

Introducing the Center of Main Interests in International Insolvency Cases to Cambodian Law

A Comparative Analysis of the Model Law, the EU, US and Japan

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Abstract

The determination of the Center of Main Interests (COMI) has become a significant topic in Cross Border Insolvency (CBI) for the enacting countries of the Model Law and the EC Regulation. The regime has, however, been ignored by Cambodian law. The Cambodian Law on Insolvency lacks CBI provisions, a fact that creates an unsatisfactory situation in the legal system at a time when the country is beginning to deal with cases involving CBI. This situation will also create a major risk of legal uncertainty when Cambodia becomes a member of the ASEAN Economic Community in 2015. This paper examines the difference in interpretation of COMI under the Model Law, and the legislation of the EU, US and Japan, and proposes an approach to properly handling COMI determination, which will provide advantages not only to Cambodia, but also to any country that has adopted the Model Law and the EC Regulation.

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I. Introduction

If a company suffers financial distress and cannot pay its debts to creditors it may be forced into bankruptcy.¹⁾ The resolution of issues related to a company's bankruptcy might not be difficult when the relationship between the debtor and its creditors remains within one country. However, if the transaction is global the situation becomes that of a Cross Border Insolvency (CBI). CBI presents a number of difficult problems, particularly in cases where the debtor has assets in two or more countries and the courts in each apply their respective laws resulting in conflicting opinions.²⁾ One of the most important issues in such cases is the determination of the debtor's Center of Main Interests (COMI).³⁾

The COMI issue arises as a source of substantive dispute because there is no specific criterion for determining COMI. Usually, the debtor's registered office is presumed to be their COMI. In practice, however, a company may register an office in one jurisdiction but have a COMI elsewhere, which causes difficulties for the courts in determining where the company's COMI is, in particular with regard to the question of in which specific circumstances the presumption can be rebutted.⁴⁾ The movement of COMI across borders also raises the problematic question of what date in time a court should use in determining where a company's COMI is located.⁵⁾ Consequently, the courts of several countries have made contradictory rulings on the criteria for determining COMI.

An examination of COMI is necessary in order to achieve legal certainty and predictability in foreign proceedings. If there is no clear understanding about

1) Bryan A. Garner, *Black's Law Dictionary*, ninth (West, 2010), 867.

2) Stephanie L. Warner, "Cross Border Insolvency: The COMI Issue in the Sandford Case" (July 15, 2011): 3.

3) *Proposal by the Delegation of the United States of America for Preparation of a Model Law or Model Provisions on Selected International Insolvency Law Issues*, UNCITRAL Working Group V (Insolvency Law), Thirty-eighth session (Vienna, April 19, 2010), 1.

4) Jo Windsor, *Proposals for the Revision of the European Insolvency Regulation – a Step Forward in the Rescue Culture?*, December 14, 2012, 2.

5) United Nations Commission on International Trade Law Working Group V (Insolvency Law) Thirty-eighth session, *Proposal by the Delegation of the United States of America: Background Paper* (New York, April 19, 2010), 17.

the location of a debtor's COMI, controversy may arise concerning which courts have jurisdiction to open foreign main or non-main proceedings.⁶⁾ Indeed, there is no principle, which prohibits debtors from moving their COMI from one country to another.⁷⁾ Moreover, such COMI migration or forum shopping can afford advantages for a debtor in the new jurisdiction in some instances. Fraudulent forum shopping may however negatively affect stakeholders such as employees or creditors who may receive less favorable legal treatment as a result.⁸⁾

To deal with the issues raised by CBI in 1997 the United Nations Commission on International Trade Law (UNCITRAL) adopted the Model Law on CBI.⁹⁾ This was followed in 2000 with the European Union Council (EC) enactment of the EC Regulation on Insolvency Proceedings to settle CBI issues among EC member states.¹⁰⁾ In addition to these Japan enacted the Act on Recognition of and Assistance for Foreign Insolvency Proceedings (ARAF)¹¹⁾ in 2000 and the United States (US), in 2005, adopted Chapter 15 of the United States Bankruptcy Code (USC).¹²⁾

The purpose of this paper is to suggest the best rules for COMI determination for the new law on CBI in Cambodia. In this regard, the new legislation should adjust and select the best solutions for COMI determination from the Model Law and the legislation of the EU, US and Japan. Such a new law will be very useful for Cambodia as the current Law on Insolvency (LOI) has not been updated since it was enacted in 2007 and lacks effective and efficient remedies for CBI. While CBI issues have spread globally, Cambodian law has been left

6) Laurien Martens, "A Definition of the Term Centre of Main Interests for Insolvent Cross-Border Groups of Companies" (Tilburg University, 2013), 2.

7) Richard Sheldon QC, *Cross Border Insolvency*, Third (Bloomsbury Professional, 2011), 37.

8) Martens, "A Definition of the Term Centre of Main Interests for Insolvent Cross-Border Groups of Companies," 3.

9) UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation (United Nations 2014).

10) Council Regulation (EC) No 1346/2000 on Insolvency Proceedings (2000).

11) Act on Recognition of and Assistance for Foreign Insolvency Proceedings, 129 (2000).

12) U.S.C: Title 11-Bankruptcy Code (2005).

behind.

Furthermore, Cambodia will implement a plan called the ASEAN Economic Community (AEC) in 2015.¹³⁾ Through the AEC, ASEAN will become a single market-based community, creating a strong likelihood that CBI cases will increase in number and that new CBI legislation¹⁴⁾ in ASEAN nations, including Cambodia, will be needed. Therefore, in order to provide the best preparation for CBI in the future, Cambodia should learn about how COMI cases under the Model Law and the legislation of EU, US and Japan are handled.

This paper uses the Model Law, EU, US and Japanese legislation as a basis for comparative analysis because all four incorporate a great deal of experience with CBI issues. The UNCITRAL recently reformed the Model Law to provide the best recommendations for enacting countries. Additionally, the EC Regulation has also been modified. Even though the EC Regulation and judicial decisions apply only within the EU community the implications of these should be examined by other nations. The courts of the US and Japan have also made many rulings on COMI determination that should be considered.

This paper is divided into four chapters. Chapter I is the introduction. Chapter II discusses the interpretation of COMI under the Model Law, and EU, US and Japanese legislation. This chapter will separately examine three issues: the definition of COMI, the relevant factors necessary to rebut the COMI presumption, and the relevant date at which COMI is determined. Chapter III then conducts a comparative analysis of COMI determination in order to illustrate the best approaches for the new law on CBI in Cambodia. Chapter IV then provides conclusions.

II. Interpretation of Center of Main Interests (COMI)

This chapter is divided into three sections. The first section analyses the

13) Sanchita Basu Das et al., "The ASEAN Economic Community: The Investment Climate," in *The ASEAN Economic Community: A Work in Progress* (Institute of Southeast Asian Studies, 2013), 141.

14) Chan Sek Keong, "Cross-Border Insolvency Affecting Singapore," *Singapore Academy of Law Journal* (2011): 415.

definition of COMI under the Model Law and EC Regulation. The Model Law in fact takes up and refers to an interpretation of COMI contained in the EC Regulation. Neither of these international instruments, however, explicitly provides a definition of COMI. The first section therefore attempts to clarify the notion of COMI.

The second section then examines the factors necessary to rebut a presumption of COMI in the Model Law and the legislation of EU, US and Japan. The presumption is that the registered office is the COMI of debtor. In practice, however, there are cases where the debtor registers an office in one jurisdiction and has its COMI elsewhere. It therefore becomes necessary in such cases to rebut the presumption in order to find the exact location of a debtor's COMI.

Under the Model Law, the UNCITRAL provides that the courts should primarily focus on two factors to determine COMI. The first factor is the location where the debtor is readily ascertainable by creditors. The second factor is the place where the central management of the debtor's business takes place (this is often referred to as its "central administration"). If these two factors cannot be discerned to find the locus of the debtor's COMI, the UNCITRAL provides a number of additional factors. In the US and Japan, the courts do not limit these to any specific criteria. EU law is also silent in providing additional criteria to rebut COMI presumption. Accordingly, the resolution on the issue of relevant factors to rebut the presumption remains ambiguous.

The third section discusses two problems regarding the date at which COMI is determined. The first of these arises when the debtor moves its COMI from one jurisdiction to another before the petition to open insolvency proceedings is filed to the court. The UNCITRAL accepts the date of commencement of foreign proceedings as the date at which the COMI is to be determined. The EU's courts recognize it as falling on the date of application for the commencement of insolvency proceedings in the EU jurisdiction. US courts on the other hand have taken conflicting approaches to the question. Some courts support the filing date of foreign insolvency proceedings while others the date

of application for recognition. Japanese courts use the date of the filing of a petition in a foreign proceeding. It can consequently be said that there is no universally accepted approach to the issue.

Second is the problem of how to treat a change of COMI by the debtor just before the opening of insolvency proceedings. The UNCITRAL does not provide any specific instructions and simply advises courts to give serious consideration to this matter. The EU courts tend to accept the date of the original application for commencement of insolvency proceedings. In the US there have been no cases on this issue while the Japanese courts accept the date on which the petition for commencement of bankruptcy proceeding is first filed. The current situation is that there is no standard practice to determine COMI. Each jurisdiction chooses the approach that it thinks best.

1. Definition of COMI

One of the major reasons for the diverse approaches for the determination of COMI is that the concept of COMI is not clear enough. It is therefore useful to examine the notion of COMI here to produce a more useful definition. COMI is a term of art that makes for a complicated interpretation. The EC Regulation first coined the term and the Model Law on Cross Border Insolvency (CBI) borrowed it. Both of these international pieces of legislation fail to provide a clear definition of COMI. As a result, COMI has given rise to confusing discussion among the courts in the countries that have adopted the Model Law and the EC Regulation.

