

Resolving disputes in the IT sector

The global information technology industry is on pace to reach USD five trillion in 2019 and as in many developed countries, the IT sector in Turkey already accounts for a significant portion of economic activities. According to data published by the Turkish Informatics Industry Association (TÜBİSAD), the Turkish IT sector has grown 19% between 2014 and 2018, to reach USD 27.4 billion.

The trend of transforming infrastructures into IT-operated systems has played a significant role in sector growth. For instance, when electricity distribution was privatised in Turkey in 2010, a major requirement the state imposed on bidders was the complete overhaul and transformation of the infrastructure into information technology-centric systems, which led to a wealth of outsourcing contracts. The more businesses rely on IT-centric operations, the more IT elements will permeate their contracts – and thus their disputes.

When it comes to overcoming disagreements between contract parties, traditional dispute resolution methods and venues may not offer adequate solutions, and the parties may thus turn to arbitration as an alternative. This article provides an overview of common IT disputes and the potential advantages of resolving them through arbitration.

Common types of IT contracts and related disputes

The most common types of contracts in the IT sector can be listed as purchase contracts, software maintenance and implementation contracts (project contracts), software licensing contracts, outsourcing contracts and software-as-a-service contracts. In addition to these, smart contracts and the blockchain technology they use stand as the newest and hottest type of IT contract.

While these contractual relationships relate to different IT systems and services, one common feature is that when the subject matter is an IT system, problems are almost inevitable. According to a recent report by the British Computer Society, the rate of success in IT projects is only one in eight.

The majority of IT disputes does not necessarily stem from technical issues, and instead tends to relate to pure contractual matters such as termination causes, inadequate performance or default in payment. On the other hand, when the performance or specificities of the IT system itself are in dispute, technicality – and thus complexity – come to the forefront, and the interpretation of legal principles applicable to such disputes may diverge from those applying to disputes over traditional products and services.

Under Turkish contract law, a buyer has a duty to examine the purchased good for potential defects within a limited period of time, and to notify the supplier. If the product is a car, there would be customary steps to follow when examining that car, such as checking the exterior and interior for scratches, making a test drive, and so on. If there is a defect, the buyer would most probably identify it in the course of a detailed examination. When the product is a software system, however, the buyer's duty to examine the product drastically differs. Be it in the form of minor bugs or serious defects, it is almost impossible to fully test a software product with an initial examination. For that reason, traditional principles regarding the examination of goods may not work flawlessly for IT products. The definition of "defect" is also crucial for software systems. The question of whether an alleged defect is a mere request for modification, or an actual system fault that was neglected by the supplier, arises quite often in IT project contracts. Customary definitions and standards of defects differ when an IT system is at stake. These are all potential triggers for conflict.

Another common cause for dispute in IT project agreements is whether a particular project milestone has been reached, where payments are conditional upon such milestones. This type of payment scheme is quite common in construction contracts, under which the constructor becomes entitled to partial payments and the reimbursement of costs incurred to date upon issuing progress billings at particular milestones, such as completing a defined number of floors or a particular area. This pattern is inapplicable to most IT projects, as there will not usually be a tangible product to justify progress billings at particular milestones. Nonetheless, experience shows that this type of contractual arrangement may still be used due to sectoral habits, and in such cases the determination of progress milestones is often cause for conflict.

Last but not least, some IT contracts involve significant intellectual property issues that become intertwined with IT aspects, leading to multi-faceted disputes. These can notably stem from the scope of a software licence, and the terms and conditions for exploiting the licensed software. The similarity between IT products can also lead to intellectual property rights infringement disputes, be it with respect to software, mobile applications or video games. In a dispute where the authors of this article were acting

as counsel, the similarities between two mobile application games published by different companies were at the centre of arguments, including the level of resemblance between the two underlying concepts, operation models and video graphics.

Considerations in selecting an adequate dispute resolution mechanism

Common traits of IT disputes are their complex nature and the lack of specific regulations to address the issues they raise in many instances, which then leaves no other option but to interpret and apply general principles of law. Navigating through conflicts stemming from core engineering matters also requires expertise beyond law. These challenges place arbitration in a better position, compared to litigation, as an efficient means to resolve IT disputes.

Some of the reasons to favour arbitration as a dispute resolution method in the IT sector are as follows:

- The main advantage of arbitration in IT disputes is the availability of expert decision makers. Resolving high-tech disputes requires an understanding of the complex technicalities behind the IT system at hand, and the ability to select an arbitrator with the capacity to comprehend this kind of information can be crucial. The parties may also consider establishing a panel of two non-lawyer arbitrators with the requisite technical expertise and a legal expert as the chair, where the case requires a combination of technical and legal expertise.
- Another advantage is the option to make extensive oral arguments at hearings, with sufficient time to delve in complex aspects of the dispute. In Turkey, as in a number of other civil law countries, the judicial process mostly relies on the exchange of written submissions, and judges are not keen on listening to oral arguments during hearings, or will only allow very brief remarks. IT disputes resolved through arbitration, on the other hand, can greatly benefit from a comprehensive presentation of the parties' respective arguments, often relying on visual aids. Typical proceedings before an arbitral tribunal thus appear better-suited for that purpose.
- The ever-debated option to cross-examine or redirect experts comes as another useful tool when handling IT disputes through arbitration. Where the civil law judge would ask limited or no questions to a technical expert, an arbitration hearing would leave room for the parties' counsel – or even the arbitrators themselves – to interrogate the technical expert in order to educate the arbitrators, who would in most cases be non-technical people, and assist them in returning the best possible award.