The Legal Relationship between Physician and Health Tourist and Duty to Inform in Health Tourism Law

Tuğçe Oral

University of Ankara, Turkey

ABSTRACT

In this paper, it will first be discussed the legal relationship between the health tourist, physician (or dentist) and hospitals. And in particular, it will be examined whether the relationship that arises can be considered as a "consumer contract" generally and also within the meaning of relevant provisions of the new Turkish Consumer Protection Code, which was renewed on 7th November 2013 and entered into force on 28th May 2014. Secondly and on the basis of conclusion reached under the first question, it will be dealt with the question of which legal system should have jurisdiction in case of a dispute. The third and final questionposed will be if there are any specific obligations of physician and private hospitals or changes in the scope of their duties to inform and take informed consent.

Keywords: Duty to Inform in the Framework of Health Tourism Law, Informed Consent, Treatment Contracts as Consumer Contracts, Health Tourism, Legal Definition of Treatment Contracts, Obligations of Physician

1. INTRODUCTION

Health tourism has been one of the oldest types of tourism since the ancient time. However, due to the globalization, people have more convenient possibilities for transboundary travels and hence prefer visiting other countries for treatment if the medical facilities in their countries are poor or very expensive. For instance, Spain hosts more than 6 million health tourists mainly from Great Britain and the USA, which turns Spain into the health tourism center of Europe. Namely, Turkey hosted more than 400.000 health tourists (TÜRSAB (2015), p. 1) during 2015, who are mostly visiting to be operated by plastic surgeons, since there are many qualified and cheap plastic surgeons. Additionally it is reckoned that during 2016 more than 600.000 and aimed that in 2023 more than 2 million health tourists will be hosted in the private hospitals in Turkey.

It should be also emphasized that if a patient is treated in the public hospitals, there will not be any treatment contracts concluded between the physician and the patient and the physician will be only liable according to the tort law principles, as the physicians working in public hospitals are public servants and it is impossible to conclude a contract with a public servant during his or her work and hence the state will be liable in case of a malpractice during the treatment or the convalescence period.

The contract between the patient and the physician will be concluded with the acceptance of the physician on the issue of medical treatment in addition to the application of the patient to physician. This contractual relationship will form the basis of the patients' and physicians' rights, requests and obligations (Deutsch and Spickhoff (2008), p. 55). The cure and therapy that will be applied to the patient will constitute the content of the contract. Thus, the physician assumes the obligation of giving medical treatments, attending caring and giving information to the patient about his or her condition.

2. THE LEGAL DEFINITION OF LEGAL RELATIONSHIP BETWEEN THE PHYSICIAN OR HOSPITAL AND PATIENT

In civil law systems, there are three different views for the question of "What is the legal definition of relationship between the physician or hospital and the patient?"

According to the first view, a treatment contract has a characteristic of sui generis contracts, since the treatment contracts cannot be explained and qualified with one of the contract types found in the Code of Obligations. Forasmuch as although the treatment contract is a synallagmatic one, contrary to the patient's debts, physician's debts cannot be categorized as "good" or

"work or services". In addition, the consequences of a physician's any malpractice can be even be paid with the "life" of the other party. In other words, types and results of debts are different.

The second view claims that a treatment contract is a contract of employment. German and Austrian doctrine and practice in particular are based on this opinion (Koch (2011), Rn. 59; Petry (2011), Rn. 159; Laufs and Kern (2010), § 38 Rn. 9; Koziol (1984), p. 177 ff.; Kern (2013), § 1, Rn. 12; Busche, § 631 Rn. 238; Weidenkaff (2016), Einf v. § 611 Rn. 18, § 630a Rn. 7; Bergmann and Middendorf (2014), §630a Rn. 1 f.; Rehborn and Gescher (2014) §630a Rn. 1 ff.) and practice (BGH NJW, 1975, 305; OLG Düsseldorf NJW 1975, 595; BGH NJW 1980, 1452, 1453; BGH NJW, 1981, 613; OLG Köln, VersR 1988, 1049).According to this approach, the obligation undertaken by a physician is the treatment of a patient which constitutes the performance of a service. However, from my point of view, treatment contracts cannot be classified as contracts of employment by reason of two arguments: First, the parties to a contract of employment are the employer and employee. However in treatment contracts neither the physician is an employee, nor is the patient an employer. Forasmuch as a physician treats the patient in a manner which does not comply with the patient's orders, instructions or decisions, contrarily complying with his or her professional knowledge or experience. On the contrary, a physician has an instructing role in this relationship since he or she has the right to determine or decide how many days the patient should stay in hospital, to decide on the appropriate nutritional plan, which drugs should be given to the patient, etc. Second, one of the primary elements of a contract of employment is the duration of the contract. Although it can be decided for a definite or indefinite period, the duration of the contract should be foreseeable at the time of the conclusion of the contract. However, the duration of treatment contracts depends on the individual patient's condition.