(1) The Model Law

The Model Law on CBI, which was adopted in 1997 by the UNCITRAL, has sought to assist countries developing national insolvency laws with modern, effective, and harmonized rules on CBI.¹⁵⁾ Generally, the Model Law is not a law, but is a recommendation from UNCITRAL to any country wishing to improve its national insolvency laws with a set of internationally recognized

15) UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation, 19 (United Nations 2014).

standards in order to facilitate and promote a uniform approach to CBI.¹⁶⁾

The operation of the Model Law depends on whether a foreign proceeding is a foreign main or non-main proceeding. If the debtor's COMI is located in the same place as its registered office, this proceeding will be considered a foreign main proceeding.¹⁷⁾ However, the recognition application is deemed to be a non-main proceeding if the debtor has an establishment in that jurisdiction.¹⁸⁾ The distinctions between the two proceedings are very important because the Model Law offers different types of relief for each. In this regard, the scope of relief available in foreign main proceeding includes providing an automatic stay or suspension to all litigation and any executions against the assets of the debtor.¹⁹⁾ By contrast, in non-main proceedings foreign representatives are required to make requests to the court if they wish to obtain the same quality of relief as in the main proceedings.²⁰⁾ The relief must be related to assets or information contained in the foreign non-main proceeding.²¹⁾

It is worth noting that COMI is taken from the EC Regulation and that, importantly, the Model Law did not provide its own definition of the term COMI. The UNCITRAL refers to an interpretation of COMI from a report of Virgos-Schmit²²⁾ on the Convention of Insolvency Proceedings as a reference to explain the meaning of COMI under the Model Law.²³⁾ Since COMI under the Model Law is connected with the EC Regulation, this study analyses the term

16) *Ibid.*

17) *Ibid.*, Art. 2 ¶ b.

18) *Ibid.*, Art. 2 ¶ c. Establishment is any place of operations where the debtor conducts a non-transitory economic activity with human means and goods or services. See, Article 2 (f) of the Model Law on CBI

19) *Ibid.*, Art. 20 ¶ 1.

20) Ian F. Fletcher, *Insolvency in Private International Law: National and International Approaches* (Oxford University Press, 2005), 466.

21) Jenny Clift, "UNCITRAL Model Law on Cross-Border Insolvency - A Legislative Framework to Facilitate Coordination and Cooperation in Cross-Border Insolvency, The," *Tul. J. Int'l & Comp. L.* 12 (2004): 323.

22) Virgos-Schmit Report was a report prepared by professors Miguel Virgos and Etienne Schmit for the purpose of assistance and interpretation of the European Convention (EC Regulation).

23) United Nations Commission on International Trade Law Working Group V (Insolvency Law) Forty-first session, *Interpretation and Application of Selected Concepts of the UNCITRAL Model Law on Cross-Border Insolvency Relating to Centre of Main Interests (COMI)* (New York, May 30, 2012), 17, paragraph 31.

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COMI in the EC Regulation section in order to avoid any repetition in explanation.

(2) The EC Regulation

The European Union Council on Regulation (EC) No. 1346/2000 on Insolvency Proceedings, which came into force on 31 May 2002, establishes rules to handle disputes only in regard to intra-community relationships and does not solve issues related to non-EU member states.²⁴⁾ From this viewpoint, the courts of member states where the debtor has its COMI will have jurisdiction to open main insolvency proceedings.²⁵⁾ The court of other member states will commence secondary proceedings where the debtor has an establishment in their jurisdiction. The secondary proceeding has to be a liquidation proceeding and apply only to the assets of debtors located in that jurisdiction.²⁶⁾

As mentioned previously, there is no clear definition of COMI under the EC Regulation.²⁷⁾ Preamble 13 of the EC Regulation provides that:

The center of main interests (COMI) should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.²⁸⁾

Some courts have considered this preamble to be the definition of COMI.²⁹⁾ Actually, the phrasing in this preamble is taken from the report of Virgos-

24) B. Wessels, "Cross-Border Insolvency Law in Europe: Present Status and Future Prospects," *PER: Potchefstroomse Elektroniese Regsblad* 11, no. 1 (2008): 11.

25) Council Regulation (EC) No 1346/2000 on Insolvency Proceedings, Art. 3 ¶ 1 (2000).

26) *Ibid.*, Art. 3 ¶ 2.

27) Pedro Jose F. Bernardo, "Cross-Border Insolvency and the Challenges of the Global Corporation: Evaluating Globalization and Stakeholder Predictability through the UNCITRAL Model Law on Cross-Border Insolvency and the European Union Insolvency Regulation" (2012): 812.

28) Council Regulation (EC) No 1346/2000 on Insolvency Proceedings, Recital 13.

29) Gabriel Moss QC and Christoph G. Paulus, "The European Insolvency Regulation-the Case for Urgent Reform," (London: INSOL Europe, 2005), 2.

Schmit, paragraph 75 on the draft Convention of the EC Regulation.³⁰⁾ Since the Convention was never finalized, this report never became official, but is treated as a helpful guide to the interpretation of the EC Regulation.³¹⁾ Therefore, COMI is “somewhat nebulous”³²⁾ and consequently, the courts of many countries have differently construed COMI based on their own legal and geographical contexts.³³⁾ Moreover, finding the location that is most closely matched to the activities of a company debtor is a controversial topic in private international company law.³⁴⁾ Accordingly, in order to overcome the vagueness of COMI’s definition, three proposals have been suggested to the EC to amend the EC Regulation.

First, the European Parliament proposed a recommendation to the EU Commission on Insolvency Proceedings to include a definition of COMI from Recital 13, which focuses on “the objective factors ascertainable by third parties.”³⁵⁾ Normally, this factor is called the “head office function” and refers to the management and administration of the company’s debtor.³⁶⁾

Second, the European Commission, which prepared a proposal for amending the Council Regulation (EC) No 1346/2000 on insolvency proceedings, requested the introduction of Recital 13 into Article 3 (1) of the EC Regulation.³⁷⁾ This proposal suggested that:

30) Miguel Virgos and Etienne Schmit, “Report on the Convention on Insolvency Proceedings” (1996): para. 75, http://aei.pitt.edu/952/1/insolvency_report_schmidt_1988.pdf (accessed October 8, 2014).

31) QC and Paulus, “The European Insolvency Regulation—the Case for Urgent Reform,” 2.

32) Morse C.G.J., “International Conflict of Laws for the Third Millennium: Essays in Honor of Friedrich K. Juenger / Borchers, Patrick J.,” in *Cross-Border Insolvency in the European Union*, edited by Patrick J. Borchers and Joachim Zekoll (Transnational Publishers, 2001), 233.

33) Astrid Stadler, “International Jurisdiction under the Regulation 1346/2000/EC on Insolvency Proceedings,” in *Cross Border Insolvency, Intellectual Property Litigation, Arbitration and Ordre Public*, edited by Rolf Stürner and Masanori Kawano (Isd, 2011), 16.

34) *Ibid.*

35) European Parliament, *Report with Recommendations to the Commission on Insolvency Proceedings in the Context of EU Company Law (2011/2006(INI))*, 2011, 11.

36) Martens, “A Definition of the Term Centre of Main Interests for Insolvent Cross-Border Groups of Companies,” 30.

37) Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings, European Commission, European Commission ¶ 22 (2012).

[t]he courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings ("main proceedings"). The centre of main interests shall be the place where the debtor conducts the administration of his interests on a regular basis and which is ascertainable by third parties.³⁸⁾

Third, Professor Gabriel Moss QC and Professor Dr. Christoph G. Paulus separately suggested a head office function test to define COMI. In asserting this viewpoint, both professors similarly proposed that in the case of a legal person, the place where a debtor administers his interests on a regular basis is the place where the head office functions of the debtor are carried out.³⁹⁾ The head office test is also similar to that contained in the report of Virgos-Schmit.⁴⁰⁾

In the end, the EC, in amending the EC Regulation, has adopted the definition of COMI, as "…the place where the debtor conducts the administration of his interests on a regular basis and which is ascertainable by third parties."⁴¹⁾

2. Relevant Factors to Rebut the Presumption

When the COMI of a debtor is in a different location from its place of registration, there is no clear way for the relevant factors to deal with this situation. The Model Law and the courts of the US and Japan have examined a number of additional factors. In the EU, the EC Regulation does not provide specific criteria to rebut the presumption. Accordingly, the relevant factors to determine COMI are imprecise.

38) *Ibid.*

39) Gabriel Moss and Paulus, "The European Insolvency Regulation-the Case for Urgent Reform," 4-5.

40) Virgos and Schmit, "Report on the Convention on Insolvency Proceedings," para. 75.

41) Council Regulation (EC) No 1346/2000 on Insolvency Proceedings, Art. 3 ¶ 1 (2014). Amended on June 3, 2014.

(1) The Model Law

In order to determine whether the foreign main proceeding constitutes the location of a debtor's COMI, the UNCITRAL concludes that the location in which the debtor is readily ascertainable by creditors and the location where the central administration of debtor takes place are the principal factors.⁴²⁾ However, if both factors cannot indicate the location of the debtor's COMI, the court may examine additional factors to discern where a particular debtor has its COMI.⁴³⁾

The UNCITRAL working group provides the following factors to consider:

- 1) The location of the debtor's books and records;
- 2) The location where financing was organized or authorized, or from where the cash management system was run;
- 3) The location in which the debtor's principal assets or operations are found;
- 4) The location of the debtor's primary bank;
- 5) The location of employees;
- 6) The location in which commercial policy was determined;
- 7) The site of the controlling law or the law governing the main contracts of the company;
- 8) The location from which purchasing and sales policy, staff, accounts payable and computer systems were managed;
- 9) The location from which contracts (for supply) were organized;
- 10) The location from which reorganization of the debtor was being conducted;
- 11) The jurisdiction whose law would apply to most disputes;
- 12) The location in which the debtor was subject to supervision regulation; and

42) United Nations Commission on International Trade Law Working Group V (Insolvency Law) Forty-Third session, *Interpretation and Application of Selected Concepts of the UNCITRAL Model Law on Cross-Border Insolvency Relating to Centre of Main Interests (COMI)* (New York, April 15, 2013), 22, paragraph 123F.

