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Lawyer Monthly

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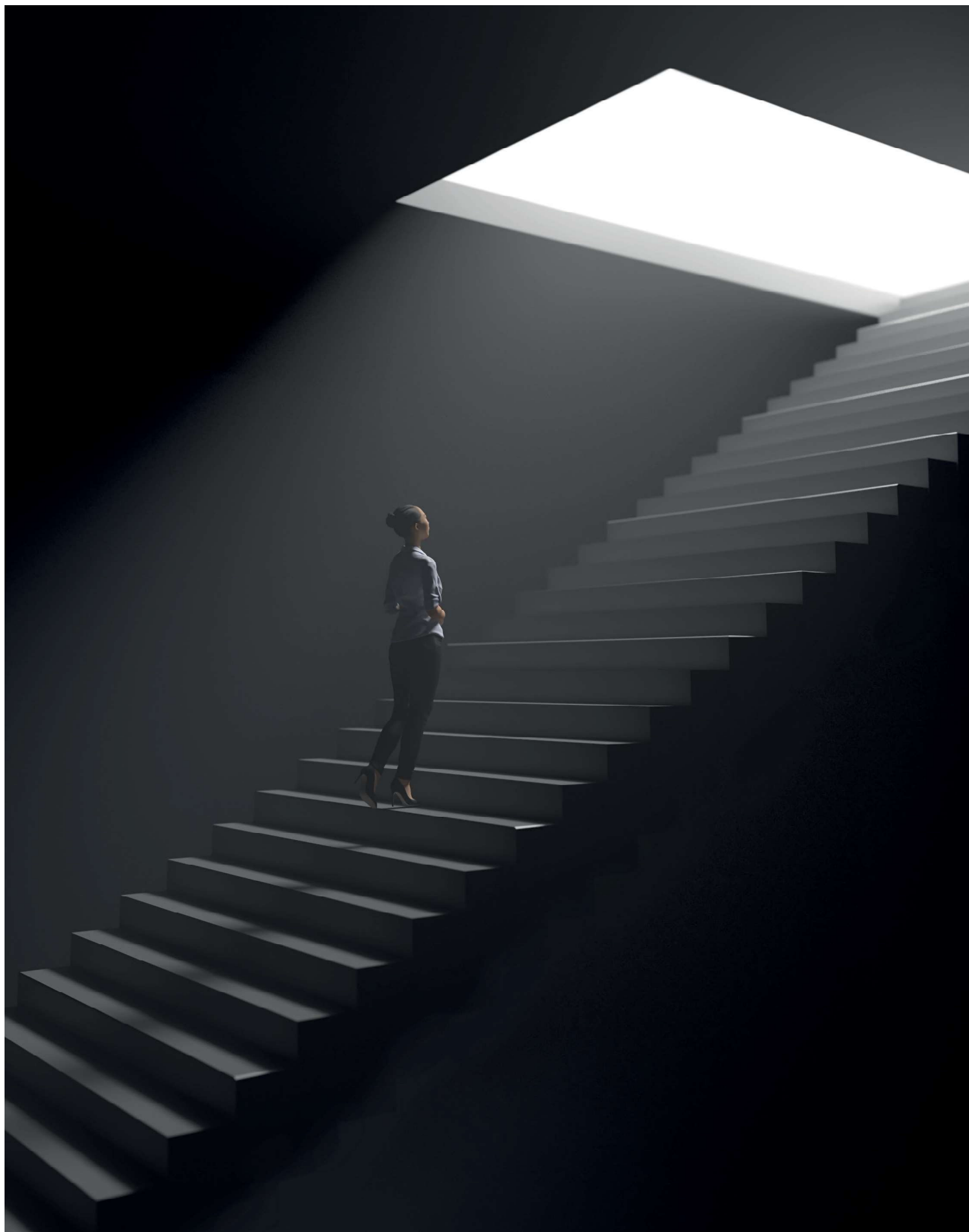
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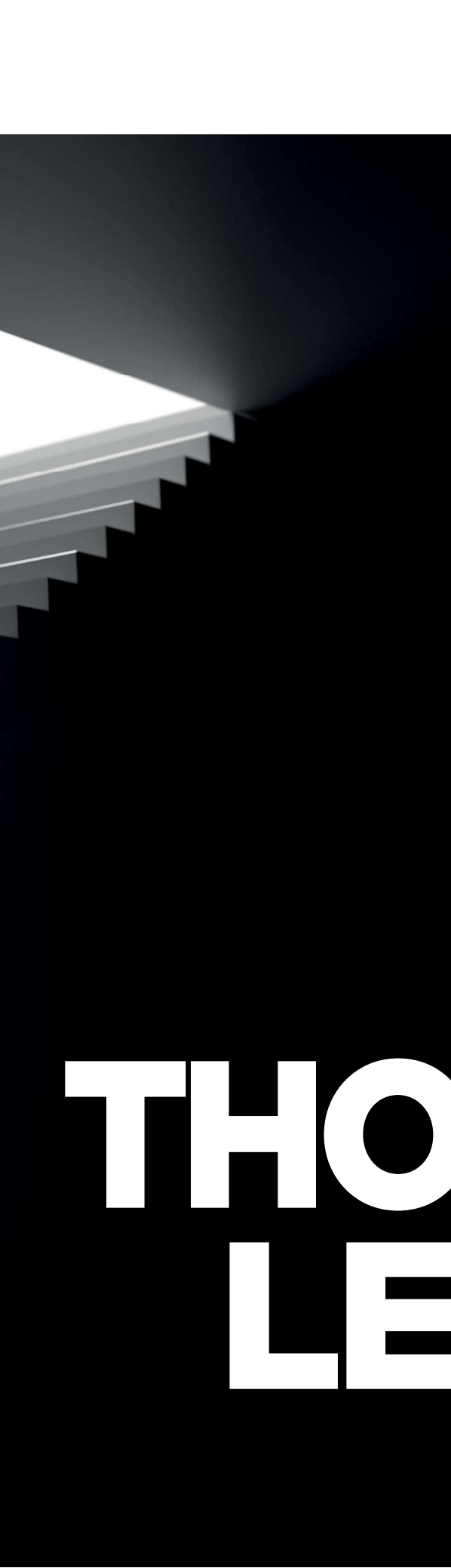
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This portion of Lawyer Monthly Magazine features op-eds written by professionals in or adjacent to the legal sector, shining a light on changes occurring within their jurisdiction and exploring new ways of tackling them. The articles in this section are guaranteed to be incisive, informative and thought-provoking.