According to the third view, a treatment contract is a contract of mandate. According to the Turkish and Swiss law of obligations, a contract of mandate is a contract whereby the agent undertakes to conduct certain business or provide certain services in accordance with the term of the contract. In other words, the agent does not have to be the representative of the other party. This means that a representation relationship does not always arise from a contract of mandate, and, in the same manner, a contract of mandate does not necessarily have to give rise to a representation relationship. In treatment contracts a physician undertakes to provide certain services, namely the treatment of a patient. Hence treatment contracts are considered as contracts of mandate from the majority of the doctrine (Fellman, 2007, p. 106 ff.; Honsell, 1994, p. 47 ff.; Wiegand, 1985, p. 84-85; Schweierische Eidgenossenschaft, Patientenrechte und Patientenpartizipation in der Schweiz, Bericht in Erfüllung der Postulate 12.3100 Kessler, 12.3124 Gilli und 12.3207 Steiert, Bern, 24.06.2015, p. 20 ff. (In Switzerland treatment contracts are planned to be regulated as special types of contracts during the 2020 changes that will be done in Code of Obligations)) in Turkey and Switzerland, as evidenced by judgments of the Swiss Federal Court (BGE 117 Ib 197; BGE 116 II 519) and Turkish Supreme Court of Appeals (HGK 28.06.1978 T, 976-4-3539 E, 978-696 K, ABD 1978, p. 980 ff.; 13. HD 04.03.1994 T, 8557 E, 2138 K, YKD 1994, p. 1288 ff.).

Nonetheless in some exceptional cases, treatment contracts can constitute contracts for work. For instance, the relationship between a cosmetic surgeon or dentist and his or her patient can be regarded as a contract for work. Since an obligation of result is inherent to a contract for work and since during cosmetic surgery physicians should achieve a precise successful consequence, treatment contracts signed by them are contracts for work.In German and Austrian Law system, the relationship between the cosmetic surgeon and the patient is also interpreted as a contract of employment, since it is also impossible to undertake a specific successfulresult during thecosmeticsurgery. (OLG Düsseldorf, VersR 2005, 1737; OLG Köln VersR 1998, 1510.)

To sum up, the contractual relationship between a patient and physician who works in his or her private clinic or in a private hospital with a contract of mandate is a contract of mandate or in exceptional cases a contract for work. In particular, if the patient signs a contract with the private hospital, the type of legal relationship which is established between him and the physician will be depending on the contractual relationship between the hospital and the physician. In practice some private hospitals prefer to sign contracts of mandate instead of contracts of employment in order to deprive physicians of benefitting from the rights of an employer. In such a case the relationship between the physician and patient will also constitute a contract of mandate, whereas tort law principles will be applicable if there is a contract of employment between the hospital and the physician. Since both contracts are contracts of mandate and a physician has an objective duty of care by virtue of his profession, there will be a third unsigned contract between the patient and physician according to the Turkish and Swiss law of obligations.

It should be also stressed that, when compared with tort law principles, a contractual relationship only leads to a reversal of the burden of proof in this particular case by reason of the relevant provisions of the Turkish Code of Obligations.These provisions regulate the duty of care of a professional and prevent a physician from avoiding liability for slight negligence notwithstanding whether the relationship between the physician and the patient is a relationship based on a contract or tort. Additionally, there is also no difference between tort and contractual relationships with regard to the compensation of non-pecuniary damage.