43) United Nations Commission on International Trade Law Working Group V (Insolvency Law) Forty-first session, *Interpretation and Application of Selected Concepts of the UNCITRAL Model Law on Cross-Border Insolvency Relating to Centre of Main Interests (COMI)*, 4.

- 13) The location whose law governed the preparation and audit of accounts and in which they were prepared and audited.⁴⁴⁾

As noted above, there are a number of additional elements that the court may use as a measurement to determine the debtor's COMI when the company's place of operation is different from that of its registered office. However, these multiple approaches may give rise to the risk of competing claims from the foreign proceedings.⁴⁵⁾ Moreover, the use of an unrestricted set of criteria will increase the number of judicial decisions relying on differing factors to rebut the presumption among countries, which have enacted the Model Law.⁴⁶⁾

(2) The EC Regulation

In the EU when there has been controversy regarding COMI determination the courts of member states have considered a variety of factors such as: the place of debtor's management, the nationality of the directors, the place where the company had presented itself to its most substantial creditor as the principle executive offices, the place where the current contractual work was in progress, the place of the parent's company, the place where the code of the computer programmed by the debtor are stored, and the place of the company's bank account.⁴⁷⁾

Although there are various considerations on factors to rebut the COMI presumption, the common trend is likely to support both criteria, which are objective and ascertainable by creditors. In the well-known case of *Eurofood ILSC Ltd.*, which concerned whether the COMI of Eurofood was in Italy or

44) United Nations Commission on International Trade Law Working Group V (Insolvency Law) Forty-Third session, *Interpretation and Application of Selected Concepts of the UNCITRAL Model Law on Cross-Border Insolvency Relating to Centre of Main Interests (COMI)*, 22–23.

45) United Nations Commission on International Trade Law Working Group V (Insolvency Law) Fortieth session, *Interpretation and Application of Selected Concepts of the UNCITRAL Model Law on Cross-Border Insolvency Relating to Centre of Main Interests (COMI)* (Vienna, November 31, 2011), 10, paragraph 39.

46) *Ibid.*, 10.

47) Bob Wessels, "Cross-Border Insolvency Law in Europe: Present Status and Future Prospects" 1 (2008): 9–10.

Ireland, the ECJ stated:

[...] the presumption may be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating at the registered office [...]. By contrast, where a company carries on its business in the territory of the member states where its registered office is situated, the mere fact that its economic choices are or can be controlled by a parent company in another member states is not enough to rebut the presumption laid down by that Regulation.⁴⁸⁾

This ruling states that the presumption will be overcome if the creditor can prove that third parties could ascertain that the company's headquarters is in another member state.⁴⁹⁾ If the company is not carrying out business from the place of its registered office, for example in the case of letterbox companies, the presumption may be easily rebutted.⁵⁰⁾ "The mere fact" that a parent company made economic choices as to where the registered office of a subsidiary might be situated would not be enough to rebut the presumption.⁵¹⁾

In *Stanford International Bank Ltd.*, the England High Court of Justice, Chancery Division, confirmed the ECJ decision in *Eurofood*.⁵²⁾ The High Court held that only concentrating on the place where the head office functions were carried out without considering whether the location was ascertainable by third parties was the wrong test. The presumption can be rebutted whenever both factors, objective and ascertainable by third parties, provide evidence that the

48) *Eurofood IFSC Ltd* [2006] Case no C- 341/04 (European Union|EU.INT The European Court of Justice, May 2, 2006).

49) Federico M. Mucciarelli, "The Unavoidable Persistence of Forum Shopping in European Insolvency Law" (2013): 7.

50) Bob Wessels, "European Union Regulation on Insolvency Proceedings," *Proceedings Entered into Force. Within the Development of Insolvency Law in Europe* (2002): 16.

51) *Eurofood IFSC Ltd* [2006] Case no C- 341/04 (Europa.eu The European Court of Justice, May 2, 2006).

52) *Stanford International Bank Ltd., et al* [2009] Case no EWHC 1441 (UK The High Court of Justice, Chancery Division, July 3, 2009).

actual situation is different from the registered office.⁵³⁾

Additionally, In *Interedil Srl*, the ECJ ruled that:

The presumption cannot be rebutted where the place in which the bodies responsible for the management and supervision of debtor are actually taken at the same place of the registered office. Furthermore, the only presence of company assets and the existence of contracts for the financial exploitation of assets in the member State other than the registered office is situated cannot regarded as sufficient factors to rebut the presumption.⁵⁴⁾

Therefore, in order to support the judicial decisions of the ECJ and the EU national courts, the EC has amended the EC Regulation by introducing recital 13 (a), which states that:

[...] it should be possible to rebut the presumption, in particular if the company's central administration is located in another member state than its registered office and a comprehensive assessment of all the relevant factors establishes, in a manner that is ascertainable by third parties, that the company's actual centre of management and supervision and of the management of its interests is located in that other member state.⁵⁵⁾

In short, even though both factors, which were objective and ascertainable by creditors, were considered as the main conditions to determine the debtor's COMI, the EC did not specify additional criteria to rebut the presumption.

53) *Ibid.*

54) *Interedil Srl v Fallimento Interdil Srl, Intesa Gestione Crediti SpA*, [2011] Case no C- 396/09 (Europa.eu European Court of Justice, October 20, 2011).

55) European Parliament, *Draft Report on the Proposal for a Regulation of the European Parliament and of the Council Amending Council Regulation (EC) No 1346/2000 on Insolvency Proceedings*, September 11, 2013, 8.

(3) The US Chapter 15

The US Congress adopted Chapter 15 of the U.S. Bankruptcy Code in 2005 to provide an effective mechanism for dealing with cases of CBI.⁵⁶⁾ Chapter 15 incorporated the Model Law on CBI and allowed American courts to interpret this legislation by considering international origins and similar statutes adopted by foreign jurisdictions.⁵⁷⁾ Under Chapter 15, a foreign proceeding will be recognized as a foreign main proceeding if the COMI of the debtor is in the same country of the applicant, or a non-main proceeding if the debtor's COMI is elsewhere but the debtor has an establishment in that country.⁵⁸⁾ In cases where the foreign proceeding is the main proceedings, the court will grant automatic relief to prevent any actions against the debtor or the interests of creditors.⁵⁹⁾ However, a foreign representative has to seek appropriate relief if the foreign proceeding falls into the category of non-main proceedings.⁶⁰⁾

Indeed, COMI is a term of art that is not specifically defined.⁶¹⁾ Jay Lawrence Westbrook⁶²⁾ compares the term COMI under Chapter 15 as being the “principal place of business”, the “chief executive offices” or the “real seat” of a company

56) Nora Wouters and Alla Raykin, “Corporate Group Cross-Border Insolvencies between the United States & European Union: Legal & Economic Developments,” *Emory Bankr. Dev. J.* 29 (2013 2012): 392.

57) U.S.C: Title 11-Bankruptcy Code, § 1508 (2005).

58) Fred S Hodara, Lisa G Beckerman, and Brian G Geldert, “Chapter 15 and the UNCITRAL Model Law: Narrowing the US Approach to International Judicial Cooperation?” (Akin Gump Strauss Hauer & Feld LLP, 2009), 37.

59) U.S.C: Title 11-Bankruptcy Code, § 1520.

60) *Ibid.*, § 1521 ¶ a.

61) Oceana Editorial Board, *American International Law Cases Fourth Series: 2009* (Oxford University Press, 2011), 1275–76. federal appellate courts, and the U.S. Supreme Court, as well as some state courts, the U.S. Court of Claims, the U.S. Court of International Trade, and the U.S. Tax Court. The series seeks to provide not every single case in which a court refers to international law but rather all cases that analyze at least one international law issue in depth. The list of subjects addressed by these volumes is vast and changes from year to year, with the inclusion and prominence of most topics turning on their prevalence in a given year's jurisprudence. Some consistently prominent topics are personal jurisdiction over foreign defendants, deportation procedure, and double taxation. Over the last three editions (2006, 2007, and 2008

62) Professor Westbrook is a professor who participated in drafting the UNCITRAL Model Law on Cross Border Insolvency. He is also the co-head of the US delegation to the UNCITRAL conference.

Introducing the Center of Main Interests in International Insolvency Cases to Cambodian Law (Panha) debtor.⁶³⁾ In the absence of evidence to the contrary, the debtor's registered office is presumed to be its COMI.⁶⁴⁾ However, there is no legislative guidance on what type of evidence would oppose this presumption.

In order to determine the COMI of a debtor, American courts have considered various factors related to the location of: the debtor's headquarters, debtor's management, the debtor's main assets, the majority of the debtor's creditors and the jurisdiction whose law is applicable to most disputes.⁶⁵⁾ However, the court cannot apply these elements automatically; instead, the court considers these criteria in the light of the emphasis placed on protecting the reasonable interests of parties and the maximization of the debtor's value.⁶⁶⁾

In *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd.*, the court declined to recognize a foreign proceeding in the Cayman Islands as a foreign main proceeding.⁶⁷⁾ In that case, Bear Stearns registered its office as an exempted company in the Cayman Islands but there were neither employees nor managers there. The investment manager and the back-office operations were located in New York, along with assets, books and records.⁶⁸⁾ The court ruled "the presumption that COMI is the place of registered offices has been rebutted by evidence to the contrary due to the place where Bear Stearns conducts the administration of interests on a regular basis and is therefore ascertainable by third parties was in the US."⁶⁹⁾ By this consideration there was a separation between the jurisdiction of incorporation and the real seat of operation of the company.⁷⁰⁾ However, the decision was appealed to the US District Court.

On appeal, the US District Court affirmed the lower court decision. The

63) Jay Lawrence Westbrook, "Locating the Eye of the Financial Storm," *Brook. J. Int'l L.* 32 (2006): 1020.

64) U.S.C: Title 11-Bankruptcy Code, § 1516.

65) *Re SPhinX, Ltd., et al.*, No. 06-11760 RDD (US United States Bankruptcy Court September 6, 2006).

