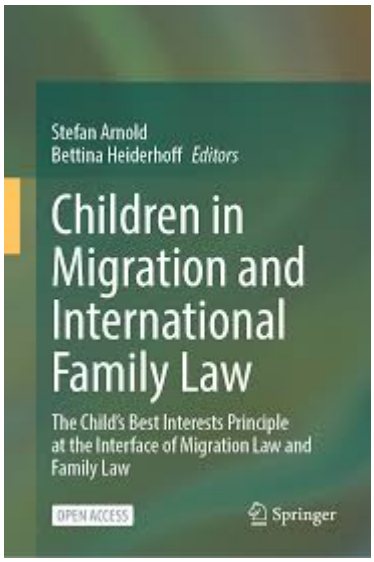
Out Now: New open Access book on Children in Migration and International Family Law (Springer, 2024) by Stefan Arnold & Bettina Heiderhoff

Stefan Arnold (Institute of International Business Law, Chair for Private Law, Philosophy of Law, and Private International Law, University of Münster, Münster, Germany) and **Bettina Heiderhoff** (Institute for German and International Family Law, Chair for Private International Law, International Civil Procedure Law and German Private Law, University of Münster, Münster, Germany) have recently published an edited book on *Children in Migration and International Family Law* (Springer, 2024).

The book is an open access title, so it is freely available to all. In the editors' words, the book aims "*to shed light on the often overlooked legal difficulties at the interface between international family law and migration law*" (p. 3) with focus placed "*on the principle of the best interests of the child and how this principle can be more effectively applied*." (p.4)

The book's blurb reads as follows:



This open access book offers readers a better understanding of the legal situation of children and families migrating to the EU. Shedding light on the legal, practical, and political difficulties at the intersection of international family law and migration law, it demonstrates that enhanced coordination between these policy areas is crucial to improving the legal situation of families on the move. It not only raises awareness of these "interface" issues and the need for stakeholders in migration law and international family law to collaborate closely, but also identifies deficits in the statutory framework and suggests possible remedies in the form of interpretation and regulatory measures.

The book is part of the EU co-financed FAMIMOVE project and includes contributions from international experts, who cover topics such as guardianship, early marriage, age assessment, and kafala from a truly European perspective. The authors' approach involves a rigorous analysis of the relevant statutory framework, case law, and academic literature, with particular attention given to the best interest of the child in all its facets. The book examines how this principle can be more effectively applied and suggests ways to foster a more fruitful understanding of its regulatory potential.

Given its scope and focus, the book will be of interest to researchers, scholars, and practitioners of Private International Law, Family Law, and Migration Law. It makes a valuable contribution to these fields, particularly at their often-overlooked intersections.

The content of the chapters is succinctly summarized in the introductory chapter of the book, authored by the editors ("Children in Migration and International Family Law: An Introduction," pp. 11–16). This summary is referenced here as a sort of abstract for each chapter.

Part I Introduction

Children in Migration and International Family Law: An Introduction

Bettina Heiderhoff and Stefan Arnold

The chapter describes the “Aims of the book and the FAMIMOVE Project”, “The Protections of the Best Interests of the Child: ”

An Introduction to FAMIMOVE, Its Accomplishments and Its Challenges

Marta Pertegás Sender

The first part of this book (Part I) … is dedicated to the FAMIMOVE-project and sets out the background, foundation and aims of FAMIMOVE.

Part II General Topics

The Child’s Best Interests in International Jurisdiction Under the Brussels IIter Regulation

María González Marimón

[The chapter] sheds light on the child’s best interests in the area of international jurisdiction under the Brussels IIter Regulation. María González Marimón focuses on parental responsi-bility which is of paramount importance for the child’s best interests in international settings and within migration contexts. She demonstrates how the Brussels IIter Regulation’s jurisdiction model aims to reflect an accurate balance between abstract and concrete notions of the child’s best interests. The article illustrates how this balance is achieved: The habitual residence of the child is generally the relevant factor for jurisdiction, but a range of exceptions to this general rule reflect experiences from practice and enables courts to achieve adequate solutions. María González Marimón also welcomes the

jurisdiction regime as an enhancement of the child's best interests principle in its triple dimension as a substantive right, an inspiring principle, and as a procedural rule.

The Principle of the Child's Best Interests in EU Law on Third-Country Nationals

Iris Goldner Lang

[The chapter] demonstrates that the child's best interests principle is a paramount and intrinsic value of EU law, serving as an underlying rationale for EU legislation and judgments. Iris Goldner Lang examines how this fundamental principle impacts the rights of third-country nationals in the EU, with a focus on decisions related to family reunification as well as EU migration and asylum law. She develops a multidimensional understanding of the child's best interests principle, highlighting its threefold function as a substantive right, an interpretative tool, and a procedural rule. Based on this analysis, Iris Goldner Lang argues that the principle of the child's best interests will continue to gain importance in EU law on third-country nationals, due to its multidimensional nature and its role as a counterbalance to the ongoing trend of restricting the rights of migrants and asylum seekers across the EU.