3. TREATMENT CONTRACTS AS CONSUMER CONTRACTS?

Before examining whether the relationship can be considered as a consumer contract, the terms "consumer" and "consumer contracts" should be clarified under Turkish Law. According to the new provisions of Turkish Consumer Protection Code, "a consumer is a natural or juristic person that buys goods or services without commercial or professional purposes." Additionally, in order to conclude a consumer contract, the other party should be "a seller, creditor or service provider that has commercial or professional purposes." Furthermore, a contract can only constitute a consumer contract if that type of contract is included in the Code's scope by referring to the contract types in the Code of Obligations.

Contrary to the former Consumer Protection Code, in Art. 3 of the new Code, contracts of mandate are explicitly cited in the scope of the Code. However, on the other hand, according to Art. 13 of the Code titled "defective services", "a service provider is faultless liable if he/she does not start fulfilling his/her obligations on time or if the services provided do not conform with the conditions set within the contract."

Interpreting these two regulations as regards treatment contracts, there are two views in Turkish doctrine.

According to the dominating view in doctrine – and contrary to my view - treatment contracts cannot be regarded as consumer contracts, although they have the characteristic of contracts of mandate. Due to this view, the legislator committed an error either while taking contracts of mandate into the scope of the Code or regulating defective services. Insofar as an agent does not undertake to perform with a specific result, he/she only undertakes a specific type of conduct. Additionally, a party can only be liable for defects if said party undertakes to perform with a specific result as this liability is a type of no-fault liability. Furthermore, in treatment contracts, success of performance also depends on the condition of the individual patient. Hence, treatment contracts cannot constitute consumer contracts (Reisewitz, 2015, p. 47; Könning-Feil, 1992, p. 193; Muschner, 2002, p. 36.).

However in my opinion, treatment contracts could have been regarded as consumer contracts even if they had not taken explicitly in the scope of service contracts by the reason of contracts of mandate is generally a type of service contracts. Moreover Art. 13 titled "defective services" cannot be applied (Comp. With AkipekÖcal, 2015, p. 298. The author claims that although liability from defects is a faultless liability, the physician can be liable from his or her faults according to the liability from defects.)to contracts of mandate since it is against their nature.In other words, only a general legal arrangement, which is not appropriate for the nature of a contract, is not per se a reason to interpret whole contract type as falling outside of the Code's scope. Such an interpretation would also go against the intended purpose of the legislator. This interpretation has been also defended in the other civil law and common law country's law systems (Neumayr, 2015, Rn. 10; Bellhausen, 2013, p. 121 ff.; Hall and Schneider, 2008, p. 644; LG Feldkirch, 20.10.2003, 3R259/03s).

As a result, the treatment contracts can be classified as consumer contracts, if the other conditions are also fulfilled in order to conclude a consumer contract, which are being a consumer, in other words buying goods or services without commercial or professional purposes and concluding a contract with a buyer, service provider or creditor that acts with commercial or professional purposes. At this point another question should be posed, which is "Is it possible for a patient to act with commercial and professional purposes?" Under normal circumstances, it can be considered that acting with commercial and professional purposes is not suitable for a patient. However in a case in Turkey, an oriental dancer applied to a cosmetic surgeon for a breast enlargement operation in order to have a "sexier body and appearance while dancing". Here, it is undoubted that the oriental dancer, as a patient is acting with the professional purposes and correspondingly the dispute arisen from this treatment contract cannot be resolved at the consumer courts or arbitration committees for consumer problems.

4. LEGAL SYSTEM HAVING JURISDICTION IN CASE OF A DISPUTE

Based on the conclusion reached under the first question, legal disputes which arise between a health tourist and a physician will be resolved according to the consumer protection law and therefore, if the Turkish legal system has jurisdiction, consumer courts or arbitration committees for consumer problems will be authorized to settle the case.

