



The Current/Potential Legal Issues in Contract Law and Health Law due to the COVID-19 Pandemic

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Abstract

Legal rules are already established rules. Legal structure, while on the one hand, ensures stability and natural predictability of its inherent sanctions, it may be incomplete or inadequate in extraordinary situations, on the other hand. There are certain procedures for enforcement of legal rules; these procedures or the extraordinary conditions of disaster periods might not be suitable for taking quick action. As in the 1999 earthquake, various legal problems have come up in Turkey during the COVID-19 pandemic, which affected the whole world. What is important here is to realize these problems and start searching for a permanent solution.

The pandemic process led to certain social, economic, commercial, national and international problems in the world and in Turkey since the very beginning; these problems have unavoidably transformed into legal problems and a search for a solution was initiated. This study focuses on the current and potential issues occurring in contract and health law due to the COVID-19 pandemic.

Keywords:

COVID-19 pandemic, legal issues due to pandemic, contract law, health law

Introduction

It is common knowledge that the “**Law No.7269 on Measures to be Employed and Aids to be Provided in Case of Disasters Affecting General Living Conditions**” has been updated from time to time. These updates also show that although the Law enacted in 1959 addressed the needs of the period, it was inadequate in subsequent disasters. First of all, there is a need for a current law on disaster situations taking advantage of the use of the technological advancements and contributions of the 21st century. Such a framework Law will also constitute a legal basis for the steps to be taken by the administration, regulations, circulars and directives to be issued in future disasters; thus, the rules concerning the society will be moved away from the debate of legality.

Another issue that has to be stressed is the contradictions in the decisions taken due to the COVID-19 outbreak. Even the Presidential Decisions that have published during the course of the pandemic have naturally been either repeatedly modified or subsequently interpreted. Since disaster periods are characterized by a rapid change in the process, there will be a need to set rules immediately due to the developments until then; then new conditions emerge, which make it mandatory to change this rule as well. The point to be considered here is that there should be a holistic perspective and the impact of the decisions taken on other legal areas should be investigated and evaluated. Otherwise, the arrangements will cause unexpected problems in other legal areas; indeed, our practical experience also confirms these suggestions.

This study will not focus on the theoretical aspects of the following two key topics (Contract Law and Health Law) will not be emphasized. Since the reports shared by other academics will presumably contain theoretical information, we would avoid repetitions and present a solution-oriented perspective.

Legal Issues Encountered in the Field of Contract Law During the COVID-19 Outbreak

Although contracts are considered to be the main subject of the Law of Obligations, they have both private law and public law applications. For this reason, contracts were among the most debated legal issues during the pandemic period. The reason for this is that contracts are considered to be the main subject of the Law of Obligations, on the one hand, and contracts are being used in most fields of the private law, including the Consumer Law, Insurance Law, Commercial Law, on the other hand. However, even the Administrative Law, which is a matter of public law, has been affected at this very point. This is because both high court decisions and the doctrine considers contracts subject to public tenders to have the effects of private law contracts (Günday, 2003: 179).

It cannot be said that there had been legal problems in terms of all contracts during the outbreak; for example, in online shopping, online goods/services contracts, companies have been able to perform their obligations by sending the purchased goods to their respective buyers by courier services.

In some industries, issues were resolved in a short time through regulations. For example, announcements were made about how the airlines would handle passenger ticket refunds. Again, after the removal of the distinction between private and public hospitals as well as after the transformation of hospitals into “pandemic hospitals” by the Ministry of Health, insurance companies included COVID-19 diagnosis and treatments within the scope of private health insurance within the current limits. However, import and export restrictions, broken supply chains as well as the permanent or temporary closure of certain businesses during the pandemic also led to contractual disputes. Therefore, force majeure or impossibility of performance, excessive difficulty of performance, adaptation of contracts and resulting legal consequences cannot be generalized to all contracts.

It is relatively easy to apply the rules that will solve the dispute in lean contracts. However, business contracts are practically more complicated and the parties have experienced more problems than expected. For example, in the case of private school fees where accommodation, meal and tuition fees are paid together, dormitories are emptied, and meal services could not be given in accordance with contractual terms although distance education was made available. It is possible to see these complicated examples in many sectors of commercial life.

