

Corporate Rescue Mechanism: Employee's Position During Business Recue in Malaysia

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ABSTRACT

Employees are essential to the success and sustainability of business operations, providing the basis for organizational productivity and growth. However, when companies face financial distress, employees are often the most vulnerable, resulting in the adverse consequences of layoffs, wage reductions, and job insecurity. In Malaysia, the corporate rescue legal framework includes measures intended to protect the employees' rights and interests during restructuring process. These measures, however, often fail to provide comprehensive and effective safeguards for employees, leaving significant gaps in their implementation and enforcement. This study examines the role of employees within Malaysia's corporate rescue framework, focusing on the relevant legal provisions particularly in three different statutes and identifying gaps requiring further research. It also proposes strategies to enhance employee protection. the research adopts a doctrinal analysis approach, systematically reviewing the statutory laws governing corporate rescue in Malaysia. It also incorporates insights from recent secondary sources, including legal commentaries, academic literature, and case law, to provide a comprehensive understanding of the current landscape. The study underscores the persistent challenges faced by employees in retaining job security, fair treatment, and adequate compensation amidst corporate rescue efforts. Ultimately, the research concludes that the status of employees within Malaysia's corporate rescue framework remains a critical issue that requires immediate attention. To address this, the study proposes a range of strategies to enhance employee protection. These recommendations aim to strike a balance between facilitating corporate recovery and safeguarding the fundamental rights of employees, ensuring a more equitable and sustainable approach to business rescue in Malaysia.

Keywords: Corporate Rescue, Business Rescue, Employee Position

INTRODUCTION

To pilot hardships and uphold regular activities, businesses might need to consider adopting a restructuring plan. A critical part of corporate revival involves employees' situations. When an employer files for bankruptcy, employees are usually among the hardest-hit stakeholders, and they require adequate recompense and protection under the law. As employees are central to a company's functioning, it is essential to focus on their well-being during corporate recovery. Therefore, companies must establish strong plans to mitigate impacts on employees and secure their rights.

CORPORATE RESCUE MECHANISM IN MALAYSIA

A corporation may require corporate rescue due to various factors, such as operational inefficiencies (Cascio, 2021; Shin, 2017), declining market share (Gibbs, 1993), financial difficulties, or strategic errors (Cascio, 2021). The process of corporate rescue typically involves a thorough assessment of the business, its stakeholders, and market conditions, followed by strategic and financial restructuring. Common strategies for corporate rescue include financial restructuring, operational reorganization, strategic realignment, and occasionally seeking external investment or acquisition (Cascio, 2021).

Similar to other Southeast Asian countries, Malaysia faced significant challenges during the 2008–2009 financial crisis (Nambiar, 2009) and the COVID-19 pandemic. In Malaysia, employee roles are critical during the corporate rescue process and are protected by specific legal provisions. The corporate rescue framework in Malaysia outlines employee rights, including the right to receive pay and benefits during the rescue period, the right to be informed and consulted about the rescue process, and the right to participate in decisions that may affect their employment, such as restructuring or downsizing (Abd Razak & Ors, 2021). However, the legal framework has limitations, particularly the absence of specific provisions addressing employee claims (Ahmad & Rahman, 2020).

EMPLOYEES POSITION DURING RESTRUCTURING PROCESS

In Malaysia, when an employer begins judicial management or a scheme of arrangement as a business rescue mechanism, it is necessary to consider the impact on employees. These processes can affect employees' job security, entitlements, and contractual rights.

The positions of employees may be affected in various ways, depending on the specific circumstances of the company and the decisions of the judicial manager. These changes may involve changes to job responsibilities, reporting structures, and working conditions as part of the restructuring process (Gill, Kirton, Cécile, & Guillaume, 2017). It is crucial for employees to understand their rights and obligations during this period and to actively engage in the process to ensure their concerns are addressed and their interests protected (Migen & Dibra, 2021). Additionally, employees may face uncertainties regarding their job security and prospects within the company.

Employees may face changes in their roles, responsibilities, and reporting structures as the business undergoes restructuring. Additionally, there may be reductions or suspensions of wages, modifications to working hours or conditions, and even the possibility of retrenchment (Abd Razak & Ors, 2021). Guaranteeing that employees are informed and consulted throughout the process is essential to safeguarding their rights.

To this end, businesses must prioritize effective communication and transparency with employees during the restructuring process. Regular updates and quick resolution of concerns are vital to maintaining employee morale, mitigating potential negative impacts on performance, and promoting trust and a sense of fairness.