However some private hospitals, notwithstanding whether these private hospitals are originated in Turkey or not, are having some offices abroad in order to conclude health tourism contracts by introducing themselves and advertising their facilities. If the treatment contract was signed in the foreign offices of private hospitals, the legal system, where the contract was concluded will have jurisdiction according to the consumer protection law systems in civil law (NEUMAYR, 2015, Rn. 7).

5. OBLIGATIONS OF PHYSICIAN AND PRIVATE HOSPITAL THAT HAVE SPECIAL IMPORTANCE IN THE FRAMEWORK OF HEALTH TOURISM LAW

Let me now turn to the third question of whether there are any specific obligations of physicians and private hospitals or changes in the scope of their duties to inform and take informed consent.Some duties held by physicians and private hospitals arise from the relationships regardless of whether this relationship constitutes a contractual relationship or tort.For instance, the duty to protect life, the duty to obey professional and ethical rules, the duty to diagnose, the duty to avoid malpractice, the duty to care, the duty to confidentiality, the duty of documentation, the duty to inform and informed consent, the duty to improve his or her professional knowledge or experiences, etc. In my estimation among others, three duties are of greatest relevance in the field of health tourism law, namely the duty to confidentiality, the duty of documentation and the duty to inform and informed consent.

Starting with the duty of documentation and duty of confidentiality, these two duties are closely associated with data protection law. Hence if the contract is concluded in the health tourist's country, the hospital will be responsible under that country's data protection law system.

Coming to the duty to inform and informed consent, which has basically the aims of establishing a relationship of trust between patient and physician and to make the patient able to decide whether he/she wishes to accept or refuse the treatment, according to the view of the Supreme Court and the dominant view in doctrine, there are no differences in the scope of coverage of the duty to inform of a physician or hospital in health tourism law. They adhere to the principle of freedom of contract and state that people are free to decide where to be treated. Additionally if a health tourist voluntarily chooses a hospital where he/she does not understand the language spoken there, he/she will accept the risks associated with this. However, from my point of view, the basic condition of informed consent is to fulfill the duty to inform, as it is "informed" consent. In addition, since it is a duty of the physician or private hospital, they have to ensure that they fully informed the patient about the essential points of treatment or content of the operation and they are understood correctly by the patient. Therefore they have to provide translators for the patient's native language or prove that they made a reasonable effort to provide that translator. Otherwise the informed consent by the patient would be meaningless. It should be also stressed that the duty to supply disclosures or recommendations about an operation, phases or consequences of treatment is a duty falling under the duty to avoid malpractice. Hence this duty should not be included under the duty to inform.

6. CONCLUSION

Consequently, it can be claimed that treatment contracts, which can be classified generally as contracts of mandate or exceptionally contracts for work, can be regarded as consumer contracts and therefore the legal system where the contract was concluded has jurisdiction in case of a dispute. Furthermore, in health tourism law, the duty to inform and informed consent has a special importance, which leads the hospital or physician to provide a translator to the patient in his/her own language.

REFERENCES

AkipekÖcal, Ş. (2015) Hasta veHekimArasındaKurulanSözleşmelerBakımındanTüketicininKorunması, in Topbaş, H. and Üçışık F. SektörelBazdaTüketiciUygulamaları 2014-2015 Ankara: Bilge, p. 283-295

Bellhausen, B. (2013) Das Arztrechtliche System alsGrenze der ArbeitsteiligenMedizin: ZugleicheinBeitragzurprivatrechtsdogmatischen Integration des Artzrechts, Göttingen: UniverlagUniversitaetGöttingen

Bergmann and Middendorf (2014), §630a, in Bergmann, K. O., Pauge, B. and Steinmeyer, H. D. GesamtesMedizinrecht, Nomos Kommentar, 2. Auflage, Baden-Baden: Nomos

Busche (2009) in MünchenerKommentar, 5. Auflage, München: Beck

Deutsch, E. and Spickhoff, A. (2008), Medizinrecht, 6. Auflage, Berlin, Heidelberg: Springer ERMAN, BGB, 14. Auflage, Köln, 2014

