

BISET SENA GÜNEŞ

Succession Upon Death:
A Comparison of European
and Turkish Private
International Law

*Max-Planck-Institut
für ausländisches und internationales
Privatrecht*

*Studien zum ausländischen
und internationalen Privatrecht*

511

Mohr Siebeck

Studien zum ausländischen und internationalen Privatrecht

511

Herausgegeben vom
Max-Planck-Institut für ausländisches
und internationales Privatrecht

Direktoren:
Holger Fleischer und Ralf Michaels



Biset Sena Güneş

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A Comparison of European and
Turkish Private International Law

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ISBN 978-3-16-161352-4 / eISBN 978-3-16-161353-1
DOI 10.1628/978-3-16-161353-1

ISSN 0720-1141 / eISSN 2568-7441
(Studien zum ausländischen und internationalen Privatrecht)

The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliographie; detailed bibliographic data are available at <http://dnb.dnb.de>.

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The book was printed and bound on non-aging paper by Gulde Druck in Tübingen.

Printed in Germany.

To my family...

Preface

This study was accepted by the Faculty of Law of the University of Regensburg as a dissertation for the degree of doctor juris in September 2021. Revisions of the literature and case law cited were made until April 2022.

It is often said that writing a doctoral thesis is a rather lonely but rewarding experience. I am fortunate enough to say that I received a great degree of academic and personal support from many people in this highly rewarding journey, which did not leave me feeling lonely. Therefore, I would like to use this occasion to thank all of them here.

First and foremost, I would like to express my sincere gratitude to my doctoral supervisor, Prof. Dr. Anatol Dutta, M. Jur. (Oxford), for his invaluable advice and continuous support during the entire process. Even from the very early days of this process, he always encouraged me and offered his help whenever I had difficulty drafting my work. I have indeed benefited greatly from his extensive knowledge and experience both professionally and personally, and for this I will always be grateful to him. I would like to extend my thanks also to the second examiner of my thesis, Prof. Dr. Martin Löhnig, for his prompt submission of the examination report and for the supportive comments in his report.

This study is in fact a product of time I spent in Ankara, Regensburg, and Hamburg. The idea of pursuing a doctorate in Germany originated in Ankara, where I previously worked as a research assistant at the department of international private and procedural law at Ankara Yıldırım Beyazıt University. I would like to express my deepest appreciation to Prof. Dr. Musa Aygül and Prof. Dr. M. Fatih Uşan for their tireless support and encouragement at every phase of my doctorate, even when I decided to continue my career in Germany. I also thank my colleagues from Ankara, Dr. iur. Belkıs Vural Çelenk, Dr. Canan Erdoğan, Assoc. Prof. Dr. Ersin Erdoğan, and Dr. Elif Hande Altıntaş Açıkgöz, for their support and help throughout all the years I worked there; and all my other colleagues from the department for their many collaborative efforts and assistance in finding resources.

Most of the foundational research on which this book is based was conducted in Regensburg and Hamburg. I would like to acknowledge the assistance that was provided by the staff of the chair of Prof. Dutta at the University of Regensburg with the doctoral procedures and to thank them for the

friendly exchange we had during the time I spent there. I would also like to extend my special thanks to my colleagues from the Max Planck Institute for Comparative and International Private Law in Hamburg, which I first visited as a guest researcher and where I now have the privilege of being employed as a senior research fellow and head of the Centre of Expertise on Turkey. First of all, I am very grateful to Prof. Dr. Ralf Michaels, LL.M. (Cambridge), under whom I work at the Institute, for his steady reassurance during both the final phase of my doctorate and the publishing process of this book. From the Institute, I would also like to express my thanks to Priv.-Doz. Dr. Jan Peter Schmidt for the enlightening discussions on different parts of my thesis; to Prof. Dr. Nadjma Yassari, LL.M. (London), Dr. Dörthe Engelcke, Dr. Jennifer Trinks, Maître en droit (Paris II), LL.M. (Yale), Dr. Mateusz Grochowski, LL.M. (Yale), Dr. Antonia Sommerfeld, Dr. Denise Wiedemann, LL.M. (Lisabon), and all my other colleagues from 'Team Michaels' for the moral support and friendly exchange at the Institute; to Claudia Holland and her entire team for their help with research in the library; to Elke Halsen-Raffel for kindly arranging my previous visits to the library; to Dr. Christian Eckl, Michael Friedman, A.B. Economics (USC), Juris Doctor (Berkeley), Janina Jentz, LL.M. (oec), M.A., and David Schröder-Micheel, M.A., for their editorial support during the publication process of this book; and to my student assistants, Ruth Sander and Luiz Florian Wimmer, for their help on the revision of the bibliography and for the final proofreading.

Various stages of my doctoral studies in Germany have been financially supported by the Jean Monnet Scholarship, the DAAD Scholarship, and the research scholarship of the Max Planck Institute for Comparative and International Private Law. The generous financial backing from the granting institutions is truly appreciated. My dissertation was honoured by the Alumni Association of the Law Faculty at the University of Regensburg with the Juratisbona-Prize recognizing exceptional doctoral dissertations. I am truly thankful to the Alumni Association for the accolade and the financial support. I also gratefully acknowledge the generous financial support of the Johanna und Fritz Buch Gedächtnis-Stiftung, Hamburg, for the publication costs of this book.

During this journey, I am highly indebted to my dear friends, Dr. iur. Merve Ürem Çetinel, Dr. Büşra Cömert Akbay, Dr. Zahide Altunbaş Sancak, Dr. Anıl Güven Yüksel, Dr. Ekin Korkmaz, Assoc. Prof. Dr. Müge Ürem, Dr. Nurten Kansu Okyay, Hüseyin Coşgun, LL.M. (London), and Cansu Sinem Eden. I thank each and every one of them wholeheartedly for their continuous support, praise, and truly invaluable friendship.