Legal Issues

Failure to perform obligations or debtors’ delay in performing their obligations (default) emerged as the main legal issues with respect to different types of contracts. The issues debated by lawyers in both the doctrine and in practice can be summarized under the following main headings in terms of contractual responsibility:

- a. *Whether the pandemic is a force majeure*
- b. *If considered as force majeure, whether the performance of the debt has become impossible*
- c. *Situations of non-acceptance of partial performance in the contract*
- d. *The debtor's default due to force majeure and the consequences of default*
- e. *Excessive difficulty in performance, adapting the contract to new conditions*

The answer to all these questions depends primarily on the clarification of the debate on whether the pandemic will be accepted as force majeure, and there is no reason why an epidemic that affected daily life and business life globally in a very short time should not be considered as force majeure. Supreme Court precedents and the doctrine consider epidemic as a force majeure incident. The problem lies in how the force majeure clause is addressed in contracts. A contract:

- Could provide that the debtor will also be responsible in the case of force majeure.
- Could have restricted force majeure clauses.
- Could have unrestricted force majeure clauses.

With respect to the last possibility, it is natural to consider the pandemic as a force majeure incident consistent with court rulings and doctrinal opinions and conclude that the liability of the debtor will discontinue. However, Contract Law should be interpreted in accordance with its meaning and purpose with respect to the other two possibilities. Indeed, there have been no outbreaks that have spread so rapidly and led to such a high death toll and the interruption of social and business life since the Spanish flu. Spanish flu years were too simple to be compared with today in terms of legal, economic and business relations; contracts were also lean contracts during those years. For example, since airlines did not make such high numbers of business flights, there has been no debate on ticket refunds; because there were no private hospitals, no foundation universities or shopping malls, today's important discussion topics corresponds to nothing in the past. These examples can be multiplied.

As a rule of thumb, freedom of contract constitutes the main structure of the Contract Law. The parties can decide on any remaining terms with their free will on the condition that they comply with the other mandatory rules in article 27 of the Law of Obligations. The parties may have undertaken "the responsibility due to the force majeure" especially since the debtors could not imagine, or, like most of us, even dream of, the possibility of a pandemic such as COVID-19 both during the negotiation and execution of the contract.

Moreover, most of the time, the parties do not get professional assistance while drafting the contract, adapting similar contracts in that specific field to their own legal relations. Therefore, in some contracts, the "force majeure"

clause might not be a conscious choice regardless of the possibilities given above. Since the law binds the individuals and parties to the contract by certain principles, principles such as the “honesty” rule, the concept of “equity” and “adapting the contract to new conditions” exist in law for these very needs.

So, what did the parties to the contract contemplate, evaluate and take as example when drafting the “force majeure” clause? They should probably not have been able to imagine a pandemic that would interrupt the entire social life and kill hundreds of thousands of people when defining or restricting force majeure incidents.

It should be remembered that controlled normalization apart from the legal issues arising from the contracts executed before the pandemic, normalization, and a second, perhaps third, pandemic wave predicted by the scientists will expose us to more legal issues than now.

Each concrete contract will create individual cases of issues, and solutions we will find through generalizations will be the sources of new problems.

Our Opinion and Suggested Solutions

Two important issues will come up after the period of lockdown that we have gone through due to the COVID-19 pandemic: economic issues and legal issues. The increased number of legal issues brought before the courts will increase the number of hearings as well as putting extraordinary burden on the courts. What is more, these issues will not only concern the Law of Obligations, but, on top of other contracts executed in other private law contexts, will lead to a burden which cannot be easily addressed. I would like to bring to your attention the difficulty of Consumer Courts addressing the legal issues arising from the contracts executed under the Consumer Protection Law only.

On the other hand, as a rule of thumb, the parties’ free will cannot be ignored in the context of private law. Therefore, it would be appropriate to leave settlement primarily to the parties’ discretion. Because it is the parties who know the contractual negotiations as well as the conditions underlying the contract best.

