[227] Moreover, there are another case, such as 9274/2559 or 6099/2556 that the court will consider the fairness of dismissal from the actual performance and loss in capital of the business. The court will not hold managerial decision in the term of business practice. (iii) The classification of dismissed employees is based on the valid and lawful, non-discrimination and fair justification. (iv) The employer had to prove that fair practices were engaged to the employees and workplaces. Any legal requirements shall be met before dismissal. (v) The dismissals still happened, even if the employers took every precaution method and applied any possible alternative measures in order to minimize or mitigate or avoid such situations and damages.[228] From such presumptions, some dismissal cases are a result from the employer's effort to adjust working condition where such demand is rejected or does not work well after the adjustment is applied. Employers have to encounter the labor court's decision when such dismissal is brought to the court. Managerial decisions and carefulness of managers is not included in consideration of the case. These provide fewer choices for employers in applying changes to the enterprise. According to the

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[227] Judgment No. 7797-7807/2553.

[228] Wilawan, 191.

result, restructuring will be long lasting in an enterprise's life time, fewer choices in change might turn down opportunities of improvement and lead an enterprise to hard times in the future.

It is hard to measure the reflection between the problem and the solution. Some of the restructuring plans might not affect the change in short term period and some might not affect directly to the problem. The restructuring plan needs sophisticated knowledge and study in the field of management that a business person in a management position is in charge of and should be the right person to concern and work over it.

As a strong standpoint of this thesis, restructuring is a very common business task that every enterprise will work towards in business society. Restructuring plans can also be established and implemented anytime in the life of the enterprise, not only when the enterprise faces a great recession or substantial loss.

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4.3.3 Inadequate labor protection for collective dismissal

Sometimes, flexibility in workforce adjustment is important for the business management or for restructuring because some might cause greater than a dismissal of a few employers. The massive layoffs can cause a lot of social impact. It might blow off the unemployment rate, take all stakes to painful situations and adversely affect national financial status. The protection for collective dismissal will

help create the precaution measures that will bring employer's plans to the inspection of labor authority. Thai labor laws do not lay a precaution measure or procedure to minimize damages from collective dismissal. It just provides some protection for a common dismissal as the followings: dismissal of the employees during the demand is in the course, dismissal of employee committee's member without permission of the labor court, dismissal during the force of condition of employment agreements, decisions or awards, dismissal on the reasons that the employees take a legal action, and dismissal regarded abusive of agreement related to condition of employment[229]. Unlike in France, it indicates procedural requirement before an actual implement of collective dismissal plans.

4.4 Labor protection and mechanism for restructuring in the international standard and other countries

These are how Labor protections and mechanisms for restructuring in the international standard and other countries apply to modify the insufficient provision in Thai labor laws. There are 5 issues to be described. Firstly, Labor-management rule from Japan will apply to fix the strict minimum standard (4.4.1). Secondly, the economic ground will be obtained to make dismissal flexible and just for every involved party and will be a guideline for making court decision in order to provide

[229] Ibid.

more space for management action (4.4.2). Thirdly, there are collective bargaining models that might be used to promote collective action (4.4.3). Fourthly, establishment of training system is a solution that can reduce risk from social interest efficiently (4.4.4). Some of them will be taken into discussion to make more flexibility in the laws in order to derogate some restriction for managerial activities, but some might use to make fairness every party in accordance with economy and society. Every suggested measure aims to maintain and improve goodness in employment relationship as the same.

4.4.1 Establish labor-management rule

Thai labor protection law should recognize an exemption from the agreement called the 'Labor-management agreement' for the minimum standard of working conditions that are laid down in the labor protection law. This is the idea from Japan that the employers treat their employees like a partner in order to discuss and figure out the difficulty of whole business model. This agreement will be the most effective way in changing working conditions and reduction in workforce. It lets workers take part in the restructuring plan. Employers get an opportunity to communicate about situations of enterprises and present the restructuring plan to workers while employers can gather or get to know more workers' interests and learn about other problems in restructuring plans in other perspectives. The labor-management agreement will allow employers and workers to be bound in employment

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relationships that are under minimum standards required by laws in specific periods after being mutually agreed by both parties. However, labor protection laws have to contain and detail the procedure and principles of establishment of the labor-management rule very strictly.