Binding Effect of an Age Assessment

Kai Hüning

[The chapter] examines a difficult problem that is well-known in legal practice, namely the problem of age assessment in the perspective of the child's best interests principle. Kai Hüning illustrates the background of age assessment in the context of migration of minors and sheds light on the need for age assessment and its methods. The article's focus lies on the question of whether or not age assessment procedures carried out in one member state of the EU must be recognised by other member states. Kai Hüning invokes the Charter of Fundamental Rights of the European Union, the UN 1989 Convention on the Rights of the Child (CRC) and the Human Rights Convention for his approach to

that problem: Kai Hüning argues for a binding effect in principle — an effect that must be incorporated by way of interpretation of the national provisions.

Part III Guardianship for Unaccompanied Minor Refugees

Guardianship of Children in the Context of Migration in Hungary

Orsolya Szeibert

[The chapter] focuses on guardianship of unaccompanied minors in Hungary. Orsolya Szeibert gives an overview of the Hungarian asylum regime, its political background and complexity. She points out how the situation of children in Hungary was heavily affected by several legal acts in the mid-2010s that contained specific provisions for the "crisis situation caused by mass immigration". Orsolya Szeibert shows the (negative) effects of these provisions for minors and points out that the "crisis situation" has been continously prolonged since 2016 until today. She refers to criticisms of the Hungarian status quo in which unaccompanied minors between the age of 14 and 18 are effectively considered as adult asylum applicants.

Guardianship and Other Protective Measures for Minor Refugees in Germany

Bettina Heiderhoff

[The chapter] emphasises the importance of protecting unaccompanied minor refugees and points out the connections of migration law, private international law and family law. Bettina Heiderhoff examines the central terms "minor" and "unaccompanied" in the perspective of German law, describes the procedures for the appointment of guardianship and other protective measures (in particular, the so-called provisional taking into care). She also analyses cases in which a minor refugee arrives in Germany after a guardian has been appointed in another member state. Bettina Heiderhoff shows that Germany combines several legal institutions to ensure the protection of unaccompanied minor refugees. Yet she

also points to considerable problems, in particular a conflict of interest of the youth welfare office, the lack of special knowledge of the guardians as regards asylum law and certain difficulties as regards age assessment and responsibility.

A European Approach to Cross-Border Guardianship

Bettina Heiderhoff

[The chapter provides] an outlook on the European perspective regarding guardianship […]. [The author] emphasises that EU law only regulates specific aspects of migration law and private international law, while substantive family law remains under the jurisdiction of member states. Bettina Heiderhoff argues that the opportunities for EU law to directly influence guardianship practices are limited. Nonetheless, she points out potential refinements, particularly in the application of the Brussels IIter Regulation.

Part IV Early Marriage

Early Marriages in Sweden

Ulf Maunsbach

[The Chapter] explains recent developments in Sweden, where early marriages validly concluded abroad are generally not recognised. Ulf Maunsbach shows that there is a very narrow exception to this non-recognition principle: recognition is possible only in exceptional cases when there are extraordinary reasons. He argues that the application of the non-recognition principle may vary across different institutional settings, such as asylum proceedings, family law, or inheritance proceedings. Ulf Maunsbach explains that for the purposes of registering status relationships in the Swedish population registration database, the exception to the non-recognition principle will rarely apply since the Tax Agency's examination relies solely on written documentation and does not include specific investigations into the circumstances surrounding the marriage. He also highlights a general lack of case law, which makes it even more difficult to

evaluate the situation. Ulf Maunsbach argues for allowing individual exceptions to enable authorities and courts to make carefully considered decisions.

Early Marriage in Germany: Law and Politics of Cultural Demarcation

Stefan Arnold

[The Chapter] examines the German law on early marriage with a focus on the recent statute effective from 1 July 2024. Stefan Arnold argues that the recent German law on early marriage is emblematic of symbolic politics and cultural demarcation, highlighting the detrimental power of symbolic lawmaking. He shows that the law's turbulent recent history has been written by an unfortunate interplay between courts, politicians, and interest groups. He argues that before the recent legislative interventions, just and differentiated solutions were achieved by the courts through the application of the ordre public clause. Stefan Arnold shows that such solutions are no longer attainable, as German law now adheres to a strict policy of non-recognition of early marriages when a spouse was under the age of 16 at the time of marriage. He argues that the political debate and the law's resort to a symbolic outlawing of early marriages abroad have significantly worsened the position of those deserving protection, particularly the young women concerned and the children born from such marriage.