The Turkish Law of Obligations made force majeure, impossibility of performance without fault of the parties, impossibility of partial performance, and the debtor’s default conditional to certain outcomes, giving the other side of the contract the right to take legal action. When the legal problem between the parties is brought before the courts, for example in case of excessive difficulty of performance, the parties may ask the judge to adapt the contract to the new conditions.

However, it should be emphasized that there is also an option available to the parties through which they can settle their disputes faster, in shorter time and with lower costs, decide taking their interests and needs into consideration when settling their disputes, and also protect their confidentiality: Mediation.

Through mediation, the parties can adapt the contracts to new conditions or have the chance to negotiate once again the matters they have incorporated to the contract and but perhaps did not think much about at that time, and settle their legal disputes based on the principle of willingness/ voluntariness.

If we can take advantage of a more practical solution such as mediation for each concrete contract and each dispute in this upcoming process, the outcomes of which are uncertain, we can both maintain our business relations and contribute to social peace through amicable settlement.

Legal Issues Encountered in the Field of Health Law During the COVID-19 Outbreak

The pandemic, which originated in China, affected the world, and brought the health system to the point of collapse in many countries, or put it under a heavy burden that it cannot handle, saw the implementation of different processes and measures varying from one country to another. As far as we could observe, a large number of patients in the US, which has a health system based on private health insurance, could not receive health care because they had no private health insurance or they had limited coverage while Germany, which still maintains the principle of welfare state, took advantage of public handling of actual health care services, as in the case of Turkey, controlled the process as successful as possible in European countries.

Although Turkey caused the spread of the virus due to delayed decision-making in initial cases that originated internationally (delayed ban on international flights, quarantine practices for citizens returning from abroad or Umrah), it has been one of the countries with the least deaths in the world with its quick and rational decisions thanks to its social security system, a robust health system that has a strong infrastructure, and dedicated medical staff. However, it would not be realistic to conclude that there were no legal problems within the framework of the Health Law.

The “right to health”, which is guaranteed under the international conventions to which Turkey is a party, the Constitution and other legislation refers to the right to preventive/protective health care on the one hand, and the right to have access to medical sources, on the other hand.

The health industry is one of the industries that are most affected by the COVID-19 pandemic, both in terms of health care providers and users. It should be underlined that Turkey’s greatest advantage during the pandemic has been its highly qualified medical staff. The professional experience and dedicated efforts of the physicians working under the extraordinary conditions of the current health system, which is based on performance, allowed the country to manage this process as much as possible.

However, while physicians and other health care staff provided health care services on the one hand, they became health care recipients by becoming infected with COVID-19 virus, on the other hand, as a result of which some have been treated for a long time while some others have unfortunately lost their lives.

Public hospitals and Training and Research Hospitals and the health care staff in these hospitals undertook the most important part of the heavy burden during the process, then private hospitals were transformed into “Pandemic Hospitals” with the removal of the distinction between public and private hospitals.

long-term prescription periods were extended and long-term prescription medicines were made available directly from pharmacies in order to prevent the suffering of patients due to problems of access to long-term prescription medicines.

Medications used in the treatment of patients infected by the virus are included in the list of covered drugs (Health Practices Communiqué, HPC).

The Family Health Centers continuing to provide Primary Health Care offered an important advantage, thus resulting in both the sustainability of the health care and preventing the possibility of increased number of patients in Secondary and Tertiary Health Care Institutions, especially in the institutions most of which have been converted into pandemic hospitals. The medical staff at Family Health Centers provided health care services such as diagnosis and treatment, on the one hand, and followed people who were either receiving treatment or under quarantine at their homes, on the other hand.

The Public Sanitary Law No. 1593, which came into force in 1930 and was updated with the addition of new provisions over time, came to the fore as one of the most referenced laws during the pandemic. Although this Law significantly addresses many legal issues during the extraordinary environment created by pandemic conditions, it has been inadequate or opened to discussion from time to time. The clutter of legislation in the field of Health Law caused some problems during this process. The Ministry of Health took certain measures to address these problems, with efforts to fill the gaps with either Presidential Decisions or amendments to Laws and Regulations. The term “emergency” has been redefined, with necessary amendments made promptly in other legislation.