Last but not least, this endeavour would of course not have been possible without the support of my beloved family. I am deeply thankful to my mother, Nalan Güneş, my father, Dr. Ahmet Güneş, and my brother, İsmet Serhan Güneş, not only for their never-ending belief in me, encouragement, and patience during the process, but also for their unconditional love and for all

the things they have taught me throughout my entire life. I would also like to thank my uncles, Hüseyin Kadir İleri and Mustafa Sadık İleri, my grandfather, Halil İbrahim İleri, and my late grandmother, Zekavet İleri, for their deeply appreciated support and love during my whole life. Lastly, I would like to recognize the moral support of my sister-in-law, Nevin Güneş who joined our family during the last phase of this study.

Hamburg, December 2022

Biset Sena Güneş

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Table of Abbreviations

AB	Ausschussbericht (Committee Report)
ABD	Ankara Barosu Dergisi (Journal/Turkey)
Abs	Absatz
AcP	Archiv für die civilistische Praxis (Journal/Germany)
AD	Adalet Dergisi (Journal/Turkey)
aF	alte Fassung
AG	Amtsgericht (Local Courts of Germany)/Advocate General of the CJEU
AGORA Int'l J Jurid Sci	AGORA International Journal of Juridical Sciences
AJCL	American Journal of Comparative Law
AJIL	American Journal of International Law
AJP	Aktuelle Juristische Praxis (Journal/Switzerland)
AkdHFD	Akdeniz Üniversitesi Hukuk Fakültesi Dergisi (Journal/Turkey)
Am U L Rev	American University Law Review
Anali PFZE	Anali Pravnog fakulteta Univerziteta u Zenici (Journal/Bosnia and Herzegovina)
Ankara L Rev	Ankara Law Review
Anm.	Anmerkung
Art/Arts	Article/Articles
AS	Amtliche Sammlung des Bundesrechts (The Official Compilation of Federal Legislation in Switzerland)
AußStrG	Außerstreitgesetz (Austrian Non-Contentious Proceedings Act)
AÜEHFD	Atatürk Üniversitesi Erzincan Hukuk Fakültesi Dergisi (Journal/Turkey)
AÜHFD	Ankara Üniversitesi Hukuk Fakültesi Dergisi (Journal/Turkey)
AÜSBFD	Ankara Üniversitesi Siyasal Bilgiler Fakültesi Dergisi (Journal/Turkey)
AYM	Anayasa Mahkemesi (Constitutional Court of Turkey)
BAÜHFD	Bahçeşehir Üniversitesi Hukuk Fakültesi Dergisi (Journal/Turkey)
BB1	Bundesblatt (Federal Law Gazette of Switzerland)
BeckFormB ErbR	Beck'sches Formularbuch Erbrecht (Form Book/Germany)
BeckOK	Beck'scher Online-Kommentar (Legal Commentary/Germany)
BeckOGK	Beck-online Großkommentar zum Zivilrecht (Legal Commentary/Germany)
BeckRS	Beck-Rechtsprechung (Journal/Germany)
BerGesVR	Berichte der Deutschen Gesellschaft für Völkerrecht (Journal/Germany)

BGB	Bürgerliches Gesetzbuch (Civil Code of Germany)
BGBI.	Bundesgesetzblatt (Federal Law Gazette of Germany and Austria)
BGH	Bundesgerichtshof (German Federal Court of Justice)
BGHZ	Entscheidungen des Bundesgerichtshofes in Zivilsachen (Collection of Judgments of the German Federal Court of Justice in Civil Matters)
Bing	Bingham's Reports, Common Pleas
BÜHFD	Başkent Üniversitesi Hukuk Fakültesi Dergisi (Journal/Turkey)
BVerfG	Bundesverfassungsgericht (German Federal Constitutional Court)
BvR	Aktenzeichen einer Verfassungsbeschwerde zum Bundesverfassungsgericht (File number of a Constitutional Complaint to the German Federal Constitutional Court)
BWNotZ	Zeitschrift für das Notariat in Baden-Württemberg (Journal/Germany)
BYIL	British Yearbook of International Law
C	Information and Notices (of the European Union)
Case W Res J Int'l L	Case Western Reserve Journal of International Law
Cass.	Cour de cassation (French Court of Cassation)
CESifo Econ Stud	CESifo Economic Studies
cf.	confer/conferatur (meaning compare)
ch.	chapter/chambre
civ.	civile (Civil Chamber of the French Court of Cassation)
CJEU/ECJ	Court of Justice of the European Union/European Court of Justice
CML Rev	Common Market Law Review
COM	Commission (of the European Union)
contra	against/conflicting/opposite
Cornell LQ	Cornell Law Quarterly
ÇSGB	T.C. Çalışma ve Sosyal Güvenlik Bakanlığı (Turkish Ministry of Labour and Social Security)
ÇTTAD	Çağdaş Türkiye Tarihi Araştırmaları Dergisi (Journal/Turkey)
Destatis	Statistisches Bundesamt (Federal Statistical Office of Germany)
DEÜHFD	Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi (Journal/Turkey)
div.	division
DNotI	Deutsches Notarinstitut (The German Notarial Institute)
DNotZ	Deutsche Notar-Zeitschrift (Journal/Germany)
Doc	Document
DStR	Deutsches Steuerrecht (Journal/Germany)
DTJV	Deutsch-türkische Juristenvereinigung (German-Turkish Lawyers Association)
DÜHFD	Dicle Üniversitesi Hukuk Fakültesi Dergisi (Journal/Turkey)
E	Esas Sayısı (File number for judgments of Turkish Courts)
EC	European Community
ECR	European Court Reports
ed/eds	editor/editors
Edinburgh L Rev	Edinburgh Law Review
edn	edition

