The dispute resolution practice is a “must have” for every legal counsel in Ukraine. The new market players refined business strategies towards a delineated dispute front, making it their “bread and butter”. The recently adopted changes to the judicial system, client demand for flexible and reliable tools of legal protection, upcoming reform in the arbitration sector, mean this is obviously a perfect time to adjust their legal solutions as for time and finance efficiency, force marketing and introduce a forward-thinking vision. We addressed these and other questions to Ivan Mishchenko, managing partner of Trusted Advisors, a new ambitious team establishing its place on the dispute resolution landscape in Ukraine. Here’s what he had to say.

Forward-Thinking Mode
UJBL: You are a new, very dynamic and ambitious market player specializing mainly in disputes settlement, in particular in international arbitration. How is this practice developing in your company today? How would you define it?

Ivan Mishchenko: When we started our business and thought about business concept, we strove to deal with settling disputes according to the principle “anytime, anywhere”. So we have come to create a “full circle dispute resolution firm”. Arbitration is undoubtedly the crucial component of such a concept.

Until recently, Ivan Lishchina ran the international arbitration practice in our company, but when he was appointed a commissioner for the European Court of Human Rights (ECHR) in the Ministry of Justice of Ukraine, I took over the arbitration practice as the managing partner. This practice is seen as one of the overriding priorities for our company and is developing actively. We want to have an opportunity to offer our clients all possible legal instruments in dispute resolution — the international arbitration by itself, investment disputes with the state, cross-border litigation, transnational insolvency, asset-tracing and other instruments.

Ivan Lishchina’s appointment to the position in the Ministry of Justice of Ukraine is treated with respect and understanding because his knowledge and experience are perfect for this position in this difficult time for the country. He worked at the European Court of Human Rights for 6 years and then practiced international arbitration activity and worked in the ECHR as an advocate for many years, gaining considerable experience and understanding of these processes. For this reason, to my mind, he is the best candidate in this area for the State of Ukraine.

We do not plan to engage new partners for development of this practice, but will develop it by ourselves. Now I run a team that worked with Ivan Lishchina and continue to carry out current projects with colleagues.

UJBL: What are the spheres of application of arbitration today? What are the most frequent demands made by your clients? What main directions of your arbitration practice do you develop these days?

I. M.: The first and maybe the most popular and desired category of dispute for advocates is complex corporate dispute. To my mind, the number of such disputes has fallen for quite objective reasons in recent years.

Asset-tracing and debt enforcement became the most popular ones for quite an objective reason. The banks play an active role in this area. The instruments of this practice are being used more and more actively by banks, despite their conservative approach and large number of corporate agreements, etc. Indeed, in Ukraine, even in the presence of a positive jurisprudence, it is not always possible to execute judgments, because the debtor is in much better position than the creditor. However, the opposite is true in foreign jurisdictions. A number of problems, either financial or concerning the reputation of a debtor, are caused by prosecution in Switzerland, Cyprus, the USA or other jurisdictions.

As long as the export of agricultural and metallurgical products is as usual dominant in our country, I would in...
Yet, we think that soon investment disputes with Russia concerning the Ukrainian companies’ property nationalized in Crimea could become more intensive.

I. M.: Actually, there are talks about this matter, but they rarely reach concrete agreements, because the procedure of the dispute with the State is quite complicated in itself and needs serious intellectual and financial resources. For example, I used to work for the Ministry of Justice. At that time there were a number of disputes between the State and foreign investors, but now as long as the number of investments is much smaller, the number of potential and real disputes has decreased.

From my experience with foreign investors, I can say that having sufficient interest in the Ukrainian market, they are confused by the great number of toxic assets; almost every asset has its own story. Unfortunately, the risks that this toxicity will sooner or later lead to a corporate conflict or a conflict with the State are quite high. What is more, the image of our country is not excellent from the point of view of investors. A confirmation of this is the conflict between Swissport and Ihor Kolomoyskyi caused Swissport’s exit from our market; the recent story with Sky Mall. I do not know profoundly the details of this dispute, but I know that Hillar Teder managed to win the case in arbitration tribunal, here it was “scorched earth”. The Ukrainian legal entities’ owners of assets were liquidated during insolvency proceedings, etc.

Yet, we think that soon investment disputes with Russia concerning the Ukrainian companies’ property nationalized in Crimea could become more intensive. It depends on a decision of jurisdictional processes in an investment arbitration proceeding against the Russian Federation to date, particularly by Ukrafta. Relevant decisions of investment tribunals can be expected by the end of autumn. Realizing that the investment arbitration is not cheap and its usual value could be higher than the value of the property lost in Crimea, we have elaborated a procedure of a comparatively inexpensive representation of such disputes.