66) *Ibid.*

67) *In Re Bear Stearns High-Grade Structured Credit Strategies Master Fund*, 374 BR 122 (United States|US Bankr. Court, SD New York 2007).

68) *Ibid.*

69) *Ibid.*

70) Westbrook, "Locating the Eye of the Financial Storm," 1020.

District Court found that although the debtor registered its office in the Caymans, neither employees nor governed investment activity was located there.⁷¹⁾ The debtor's business office, as well as all assets, books and records prior to the commencement of foreign proceedings, was located in the US.⁷²⁾ Therefore, the court ruled that the COMI of the debtor was in the US and not in the Cayman Islands.⁷³⁾

In *In re Tri-Continental Exchange Ltd.*,⁷⁴⁾ creditors in the High Court of Justice of the Saint Vincent and the Grenadines (SVG) filed a petition for recognition of a liquidation proceeding under Chapter 15 as a foreign non-main proceeding. The debtor company⁷⁵⁾ was registered and located in the SVG where about twenty employees were working. The debtors committed an insurance scam and generated premiums from customers in the US and Canada.⁷⁶⁾ After the hearing, the court indicated that the COMI of the debtor was in the SVG and the liquidation proceeding in the SVG was the foreign main proceeding.⁷⁷⁾ The court noted that the debtor operated its regular business in the SVG at the same place as their registered office in a manner that equated with a "principle place of business" in the US law.⁷⁸⁾ For these reasons, the court said these findings were sufficient to qualify the SVG liquidation proceeding as the debtor's COMI even though the entity perpetrated an insurance scam primarily in the US and Canada.⁷⁹⁾

Similarly, the case *In re British American Insurance Company Limited*,⁸⁰⁾ provisional liquidators sought recognition of proceedings in the Bahamas as

71) *In Re Bear Stearns High-Grade Structured Credit*, 389 BR 325 (United States|US Dist. Court, SD New York 2008).

72) *Ibid.*

73) *Ibid.*

74) *In Re Tri-Continental Exchange Ltd.*, 349 BR 627 (United States|US Bankr. Court, ED California 2006).

75) Debtors refer to Tri-Continental Exchange Ltd., Combined Services Ltd., and Alternative Exchange Ltd., which are insurance companies formed under the laws of SVG.

76) *In Re Tri-Continental Exchange Ltd.*, 349 BR 627.

77) *Ibid.*

78) *Ibid.*

79) *Ibid.*

80) *In Re British American Ins. Co. Ltd.*, 425 BR 884 (United States|US Bankr. Court, SD Florida 2010).

foreign main proceedings. However, the court in Florida, after critical consideration, ruled that the COMI of the debtor was not in the Bahamas. The court said that even though the debtor registered its office in the Bahamas all functions of the debtor were delegated to a subsidiary, which was located in Trinidad.⁸¹⁾ The court further considered that the location of the debtor's COMI should be readily ascertainable by third parties and finally stated that the debtor's entity had no bank accounts, directors nor employees in the Bahamas. The policyholders and creditors normally dealt with local offices and the debtor's subsidiaries outside the Bahamas. The court, accordingly, believed that there was little reason the debtor's creditors thought the debtor's COMI was in the Bahamas.⁸²⁾

(4) The Japanese ARAF

Japan adopted the Act on Recognition of and Assistance for Foreign Insolvency Proceedings (ARAF)⁸³⁾ in November 2000 and it came into effect in 2001.⁸⁴⁾ The ARAF took a page from the Model Law on CBI and allowed Japanese courts to recognize and assist insolvency proceedings commenced abroad and consequently the relevant insolvency regimes⁸⁵⁾ were amended to go along with the new Act.⁸⁶⁾

Under the Japanese ARAF, the court will recognize foreign proceedings as primary foreign proceedings if the debtor engages in commercial business in the country where its principal place of business is located.⁸⁷⁾ The ARAF does not use the concept of presumptive rule, which assumes that the registered office is the COMI of the debtor. This is because the notion of COMI is almost the same as the concept of "principal place of business" in domestic insolvency

81) *Ibid.*

82) *Ibid.*

83) Junichi Matsushita, a professor at the University of Tokyo, translated the English version.

84) Act on Recognition of and Assistance for Foreign Insolvency Proceedings, 129 (2000).

85) The Bankruptcy Law, the Civil Rehabilitation Law and the Corporate Reorganization Law.

86) Hiroshi Oda, *Japanese Law* (Oxford University Press, 2009), 291.

87) Act on Recognition of and Assistance for Foreign Insolvency Proceedings, Art. 2 (ii).

codes⁸⁸⁾ and the Code of Civil Procedure of Japan.⁸⁹⁾ Moreover, there is no different interpretation from the COMI under the Model Law.⁹⁰⁾

In Japan, an application for recognition should be submitted to the Tokyo District Court, which has exclusive jurisdiction to recognize and assist foreign proceedings.⁹¹⁾ After that, the case will be transferred to the district court that has competence over the debtor's business office.⁹²⁾ One substantial difference between the Japanese ARAF and the Model Law is that the Japanese courts only recognize foreign proceedings. The courts do not provide automatic stays as a result of this recognition.⁹³⁾ The rationale behind this approach is that Japanese lawmakers realized that the Tokyo District Court has no experience in the recognition of foreign proceedings.⁹⁴⁾ In particular, automatic stays may contradict those in Japan, or may be unfamiliar to the Japanese courts.⁹⁵⁾ Accordingly, in addition to applying for an assistance order a foreign representative also has to apply for a recognition order, which is a prerequisite condition for the assistance order.⁹⁶⁾

In *Think3 Inc.*,⁹⁷⁾ the Tokyo District Court dealt with a case of whether the debtor's principal place of business was in the US or Italy. The debtor had registered its office in the US and had a branch office in Italy, along with subsidiaries in six countries, including Italy, Japan, China, India, France and Germany. According to an application filed by the Italian creditors, the Italian court issued a commencement of bankruptcy proceedings against the debtor and appointed a trustee. However, the US bankruptcy court also opened insolvency

88) Article 5 (1) of the Bankruptcy Act, Article 5 (1) of the Corporate Reorganization Act, and Article 5 (1) of the Civil Rehabilitation Act

89) *Think3 Inc.* [2012] Case no 3 & 5 of 2011 (Japan|JP The Tokyo District Court, Tokyo, July 31, 2012).

90) *Ibid.*

91) Act on Recognition of and Assistance for Foreign Insolvency Proceedings, Art. 4.

92) *Ibid.*, Art. 5.

93) Shinnosuke Fukuoka et al., "Japan," in *Cross-Border Insolvency II: A Guide to Recognition and Enforcement*, edited by (INSOL International, 2012), 148.

94) Chan Ho Look and Kazuhiko Yamamoto, "Japan," in *Cross-Border Insolvency: A Commentary on the UNCITRAL Model Law* (Globe Business Publishing, 2007), 107.

95) Fukuoka et al., "Japan," 148.

96) *Ibid.*, 149.

97) *Think3 Inc.* [2012] Case no 3 & 5 of 2011 (Japan|JP The Tokyo District Court, Tokyo, July 31, 2012).

Introducing the Center of Main Interests in International Insolvency Cases to Cambodian Law (Panha) proceedings against the debtor and appointed a representative.⁹⁸⁾

In order to protect the interests of creditors, the American representative submitted to the Tokyo District Court an application for recognition and on the same day, the court recognized the petition. Afterwards, the Italian trustee applied for recognition to the Tokyo District Court and claimed that the debtor's business office was in Italy.⁹⁹⁾ The US representative opposed¹⁰⁰⁾ the Italian trustee's application and argued that the debtor's principal business office was in the US.¹⁰¹⁾ The Tokyo District Court ordered the consolidation of both cases into one.

The Court considered various factors raised by the different courts in foreign countries, and the discussion of the UNCITRAL working group. The Court compared the term "principal place of business" in Japan to "substantive headquarters", but not to "registered headquarters" by virtue of the interpretation in national insolvency codes.¹⁰²⁾ However, the Court did not reach any specific conclusions as to which of the several key factors set out in the foreign judgments it reviewed it regarded as most relevant.¹⁰³⁾

Finally, the Court concluded that it should consider all of the criteria, which had been raised by courts around the world. Those factors include the location of the debtor's head office functions or nerve center, the location of its main assets and operations, the location of its business management and administration, the location easily ascertainable by creditors, and other criteria that are perceivable to creditors to be more important.¹⁰⁴⁾ Based on this viewpoint, the court recognized the petition of the US representative as the

98) *Ibid.*

99) *Ibid.*

100) The US representative argued that the opening of bankruptcy proceedings in Italy had no effect on the assets of the debtor located in Japan due to the Italian bankruptcy law accepting the territoriality principle. Therefore, the Italian bankruptcy proceedings were the secondary foreign proceedings.

101) *Think3 Inc.* [2012] Case no 3 & 5 of 2011 (Japan|JP The Tokyo District Court, Tokyo, July 31, 2012).

102) *Ibid.*

103) *Ibid.*

104) *Think3 Inc.* [2012] Case no 3 & 5 of 2011 (Japan|JP The Tokyo District Court, Tokyo, July 31, 2012).

primary foreign proceeding and said the principal place of business of the debtor was in the US.¹⁰⁵⁾ The Tokyo High Court affirmed the Tokyo District Court judgment.¹⁰⁶⁾

To sum up, the Court in *Think3 Inc.* hesitated to identify which of the specific criteria used in foreign judgments it viewed as most relevant. Hence, the Court considered all relevant factors that had been examined by the different courts around the world when determining the debtor's principal place of business.

3. Dates to Determine COMI

The Model Law, and the legislation of the EU, US and Japan fail to create a temporal framework for determining COMI when the debtor moves it to another jurisdiction before the petition to commence insolvency proceeding is filed, or after the application has been made to the court. Accordingly, this paper examines these issues looking at four sets of legislation to find a proper solution to this question.