EEC	European Economic Community
EFTA	European Free Trade Association
EG	Europäische Gemeinschaft
EGBGB	Einführungsgesetz zum Bürgerlichen Gesetzbuche (Introductory Act to the Civil Code – Private International Law Code of Germany)
EJIL	European Journal of International Law
ELI	European Law Institute
Emory Int'l L Rev	Emory International Law Review
EPLJ	European Property Law Journal
ErbR	Zeitschrift für die gesamte erbrechtliche Praxis (Journal/Germany)
ErbStB	Der Erbschaft-Steuerberater (Journal/Germany)
ERPL	European Review of Private Law
ESR	European Succession Regulation
esp.	especially
et seq.	et sequentes (and the following)
EU	European Union
EuErbVO	Europäische Erbrechtsverordnung (European Succession Regulation)
EuGVVO	Brüssel I Verordnung (Brussels I Regulation)
EuGüVO	Europäische Güterrechtsverordnung (European Matrimonial Property Regulation)
EuR	Europarecht (Journal/Germany)
Eur J L Reform	European Journal of Law Reform
Eur Rev	European Review
EUV/AEUV	Der Vertrag über die Europäische Union/Der Vertrag über die Arbeitsweise der Europäischen Union (Treaty of the European Union/Treaty on the Functioning of the European Union)
EuZPR/EuIPR	Europäisches Zivilprozess- und Kollisionsrecht (European Civil Procedural Law and Conflict-of-Laws)
EWCA Civ	England and Wales Court of Appeal Civil Division
EWHC	England and Wales High Court
(Ch/Comm/Fam)	(Chancery Division/Commercial Division/Family Division)
FamFG	Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit (German Act on Court Procedure in Family and Non-litigious Matters)
FamRZ	Zeitschrift für das gesamte Familienrecht (Journal/Germany)
ff	and the following
FGPrax	Praxis der freiwilligen Gerichtsbarkeit (Journal/Germany)
FLR	Family Law Reports
fn	footnote
Form.	Formular
FORUM	International Law FORUM du droit international
FuR	Familie und Recht (Journal/Germany)
GBO	Grundbuchordnung (German Real Estate Registry Act)
Geo Wash Int'l L Rev	George Washington International Law Review
GKG	Gerichtskommissärsgesetz (Austrian Act on Court Commissioners)

GP	Gesetzgebungsperiode (des Nationalrates) (Legislative Period of Austrian National Council)
GPR	Zeitschrift für das Privatrecht der Europäischen Union (Journal/Germany)
GSÜHFD	Galatasaray Üniversitesi Hukuk Fakültesi Dergisi (Journal/Turkey)
GÜHFD	Gazi Üniversitesi Hukuk Fakültesi Dergisi (Journal/Turkey)
Harv L Rev	Harvard Law Review
Hg.	Herausgeber
HL	House of Lords
HmbGVBl	Hamburgisches Gesetz- und Ordnungsblatt (Hamburg Law and Ordinance Gazette)
HmbWBG	Hamburgisches Wohn- und Betreuungsqualitätsgesetz (Hamburg Quality of Housing and Care Law)
HTestFormÜ	Haager Testamentsformübereinkommen (Hague Form of Wills Convention)
IAS	Iustum Aequum Salutare (Journal/Hungary)
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
IESC	Supreme Court of Ireland
IJPL	International Journal of Procedural Law
ILPr	International Litigation Procedure
InfAusIR	Informationsbrief Ausländerrecht (Journal/Germany)
InsO	Insolvenzordnung (Insolvency Statute of Germany)
IntErbRVG	Internationales Erbrechtsverfahrensgesetz (Act on International Procedure in Succession Matters)
IntGüRVGEG	Gesetz zum Internationalen Güterrecht und zur Änderung von Vorschriften des Internationalen Privatrechts (German Law on International Matrimonial Property Law and Reform of International Private Law Provisions)
Iowa L Rev	Iowa Law Review
IPR	Internationales Privatrecht
IPRax	Praxis des Internationalen Privat- und Verfahrensrechts (Journal/Germany)
IPRG	Bundesgesetz über das Internationale Privatrecht (Swiss Federal Act on Private International Law)
IPRspr	Die deutsche Rechtsprechung auf dem Gebiet des Internationalen Privatrechts (Collection of Court Rulings/Germany)
İBD	İstanbul Barosu Dergisi (Journal/Turkey)
İKÜHFD	İstanbul Kültür Üniversitesi Hukuk Fakültesi Dergisi (Journal/Turkey)
İMÜHFD	İstanbul Medipol Üniversitesi Hukuk Fakültesi Dergisi (Journal/Turkey)
İNÜHFD	İnönü Üniversitesi Hukuk Fakültesi Dergisi (Journal/Turkey)
İÜHFM	İstanbul Üniversitesi Hukuk Fakültesi Mecmuası (Journal/Turkey)
İTİCÜSBD	İstanbul Ticaret Üniversitesi Sosyal Bilimler Dergisi (Journal/Turkey)

J	Justice
JbItalR	Jahrbuch für Italienisches Recht (Yearbook/Germany)
JDI	Journal du Droit International (Journal/France)
JHA	Justice and Home Affairs
J Islam Stud	Journal of Islamic Studies
JN	Jurisdiktionsnorm (Austrian Act on Court Jurisdiction in Civil Matters)
J Priv Int L	Journal of Private International Law
JT	Journal des tribunaux (Journal/Belgium)
JURA	Juristische Ausbildung (Journal/Germany)
jurisPK-BGB	juris PraxisKommentar BGB (Legal Commentary/Germany)
JZ	Juristenzeitung (Journal/Germany)
K	Karar Sayısı (Decree number for judgments of Turkish Courts)
KG	Kammergericht (Court of Appeal in Berlin)
KHASHFD	Kadir Has Üniversitesi Hukuk Fakültesi Dergisi (Journal/Turkey)
L	Legislation (of the European Union)
La L Rev	Louisiana Law Review
Law & Contemp Probs	Law and Contemporary Problems
Leiden J Int Law	Leiden Journal of International Law
LG	Landgericht (Regional Courts of Germany)
Lloyd's Rep	Lloyd's Law Reports
LugÜ	Lugano-Übereinkommen (Lugano Convention)
LPartG	Gesetz über die Eingetragene Lebenspartnerschaft (German Law on Registered Partnerships)
LQR	The Law Quarterly Review
Maast J Eur & Comp L	Maastricht Journal of European and Comparative Law
MB	Moniteur Belge (Official Gazette of Belgium)
MHAD	Mukayeseli Hukuk Araştırmaları Dergisi (Journal/Turkey)
MHB	Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni (Journal/Turkey)
MHFD	Maltepe Üniversitesi Hukuk Fakültesi Dergisi (Journal/Turkey)
MİHDER	Medeni Usul ve İcra İflas Hukuku Dergisi (Journal/Turkey)
MittBayNot	Mitteilungen des Bayerischen Notarvereins, der Notarkasse und der Landesnotarkammer Bayern (Journal/Germany)
MittRhNotK	Mitteilungen der Rheinischen Notarkammer (Journal/Germany)
MÖHUK	Milletlerarası Özel Hukuk ve Usul Hukuku Hakkında Kanun (Turkish Private International and Procedural Law Act)
MÜHF-HAD	Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi (Journal/Turkey)
MüKoBGB	Münchener Kommentar zum BGB (Legal Commentary/Germany)
MüKoZPO	Münchener Kommentar zur Zivilprozessordnung (Legal Commentary/Germany)
n	note