LEGAL PROTECTION

During corporate restructuring in Malaysia, employees have legal protections under labour legislations such as the Employment Act 1955, the Industrial Relations Act 1967, the Trade Union Act 1959 (Ganesan, 2016) and the Companies Act 2016. These legislations are designed to safeguard employees' rights and interests during corporate rescue or insolvency proceedings.

Employment Act 1955

In Malaysia, the relationship between employers and employees is governed by the Malaysian Employment Act 1955. The Act was amended in 2022 to deal with several employment and labour rights-related issues.

The purpose of the amendment is to enhance and improve the protection and welfare of the employees and to ensure that labour law provisions are in accordance with the international labour standards.

In general, the EA 1955 is viewed as a basic safeguard for employment and designed to offer protection for private sector employees under limited statutory conditions (Abd Razak et al, 2021). It also outlined the framework for employer-employee relationships. Although, the Act grants employees with basic entitlements like wages and benefits. However, these rights are frequently insufficient during corporate rescue. It fails to outline a clear approach to employee claims during corporate restructuring (Goh & Ng, 2022).

According to Section 12(1) EA 1955 the employer may give to his employee the notice of his intention to terminate the contract of service of his employee on the reason of employer's restructuring. This can be seen under Section 12(3) which provides the grounds for the employer to give notice of terminating the employee's employment:

1. the employer has ceased or intends to cease to carry on the business for the purposes of which the employee was employed.
2. the employer has ceased or intends to cease to carry on the business in the place at which the employee was contracted to work.
3. the requirements of that business for the employee to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish.
4. a change has occurred in the ownership of the business for the purpose of which an employee is employed or of a part of such business, regardless of whether the change occurs by virtue of a sale or other disposition or by operation of law.

The above rights to retrench the employees must be exercise in good faith the employer must demonstrate the genuine financial problem which lead to the corporate restructuring as shown in the case of **Maybank Discount Bhd v. Nooraini bte Mohd Ishak [1994] 2 ILR 822**, where the employer presented proof of their losses of around RM11 million over the course of two years and the closure of one of the company's branches, leading the court to declare that the employer had legitimately exercised its prerogative. However, in another case of **Mohd Zakir Yusoff v. Telarix (M) Sdn Bhd [2020] 2 LNS 0829**, The employer laid off employees citing financial difficulties. However, it later advertised three similar positions to those recently retrenched. The court ruled the retrenchment unlawful since the employer couldn't demonstrate genuine redundancy.

Although, the EA 1955 gives the employers a permissible ground for terminating the employee during corporate restructuring, it still provides protection for the employee's interest to minimize the adverse effects of the said process on their livelihoods. The protection is:

1. the right to be informed regarding the corporate restructuring process, including any changes that might impact their terms and conditions of employment or employment status – Section 12(3) EA 1955
2. Ensuring fair and equitable treatment during corporate restructuring, including safeguarding against unfair dismissals.
3. The right to receive adequate notification and compensation in case of redundancy or termination due to corporate restructuring.
4. Employees could be considered for other available positions within the company before facing a dismissal.

Although it is within the rights of the employer to carry out corporate restructuring to ensure the company's survival until the need arises to retrench the employees, however, the employer must ensure that they comply with the requirement provided by the Ministry of Human Resources under the Guidelines on Retrenchment Management (For Employers and Employees) which was first published in 2009:

1. To arrange a discussion with the workers or their representative union as soon as possible regarding the upcoming employee termination.
2. Offering a voluntary retirement scheme with a reasonable compensation package.

3. To pay compensation or termination benefits to eligible employees.
4. Issuing termination notice as prescribed under Section 12(2) of the EA 1955 which provides that:
 - a. four weeks' notice if the employee has been so employed for less than two years on the date on which the notice is given.
 - b. six weeks' notice if he has been so employed for two years or more but less than five years on such date.
 - c. eight weeks' notice if he has been so employed for five years or more on such date
5. Implementing gradual employee termination over a longer period.
6. Implementing the FWFO (foreign worker - first out) principle in the same job category, which involves prioritising the termination of foreign workers. This is in accordance with Section 60N EA 1955.
7. Implementing the Last In, First Out (LIFO) principle applies when layoffs involve only local workers in the same job category, where newer employees are terminated before those with longer service.

Industrial Relations Act 1967

The Industrial Relations Act in Malaysia aims to promote and maintain industrial harmony by regulating the relationships between employers, employees, and their trade unions. It complements the Employment Act 1955 to protect the rights of employees.

Under the Industrial Relations Act 1967 in Malaysia, employees are entitled to various rights, such as the freedom to establish and participate in trade unions, engage in collective bargaining, and take industrial action. They are also protected from discrimination and harassment at work. Furthermore, employees have the right to adequate notice before termination and to compensation in cases of unjust dismissal.