UJBL: What worldwide trends in international arbitration could you mention?
I. M.: To my mind, more and more disputes will be re-committed to arbitration from state courts. Because it is easier and clearer: the quality of arbitration is higher than the state judiciary system, while the processing period can compete with the examination of cases in state courts. For instance, the most popular arbitration forum in the world is in the United Kingdom. Almost all international arbitration institutes try to create more recent procedures. For this reason, the trend towards development, universalization, towards attempts to adjudicate more disputes, towards simplifying and reducing the procedures and processing period of arbitration, towards support of arbitration procedures by the courts of general jurisdiction continue.

UJBL: How does the role of lawyers change during the arbitration process? How does the influence of lawyers specializing in disputes, and lawyers specializing in other jurisdictions, change?
I. M.: I think there is quite a strong trend towards reducing the role of local lawyers in comparison with the lawyers from foreign jurisdictions. I’ll take our legal practice as an example. Talking about the LCIA, we undoubtedly have to enlist a barrister.

However, if we talk about cross-border disputes or proceedings in any foreign court, we have to engage local advocate anyway. If, however, English solicitors used to present themselves very successfully and do the main part of the job, now the process would be as follows. The law firm does almost 80% of all work, and the role of a solicitor is often reduced to the verification of language and a certain link between us and the barrister. Of course, this affects the value, because the working hours of English solicitors are very expensive. In this sense, we can provide and offer our customers a significant cheapening of this process, because we do most of the work by ourselves. If we hire colleagues abroad, we are still trying to do most of the work for them. And as I understand, this trend is developing. Nevertheless, from the point of view of the immediate reference to the court, we can’t do without a local lawyer.
How do world trends impact Ukraine?

I. M.: I think that Ukraine should follow world trends — after all, we attempt to develop pro-arbitration jurisdiction attracting disputes to Ukraine.

But this is primarily linked to the development of the ICAC, the introduction of amendments to procedural legislation. This is exactly the issue which the new relevant draft act is about. However, we still seem to be somewhere at the start of the way. Both foreign customers and contractors prefer their jurisdictions or other international institutions for disputes to the ICAC.

What changes does Ukrainian legislation need for the organization of Ukraine as a pro-arbitration jurisdiction? What legislative initiative could this process promote?

I. M.: International arbitration requires the support of a national judicial system. First of all, the issue here is the likelihood of seizure of assets, a so-called freezing order. The seizure of assets or some comparable to that legally relevant actions cannot be possibly achieved in our local courts. There are some precedents, but this situation does not change systematically. The situation is similar with the disclosure of evidence. There are civil procedure projects, the project of the economic process, in which these matters have been resolved at the proper level. But the big issue is when they will be introduced.

I think that the judges of the court of the first instance and of the court of appeal by themselves are not ready to deal with matters regarding international arbitration.

However, the other problem is judges' education. In my experience, they do not really understand what it is, because they rarely come across this problem. Recognition and implementation of decisions of international arbitrations or foreign judgments are more or less familiar for them. But in the context of seizure of assets in support of arbitration, in the context of calling witnesses, of discovery of documents, etc., everything is quite difficult and inactive. What is more, I believe it makes sense to limit the consideration of such a matter in two instances. That is, in the appeal courts and in the Supreme Specialized Court, rather than in three instances, as is the case now.

I agree fully with my colleagues from the Attorneys’ Association of Ukraine, who have prepared such an initiative. Perhaps it should be the Court of Appeal, and the Supreme Specialized Court, and it makes sense to take a similar function away from the first instance. The latter is quite overloaded, and moreover, technically, institutionally, mentally not ready for this.

What examples of creation of pro-arbitration jurisdiction can you mention?

I. M.: After the UK, which is the most successful example, I would like to mention Sweden, which was not afraid to challenge the LCIA. Of course, their market size is not comparable to London. However, the creation of a pro-arbitration jurisdiction is really a conscious decision by the Swedes. And it seems to me that over the years they have achieved this. As many clients prefer Stockholm to London. Of course, London is more expensive, longer, and, I would say, in some cases much more unpredictable. In Stockholm the judicial perspective is very clear, which is certainly important. This causes a large number of settlements at some stages of the process.

What are the prospects of international arbitration in Ukraine? What will be demanded in the short term?

I. M.: I think during the next few years, the number of disputes against the State of Ukraine will not increase. In the context of market size, I don’t see any reason to say that this capacity will increase next year and the number of disputes will increase. On the other hand, banks can begin to actively perceive the instruments of international arbitration, in terms of debt collection from their debtors. Of course, banks strive to use national procedures more often, which are more familiar to them. For them, arbitration, in terms of my perception and those banks with which our company cooperate, is often some kind of almost a last resort, after all the national methods that were used.

What projects does your law firm take on? What areas do you plan to develop?

I. M.: We have two processes in LCIA and two processes in Cyprus. We recently settled a case in GAFTA and will take on another one soon. What we intend to pursue are GAFTA and FOSFA. However, the agribusiness, out of all sectors of the economy, is showing dynamic development.