4.4.2 Provision of dismissal for economic ground and its presumption

In France, the labor law allows the dismissal based on economic ground. The justified reason includes technological changes, economic difficulties, rejection of working, condition modifications request, and maintaining of competitiveness of the enterprise. It is a kind of specified ground for the justified reason. The legislative power intends to establish this provision into the law and extends the freedom of the enterprise. These shows how the law can be developed to cope with globalization while the law is created with accurate words and phrases enough to promote the ground of dismissal without exaggerating empowerment. The law provides some release and relaxation for the business sector and still work well as the regulator. Moreover, French law affirms the provision in testifying carefulness of managerial decisions, which make the law concise and flexible. In the U.S., an employer is only required to prove the duty of care upon business judgment rules. Following the judgment trend and enacted laws in both civil and common law system countries, the courts emphasize the power of managements and managerial decisions. According to the appropriate meaning of restructuring in understanding of a business

person[230], the Thai court has to get rid of the old consideration norm that developed from the judgment of the previous case from time to time. Legislative power has to create the rule in validating business reasons for dismissal based on such meaning of restructuring. The newly created law has to allow changes or dismissal from managerial decisions that a manager has proved his own actions being for the best interest of an enterprise, without conflict of interest and being on the edge of duty of care. The burden of proof will be the responsibility of an employer or a manager.

4.4.3 Promotion of socialism in collective bargaining

There are big differences in how to treat collective bargaining in each country. In the United States, individualism is deeply rooted in the American worker's attitude. Employees will bargain on their own to secure their interest and employers will persist with the property right to engage economic activities on their own intention. The collective bargaining will abuse the property right of employers in managing their business. With the nature of collective bargaining, the individual interest will be subordinated in order to conclude the major interest of all workers who are represented by the union, it means some individual interests are also abused or

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[230] Refer to Chapter 2

ignored.[231] The collective bargaining in the U.S. works as a strict economic function that will be used to serve entrepreneurs' or shareholders' business purpose.[232] In Europe, labor unions and employer associations are considered as social partners. In France, the legislation empowers the trade union to bargain at national level. Any change to the regulations in relation with working conditions and employment relationships must bargain with a representative of the trade union and employer association in advance. These provide a secure negotiation in order to avoid the crisis for a labor dispute. Moreover, French law provides collective bargaining in other levels – industry level and company level, these made collective agreement and can be concluded with specific terms and condition that are applicable to different types of occupations or industries. It is easier in response to interest of workers. In Japan, the legislation allows numerous establishments of the union in an enterprise and indicates the legal obligation for employers to negotiate with every existing union in the enterprise. Japanese enterprise treats the labor union as a partner and they negotiate with each other with good cooperation and intention to survive the economic recession together. The improvement of collective bargaining will empower

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[231] Richard N. Block and Peter Berg, *Collective Bargaining in Context* (W.E. Upjohn Institute for Employment Research, 2003).

[232] Ibid.

employees in bargaining or negotiation with employer, while the employees will be taken into the position where they need to be responsible with the survivability of the company as well. From this point, the employees will be treat as a social partner of the business. Both party will negotiate the condition of employment in amicable atmosphere and admire to decrease their expectation to serve survivability of the company until its recovery.

4.4.4 Establishing the training system

Training is a mechanism to improve the value of workers' skills. Employers can expect higher qualities from the same workforce. On the other hand, training systems make employees improve themselves, acquires more professional skill and energizes their expectation on their career. Training systems will encourage them to be self-confident and self-confident to confront challenges. Training system in Japan is very unique and very efficient because it was built and grounded from the cooperation between employment sector and educational institution. The system produces people with strong basic knowledge and proper attitude for future development. Japan also laid over the laws and regulations for regulating training system. The Human Resources Development Promotion act ensure the opportunity to access and receive vocational training of employees. In Japan, the employment custom created the gentleman like agreement as a lifetime agreement that is well compatible with the training system. The employee can perform and make the training