NA	Nachlassabkommen
NK-BGB	Nomos-Kommentar zum BGB (Legal Commentary/Germany)
No/no/Nr.	Number/Number
NR	Nationalrat (The National Council of Austria)
NILR	Netherlands International Law Review
NIPR	Nederlands Internationaal Privaatrecht (Journal/Netherlands)
NJW	Neue Juristische Wochenschrift (Journal/Germany)
NZ	Österreichische Notariats-Zeitung (Journal/Austria)
OFK	Orell Füssli Kommentar (Legal Commentary/Switzerland)
OGH	Oberster Gerichtshof der Republik Österreich (Supreme Court of Justice of the Republic of Austria)
OJ	Official Journal of the European Union
OLG	Oberlandesgericht (Higher Regional Courts of Germany)
Osgoode Hall LJ	Osgoode Hall Law Journal
OUP	Oxford University Press
p/pp	page/pages
para/paras	paragraph/paragraphs
PIL	Private International Law
PILA	Private International Law Act
Pol Int Eur Law	Polish Review of International and European Law
PPPM	Problemy Prawa Prywatnego Międzynarodowego (Journal/Poland)
Q	Question
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht (Journal/Germany)
RdC	Recueil des Cours (Collected Courses of The Hague Academy of International Law)
RDIPP	Rivista di diritto internazionale privato e processuale (Journal/Italy)
Rev crit dr int privé	Revue critique de droit international privé (Journal/France)
RGBL.	Reichsgesetzblatt (Official Gazette of the German and Austrian Empires)
RIW	Recht der Internationalen Wirtschaft (Journal/Germany)
RNotZ	Rheinische Notar-Zeitschrift (Journal/Germany)
Roman LT	Roman Legal Tradition
RPflG	Rechtspflegergesetz (Act on Senior Judicial Officers)
S/S.	Section/Seite/Satz
SJZ	Schweizerische Juristen-Zeitung (Journal/Switzerland)
SIG	Special Interest Group (of ELI)
soFid	Sozialwissenschaftlicher Fachinformationsdienst (Social Science Information Service)
StAZ	Das Standesamt (Journal/Germany)
Stb.	Staatsblad van het Koninkrijk der Nederlanden (Official Gazette of the Kingdom of the Netherlands)
subpara	subparagraph

SÜHFD	Selçuk Üniversitesi Hukuk Fakültesi Dergisi (Journal/Turkey)
Sydney L Rev	Sydney Law Review
T	Tarih (Date for the judgments of Turkish Courts)
TBB	Türkiye Barolar Birliği (Union of Turkish Bar Associations)
TBMM	Türkiye Büyük Millet Meclisi (The Grand National Assembly of Turkey)
T.C.	Türkiye Cumhuriyeti (Republic of Türkiye)
TFEU	Treaty on the Functioning of the European Union
TIL	The International Lawyer
TLQ	The Lawyer Quarterly
Tru L I	Trust Law International
TÜİK	Türkiye İstatistik Kurumu (Turkish Statistical Institute)
U Colo L Rev	University of Colorado Law Review
UINL	Union Internationale du Notariat (International Union of Latin Notaries)
UMD	Uyuşmazlık Mahkemesi Dergisi (Journal/Turkey)
U Miami L Review	University of Miami Law Review
UNIDROIT	International Institute for the Unification of Private Law
Urt	Urteil
UTTDER	Uluslararası Ticaret ve Tahkim Hukuku Dergisi (Journal/Turkey)
UYAP	Ulusal Yargı Ağı Projesi (National Judiciary Informatics System in Turkey)
v	von/vom
Ves & Beames	Vesey & Beames' Reports
VO	Verordnung
vol	volume
Vorb.	Vorbemerkungen
VwGH	Verwaltungsgerichtshof (Administrative Court of Austria)
WPNR	Weekblad voor Privaatrecht, Notariaat en Registratie (Journal/Netherlands)
YbPIL	Yearbook of Private International Law
YD	Yargıtay Dergisi (Journal/Turkey)
YKD	Yargıtay Kararları Dergisi (Journal/Turkey)
YLJ	Yale Law Journal
YÜHFD	Yeditepe Üniversitesi Hukuk Fakültesi Dergisi (Journal/Turkey)
ZEuP	Zeitschrift für Europäisches Privatrecht (Journal/Germany)
ZEV	Zeitschrift für Erbrecht und Vermögensnachfolge (Journal/Germany)
ZGBR	Schweizerische Zeitschrift für Beurkundungs- und Grundbuchrecht (Journal/Switzerland)
ZPO	Zivilprozessordnung (German Code of Civil Procedure)
ZVglRWiss	Zeitschrift für Vergleichende Rechtswissenschaft (Journal/Germany)
ZZPInt	Zeitschrift für Zivilprozess International (Journal/Germany)

Introduction

As the Turkish poet *Turgut Uyar* famously wrote: ‘Death is like a memory in man; / sometimes [it is] remembered, sometimes [it is] forgotten. / Yet one day, one day finally, / [it becomes] visible, tangible...’.¹ Indeed, when this tragic yet inevitable fact of life becomes ‘visible’ and ‘tangible’ for a person, there are a number of legal issues to be dealt with by the surviving relatives. One of these issues, undoubtedly, is how property will devolve. The answer to this question is considered part of the ‘legal DNA’² of a country, whereby cultural and social customs play an important role and the rights of family members and third parties are involved;³ hence, the national rules of States often differ in this field. Such variety does not usually pose a problem in a purely domestic case, since courts will resolve the dispute in line with their own laws. This unproblematic posture was generally the case in former times, when international succession cases were exceptional rather than common practice. Yet in today’s world there is an ever-increasing mobility of people. This has a direct effect on the perception, content, and application of the law in many fields.⁴ And this is especially true for the law of succession, a legal field which, compared to others, will frequently feature international elements.⁵

Despite the likelihood of cross-border succession cases, the diversity of national rules in this area presents certain challenges in practice.⁶ In the first place, such a diversity negatively affects foreseeability and legal certainty for

¹ Turgut Uyar, ‘Ölüme Dair Konuşmalar 2’ in Bedirhan Toprak (ed), *Büyük Saat* (11th edn, Yapı Kredi Yayınları 2011) 25 (author translation from Turkish original).