(1) The Model Law

With regard to situations in which the debtor migrates its COMI before the filing date of the opening of insolvency proceedings, the UNCITRAL concludes that the date of commencement of foreign proceedings (foreign commencement time) is the date to determine COMI.¹⁰⁷⁾ The UNCITRAL provides three reasons for taking this line. First, the UNCITRAL rejects the idea of using the present tense in Article 17 (2)(a)¹⁰⁸⁾ as a reference to find the location of COMI. The UNCITRAL states that the present tense in that provision does not deal with the problem of the date to examine COMI, but requires that the foreign

105) *Ibid.*

106) *Think3 Inc.* [2012] Case no 1757 of 2012 (Japan)JP The Tokyo High Court, Tokyo, November 2, 2012). Available at <https://www.insol.org/page/304/japan>

107) Look Chan Ho, *The Revised UNCITRAL Model Law Enactment Guide - A Welcome Product?*, SSRN Scholarly Paper (Rochester, NY, May 8, 2014), 329, <http://papers.ssrn.com/abstract=2434780> (accessed November 25, 2014).

108) A foreign proceeding will be recognized as foreign main proceedings if it is taking place in the State where the debtor has the COMI.

Introducing the Center of Main Interests in International Insolvency Cases to Cambodian Law (Panha) proceeding be current or pending at the time of the recognition decision.¹⁰⁹⁾

Second, the UNCITRAL reasoned that the acceptance of the date of commencement of foreign insolvency proceedings provides clarity to foreign proceedings when the foreign representative submits a request for recognition.¹¹⁰⁾ In this viewpoint, the UNCITRAL said:

[w]here the business activities of the debtor ceases after the commencement of the foreign proceedings, all that may exist at the time of the application for recognition to indicate the debtor's COMI is that foreign proceeding and the activity of the foreign representative in administering the insolvency estate. In such a case, determination of the COMI by reference to the date of the commencement of those proceedings would produce a clear result. The same reason may also apply in the case of reorganization where, under some laws, it is not the debtor that continues to have a COMI, but rather the reorganizing entity.¹¹¹⁾

Third, the UNCITRAL argues that if the date of the application for the recognition of the foreign proceeding is deemed to be the date to examine COMI, this timing will trigger difficulties if the foreign proceeding is a liquidation proceeding.¹¹²⁾ In this regard, the debtor would not have an active COMI beyond the date of commencement of insolvency proceedings, as the

109) United Nations Commission on International Trade Law Working Group V (Insolvency Law) Forty-first session, *Interpretation and Application of Selected Concepts of the UNCITRAL Model Law on Cross-Border Insolvency Relating to Centre of Main Interests (COMI)*, 7.

110) *Ibid.*

111) United Nations Commission on International Trade Law Working Group V (Insolvency Law) Forty-Third session, *Interpretation and Application of Selected Concepts of the UNCITRAL Model Law on Cross-Border Insolvency Relating to Centre of Main Interests (COMI)*, 24.

112) United Nations Commission on International Trade Law Working Group V (Insolvency Law) Forty-first session, *Interpretation and Application of Selected Concepts of the UNCITRAL Model Law on Cross-Border Insolvency Relating to Centre of Main Interests (COMI)*, 8.

business generally ceases operating at the time of commencement.¹¹³⁾ Consequently, there is no COMI, only the center of the activities of the liquidator.¹¹⁴⁾ Therefore, a complicated condition would be created if the UNCITRAL were to conclude that the date of the application for recognition of foreign proceedings was the time at which the COMI was determined.

Once the debtor shifts COMI, sometimes in close proximity to the commencement of foreign proceedings and even between the time of the petition for the opening and the actual commencement, the UNCITRAL does not provide a clear solution, but requires the receiving court to take more care in examining the COMI of the debtor.¹¹⁵⁾ Hence, the UNCITRAL does not provide a recommendation on this issue.

In short, when the debtor changes COMI from one jurisdiction to another before the application for commencement of insolvency proceedings, the UNCITRAL sets the date of commencement of foreign proceedings as the time at which COMI is determined. The UNCITRAL reasons that this determination provides clarity to foreign proceedings. When the debtor relocates its COMI after the petition is filed to the court, sometimes just before the commencement of insolvency proceedings, the UNCITRAL fails to provide a clear solution.

(2) The EC Regulation

There is no principle of immutability when the company is threatening to go bankrupt and the debtor shifts COMI to a new jurisdiction to take advantage of insolvency proceedings.¹¹⁶⁾ However, the purpose of the EC Regulation is to avoid forum shopping by the debtor.¹¹⁷⁾

The date for determining COMI when a debtor has transferred its COMI from one jurisdiction to another before the application for insolvency

113) *Ibid.*

114) *Ibid.*

115) United Nations Commission on International Trade Law Working Group V (Insolvency Law) Forty-Third session, *Interpretation and Application of Selected Concepts of the UNCITRAL Model Law on Cross-Border Insolvency Relating to Centre of Main Interests (COMI)*, 23.

116) Sheldon QC, *Cross Border Insolvency*, 37.

117) Council Regulation (EC) No 1346/2000 on Insolvency Proceedings, Recital 4 (2000).

proceedings is made to the court was debated in *Trillium (Nelson) Properties Ltd v Office Metro Ltd*.¹¹⁸⁾ In that case the debtor's registered office was in England. However, the debtor changed its main headquarters and place of administration to Luxembourg almost three years before it filed for the opening of insolvency proceedings. The debtor retained a registered office in England, but no interests there. All employees and the board meetings were conducted in Luxembourg. In the end, the UK court ruled that the COMI of the debtor at the time of filing the petition in Luxembourg determined the international jurisdiction because the court was able to uphold the jurisdiction where the debtor's new COMI was located.¹¹⁹⁾

In *Interdil Srl*, the ECJ held that "in principle, it is the location of the debtor's main centre of interests at the date on which the request to open insolvency proceedings was lodged that is relevant for the purpose of determining the court having jurisdiction".¹²⁰⁾ Likewise, more recently in *Schmid v Hertel*, the ECJ ruled "in order to determine which courts have jurisdiction to open insolvency proceedings, the debtor's COMI must be determined at the time when the request to open insolvency proceedings has been lodged [...]".¹²¹⁾

In the event that the debtor moves its COMI after lodging a petition but just before the proceedings are opened, the date of the application for commencement of insolvency proceedings is the date for determining the COMI. In *Staubitz-Schreiber*¹²²⁾ the debtor applied for the opening of insolvency proceedings at a local court in Germany. However, after the application was made, just before the court had almost determined whether to open insolvency proceedings, the debtor moved its COMI to Spain.

The ECJ finally ruled that even if the debtor moves its COMI to another

118) *Trillium (Nelson) Properties Ltd v Office Metro Ltd* [2012] (UK The High Court of Justice, May 9, 2012).

119) *Ibid.*

120) *Interdil Srl v Fallimento Interdil Srl, Intesa Gestione Crediti SpA*, [2011] Case no C- 396/09 (Europa.eu European Court of Justice, October 20, 2011).

121) *Schmid v Hertel* [2014] Case no EUECJ C-328/12 (Europa.eu European Court of Justice, January 16, 2014).

122) *Staubitz-Schreiber* [2006] Case no C- 1/04[2006] ECR I-1701 (Europa.eu European Court of Justice, January 17, 2006).

member state after an application to open insolvency proceedings have been made, the transfer would not be effective as the court of the first member state already retained jurisdiction to open such insolvency proceedings.¹²³⁾ The ECJ ruling is in line with a proposal by Virgos and Garcimartin, which suggests that the relevant time to determine COMI is the date the application for commencement of insolvency proceeding is filed.¹²⁴⁾ Moreover, this consideration is based on the principle of *perpetuatio fori*, which means that a transfer by the debtor to a different state after an application is opened for insolvency proceeding does not change the jurisdiction of the court.¹²⁵⁾

To conclude, when the debtor shifts its COMI before an application for the opening of insolvency proceedings is filed to the court or the move is carried out shortly before the court commences insolvency proceedings, the EU courts reached the same conclusion that the date of the application for commencement of insolvency proceedings is filed is the date to determine COMI.

(3) The US Chapter 15

The US courts have experienced some controversies between previous and present judicial decisions on the date for determining COMI.

3.1 Previous Decisions

Formerly, many judicial judgments in the United States held that the date of application for the recognition of foreign proceedings was to be used as the time to determine COMI when the debtor moved it before the petition to commence insolvency proceedings was filed to the court. In *In re Lavie v Ran* the debtor was a well-known businessman and had registered his office in Israel. After his business encountered financial distress, the debtor relocated its COMI from Israel to the US prior to insolvency proceedings being commenced against him.¹²⁶⁾ Nearly a decade after the debtor moved its COMI to the US,

123) *Ibid.*

124) Miguel Virgós Soriano and Francisco J. Garcimartin Alférez, *The European Insolvency Regulation: Law and Practice* (Kluwer Law International, 2004), 47–48.

125) *Ibid.*, 50.

126) *Lavie v. Ran*, 406 BR 277 (US Dist. Court, SD Texas 2009).

creditors filed a petition seeking recognition for the Israeli proceeding as a foreign main proceeding under Chapter 15. The creditors argued the court should look at the company debtor's history in determining which date to use to determine its COMI.¹²⁷⁾

The court, however, found that the present tense used in Section 1502 of Chapter 15, which states that a foreign main proceeding is a foreign proceeding pending in the country where the debtor has the center of its main interests,¹²⁸⁾ permitted the court to hold that the COMI should be determined at the time the petition for recognition was filed.¹²⁹⁾ “[I]f the court considered past connectivity with the debtor, the conflict of decisions with other courts would grow”, stated the US District Court for the Southern District of Texas.¹³⁰⁾

Likewise, the US court in *In re Betcorp Ltd.*¹³¹⁾ ruled that the correct time to determine COMI was the time of recognition of the petition. The court affirmed that if the assessment of COMI were based on the debtor's operational history, there would be an increase in the likelihood of conflict in COMI determination.¹³²⁾ Moreover, the consideration of past operations would destroy the goal of using COMI to “harmonize” insolvency proceeding internationally and would make the determination imprecise and incorrect.¹³³⁾

3.2 Recent Decisions

The New York bankruptcy court in *In re Millennium Global Emerging Credit Master Fund Limited, et al.* held that “the substantive date to determine COMI was on or about the date of the commencement of the foreign proceedings for which recognition was sought.”¹³⁴⁾ The court noted that “using the date of the chapter 15 filing as the date for making the COMI determination carries with it

127) *Ibid.*

128) U.S.C: Title 11-Bankruptcy Code, § 1502 ¶4 (2005).