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system that plans and set expectation for the long term. Most of the professional skills can be manifested with long periods and need experiencing to gain on a day by day basis. Some skills might take a long time before they can contribute to the actual benefit to the enterprise. Moreover, the flexibility nature coming with lifetime agreements work very well with the training system that the employer can rotate an employee to any position in the enterprise to serve the demand of the enterprise even form white-collar to blue-collar. While the cost will be incurred from both recruitment for fulfilling the business function that lack of workforce and budget for paying out a compensation for dismissing employees due to over demand, both party will rely on the training system that make productivities in work at the same amount of workforce and gain more employees' confident in the event of work rotation. Training system will also work well with the situation of the Thai elderly 2015 showed that Thailand trended to gain the population age 60 years at the rate above 4 percent per year from 2005 and the office of the National Economic and Social Development Board (NESDB) forecasts that Thailand will completely transform to an aged society in 2021. Upon the forecast, the population age 60 years will count 20 percent of all population.[233] The promulgation of the elderly employment bill is soon pass and

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[233] Pramote Prasertkul, "Situation of the Thai Elderly 2014," ed. Foundation of Thai Gerontology Research and Development Institute (TGRI) and Mahidol University

enforced in accordance with the 12th National Economic and Social Development Plan of Thailand and the suggestions on sustainable income security for the elderly promotion. The employers might manage this scenario to enhance the effectiveness of training system by maintaining the appropriate amount of their senior employees and assigning them to support the on-job-training program. The employers might award them for such performance to persuade them to work in such role. This informal on-job-training program might be the valuable investment on development of human resources. Employers will continue the business with higher quality of work substantially.

In this chapter, it has shown the problem in Thai Labor law and set a few mechanisms that might be used to apply to fix such problem in order to provide more employees' protection and economic flexibility. This thesis will end with summary and suggestion in the next chapter.

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Institute for Population and Social Research (Taling Chan: Amarin Printing & Publishing Public Company Limited, 2016).

Chapter 5

Summary and suggestions

5.1 Summary

Because of the fast-growing innovation and technology and economic recession around the world, business units are forced by economic necessity to improve their productivities and economic competitiveness. Restructuring plans, as normal managerial task of the entrepreneurship, might be intensively studied and carefully created. In economic society, restructuring, a mechanism to uplift an enterprises' competitiveness potential in business societies, can change the ways of works, enterprises' structures and business behaviors. To make a great intensive impact and stability, targeted structures must fundamentally apply to the root of business structure and to every perspective of the business function. Restructuring allows an enterprise to conduct its business activities effectively with cheaper operation costs and can be performed at any time during an enterprise's lifetime. However, from the legal perspective, restructuring activities must be carefully conducted because it might cause a lot of social unrest. Restructuring activities might be performed as long as it is not against the law of the particular country. The law needs to provide an adequate degree of flexibility that will not lead the business into crisis. Whatsoever, cost of labor, the largest funding of all capital of an enterprise, is unavoidably affected. Restructuring

includes many actions on employment relationships and labor issues: conciliations, working condition modifications, relocations and reductions in workforces. The employers are required to study how to progress restructuring plans in the appropriate way because they need to handle unavoidable increasingly intensive degrees of business recession and the following negative effects from the employees' mindsets inside the enterprises. There are employees' rights and protection and employers' rights in property existing in an enterprise. Employees' right ensure every worker the opportunity to gain the qualities of living and freedom to chooses or accepts designed work. They are rightfully entitled to get such a fair remuneration, decent conditions of work, and appropriate working time. Employers' rights are entrepreneurship right that allow every entrepreneur to freely determine their economic status and increase their wealth. The exercising of such rights and the restriction of rights exercising in restructuring frameworks should be equalized on the ground of fairness. Notwithstanding, the occurring employment relationships are seemly fair as long as they are economically worth. If either party to the employment agreement perceives unfairness in the agreement, such employment agreement will be vanished in accordance with both parties and have advantages towards each other in the bargaining process. Such occurred employment relationships will also be considered fair if they comply with the applicable laws and regulations otherwise they might be void or invalid.

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Thai labor laws should provide greater support in business activities and still function as the regulator to protect social interests at the same time. Thai labor laws do not provide the effective way or flexibility of working condition modifications. There are several measures in the legislations of France and Japan that can be adapted to support changes in employment relationships in Thailand. In case of reductions in forces, the presumptions, that are used to justify dismissal reason upon article 49 of Act on the Establishment of and Procedure for Labor Court, B.E. 2522 (1979), indicates that Thai courts still perceives restructuring as a method which might be used when an enterprise is confronted with significant lose in capital. Neither Thai laws can describe or define the significant characteristics of restructuring in business terms. However, we can find more extended economic meaning of restructuring in the ILO guideline, the U.S. business judgment rules and the dismissal on economic grounds in France. In addition, section 49 authorizes the court to review and make decisions on economic reasons for dismissal. The cases that refer to section 49 stipulate the presumptions to testify the fairness of dismissal reasons. The court will consider fairness of such dismissal reasons from the facts of the cases, not from the managerial decisions of the employers. Inflexible labor regulations will make fluctuation to business sectors and labor markets.