Before moving on to the legal issues and solutions we have identified in the field of Health Law, we will try to give a summary of the pandemic under the title of opportunities/threats, strengths, and weaknesses:

- **Strengths:**

- *Qualified physicians and health care staff*
- *Professional experience, dedicated health care professionals*
- *Presence, experience and equipment of public hospitals and Training and Research Hospitals*
- *Relatively late onset of the pandemic in Turkey, making up time*
- *Health security financed by the Social Security Agency*

- **Weaknesses:**

- *Delayed announcement of the pandemic*
- *Continuously changing rules in mask distributions and/or sales as well as in the lockdown practice*
- *Delays in protecting health personnel and providing protective equipment*
- *Not using the codes recommended by WHO*
- *Transparency of the process, mistrust about the number of infected and deceased patients reported*
- *No mobile testing*

- **Opportunities:**

- *Young, dynamic, dedicated staff*
- *Infrastructure of the health system, technological investments*
- *People largely complying with the measures, and behaving discreetly*
- *Presence of a Scientific Committee, made up of specialists*
- *Ability to commission mobile testing teams*

- **Threats:**

- *Continuation of the spread of the outbreak*
- *Physicians and other health personnel getting infected and dying*
- *Burnout syndrome in health care professionals*
- *A second, or even a potential third wave*
- *Possible change in people's motivation in complying with the measures*
- *Early normalization calendar taking into account the economic conditions.*

With Respect to Health Management and Organization

Legal Issues

Managerial problems stand out among the legal problems during the course of the spread of the pandemic throughout the country, which the Republic of Turkey witnessed for the first time since its foundation. The Parliament was disabled due to the nature of the Presidential Government System, and

laws that actually had to be enacted by the Turkish Grand National Assembly were adopted by Presidential Decision. The hierarchy of norms has been omitted in some regulations and circulars that have been announced, and the arrangements made are set to be discussed without legal basis.

One other organization that was also disabled was the Turkish Medical Association (TMA), which had no representation in the Scientific Committee. Although it is accepted that the members of the Scientific Committee are naturally members of the TMA, corporate perspective is as important as individual perspective, and critical perspective, which is required from time to time, is also important during extraordinary times.

Even if due to a pandemic, “crisis management” is a different form of management. Although the Scientific Committee was formed, other boards integrated with this Committee were ignored, with a sub-committee formed towards the end of the process. What needs to be emphasized here is the need for an organization other than the sub-committee. Put in a nutshell:

- *A “Scientific Committee” consisting of medical scientists (present)*
- *A “Supreme Board of Law” consisting of jurists specialized in Health Law, and who have a deep knowledge of both fields*
- *An “Economy Supreme Board” should be established since the process has direct impact on national economy, the and these Committees should turn into a tripartite organization integrated to and coordinated with one another. Thus, both the economic aspect and the public health aspect of the decisions taken would be evaluated together and the possibilities that could arise in terms of the Health Law would be evaluated.*

There is uncertainty about how the Scientific Committee was formed as well as the legislation it was based on. It is indisputable that it is made up of highly competent people. However, it remains uncertain whether its decisions are advisory or binding in nature. Another uncertainty is whether the administration complies with the decisions that the Scientific Committee members “recommend”, and the reason for this, if it does not. For example, as far as we can follow from the press, the Scientific Committee suggested the implementation of a “curfew” covering everybody with a set period during the early period, but its recommendation had no chance of success mainly for economic reasons. Again, we estimate that Committee was not positive on the opening of workplaces and shopping malls in the first place during the “controlled normalization process”.

Ministry of Health

Although it was emphasized in the calls made by the Ministry of Health and the administration that those who need health services should not use pandemic hospitals, the lack of awareness in the society continued to cause problems. While the physical spaces in hospitals could be separated in consideration of

this possibility, they were not; and this facilitated patients who were infected or likely to be infected to be in the same setting with those who wanted to receive other health care services. Considering also that social distancing was not practiced, one can easily establish that this situation poses a great risk.