² House of Lords European Union Committee, ‘Minutes of Evidence on the EU’s Regulation on Succession – 6th Report of Session’ 2009–2010 HL 75 18-Q8 <<https://publications.parliament.uk/pa/ld200910/ldselect/ldeucom/75/75.pdf>> accessed 22 June 2021.

³ Eva Lein, ‘A Further Step Towards a European Code of Private International Law – The Commission Proposal for a Regulation on Succession’ (2009) XI YbPIL 107, 108–109.

⁴ Walter Schwimmer, ‘The Effects of Globalisation on Law: The Impact on the Council of Europe’ (2000) 2 FORUM 227, 227.

⁵ Eduard Maurits Meijers, ‘Erfrechtelijke moeilijkheden op het gebied van het internationaal privaatrecht’ (1936) 67 WPNR 609, 645.

⁶ Heinrich Dörner and others, ‘Auf dem Weg zu einem europäischen Internationalen Erb- und Erbverfahrensrecht’ [2005] IPRax 1, 2; Anotol Dutta, in Franz Jürgen Säcker and others (eds), *MiKoBGB*, vol 12 (8th edn, C.H. Beck 2020) EuErbVO Vorb. Art 1 para 16.

estate planning.⁷ It is difficult for individuals operating in such a diversity to know in advance which court will have jurisdiction or which law will be applicable to their succession.⁸ Furthermore, the wide variety of rules also complicates the situation for the individuals entitled to the succession in terms of the cross-border administration of an estate and the enforcement of succession rights. This is because judgments or authentic instruments relating to a succession may not be easily recognised in other States where some parts of the estate are located, in other words, in those places where succession rights are ultimately to be asserted.⁹ In addition, divergent or sometimes overlapping jurisdictional rules in this area can trigger *forum shopping*¹⁰ for the involved individuals and also confront them with jurisdiction conflicts, be they of a negative or positive nature. There is also the risk of their receiving inconsistent judgments as a result of different conflict-of-laws rules being applicable.¹¹

The European legislature, considering the frequency of cross-border cases in this area and aiming to eliminate such difficulties within the European Union (hereinafter also referred to as ‘the EU’ or simply ‘the Union’),¹² enacted the European Succession Regulation (hereinafter ‘the Regulation’),¹³ which has been applicable in the Member States¹⁴ since 17 August 2015 (Article 84). Although not binding on third States,¹⁵ the Regulation has nevertheless great significance for them since its application may be triggered in various ways. First and foremost, the Regulation’s conflict-of-laws rules extend

⁷ Dutta, *MüKoBGB* (2020) EuErbVO Vorb. Art 1 para 16; cf. Dörner and others, [2005] IPRax 1, 2. See also Recital 37 of the Regulation.

⁸ Dutta, *MüKoBGB* (2020) EuErbVO Vorb. Art 1 para 16; cf. Dörner and others, [2005] IPRax 1, 2.

⁹ Dutta, *MüKoBGB* (2020) EuErbVO Vorb. Art 1 para 16.

¹⁰ Forum shopping could be described as a phenomenon in transnational litigation in which there are multiple fora available to hear the case and the claimant chooses the one that is most favourable to him. For detailed information, see Andrew S. Bell, *Forum Shopping and Venue in Transnational Litigation* (OUP 2003).

¹¹ Dutta, *MüKoBGB* (2020) EuErbVO Vorb. Art 1 para 16; cf. Dörner and others, [2005] IPRax 1, 2.

¹² Dörner and others, [2005] IPRax 1, 2; Dutta, *MüKoBGB* (2020) EuErbVO Vorb. Art 1 para 16. See also Recital 7 of the Regulation.

¹³ Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [2012] OJ L 201/107.

¹⁴ The Regulation is not applicable in Ireland and Denmark due to the special status they have since the Treaty of Amsterdam (Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts [1997] OJ C 340/01). See, in this regard, Protocols no 21 and 22 annexed to the TFEU and also Recitals 82 and 83 of the Regulation.

¹⁵ This work uses the term ‘third State’ in order to refer to the States which are not Member States of the European Union.

to cases having a connection with third States. It provides that the law applicable to succession covers the entire estate regardless of the fact that some of the assets are located in a third State (Article 21(1)). Moreover, unlike most other legal regimes, the Regulation gives a right to the deceased to choose the law applicable to the succession as a whole, and this law could be the national law of the deceased (Article 22). For third State nationals, this would be the law of a third State whose nationality they possess at the time of making the choice or at the time of death.¹⁶ Additionally, the Regulation provides uniform jurisdiction rules for the courts of Member States, allowing them to rule on succession as a whole regardless of the fact that some assets of the estate may be located in third States (esp. Article 4) or that the last habitual residence of the deceased was in a third State (Article 10).¹⁷

When this is the case, the Regulation, which binds only its participating Member States but not third States, distorts the outcome of the cases between Member States and third States which possibly adopted the same connecting factors and/or non-conflicting jurisdiction rules before the entry into force of the Regulation.¹⁸ If, for example, both sides applied the law of nationality or domicile to the succession, or both accepted the dualist approach,¹⁹ or both rejected choice of law as regards to succession, there could have been a decisional harmony between those States. The Regulation, by introducing uniform conflict-of-laws rules to be applicable within the EU (Article 20 et seq.), precludes such a possibility.²⁰ Furthermore, as the rules of the Regulation allow Member State courts to assert jurisdiction even in cases which are more closely connected to third States (see esp. Article 10), further jurisdiction conflicts could result between Member State courts and third State courts.²¹

One might think that succession issues in relation to third States are only a rare occurrence. Yet their practical relevance cannot be underestimated when the number of foreign nationals residing in the EU or the potential number of EU nationals who have assets in third States is taken into consideration. According to figures published by the official statistical institute of the Europe-

¹⁶ Eva Lein, 'Die Erbrechtsverordnung aus Sicht der Drittstaaten' in Anatol Dutta and Sebastian Herrler (eds), *Die Europäische Erbrechtsverordnung, 20 Jahre DNotI 1993–2013* (C.H. Beck 2014) 200; cf. Andrea Bonomi and Azadi Öztürk, 'Auswirkungen der Europäischen Erbrechtsverordnung auf die Schweiz unter besonderer Berücksichtigung deutschschweizerischer Erbfälle' (2015) 114 ZVglRWiss 4, 5.