129) *Lavie v. Ran*, 406 BR 277.

130) *Ibid.*

131) *In Re Betcorp Ltd.*, 400 BR 266 (US Bankr. Court, D. Nevada 2009).

132) *Ibid.*

133) *Ibid.*

134) *In Re Millenium Global Emerging Credit Master Fund*, 474 BR 88 (US Dist. Court, SD New York 2012).

an added risk of forum shopping as it gives prima facie recognition to a change of COMI between the date of opening proceedings in the foreign nations and the chapter 15 petition date.”¹³⁵⁾ More specifically, the Court further said:

If the term ‘principal place of business’ is substituted for the wording ‘COMI’, it is obvious that the date for determining an entity’s place of business refers to the business of the entity before it was placed into liquidation. A debtor does not continue to have a principal place of business after liquidation is ordered and the business stops operating. Although a debtor in a reorganization case may continue to have a principal place of business, this is the place of business of the reorganization entity, not the debtor.¹³⁶⁾

Furthermore, in *In re Kemsley*, the New York bankruptcy court supported the analysis of the *Millennium* decision,¹³⁷⁾ which ruled that the date to determine COMI should be the date of the opening of the foreign insolvency proceeding.¹³⁸⁾ The court reasoned that this determination was a fixed, verifiable date and was less subject to potential manipulation.¹³⁹⁾

However, the Court of Appeals for the Second Circuit in *In re Morning Mist Holdings Ltd. v Kryz* held that COMI should be determined on the basis of the debtor’s activities at or around the date the Chapter 15 petition was filed. In this respect, the Court examined the text of Section 1517 (b) of Chapter 15, which was written in the present tense.¹⁴⁰⁾ The Court emphasized that the present tense in this section required the debtor’s COMI to be examined when the recognition

135) *Ibid.*

136) *Ibid.*

137) *In re Gerova Fin. Grp. Ltd.*, 482 B.R. 86, 92-93 (Bankr. S.D.N.Y. 2012), the court also ruled that the date to determine COMI is the timing of the commencement of foreign proceedings.

138) *In Re Kemsley*, 489 BR 346 (US Bankr. Court, SD New York 2013).

139) *Ibid.*

140) Section 1517 provides “foreign proceeding shall be recognized as a foreign main proceeding if it is pending in the country where the debtor has the center of its main interests”.

Introducing the Center of Main Interests in International Insolvency Cases to Cambodian Law (Panha) petition was filed.¹⁴¹⁾ If Congress had intended the courts to consider COMI by looking at the past period, it could have stipulated this in the statute.¹⁴²⁾

The Court further examined other federal court decisions and found that many judgments¹⁴³⁾ supported the date the Chapter 15 petition was filed, except for *In re Millennium*, which accepted the date of commencement of foreign proceedings on the basis that the term COMI was similar to the “principal place of business”.¹⁴⁴⁾ However, the Court of Appeals for the Second Circuit indicated that both terms were not interchangeable because Congress had abandoned them when it enacted Chapter 15.¹⁴⁵⁾

Although in *In re Morning Mist Holding* the date of filing for Chapter 15 was held to be the proper date to determine COMI, some commentators have complained that this consideration invites forum shopping by corporate debtors who will seek to liquidate in countries where the law is favorable but has little or no connection to the debtors’ previous petition.¹⁴⁶⁾ Moreover, the date of the recognition application is not consistent with the decision of the UNCITRAL working group, which lately recommends the date of commencement of foreign proceedings.¹⁴⁷⁾

(4) The Japanese ARAF

In *Think3 Inc.*, the Tokyo District Court also decided on the issue of the date to determine the principal place of business. In this case, the Italian trustee argued that the court should consider the date on which the petition for a

141) *In Re Morning Mist Holding Ltd. v. Krys*, No. 11–4376 (US Court of Appeals for the Second Circuit April 16, 2013).

142) *Ibid.*

143) *In Re British American Ins. Co. Ltd.*, 425 BR 884 (US Bankr. Court, SD Florida 2010); *Lavie v. Ran*, 406 BR 277 (US Dist. Court, SD Texas 2009); *In Re Betcorp Ltd.*, 400 BR 266 (US Bankr. Court, D. Nevada 2009); *In Re Fairfield Sentry Ltd.*, 452 BR 52 (US Bankr. Court, SD New York 2011).

144) *In Re Morning Mist Holding Ltd. v. Krys*.

145) Stephen J. Shimshak, Alan W. Kornberg, and Claudia R. Tobler, “The Second Circuit Rules That the Filing of a Chapter 15 Petition Is the Relevant Period for Determining a Foreign Debtor’s ‘center of Main Interests’ (or ‘COMI’) and That ‘COMI’ Factors Include Any Relevant Activities of the Foreign Debtor” (Paul/Weiss, April 17, 2013), 4.

146) Pedro A. Jimenez and Mark G. Douglas, “Chapter 15 Petition Date ‘Anchors’ Comi Analysis,” June 2013, 11.

147) *Ibid.*

following case for recognition of foreign proceeding was filed as the timing to find the principal office of debtor. To support this assertion, the Italian trustee specified that the latest information, which was provided by the following petitions, would assist the court in determining the location of the debtor's principal office.¹⁴⁸⁾

However, the US representative argued that the time to determine the location of the debtor's principal place of business should be when the petition for the first bankruptcy proceeding was filed.¹⁴⁹⁾ The US representative claimed that if the court accepted the date of the following petition for recognition, this determination would create a risk of forum shopping and would end up being different from foreign judgments.¹⁵⁰⁾

Finally, the Tokyo District Court ruled that the date to determine the debtor's principal office was the time at which the petition for commencement of the very first insolvency proceeding was filed.¹⁵¹⁾ The court reasoned that if the filing date of the recognition petition were accepted as the date to examine the principal business office, this decision would be contrary to the trend of foreign judgments,¹⁵²⁾ which have been focusing on the time of the filing of a petition for commencement of foreign proceedings. Moreover, this examination would be at risk when there were competing claims of two or more applicants who filed the petition for recognition at an arbitrarily chosen time.¹⁵³⁾ Consequently, the courts would find it difficult to examine the debtor's principal office since the debtor could move its business activities after the opening of bankruptcy proceedings and thus the liquidation or rehabilitation proceedings would be affected by this consideration.¹⁵⁴⁾ On the other hand, choosing the time at which

148) *Think3 Inc.* [2012] Case no 3 & 5 of 2011 (JP The Tokyo District Court, Tokyo, July 31, 2012).

149) *Ibid.*

150) *Ibid.*

151) *Ibid.*

152) Many judgments accept the date of the commencement of foreign proceedings as the date to determine COMI, except the US ruling, which presently supports the date of application for recognition of foreign proceedings.

153) *Think3 Inc.* [2012] Case no 3 & 5 of 2011 (JP The Tokyo District Court, Tokyo, July 31, 2012).

154) *Ibid.*

the application for commencement of foreign proceeding provides a fixed date. The Italian trustee appealed to the Tokyo High Court.

On appeal, the Tokyo High Court affirmed but corrected the wording of the lower court decision from “when the petition for commencement of preceding insolvency proceedings is filed” to “the timing of the petition for commencement of preceding insolvency proceedings is filed, or when the preceding insolvency proceedings are commenced”.¹⁵⁵⁾ However, the Court ruled that the date of the filing of a petition of foreign proceedings is the date to determine COMI on the premise that the ARAF did not require foreign proceedings to commence at the foreign court when the foreign representative seeks recognition in Japan. The foreign representative may file a petition for recognition even if the commencement of the bankruptcy proceedings order is not yet released against the debtor.¹⁵⁶⁾ Moreover, the High Court agreed with the lower court ruling that if the court accepted the date on which the petition for recognition was filed, this consideration would be inconsistent with foreign judgments and lack of harmonization.¹⁵⁷⁾

Even though there had been no lengthy period of time between the commencement of the foreign proceeding and the application for recognition nor had there been a movement of the debtor’s principal business office just before the time of the petition for commencement in *Think3 Inc.* the Court viewed these situations as special circumstances that required careful consideration.¹⁵⁸⁾ However, the Court decided that the date to determine the principal office should be when the petition for the opening of bankruptcy proceedings is first filed.¹⁵⁹⁾

In short, the Tokyo High Court in *Think3 Inc.* held that the date for filing the

155) *Think3 Inc.* [2012] Case no 1757 of 2012 (JP The Tokyo High Court, Tokyo, November 2, 2012). Available at https://www.insol.org/page/304/japan_

156) Act on Recognition of and Assistance for Foreign Insolvency Proceedings, 129, Art. 17 para 2 (2000).

157) *Think3 Inc.* [2012] Case no 1757 of 2012 (JP The Tokyo High Court, Tokyo, November 2, 2012).

158) *Think3 Inc.* [2012] Case no 3 & 5 of 2011 (Japan|JP The Tokyo District Court, Tokyo, July 31, 2012).

159) *Ibid.*

petition for the foreign insolvency proceedings is the time at which to determine COMI in Japan. The Court reasoned that the Japanese ARAF and several insolvency laws do not need the foreign proceedings to have been commenced abroad before applying for the recognition in Japan.

(4) Summary

In sum, the interpretation of COMI differs from one jurisdiction to another even though the term COMI is a single legal concept from the EC Regulation. The Model Law employs Recital 13 of the EC Regulation to interpret the meaning of COMI. In the EU, the EC recently amended the EC Regulation and defined the term COMI.