Taking into consideration global examples, the Ministry of Health has put “Field Hospitals” into service just in case the existing hospitals would prove insufficient. These hospitals are mobile hospitals all over the world. They are put into service during times of disaster and discontinue their services when they are no more needed. However, Turkey started building permanent field hospitals. Here, the risk is: these hospitals will probably continue to function as permanent hospitals after the pandemic is over. Although it seems logical considering that investing in hospitals is expensive, Turkey will still need field hospitals since hospitals will be running at full capacity in another disaster in the near future.

Private and Public Hospital Management

It is an important and correct step to remove the distinction between Private Hospitals and Public Hospitals and transform hospitals into pandemic hospitals. Because this included the facilities of private hospitals, which have highly developed human resources and technological infrastructure, into the system. The actual and/or potential problems under this title include:

- *While all employees should be tested, tests were made only for health care personnel suspected of carrying the virus; others were anxiously waiting.*
- *Physical spaces were not separated in pandemic hospitals, so patients diagnosed with or suspected for COVID-19 and who were admitted for testing purposes and patients who were admitted to receive other health services often shared the same environment, even ignoring social distancing guidelines. This has put both health care professionals and uninfected patients and their families at risk.*
- *Physical conditions that will isolate and protect medical staff were ignored at some private hospitals, leaving particularly the physicians at great risk.*

With Respect to Patient Rights

Legal Issues

The World Health Organization was initially reluctant to declare the outbreak of COVID-19 a pandemic and, in the meantime, the infection rate increased rapidly in Turkey as in other countries. The delay in stopping international flights and closing the airports, the delay in closing border gates as in the case of Iran, and the non-suspension of intercity transportation resulted in infected people infecting healthy people. The most fundamental right, which is the right to health, was negatively affected, and individuals had to get health care.

Except for emergency health services, patients were unable to have their checks (both because they were afraid that the virus would be transmitted or from calls made to not exceed the capacity of the hospitals), with media news of negatively affected patients in certain diseases including cancer.

Practices related to individuals over the age of 65 should not be overlooked: These individuals (the elderly) are faced with violations of the right to health and patient rights, as they often have some age-related diseases. The curfew imposed on this age group and the subsequent limited permits have no legal basis, let alone affect their lives. Often, they were also deprived from activities that would positively affect their treatment, recommended by their physicians. Whether we are going through pandemic or other extraordinary processes, individual rights and freedoms can only be restricted through law. Since the Turkish Grand National Assembly was disabled and the Constitution did not allow the President to decide on issues to be regulated by law in the Presidential Government System, this problem could not be solved and the unlawful practice actually continued.

With Respect to the Rights of Physicians and Other Health Care Staff

Legal Issues

Apart from the problems identified above, financial measures were inadequate, causing discrimination among physicians and other health care professionals.

- *The situation of health care professionals who got infected with COVID-19 virus and lost their lives remains uncertain. "It is a major shortcoming that it is not described as work-related accident. There should be a legal definition of physicians and other health care professionals getting infected, being treated and losing their lives as a result of the disease. In other words, COVID-19 infection should be described as a "work-related accident", and necessary legal arrangements should be done without delay. This will be an indicator of our gratitude to our physicians who work away from their families with dedication, alleviating their "burnout syndrome" to some extent during this gruesome and extraordinary situation we are going through.*
- *Another point that should not be overlooked is the inadequate measures taken for the protection of physicians and other health care professionals. It is common knowledge that most physicians working in pandemic hospitals could not go to their homes with the fear of infecting their families as a result of their colleagues getting infected and dying. Some countries have resolved this accommodation problem by renting or nationalizing hotels that were already vacant. In Turkey, there had been certain negative stories covered by the media, and the Ministry of Health has been late at developing effective solutions at this point.*
- *The shift arrangements of physicians and other health workers, and the different expectations and attitudes of the managers (some of these managers*

are not physicians) who are on the field and who hold administrative posts in the background negatively affected the motivations of health care professionals.