¹⁷ Lein, 'Die Erbrechtsverordnung aus Sicht der Drittstaaten' (2014) 200; Bonomi and Öztürk, (2015) 114 ZVglRWiss 4, 5–6; Fabrizio Marongiu Buonaiuti, 'The EU Succession Regulation and Third Country Courts' (2016) 12 J Priv Int L 545, 545–549.

¹⁸ Lein, 'Die Erbrechtsverordnung aus Sicht der Drittstaaten' (2014) 200.

¹⁹ On monist and dualist approaches, see pp 55 ff.

²⁰ Lein, 'Die Erbrechtsverordnung aus Sicht der Drittstaaten' (2014) 200.

²¹ Lein, 'Die Erbrechtsverordnung aus Sicht der Drittstaaten' (2014) 200; cf. Buonaiuti, (2016) 12 J Priv Int L 545, 545–549.

an Union (Eurostat), there were 23 million non-Member State nationals residing in the EU at the beginning of 2020. From the Member States, the largest number of non-EU nationals were living in Germany (10.4 million), Spain (5.2 million), France (5.1 million), and Italy (5.0 million).²² A similar statistic illustrating the number of EU nationals owning assets in third countries seemingly does not exist. Nevertheless, it is likely that their numbers are considerable, given the Union's policy of encouraging free movement of capital not only between EU countries, but also between EU and non-EU countries (Article 63 of the Treaty on the Functioning of the European Union (hereinafter 'TFEU')).²³ Both of these groups increase the likelihood of a third country element being involved in succession cases arising in the EU. The analysis of the Regulation also from a third State perspective is thus of foremost significance for legal practice.

Among the succession cases which are closely related to third States, the cases connected to Turkey are of substantial relevance for the EU by virtue of their potential frequency. The significant size of the migrant population of Turkey in Member States – which includes EU residents with Turkish origin who hold the nationality of a Member State and who sometimes still retain their Turkish nationality – makes it likely that these residents will be involved in succession cases.²⁴ In addition, there are also individuals, either EU or non-EU citizens, who are resident in Turkey on a permanent or a temporary basis, some of them as a result of the phenomena of 'international retirement migration'²⁵ or 'return migration'.²⁶ These groups of people create a potential for

²² Eurostat, 'Migration and Migrant Population Statistics – Statistics Explained' <https://ec.europa.eu/eurostat/statistics-explained/index.php/Migration_and_migrant_population_statistics#Migrant_population:21.8_million_non-EU-27_citizens_living_in_the_EU-27_on_1_January_2019> accessed 30 July 2020.

²³ Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47.

²⁴ Although studies reveal that the previously extensive migration flow from Turkey to the EU has decelerated in recent years, it is beyond dispute that a sizeable Turkish community is still present in the Union, this being the result of both the guest-worker schemes adopted by some Member States in earlier decades and also the mobility intrinsic to the contemporary era: Heinz Fassmann and Ahmet İçduygu, 'Turks in Europe: Migration Flows, Migrant Stocks and Demographic Structure' (2013) 21 Eur Rev 349, 350. For figures and more information, see below under Chapter 1 – A: Turkish-EU Successions.

²⁵ International retirement migration refers to the cross-border mobility of older people which sees them relocate to destinations offering advantages such as more favourable environmental conditions or a pleasant lifestyle: Canan Balkır and Berna Kırkulak, 'Turkey, the New Destination for International Retirement Migration' in Heinz Fassmann, Max Haller and David Lane (eds), *Migration and Mobility in Europe: Trends, Patterns and Control* (Edward Elgar Publishing 2009) 123.

²⁶ Return migration is a term used for the 'return' of persons to their country of origin after living a significant time outside this country: Edda Currle, 'Theorieansätze zur Er-

cross-border succession cases between Turkey and the EU, particularly when there are assets located in both territories.

The Turkey-EU-related succession cases may be of paramount importance in practice also due to consular treaties that exist between Turkey and individual Member States, namely the Turkish-German Consular Treaty of 1929,²⁷ the Turkish-Hungarian Consular Treaty of 1938,²⁸ and the Turkish-Italian Consular Treaty of 1929.²⁹ In addition to covering other legal matters, these Treaties address private international law issues of succession,³⁰ a fact that assumes considerable significance given that Article 75(1) (1) reiterates the well-established international law principle of *pacta sunt servanda* and provides that the Treaties should enjoy priority of application over the Regulation.³¹ This article has been described as the ‘Achilles’ heel³² of the Regulation given its potential to vitiate the desired uniformity.³³ Consequently, some of the Turkish-EU succession cases will be governed by these Treaties and not by the Regulation nor, conversely, by the private international law (hereinafter also referred

klärung von Rückkehr und Remigration’ [2006] soFid – Migration und ethnische Minderheiten 7, 7; Esma Durugönül, ‘Turkish Return Migration from Europe’ (2013) 21 Eur Rev 412, 413.

Turkey is apparently a country characterised by both return and international retirement migration, see below, under Chapter 1 – A: Turkish-EU Successions.

²⁷ *Resmi Gazete* of 8.6.1930, no 1514

²⁸ *Resmi Gazete* of 27.12.1939, no 4395.

²⁹ *Resmi Gazete* of 7.4.1931, no 1768.