The March edition features a collection of articles from legal experts practicing in disparate regions – from Jersey to Switzerland, Japan and the US. Whether you are involved in the same spheres or simply curious about their topics of specialisation, this section should hold something of interest to everyone.

THOUGHT LEADER

Thought Leader

Overcoming International Debt Collection in Switzerland

As a financial hub, Switzerland is frequently involved in matters involving international debt collection. The debt recovery process necessarily involves in-depth fact-finding and additional concerns depending on the relevant parties' attachment to Switzerland. In this feature we hear from Marcel Frey, counsel at Prager Dreifuss, who outlines the obstacles that can be faced during this process and offers his insights on how they can most effectively be tackled.

In a broad sense, what is the process involved in recovering an international debt?

Switzerland is an important venue with regard to international debt recovery, since assets are frequently located in Switzerland (most often in the form of a bank account or securities located at one of the many Swiss banks, or international banks with offices in Switzerland). Swiss debt enforcement offices and local courts are thus very familiar with cases involving foreign creditors looking to enforce claims in this jurisdiction. Also, proceedings up until the court stages are simple and inexpensive as they involve primarily the debt enforcement office.

Recovering international debts in Switzerland, however, presupposes some link to Switzerland. Such a link may take the form of assets maintained in Switzerland (i.e. bank accounts, securities, real estate or

other fixed assets). Another point of connection may be that the debtor actually has its registered seat in Switzerland or – in the case of a natural person – is a Swiss resident.

Where the debtor is resident or incorporated in Switzerland, debt recovery starts with the issuance of a payment summons against the debtor. This process is initialised by the creditor requesting the debt enforcement office at the place of residency or incorporation to issue a payment summons against the debtor. The payment summons contains the information about the debtor, the amount due and the reason for the debt (in summary terms).

The summons requires payment within 20 days. Upon service, the debtor may contest the payment summons, but must do so within 10 days. Doing so then puts the onus on the collecting party to have the objection set aside. This involves a court assessing whether the debt is owed and due, and only at this stage does a judge become



involved. Successful proceedings will entitle the creditor to continue with the debt recovery, which will then take the form of a seizure of assets in the case of a natural person or the threat of bankruptcy in case of a legal entity. The same applies if the debtor does not object to the payment summons and the 20-day grace period has lapsed.

In instances where the owing party is not locally resident but assets have been located in Switzerland, the creditor has the option of attaching those assets if an attachment reason is given. The foremost attachment reason in international contexts is where a creditor has a foreign judgement against the debtor. In such instances, the creditor may, for instance, have an account attached based on the foreign judgment. The debt enforcement office will then set short deadlines for the creditor to pursue its claim by means of debt enforcement (as described above, with the difference that the debtor must be served abroad based on

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the requisite international treaties, which may prove time-consuming and cumbersome).