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Thai labor laws should be amended to support the characteristics of the restructuring. Not only targeted amendment of Thai labor laws will provide flexibility to the business sector, but also assist an enterprise to avoid Labor crises that might

occur in business recessions. The section 49 of the Labor Protection Act B.E. 2541(1998) should be amended to contain economic grounds for dismissal. Like in France, the law does not freely allow the employers to dismiss their employees just because they come up with any economic necessity, but French labor laws specify which economic reason that might be cited as a valid reason for dismissal into the laws. Such provision of French labor law includes dismissal which is the consequence of rejection of working condition modifications with economic motivation of the employers. It provides some relaxation to employment modification. The presumptions that are used to justify dismissal reason upon article 49 should also affirm the validity of managerial decision. Thai labor laws should provide a precautionary measure to monitor or investigate collective dismissal (Layoffs or plant closure) before implementation of the plan. Labor-management rules should be recognized for enhancing efficiency and flexibility in employment relationships. Finally, to maximizing effectiveness of restructuring plans and minimizing adverse consequences, the following legal and managerial measures should be included in the restructuring plans and regulations; consultation, negotiation, skill assessment, training, internal job search and early retirement.

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5.2 Suggestion

From the discussion on the decision making of court for the dismissal case, the section 49 of Act on the Establishment of and Procedure for Labor Court, B.E. 2522 (1979) empower the court the wide range for decision making. The provision of dismissal for economic purpose might be obtained in the Labor Protection Act, and the exemption to limit power of court in dismissal for economic ground might be added to the section 49 of the Establishment of and Procedure for Labor Court. Other measure and provision of laws should be concluded and implement to Thai labor laws. Suggestions in amendment of the laws shall be conformed as, amendment of the Labor Protection Act (5.2.1), amendment for adding consideration of economic reason and exemption to limit power of court (5.2.2), Establishment of training system (5.2.3) and other managerial measures and development policy (5.2.4).

5.2.1 Amendment of the Labor Protection Act (No. 6) B.E. 2560 adding provision of dismissal for economic purpose.

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5.2.1.1 General provision of dismissal for economic purpose

I suggest to enact section 121/1 to the Labor Protection Act to allow the dismissal for the economic difficulty, restructuring, and rejection of the employment relationship modification with economic motivation and so on; in addition to open for other economic reasons which the government admires appropriate to be included. The section 121/1 shall regulate employer to send

notification, consisted with number, name and reason for dismissal, to employees and the labor inspector prior to the dismissal at least 60 days and the provision of severance payment in lieu of advance notice.

Including of employees' rejection of employment relationship modification with employers' economic motivation into this section will provide a fair solution for employment relationships that cannot mutually agree to the modification of working conditions. However, it encourages the employers enter into negotiate for the expected working conditions before dismissal.

5.2.1.2 Massive dismissal for economic purpose

I suggest to add section 121/2 to the Labor Protection Act for the purpose of the employers intend to make massive dismissal. The section 121/2 shall be regulated that the employers who intend to make massive dismissal shall submit a report to the labor inspector. The report shall indicate restructuring plans which specify the time of dismissal, processing details, numbers of affected employees, budget for payoff in dismissal, training, rehiring program, and reason grounded for massive dismissal. Submission of such restructuring plan will help government to mitigate possible social problem and make the plan more prudent. It helps to protect the employees from dismissal without cause since the employers need to provide the reasons of dismissal and get approval before the dismissal plan take place.

The provisions shall also include the 120 days period of notification that the massive dismissal plan shall be sent to the labor inspector and

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notice of dismissal shall be sent the employees. The section 121/2 shall contain timeframe for reviewing such plan and the procedure for plan approval. The consideration of approval shall be granted by balancing between social issues and economic necessity and considering to the reasonably of all measures that reflects the social responsibility of the plan.

To clarify, the government might keep announces and update the number of dismissal that might regard as massive layoff. It is related to how many the employees who lose their jobs affect to economic situation in country.