³⁰ Turkey signed a similar consular treaty which also addresses conflict-of-laws and jurisdiction issues of succession in 1927 with Poland (*Düstur*, Tertip III, Cilt VIII, 1258 (583); Protocol of 19.1.1938 amending the Treaty: *Düstur*, Tertip III, Cilt XIX, 1340 (553)). However, the Treaty never entered into force. See, in this regard, Hakkı Yaşar, ‘Konso-loslara İlişkin Adli Ayrıcalıklar ve Bağışlıklar (I)’ (1982) 8 YD 37, 42; Paweł Czubik, ‘Polish Consular Law and Practice after Regaining Independence in 1918 – the Selected Key Issues of the Interwar Period’ (2020) 9 Pol Int Eur Law 49, 54.

³¹ See, for comments on the effect of such treaties of Member States on the Regulation, Max Planck Institute for Comparative and International Private Law, ‘Comments on the European Commission’s Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Authentic Instruments in Matters of Succession and the Creation of a European Certificate of Succession’ (2010) 74 RabelsZ 522, 532; Walter Pintens, ‘Foreword’ in Anatol Dutta and Wolfgang Wurmnest (eds), *European Private International Law and Member State Treaties with Third States – The Case of the European Succession Regulation* (Intersentia 2019) v.

³² Anatol Dutta, ‘Das neue internationale Erbrecht der Europäischen Union – Eine erste Lektüre der Erbrechtsverordnung’ [2013] FamRZ 4, 15; Anatol Dutta and Wolfgang Wurmnest, ‘Introduction’ in Anatol Dutta and Wolfgang Wurmnest (eds), *European Private International Law and Member State Treaties with Third States – The Case of the European Succession Regulation* (Intersentia 2019) 1.

³³ Dutta and Wurmnest, ‘Introduction’ (2019) 1.

to as ‘PIL’) rules of Turkey. These consular treaties were, however, concluded in the 20th century with the underlying legal and political ideas of that period of time, and hence have rules based on the needs of that era.³⁴ This obviously adds another dimension to Turkish-EU successions.

The aim of this book is, therefore, to examine the regime of both the Regulation and the treaties from the Turkish PIL perspective as a third State for the EU. It is hoped that a third State perspective on the Regulation and the regime of existing treaties will be an important contribution to the literature; while the Regulation has been extensively covered in numerous scholarly works, it has not received the same depth of treatment from the third State perspective.³⁵

It is important to clarify here at the outset that whereas the Regulation is of an ‘all-inclusive’³⁶ nature, covering all aspects of private international law issues relating to succession, including the European Certificate of Succession (hereinafter also referred to as ‘the ECS’), this book will concentrate exclusively on the issues which might have practical relevance from the Turkish perspective: the rules on the applicable law and on jurisdiction as well as

³⁴ Max Planck Institute for Comparative and International Private Law, (2010) 74 *RabelsZ* 522, 532–533; cf. Dutta and Wurmnest, ‘Introduction’ (2019) 1. See also Biset Sena Güneş, ‘The Relations of Turkey with EU Member States’ in Anatol Dutta and Wolfgang Wurmnest (eds), *European Private International Law and Member State Treaties with Third States – The Case of the European Succession Regulation* (Intersentia 2019) 285.

³⁵ Examples of scholarly works adopting a third State perspective exists for Switzerland: Michelle Kalt and Matthias Uhl, ‘Die EU-Erbrechtsverordnung und die Schweiz’ in Lukas Fahrländer and Reto A. Heizmann (eds), *Europäisierung der schweizerischen Rechtsordnung* (Dike 2013); Agnes Dormann, ‘Das schweizerische internationale Privatrecht und die europäische Erbrechtsverordnung im Vergleich’ in DACH Europäischen Anwaltsvereinigung e.V. (ed), *Die EU-Erbrechtsverordnung Nr. 650/2012 und deren Auswirkungen auf diverse Länder* (Schulthess 2014); Bonomi and Öztürk, (2015) 114 *ZVglRWiss* 4; Gian Paolo Romano, ‘Remarks on the Impact of the Regulation No 650/2012 on the Swiss-EU Successions’ (2015–2016) *XVII YbPIL* 253.

Exemplary studies can also be found in regards to the UK, which initially decided not to opt into the Regulation and later decided to leave the EU entirely, thus becoming a ‘third State’ as the term is used in this study: Jonathan Harris, ‘The Proposed EU Regulation on Succession and Wills: Prospects and Challenges’ (2008) 22 *Tru L I* 181; Paul Beaumont and Jayne Holliday, ‘Some Aspects of Scots Private International Law of Succession Taking Account of the Impact of the EU Succession Regulation’ (2015) <https://www.abdn.ac.uk/law/documents/CPIL_Working_Paper_No_6_Beaumont_and_Holliday.pdf> accessed 22 June 2021; James A. McLean, ‘The UK and the European Succession Regulation: Fog over the Channel – Potential Pitfalls for the Unwary?’ (2018) 22 *Edinburgh L Rev* 86.

For a paper comparing some aspects of the Regulation with the situation in both Switzerland and England and Wales, see Lein, ‘Die Erbrechtsverordnung aus Sicht der Drittstaaten’ (2014).

³⁶ Harris, (2008) 22 *Tru L I* 181, 188.

certain issues regarding the ECS. The topic of recognition and enforcement of judgments and other instruments falls mostly outside the scope of this study, and it is discussed only in the context of the ECS. Moreover, although certain rules in the Regulation are of particular interest for this book, the present study does not intend to offer detailed comments on the Regulation from a purely European perspective. The Regulation and its rules are discussed within this book in relation to those succession matters which are likely to arise in the Turkish-EU context.

As to the scope of the book, it should be further highlighted that of the three similarly formulated treaties between Turkey and individual Member States, the Turkish-German Treaty – which presumably has the greatest impact on legal practice by virtue of the fact that Germany is home to the majority of the Turkish nationals living within the borders of the Union³⁷ – will be focused on as exemplary. Further clarifications as regards the Turkish-Italian and Turkish-Hungarian treaties will be made only where dissimilarities appear. It should be also noted that the purpose of this study is not to scrutinise all the provisions of the Turkish-Germany Consular Treaty, but instead to focus on the succession provisions which are annexed to Article 20 of the Treaty (‘Terekeye Ait Ahkâm’/ ‘Nachlassabkommen’).