Fellmann, W. (2007). Arzt und RechtsverhältniszumPatienten, in Kuhn, M. W. and Poledna, T. Arztrecht in der Praxis, 2. Auflage, Zürich, Basel, Genf: Schultess

Hall, A. M. and Schneider, E. C. (2008). Patients as Consumers: Courts, Contracts and the New Medical Marketplace, Michigan Law Review, 106(4), p. 643-689

Honsell, H. (1994). Handbuch des Arztrechts, Zürich: Schultess,Kern, R. (2013), § 1, in Ratzel, R. and Lissel, P., Handbuch des Medizinschadensrechts, München: Beck

Koch, B. (2011). Medical Liability in Austria, in Koch, B. (Ed.) Medical Liability in Europe – a Comparison of Selected Jurisdictions, Tort and Insurance Law Vol. 29, Göttingen: De Gruyter, p. 1 ff

Koziol, H. (1984). ÖsterreichischesHaftpflichtrecht, Band II: BesondererTeil, 2.,neubearbeiteteAuflage, Wien: Manz

Könning-Feil, A. (1992). Das internationaleArzthaftungsrecht, Frankfurt a. M., Berlin, Bern, New York, Paris, Wien: Peter Lang

Laufs, A. and Kern, R. (2010). Handbuch des Arztrechts, München: Verlag C. H. Beck0

Muschner, J. (2002). Die HaftungsrechtlicheStellungauslaendischerPatienten, Frankfurt/M., Berlin, Bern, Bruxelles, New York, Oxford, Wien: Peter Lang

MünchenerKommentar/BUSCHE, 5. Auflage, 2009

Neumayr, M. (2015). ProzessualeFragen des Arzthaftungsprozesses, in Resch and Wallner, Handbuch des Medizinrecht, 2. Auflage, Wien: LexisNexis

Petry, F. M. (2011). Medical Liability in Germany, in Koch, B. (Ed.) Medical Liability in Europe – a Comparison of Selected Jurisdictions, Tort and Insurance Law Vol. 29, Göttingen: De Gruyter, p. 233 ff.

Rehborn and Gescher (2014). §630a, in Erman, BGB, 14. Auflage, Köln: VerlagDr. Otto Schmidt

Reisewitz, J. (2015). Rechtsfragen des Medizintourismus, Berlin, Heidelberg: Springer

SchweierischeEidgenossenschaft, Patientenrechte und Patientenpartizipation in der Schweiz, Bericht in Erfüllung der Postulate 12.3100 Kessler, 12.3124 Gilli und 12.3207 Steiert, Bern, 24.06.2015, http://www.google.at/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&cad=rja&uact=8&ved=0ahUKEwjs5r-5nvrMAhUrC8AKHaR6DJcQFggrMAI&url=http %3A%2F%2Fwww.bag.admin.ch%2Fthemen%2Fgesundheitspolitik%2F15437%2Findex.html%3Flang%3Dde%26download%3DNHzLpZeg7t%2 Clnp6I0NTU042l2Z6ln1acy4Zn4Z2qZpnO2Yuq2Z6gpJCMeIN6gWym162epYbg2c_JjKbNoKSn6A usg=AFQjCNF6CQgo1WR7Nb3e-3yoDd5ywww5sg&sig2=cYa5fZ43dyK REkEYEngrFA&bvm=bv.122676328,d.ZGg(viewed on 14 May 2015)

TÜRSAB (Association of Turkish Travel Agencies) Report for Health Tourism Law 2015, p. 1 http://www.tursab.org.tr/doa sya/12186/saglikturizmiraporu_12186_5485299.pdf (viewed on 5th May 2016)

Weidenkaff (2016). Einf v. §611. inPalandt, BürgerlichesGesetzbuch, 75. Auflage, München: Beck

Wiegand, W. (1985) Der Arztvertrag, insbesondere die Haftung des Arztes, Bern, p. 84-85 http://wolfgangwiegand.ch/publikationen/_32_Der%20Arztvertrag,%20insbesondere%20die%20Haftung%20des%20Arztes/80_insgesamt.pdf (viewed on 14th May 2016)