What key laws, statutes and regulations apply to this process in your jurisdiction?

Debt enforcement is governed by the Federal Act on Debt Enforcement and Bankruptcy (DEBA). International treaties such as the Lugano Convention or the New York Convention may come into play, where a foreign judgement or award forms the basis for the debt. Claims that have not yet become the object of court proceedings are enforced directly against the Swiss resident debtor based on the DEBA process outlined above, which again may require the serving of initial documents by means of international treaties (such as the Hague Conventions).

Where local courts need to ascertain the validity of the debt, the Swiss Civil Code and cantonal court organisation statutes come into play for certain procedural technicalities and the Federal Act on International Private Law as concerns aspects of substantive law.

Are significant complications created when the debtor organisation is particularly large?

The fact that a debtor organisation is particularly large does not in itself constitute a significant complexity. Where the debtor is incorporated in Switzerland, a quick online check in the electronic commercial register should suffice to establish the place of incorporation of the debtor and hence the district of the competent debt enforcement office.

A certain degree of complication may enter the fray if there is uncertainty which entity of a conglomerate is the actual debtor (i.e. a subsidiary or the holding company, or whether the debt was entered into by a company or a branch office located in Switzerland). However, these issues need to be resolved on a material level and do not as such impact on the actual enforcement.

What are the primary obstacles associated with cross-border debt collection?

Cross-border debt collection may be constrained by the challenge of locating assets in Switzerland, given that Switzerland does not have many publicly accessible registers that would enable creditors seeking satisfaction of their debts to locate assets ready for liquidation. Land registers are currently still maintained by each commune individually and these will only disclose



information about ownership of real estate upon an individual inquiry as to a particular parcel.

As of 1 January 2023, a national real estate search tool has been introduced, but this is only accessible to public authorities. Authorities can submit queries based on the tool, which are then relayed to the communal real estate offices. This should in effect enable authorities (but not private individuals) to find out whether a debtor owns real estate in Switzerland, even though a central land register still does not exist. There are no central security registers and banks are not permitted to disclose the existence (or non-existence) of client relationships.

Shareholdings in companies are also still quite discrete. Important stakes in publicly traded companies and certain threshold shareholdings may be visible based on stock exchange regulations, but this is frequently insufficient for creditors. Against the recommendations of the Financial Action Task Force, there are currently efforts underfoot to draft

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legislation law that would introduce a central register of beneficial owners of companies. However, here too, the legislative intent is that the register would only be accessible to the relevant authorities and not to the public.

Once identified, the owner of an asset can try to halt enforcement if it can invoke valid reasons to contest the debt for either material or formal reasons. The underlying claim documents or court decision may become the object of a local court process which may be subject to appeal. During this time, the creditor can try to prevent the debtor from dissipating its assets and may find some relief through measures provided for in the DEBA, though these again are subject to court review.

Foreign documents evidencing a claim may require translation, though English evidence is regularly accepted by domestic courts which are sufficiently familiar with English. However, a claimant may be expected to assist the court in these proceedings, particularly where foreign law is at stake.

How can these obstacles best be planned for and overcome with a minimum of difficulty?

Whenever parties are entering into a commercial relationship where there is a Swiss connection (often by a party being Swiss) or where the parties seek to secure an objective commercially attractive governing law, opting for Swiss law is advisable. This makes enforcement in Switzerland significantly easier, as courts do not have to apply a law unknown to them. Translation issues usually fall by the wayside.

On another level, obtaining advance security for performance and agreeing on a forum for performance and for disputes may take the uncertainty out of contractual deliberations.

What would your advice be for less experienced lawyers who want to emulate your success in this area?

Avoiding legal problems is always smarter than having to deal with controversies once they have arisen. Background research on potential contractual counterparties is thus prudent and reasonably easy in Switzerland. Checking the entries of a person or company in the local debt registry will inform the inquiring party in advance whether there have been any debt enforcement steps against the potential counter party in the past. Though no guarantee, earlier behaviour may give a good indication of how much leeway should be given to the other side with regard to safeguards to performance.



About Marcel Frey

Marcel Frey is a member of Prager Dreifuss's Dispute Resolution and Private Clients Teams. He represents Swiss and foreign clients in court and arbitration proceedings in addition to providing advice to private individuals on enforcing civil claims in complex cases of white collar crime. Marcel also regularly advises clients in international judicial assistance proceedings and the recovery of illegally acquired assets. In addition, he specialises in the enforcement of Swiss and international decisions in Switzerland.

Prager Dreifuss

Prager Dreifuss is a prominent Swiss law firm with a highly regarded international practice. Its team of 45 lawyers offers a full range of services to both businesses and private clients, frequently drawing upon its relationships with overseas firms to provide bespoke solutions.

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