On the issue of relevant factors to rebut the presumption that the COMI is differently located from the place of its registered office, the Model Law provides a number of additional factors for courts to use when determining COMI. The UNCITRAL does not place limits on additional factors that may be considered while the EC is quiet on extra conditions. In the US, the courts do not focus on specific criteria to determine the debtor's COMI, as was also the case with the Japanese court in *Think3 Inc.*, and considers all relevant factors that have been judged by different courts around the world.

When the debtor shifts COMI before the commencement of insolvency proceeding, the UNCITRAL uses the date of commencement of the foreign proceedings as the date for determining COMI. In the EU, the courts accept the date on which the application for commencement of insolvency proceeding is filed. In contrast, American courts have recently supported the date of application for recognition of foreign proceedings whereas the Tokyo High Court, in *Think3 Inc.*, accepted the filing date of a petition of foreign proceedings.

When the debtor migrates its COMI from one jurisdiction to another, in some instances just before the opening of insolvency proceedings, the Model Law does not provide a clear solution, but requires the courts of enacting countries to give serious consideration when this occurs. The EU courts hold that the date of the application for commencement of insolvency proceedings is the time at

Introducing the Center of Main Interests in International Insolvency Cases to Cambodian Law (Panha) which to determine COMI while in Japan, the Tokyo District Court in *Think3 Inc.*, used the date on which the petition for commencement of bankruptcy proceedings when it is first filed.

III. Comparative Analysis and Recommendations

This chapter will compare and analyze the COMI determination under the four legislative regimes reviewed here in order to make suggestions on the most suitable rules for the new legislation on Cross Border Insolvency (CBI) in Cambodia. Since this paper has not discussed the situation of international insolvency in Cambodia yet, this chapter begins with general remarks on the CBI context in Cambodia. This will be followed by a comparative analysis and recommendations for Cambodia to adopt the Model Law on CBI.

1. General Remarks on Cross Border Insolvency in Cambodia

In Cambodia, there are no provisions on CBI contained in the Law on Insolvency (LOI). Indeed, Article 5 of the LOI states, “unless insolvency law contains special provisions, the provisions of the Cambodian Code of Civil Procedure (CCCP) shall apply *mutatis mutandis*.”¹⁶⁰⁾ Articles 352 and 353 of the CCCP only deal with the recognition of foreign judgments in relation to their execution¹⁶¹⁾ and the execution of arbitration awards.¹⁶²⁾ Foreign insolvency orders, however, may not be considered foreign judgments or arbitration awards that can be enforced and recognized under the CCCP.¹⁶³⁾ Therefore, the LOI and CCCP do not provide effective remedies for governing CBI issues in Cambodia.

The courts of Cambodia have never encountered a case of a petition for recognition of foreign insolvency proceedings. If there were such an application

160) Law on Insolvency, Art. 5 (2007).

161) Cambodia Code of Civil Procedure, Art. 352 (2006).

162) *Ibid.*, of Art. 353.

163) Hon Shinjiro Takagi, “Chapter 21 Japan,” in *Recognition & Enforcement of Cross-Border Insolvency: A Guide to International Practice*, Edited by Neil Cooper and Rebecca Jarvis (Wiley, 1996), 71.

for recognition brought to a Cambodian court, the foreign petition would be refused based on the reason that the LOI and CCCP have no procedures permitting the court to recognize foreign proceedings. If Cambodia chooses not to recognize the foreign proceedings, the courts of foreign countries will react similarly in accordance with the idea of reciprocity. Accordingly, this miscommunication would have a great impact on the relationship between the legal systems of Cambodia and foreign countries and more seriously would affect business relations.

There are three reasons why Cambodia should consider adopting new legislation based on the Model Law on CBI. First, Cambodia is a member of the Association of Southeast Asian Nations (ASEAN) that will implement a plan in late 2015 called the ASEAN Economic Community (AEC). Through the AEC, ASEAN will become a single market community that might demand some kind of legislation on CBI. Indeed, Chief Justice Chan Sek Keong of Singapore¹⁶⁴⁾ has said, “[p]erhaps then, if and when the member states encounter more cross-border insolvencies among themselves, the need for action in this area of the law will appear on the radar screen.”¹⁶⁵⁾ Therefore, in order to provide effective approaches to solve the issue of CBI, Cambodia should be a leading country in adopting the Model Law on CBI.

Second, Cambodia has recently had to deal with a case involving CBI filed by an insolvent debtor, Mfone Telecommunication in 2013.¹⁶⁶⁾ In this case, Mfone was a subsidiary of Thailand’s Thaicom PLC and Singapore’s Shenington Investments. Mfone owed a debt of about US\$160 million to more than 1,000 creditors, including local Cambodian and foreign creditors.¹⁶⁷⁾ The Mfone case was about debt collection by creditors, including foreign creditors. This case signaled Cambodia’s need to be prepared for CBI issues in the coming years.

164) Chief Justice of Singapore is the top position in the judicial system in Singapore, and is chosen by the Prime Minister and appointed by the President.

165) Chan Sek Keong, “Cross-Border Insolvency Affecting Singapore,” *Singapore Academy of Law Journal* (2011): 415.

166) Bopha Phorn and Pheap Aun, “Creditors Claim \$160 Million in Mfone Debts,” *The Cambodia Daily*, March 28, 2013.

167) *Ibid.*

Third, the Model Law on CBI is the most significant model designed to provide an effective and efficient remedy to any countries that are lacking in CBI provisions.¹⁶⁸⁾ While the Cambodian domestic insolvency regime lacks provisions on CBI, the acceptance of the Model Law will offer a substantial solution for CBI for Cambodia in the future. Moreover, as many industrialized countries, such as the United States and Japan, have enacted their legislation based on the Model Law,¹⁶⁹⁾ the adoption of the Model Law in Cambodia would attract foreign investors, which favor countries that have strong legislation to protect their investments.

Accordingly, in order to bring itself into line with international standards on CBI and to equip its insolvency law with efficiency and flexibility on CBI, Cambodia should adopt the Model Law in a form, which is appropriate to the context of its legal environment. To achieve this goal, Cambodia should learn how cases of CBI are dealt with under the Model Law and the legislation of the EU, US and Japan in order to provide the most suitable rules in its new legislation on CBI.

2. Comparative Analyses

Though the Model Law is good as a model, this paper carefully analyzes it in order to effectively transplant it into Cambodia soil. This section examines the modifications and adjustments to the Model Law that will be necessary for it to work in Cambodia in three sections.

(1) Definition of COMI

The first item for a comparative analysis is the definition of COMI. American law does not provide any clear definition of COMI, while Japan takes care of the issue by using its own civil procedure law and domestic insolvency codes,¹⁷⁰⁾ so neither provides much in the way of a useful guide for Cambodia.

168) UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation, 3 (United Nations 2014).

169) http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html

170) *Think3 Inc.* [2012] Case no 3 & 5 of 2011 (JP The Tokyo District Court, Tokyo, July

Therefore, this paper examines the UNCITRAL Model Law and the EC Regulation in order to provide an appropriate definition of COMI to Cambodia.

Recently, the UNCITRAL revised the Guide to Enactment and Interpretation of the Model Law on CBI and recommended the enacting countries of the Model Law determine COMI based on two factors: the location in which the debtor is readily ascertainable by creditors, and the location where the central administration of the debtor takes place.¹⁷¹⁾ In fact, the recommendation of the UNCITRAL does not directly define the term COMI, but a consideration of both of these factors would settle many issues caused by the ambiguity of COMI.

In the EU, the EC Regulation is ahead of the Model Law in the sense that the term COMI is explicitly defined. The new amendment of the EC Regulation, Article 3(1) defines COMI as “the place where the debtor conducts the administration of his interests on a regular basis and which is ascertainable by third parties”.¹⁷²⁾ Hence, the definition of COMI under the EC Regulation is a good model for Cambodia to follow for the new law on CBI.

In this context, this paper takes the position that new Cambodian legislation should include a definition of COMI. This research finds that the lack of a comprehensive definition of COMI in the enacting countries of the Model Law and the EC Regulation results in different interpretations and leads to misunderstanding. Therefore, incorporating a COMI definition into the new legislation on CBI in Cambodia will be useful. It is also necessary to consider how to define the term COMI in a way appropriate to the Cambodian legal context.

Because the UNCITRAL does not directly define the term COMI, this paper proposes that the new Cambodian legislation on CBI should include the definition of COMI contained in the EC Regulation. This definition will help

31, 2012).

171) United Nations Commission on International Trade Law Working Group V (Insolvency Law) Forty-Third session, *Interpretation and Application of Selected Concepts of the UNCITRAL Model Law on Cross-Border Insolvency Relating to Centre of Main Interests (COMI)*, 22.

172) Council Regulation (EC) No 1346/2000 on Insolvency Proceedings, Art. 3 ¶ 1 (2000).

the Cambodian court to determine COMI rapidly and clearly while reducing the differences in ideas on the interpretation of the location of a debtor's COMI.¹⁷³⁾

(2) Relevant Factors to Rebut the Presumption

Regarding the relevant factors to rebut the presumption that a debtor's COMI differ from the jurisdiction in which its office is registered, the Model Law provides a number of additional factors. The US and Japan do not limit the factors which may be considered and tend to follow the Model Law approach whereas the EC Regulation is silent on specific additional factors to rebut the presumption. Accordingly, this paper looks at whether the new legislation on CBI of Cambodia should incorporate all additional factors or choose several key factors such as the place of main debtor's asset, the location of employees, the location easily ascertainable by creditors, or the head office function out of all the criteria provided by the Model Law.

On this issue, if the new law on CBI in Cambodia chooses to use all the relevant factors recommended by the Model Law, a number of additional factors may pose a risk of competing claims among the interested parties trying proves to the courts where the COMI is located.¹⁷⁴⁾ Particularly, the disputing parties may present new elements, which are only useful in the place in which their home country is located. More precisely, the courts may have never had experience with those new criteria, and the courts may make judgments by considering those factors. Consequently, rebutting the presumption will become more complicated.