When an employer undergoes a corporate restructuring process in Malaysia, employees have certain rights under the Industrial Relations Act 1967. These rights include:

1. The right to form and join trade unions, which are essential for representing the collective interests of employees during corporate restructuring. This is provided under Section 20 of the IRA 1967 which provides that if an employee has been dismissed from his employment without just or excuses from his employer, the trade union may negotiate on behalf of the employees to ensure their rights and interests are protected.
2. The right to engage in collective bargaining. It empowers trade unions to negotiate with the employer on matters such as terms and conditions of employment, including those that may be affected by corporate restructuring this is provided under Section 13 of the IRA 1967.

Companies Act 2016

The Malaysian Companies Act 2016 is an essential legislation that governs corporate restructuring in Malaysia which includes the provisions for the Scheme of Arrangement and Judicial Management. The Scheme of Arrangement allows a company to restructure its debts with the approval of creditors. However, the position of employees is not explicitly addressed, leaving their claims for unpaid wages and benefits uncertain (Lim, 2022).

Judicial Management on the other hand, provides temporary protection from creditors while a company attempts to restructure. While this mechanism can prevent liquidation, there is limited legal provision for safeguarding employee interests, particularly in terms of job security and wage protection (Tan & Lee, 2021). Though the provisions were not expressly safeguarding the employee's right as this mechanism often prioritize the interests of the creditors and the continuity of the business over employee rights however, it gives several protections to the employees throughout corporate restructuring.

1. Section 383(2)(r) 6th Schedule CA 2016 where the receiver has been given a power to engage and to discharge the employees of the company. However, this right must comply with the guidelines provided by the Ministry of Human Resources and the EA 1955.

2. Subsection 414(4)(k) 9th Schedule CA 2016 where similarly with Section 383(r) it grants power to the Judicial Managers to employ or to dismiss any employee.
3. Section 392(b) CA 2016 provides that All earnings received by an employee, whether through salary, wages, or commissions, as stipulated in a work contract or employment agreement, will take second in the priority over the debenture holders. These payments shall be made from the assets received by the receiver or receiver and manager, or any other person taking possession.
4. Section 527 (1)(b)(c)(d) and (e) provides that in a winding up of a company there shall be paid in priority to all other unsecured debt including all salary or wages whether or not earned wholly or in part by way of commission, under any contract of employment of any employee; all amounts due in respect of worker's compensation under any written law; all remuneration payable to any employee in respect of vacation leave; and all amounts due in respect of contributions payable during the twelve months next before the commencement of the winding up by the company as the employer to the employees.

CONCLUSION

The Malaysia's labour laws have been updated to focus on employee engagement, employer accountability, and preserving the relationship between employers and employees during company reorganization and restructuring. These laws protect employees' rights, ensuring minimum employment standards, protection from unfair dismissal, freedom to join trade unions, and involvement in potential restructurings affecting their roles. This is to ensure fair treatment for the employees and to prioritise their welfare during the employer's business restructuring or recovery. While the current legal framework offers some protections, there are significant gaps that leave employees vulnerable during restructuring processes. The following table matrix shows the only protections given for the employees during employer's corporate restructuring under the EA 1955, IRA 1967 and CA 2016.

Table 1: Table Matrix showing the protections given to employees from 3 different Statutes.

Statute	Employment	Industrial Relations	Companies
Protections	Act 1955	Act 1967	Act 2016
1. Notice to be informed when employer undergo a corporate restructuring	√	√	-
2. Receive adequate notification and compensation in case of redundancy or termination due to corporate restructuring.	√	-	-
3. consideration for other available positions within the company before facing a dismissal	√	-	-
4. implementation of FWFO principle.	√	-	-
5. Implementation of LIFO principle.	√	-	-
6. Entitlement for retrenchment benefit.	√	-	√
7. The right to form and join trade unions, which are essential for representing the collective interests of employees during corporate restructuring.	√	√	-
8. The right to be retrenched for genuine reason and in good faith.	√	-	-

Based on the above table matrix, it shows that there are insufficient protections for the employee during corporate rescue. Hence, the position of employees during corporate rescue in Malaysia remains a critical issue that requires urgent attention. Therefore, a continuous reform requires to be done to perfect the law. The experience from different jurisdiction such as from the United Kingdom when they introduce the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) which aim to provide unparalleled protection for employees during business transfer need to be visited. Future research needs to be done on this

matter and whether the introduction of a TUPE-like regulations can ensure continuity of employment during business transfers in Malaysia.

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