Except where there are uniform rules applicable, such as the rules of the Treaty, it could be seen as quite normal that the European Union (a community driven by supranational interests) and Turkey (a single State) would have different private international law rules and different civil procedure provisions. This may, however, result in inconsistent judgments, and hence, would run counter to the *raison d’être* of private international law as introduced by Savigny.³⁸ Admittedly, decisional harmony – an equivocal and debated concept³⁹ and one sometimes referred to as the ‘Holy Grail’⁴⁰ – requires that like cases should be decided in like way regardless of the forum in which they are brought.⁴¹ Such an outcome will only be achieved when there is a certain degree of coordination between the private international law rules and civil procedure of different jurisdictions.⁴²

³⁷ See below p 19.

³⁸ Friedrich Carl von Savigny, *System des heutigen Römischen Rechts*, vol 8 (Veit & Comp. 1849) 27.

³⁹ In this regard, see authors cited in Sarah Nietner, *Internationaler Entscheidungseinklang im europäischen Kollisionsrecht* (Mohr Siebeck 2016) 12–13.

⁴⁰ Friedrich K. Juenger, ‘Jurisdiction, Choice of Law and the Elusive Goal of Decisional Harmony’ (1992) 39 NILR 137, 138.

⁴¹ Savigny, *System des heutigen Römischen Rechts* (1849) 27.

⁴² Under Savigny’s approach, a complete harmony between the laws of different States is required to reach decisional harmony. However, as rightly argued, such a far-reaching harmony is not achievable. Therefore, the aim of the decisional harmony should be only a certain degree of coordination between the laws of different States: Nietner, *Internation-*

Despite being an abstract concept, international harmony of decisions would bring practical benefits in cross-border cases. First and foremost, it provides for the free movement of a right or status.⁴³ When a legal relationship is recognised in one State and not in another,⁴⁴ legal certainty is undermined and the enforcement of rights is problematic.⁴⁵ In this sense, the harmony of decisions would also safeguard legal certainty. What is more, the coordination of private international law, i.e. ensuring that different States apply the same rules in transnational cases, precludes forum shopping,⁴⁶ which for its part is mostly⁴⁷ seen as undesirable in transnational litigation.

In this sense, the quest for international harmony of decisions is also of paramount importance with regards to cross-border succession cases. Every legal institute is believed to safeguard certain interests. In the law of succession, among other things, two salient but sometimes contradicting interests are mostly at the forefront: first, the execution of the last wishes of the deceased as regards an estate and, second, the protection of the surviving family members.⁴⁸ At the PIL level, these are safeguarded when the deceased is able to plan his succession without problems and when succession rights of the beneficiaries are easily enforceable in different jurisdictions. A certain level of coordination between the private international rules and civil procedure of different States – and the resulting decisional harmony – would help to achieve these two aims of succession law. The purpose of this book is, therefore, to comparatively analyse the machinery of the Regulation and of Turk-

tionaler Entscheidungseinklang (2016) 8. This is referred as the statutory harmony ('Gesetzesharmonie'). The term is believed to have first been used by Kahn: Franz M. Kahn, *Ueber Inhalt, Natur und Methode des internationalen Privatrechts* (G Fischer 1899) 76ff.

⁴³ Erik Jayme, 'Identité Culturelle et Intégration: Le Droit International Privé Postmoderne' (1995) 251 RdC 9, 89; Nietner, *Internationaler Entscheidungseinklang* (2016) 2.

⁴⁴ A so-called 'limping' legal relationships: Michael Bogdan, *Private International Law as Component of the Law of the Forum* (Ail-Pocket 2012) 72.

⁴⁵ Arthur Taylor von Mehren, 'Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology' (1974) 88 Harv L Rev 347, 358.

⁴⁶ Paul Heinrich Neuhaus, 'Legal Certainty versus Equity in the Conflict of Laws' (1963) 28 Law & Contemp Probs 795, 806; von Mehren, (1974) 88 Harv L Rev 347, 358; Nietner, *Internationaler Entscheidungseinklang* (2016) 21.

⁴⁷ For a different view on forum shopping, see, for example, Friedrich K. Juenger, 'What's Wrong with Forum Shopping?' (1994) 16 Sydney L Rev 5.

⁴⁸ See, for example, Rona Serozan and Baki İlkay Engin, *Miras Hukuku ve Uygulama Çalışmaları* (7th edn, Seçkin 2021) § 1 paras 6–7.

There is undoubtedly much to be written and discussed on the legal values underlying (substantive) succession law. These, however, would go beyond the aim and scope of this book, which limits itself to the private international law aspects of succession in the Turkish-EU context. For a detailed discussion on the functions of succession law, see, for example, Anatol Dutta, *Warum Erbrecht?* (Mohr Siebeck 2014).

ish PIL with an eye to decisional harmony. Although a level of decisional harmony is generally present under the Treaty because of its simultaneous application in Turkey and Germany – the exception being those instances when the Contracting States adopt different interpretations of the same text – its ‘outdated’⁴⁹ rules should still be considered in the comparative analysis in order to describe the interplay between these rules and modern approaches.

In the light of these objectives, Chapter 1 of this book first focuses on the potential consequences of Turkish-EU successions for legal practice and gives an overview on, as well as the background of, the three legal sources which are at issue: the Regulation, Turkish private international law on succession, and the Turkish-German Treaty. Chapter 2 then comparatively analyses the conflict-of-laws rules in these three legal sources and discusses, particularly, the approaches of them (monist or dualist) towards succession, their connecting factors (including, if possible, the option for *professio iuris*), the scope of succession matters, the PIL approach towards dispositions of property upon death, and also the topics of *renvoi*, overriding mandatory provisions, and *ordre public*. Finally, Chapter 3 focuses on procedural issues in Turkish-EU successions. This chapter examines the main jurisdiction rules and, where applicable, the subsidiary jurisdiction rules of the three legal sources, considering their nature (exclusive or non-exclusive) and the potential for conflicts. In addition, the function of the ECS for Turkish nationals in Germany and the recognition of the ECS in Turkey are discussed.

⁴⁹ Max Planck Institute for Comparative and International Private Law, (2010) 74 *RabelsZ* 522, 532.

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