On the other hand, if the Cambodian new law selects several main factors out of all possible criteria provided by the Model Law and other countries, this will tend to restrict the courts to an evaluation of the actual location of the debtor's COMI. This limitation may provide a narrow gap for judges to examine COMI

173) Martens, "A Definition of the Term Centre of Main Interests for Insolvent Cross-Border Groups of Companies," 111.

174) United Nations Commission on International Trade Law Working Group V (Insolvency Law) Fortieth session, *Interpretation and Application of Selected Concepts of the UNICITRAL Model Law on Cross-Border Insolvency Relating to Centre of Main Interests (COMI)*, 10.

when some factors such as the location of purchased raw materials, the place of sales operations or the location of employees are spread worldwide and it is not possible to limit them.¹⁷⁵⁾ Moreover, since the US, Japan and the EC Regulation do not limit additional factors, which can be used to rebut the presumption, such restrictions will be useless for the Cambodian legal system and decrease the possibility of consistent solution to this matter. Therefore, the limitation of additional factors is not a good model for the new Cambodian law on CBI.

(3) Date to Determine COMI

With respect to the issue that arises when the debtor moves its COMI from one country to another before the application for commencement of insolvency proceedings is made to the court, the Model Law, and the legislation of the EU, US and Japan have provided three different solutions. Those options are the date of commencement of foreign proceedings, the date of application for the opening of foreign proceedings,¹⁷⁶⁾ and the date of application for the recognition of foreign proceedings. Although there are a variety of choices for handling this problem, the date of commencement and the date of application for recognition of foreign proceeding are not suitable to the context of Cambodia. In this regard, the new law on CBI in Cambodia should not choose the date of commencement of foreign proceeding because this consideration will be incompatible with the concept of the CCCP, which provides that the date of filing the petition is the fundamental time for determining the court's jurisdiction.¹⁷⁷⁾ Therefore, accepting the date of the commencement of foreign proceedings is contrary to the objective of the legal system in Cambodia.

In addition, the new Cambodian law on CBI should not accept the date of the application for recognition of foreign proceedings since this determination will

175) *Think3 Inc.* [2012] Case no 3 & 5 of 2011 (JP The Tokyo District Court, Tokyo, July 31, 2012).

176) Because the date of the filing of a petition for commencement under the Japanese approach, and the date on which the request to open insolvency proceedings is filed under the EC Regulation has the same meaning as the date of application for commencement, this paper uses only the date of application for commencement of foreign proceeding as the timing.

177) Cambodia Code of Civil Procedure, Art. 17 (2006).

increase forum shopping by foreign debtors, who will try to find a new jurisdiction after filing the petition to open insolvency proceedings. In particular, this timing will create difficulties for the court to determine COMI when the foreign proceeding is a liquidation proceeding. From this viewpoint, the debtor does not continue to have COMI after the liquidation proceeding is ordered. After that there only exists the center of the activities of the liquidator.¹⁷⁸⁾ Therefore, the courts may face more troubles in deliberating on the location of COMI if the new law of Cambodia adopts the date of application for recognition. Moreover, the date of application for recognition will raise the risk of competing claims when debtors file petitions for recognition at an arbitrarily preferred time.¹⁷⁹⁾

When the debtor moves COMI from one jurisdiction to another after the application for commencement of insolvency proceeding is filed, sometimes the move is conducted shortly before the court starts to open insolvency proceedings. The Model Law and the US courts do not provide any solutions to this matter. However, the courts of the EU accept the date of application for commencement of insolvency proceedings while the Japanese court uses the date on which the petition for commencement of foreign proceedings is first filed.

In this context, the acceptance of the date of the application for commencement of foreign proceeding is a reasonable date because shifting COMI after filing the petition to the court is not acceptable. The move does not change the jurisdiction of the court as the court already has competence to open insolvency proceedings.¹⁸⁰⁾ Therefore, the new law of Cambodia should apply this approach in setting the date to determine COMI.

3. Recommendations

After conducting a comparative analysis under the Model Law, and the

178) *In Re Millenium Global Emerging Credit Master Fund*, 474 BR 88 (United States|US Dist. Court, SD New York 2012).

179) *Think3 Inc.* [2012] Case no 3 & 5 of 2011 (JP The Tokyo District Court, Tokyo, July 31, 2012).

180) Soriano and Alf erez, *The European Insolvency Regulation*, 47–48.

legislation of the EU, US and Japan, this paper strongly suggests that Cambodia should adopt the Model Law on CBI in any new legislation on CBI in the coming year. In order to achieve this objective, this paper recommends that the new legislation should import three main points. First, the new law of Cambodia should stipulate a definition of COMI that adopts a similar approach to the EC Regulation.¹⁸¹⁾

Second, with regard to the relevant factors to rebut the presumption that the COMI is differently located from the debtor's registered office, this research proposes that the new legislation of Cambodia on CBI should include all additional factors to discern the debtor's COMI based on the UNCITRAL approach. This suggestion is reasoned on the basis that choosing several factors out of all criteria recommended by the UNCITRAL and other countries will cause difficulties for the Cambodian judges to determine the actual location of a debtor's COMI.

Third, on the issue of the date to determine COMI, the new law of Cambodia should accept the date of application for commencement of foreign proceedings as the time at which to determine COMI if the debtor moves it before the petition to open insolvency proceedings is filed to the court. This paper reasons that this timing would harmonize with the domestic code of civil procedure of Cambodia, which stipulates the date of filing petitions to be the timing for the court having jurisdiction. Moreover, taking the date of application for commencement avoids giving incentives to foreign debtors to try to transfer assets or judicial proceedings from one country to another in order to obtain a more favorable legal position. When the debtor moves its COMI to another country after the request to open insolvency proceedings have been made to the court, sometimes the migration is just before the court begins to open insolvency proceedings, so the Cambodian law on CBI should accept the date of the petition for commencement of foreign proceedings. The rationale for this is that the movement is not acceptable since the court has already obtained jurisdiction to open insolvency proceedings.

181) *See, supra* III.2.(1).

IV. Conclusion

The determination of the debtor's Center of Main Interests (COMI) has become a substantive issue in Cross Border Insolvency (CBI) when a company operates internationally and goes bankrupt. There is no explicit criterion to determine COMI when the debtor moves it from one jurisdiction to another. There is only the presumption that the registered office is the COMI of the debtor. However, in practice, the debtor may register its office in one country but have its COMI elsewhere, which presents an obstacle for courts trying to determine where the COMI is situated. Importantly, there is the problem of which relevant factors the courts should employ to rebut the presumption of COMI when the COMI is not located in the same place as the registered office. Furthermore, there is the issue of which time period the court should examine the COMI when the debtor moves it from one jurisdiction to another. Consequently, various courts have made inconsistent rulings on the issues of COMI determination, which make CBI settlement complicated.

In order to settle the issue of the COMI determination, the United Nations Commission on International Trade Law (UNCITRAL), which adopted the Model law on CBI in 1997, has recently tabled issues regarding COMI examination for discussion by providing more guidance to the enacting countries of the Model Law on CBI. Additionally, the European Union Council (EC) has also amended some articles of the EC Regulation in order to provide a much-needed improvement to CBI cases, specifically COMI determination. In this effort, the courts of US and Japan have also ruled on many judgments concerning COMI interpretation.

While many countries have improved their national insolvency laws to meet international standards, Cambodia, which adopted the Law on Insolvency (LOI) in 2007, has fallen behind the trend of international development on CBI issues. The LOI of Cambodia is not equipped with CBI provisions even though the country has been faced with cases of CBI such as *Mfone Telecommunication*. This case has been a sign for Cambodia to get ready to provide effective and efficient approaches to the issue of CBI. Moreover, Cambodia, which is a

member of ASEAN, will implement a plan called the ASEAN Economic Community (AEC) in late 2015 and through this project many commentators believe that CBI matters will spread among ASEAN nations, including Cambodia. Accordingly, Cambodia should learn how to deal with cases of CBI from the Model Law and the legislation of the EU, US and Japan can act as a helpful reference for such future legislation.

The examination here clearly suggests that Cambodia should adopt the Model Law on CBI in the coming year. From this viewpoint, Cambodia should explicitly provide a definition of COMI that follows the recent amendment of EC Regulation, Article 3 (1) that states “the center of main interests shall be the place where the debtor conducts the administration of his interests on a regular basis and which is ascertainable by third parties.”¹⁸²⁾ This definition will provide a harmonized rule on COMI determination and will reduce different interpretations among the enacting states of the Model Law and the EC Regulation.

With regard to relevant factors to rebut the presumption of COMI, the law on CBI of Cambodia should include all additional factors that have been recently presented by the UNCITRAL. The new legislation should not limit these factors because such a limitation will present a narrow gap for judges to appraise the debtor’s COMI.

Regarding the date to determine COMI, the new law on CBI of Cambodia should undertake the date of the petition of commencement of foreign proceedings as the date to determine COMI when the debtor shifts COMI from one place to another before the application for the opening of insolvency proceeding is made to the court. This timing will harmonize with the provisions of the CCCP, which accepts the date of the filing of a petition as the timing from which the court has jurisdiction. Moreover, the date of application for commencement will provide less of an incentive for COMI shopping by foreign debtors. In the event that the debtor moves COMI in close proximity to the opening of insolvency proceedings, the Cambodian law on CBI should accept

182) Council Regulation (EC) No 1346/2000 on Insolvency Proceedings, Art. 3 ¶ 1 (2000).

the date of the petition for commencement of foreign proceedings being filed. The reasoning for this is that the court will have already received jurisdiction to initiate insolvency proceedings.

The current findings may suggest the best preparation for Cambodia to tackle the issue of international insolvency in the future. Moreover, it will offer a significant contribution to the national insolvency law of Cambodia. Should Cambodia adopt the Model Law on cross border insolvency it will be able to meet international standards in this area. The suggestions contained herein will also decrease disputes concerning COMI interpretation in cases of international insolvency.