5.2.1.3 Employment condition modification for economic motivation

I suggest to provide flexibility into Thai labor laws and more choice for the employers to adjust working condition. The labor-management rule should be contained in the section 121/3 of Labor Protection Act. The rule will include the formation of the agreement, agreement reviewing process and approving process. The agreement might be formed by employer proposing their demand to make such agreement to the employees' representative or labor union to enter into the agreement reviewing process. The rule shall specify timeframe and procedure of agreement reviewing process. The employees' representative shall be appointed to join the negotiation with the employers in order to find the mutual agreement in employment. The allowed range of negotiations for altering minimum labor requirements in additional paragraph of each provision of the Labor Protection Act B.E.

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2541 (1998), like allowed extension of working time upon the labor-management agreement (section 23), decreased minimum compensation or remuneration or simulated situation that allow to make such agreement, should be carefully and accurately specified to the law.

Section 20 of the Labor Relation Act B.E. 2518 (1975) might add the exemption to allow making the labor-management agreement upon the employers' or the employees' request. All made labor-management agreement need to be monitored and reviewed under the vision of government authority.

5.2.2 The consideration of economic reason validity

I suggest to make section 49/1 into the Act on the Establishment of and Procedure for Labor Court that shall contain the consideration for validity of such economic reason acquired for dismissal. All economic reasons for dismissal should be testified by business judgement rule that such dismissal will be applied upon managerial decisions; Firstly, the manager or representative act in the best interest of the enterprise. There is no conflict of interest. They do not use the enterprise's resource in order to achieve their own interest or benefit. Secondly, the action that shall be done to achieve the enterprise's goal construe the duty of care of the manager. They act without negligence or careless. Thirdly, the manager uses all for their knowledge and skill as much as the person in this position should have.

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5.2.3 Definition of restructuring

The relevant authorizers or inspectors need to promote and understand the substantial characteristics of restructuring in the economic terms. If all section can be amended or can be added in to the laws as above, stipulating the definition of restructuring into section 5 of the Labor Protection Act. This will make an explicit direction for labor legislation in the civil law system. The definition shall include; the flexible time to apply restructuring process that can be achieve in anytime and the ability to develop business model to work more efficient with lower cost.

5.2.4 Establishment of training system

The training laws shall be adopted to create and regulate the training system. The laws shall indicate these followings; firstly, the employers need to provide opportunities and supports for employees to receive training. the employers shall allow the employees to take a long leave or to skip a part of working time to take a training courses, or they shall provide their employees paid leave during the training period. Secondly, the law shall specify that the employees in the concerns of taking training course might be the one who voluntary accept to improve their skills and the one who seek for the job. Thirdly, the government shall develop the support system, like establishment of training institution, the incentives for employers who create the training courses. The government shall also create the standard line for training program, appoint the inspector or monitor and establish the appraise system for trade skill test. According to the promulgation of the elderly employment bill will soon be

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passed and enforced to handle the elderly society, it can support long-term employment and it will maintain the numbers of skilled-quality workers. Training systems work well with elderly employment. Employers can count on invested training that they might expect long-term work from skilled employees. Employees are also encouraged to work with the enterprise for long-time. With training systems, employees will be capable of any changes.

5.2.5 Suggestion to other managerial measures and development policy

Creating new values of Thai labor working cultures that reminds employees of the uncertainty in the economic world and urge them to be ready for the upcoming changes. Thai employees need to speak out and stand for their interest over employment relationships and admire to economic changes, in order to develop employment relationships with their employers in the enterprise.

Promoting the employers to treat their employees as business partners. They can improve their relationships and working conditions within the enterprise in an amicable climate. They will understand each other's' problems, interests and necessities.

Create restructuring plans in accordance with ILO's guideline as per the following; study the feasibility, worthiness and necessity of corporate restructuring; closely consult with their employees to extend the perspective in the possibility of social problems and to control the risk in negative consequences; follow and stick with

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the plan that is void from the abusive of the applicable laws and the employees' rights; and finally, evaluate and record the results.

Provide assistances after the implementation of restructuring plans as per the following; skills training programs for affected employees make them ready to move on; external jobs searches will help employees to get new jobs faster; establishment of training center, listens and supports the survivors; and Let employees to alter their working schedules and times.

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