- *It may be necessary for the process, but it should be noted that physicians were prohibited from resigning and using leave. The legal problem here is the norm on which this decision is based. Norms that have to be put into practice under extraordinary conditions must also have legal basis.*

With Respect to Public Health

Considering that pandemics infect individuals one by one, and that the pandemic spread and is likely to spread to the whole society in this manner, it also emerges as a public health issue. Therefore, necessary evaluations will be made briefly under this title.

There was debate on whether the interns would be included in the system in Turkey, but there was no such need as the capacity of the medical staff was not exceeded. However, as a good example, in Cuba, interns are given a short training and assigned to both follow up infected patients and raise the awareness of sick families. In Turkey, this has been undertaken by Family Health Centers, as noted above. However, the staff working at Family Health Centers performed this follow-up task by telephone for patients or people quarantined at their homes. There has been an increase in the number of cases due to the unconsciousness or recklessness of patients or families about the disease as well as their disregard for hygiene and social distancing, with infected or exposed people getting mixed with the society. It can be seen from the increase in the number of cases taken into consideration after announcement of the normalization steps that it is extremely important to inform families and ultimately the society as well as individuals in terms of public health. Giving information rather than raising awareness has been the method mostly adopted in Turkey, and this has often been done through the media.

The period until the second or third wave of the pandemic should be used as a campaign period in this respect, cooperation should be made between NGOs and local governments that will take part in this campaign, and, as in the case of Cuba, interns and students studying at higher education institutions should be included in the process after giving them necessary training about pandemics and awareness-raising methods.

One other risk factor for public health is medical waste. Even people regard the warnings or wear masks and gloves because it was mandatory have thrown those masks and gloves directly in the trash. No studies were carried out and no measures were taken about the collection of these medical wastes. It would also be beneficial to briefly train employees, delivery staff and janitors about public health and pandemics.

In terms of public health, air conditioners may raise risks in the upcoming period. I am of the opinion that it is important to note that special measures need to be taken in places including hospitals and shopping malls where air conditioners are used and due to airways starting to carry passengers, and hotels being reopened.

However, we have limited knowledge about the COVID-19 virus as well as its routes of transmission. Scientists are still discovering and sharing new information on all aspects of the virus.

Our Perspective and Proposed Solutions

Certain solutions should be planned in advance in line with the problematic areas identified above. It remains unclear how the epidemic will progress, how it will affect us with another wave, and/or whether the virus will mutate.

- *Mobile testing teams should be engaged. These tests will create very important data for both tracking the virus that began to slow down and following infected people, on whether the virus began to spread again in the society and for future scientific studies.*
- *Shortcomings of mobile field hospitals and their equipment should be reviewed, and cooperation plans and disaster organization charts should be created indiscriminately with local governments. Considering especially that up to 60% of patients are living in Istanbul and the fact that Turkey is surrounded by seas on three sides -which advantages are shared by Izmir- hospital ships should be planned, and their shortcomings should be handled to make them available for use when necessary. Hospital ships are a practical method that will serve when both the capacity of existing hospitals are exceeded, and on the other hand, maritime transportation can be put into operation in the event of a pandemic that may occur in passenger ships, so that infected patients can be quarantined and treated without landing.*
- *The opinions of expert lawyers, including those working in the field of Health Law, should be sought, and the legal basis for problems noticed or reported during the process should be established, and the legal ground must be prepared for future disaster management.*

Conclusion

Considering countries such as Spain, Italy, the UK and the USA, Turkey has managed the process with success despite all identified and criticized practices. What is important at this point is making arrangement that are in line with universal principles and human rights and in compliance with international agreements as well as the hierarchy of norms, primarily the Constitution of the Republic of Turkey. It is to make arrangements in accordance with the hierarchy of norms including the Constitution and to eliminate physical, human resources and / or other identified deficiencies. The coming months will offer important opportunities in this regard.

Ignoring these opportunities and the warnings have resulted in increased number of cases in Turkey and world even before the second wave. The normalization steps in the whole world, which have been announced at an early date, also raised the risk of second wave. It will have economic impacts on Turkey and world. It seems that the contradictions in the decisions made or announced by competent authorities will likely have adverse effects in short term.

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