Early Marriages in Austria: Private International Law and Ordre Public Assessment

Martina Melcher

[The Chapter] explains the Austrian legal framework regarding early marriages. Martina Melcher shows that the issue of a valid marriage arises not only in family law matters, but most often in family reunification and asylum proceedings. This part reveals that, unlike in Germany, early marriage has not yet been the subject of intense political and academic debates in Austria. Martina Melcher points out that Austrian Law enables courts to carefully consider the individual circumstances of each case. She notes that there is no violation of the Austrian ordre public if both spouses are adults at the time of the assessment, want to

uphold their marriage, and there was neither coercion nor lack of will at the time of the marriage's conclusion. She emphasizes that explicit legislation may not be necessary and argues for a careful, individual, and conscious analysis of all relevant aspects of the situation. At the same time, Martina Melcher calls for legislative action regarding certain aspects, particularly the consequences of early marriages in cases where they are not recognised.

Early Marriage: A European Perspective

Stefan Arnold

[The Chapter] particularly compares Sweden's and Germany's strict non-recognition approach with Austria's flexible ordre public approach regarding early marriages validly concluded abroad. He argues that the Austrian approach is preferable, as it enables courts to achieve just solutions based on an individual case-by-case analysis. Based on the chapter's comparative evaluation, Stefan Arnold develops proposals for potential legislative measures with an emphasis on institutional solutions that promote justice and prioritise the needs of those worthy of protection.

Part V Kafala

Beyond Kafala: How Parentless Children Are Placed in New Homes in Muslim Jurisdictions

Nadjma Yassari

[The Chapter] explores the various legal options available in Muslim jurisdictions for placing parentless children into new homes. She identifies four categories of these options: complete incorporation of a child into a new family, wide-ranging incorporation, structures for the temporary care of abandoned or orphaned children, and jurisdictions where caretaking occurs informally, with minimal state supervision or intervention. Nadjma Yassari reviews several Muslim jurisdictions and demonstrates how they have developed alternative caretaking arrangements

for parentless children based on these categories. She discusses how these jurisdictions navigate the prohibition of tabanni (adoption) in Islamic law while still finding ways to provide children with stable homes. Nadjma Yassari highlights Tunisia as the only country to formally regulate and accept tabanni, allowing for complete incorporation of a child into a new family. She also notes the absence of a formalised legal framework for placing parentless children in new homes in some Muslim jurisdictions, such as Lebanon.

Kafala in France

Fabienne Jault-Seseke

[The Chapter] provides a French perspective on kafala. Fabienne Jault-Seseke highlights the practical importance of kafala in France: Many individuals of Moroccan or Algerian nationality living in France assume responsibility for a child born in their country of origin through kafala. Fabienne Jault Seseke explains how such arrangements intend to compensate for the absence of parents or to offer the child better living conditions and education. Additionally, as the chapter shows, kafala serves as an alternative to adoption, which is prohibited in Morocco and Algeria. Jault-Seseke argues that despite kafala not constituting adoption, it should be regulated similarly to ensure the protection of fundamental rights for all parties involved. She emphasises that Article 33 of the 1996 Hague Convention on parental responsibility and protection of children provides the necessary framework for this regulation.

Kafala in the Netherlands

María Mayela Celis Aguilar

[The Chapter] explains the legal framework and case law on kafala in the Netherlands where most cases originate from Morocco. Mayela Celis Aguilar points out a change of policy in 2013 following which kafala is no longer treated as adoptions but, with some caution, similar to foster care measures. She expounds the Dutch legislation and Article 33 of the 1996 Hague Convention that are applied in the Netherlands. Mayela Celis Aguilar evaluates the Dutch policy

with regard to the recognition of kafalas as generally coherent and in line with the applicable international instruments. Yet she also points to concerns about the use of kafala to circumvent adoption and immigration policies and regulations.

Kafala in Belgium: Private International Law as an Essential Tool to Establish Migration Law Consequences?

Leontine Bruijnen

[The Chapter] discusses how a kafala can be characterised and recognised in Belgium, whether or not it should be converted into an adoption or whether kafala is equal to foster care. She points out that a kafala should be characterised as a child protection measure according to the 1996 Child Protection Convention yet that the Convention did not solve all kafala-related issues — particularly as regards migration law consequences. Leontine Bruijnen explains the relevant legal framework as well as the Belgian family and migration case law. She offers a solution based on the general recognition rules for kafalas falling outside the scope of the 1996 Child Protection Convention. Leontine Bruijnen further argues that the private international law framework should be taken into account to determine whether a makf?l (ward) can be considered an unaccompanied minor.

Principles to Ensure a Cross-Border Kafala Placement Is in the Best Interests of the Child

Giovanna Ricciardi and Jeannette Wöllenstein-Tripathi

[The Chapter] highlights the principles and recommended practices drawn from the International Social Services (ISS) Kafalah study 2020. These principles are aimed at guiding states in ensuring that cross-border kafala placements prioritise the best interests of the child. The authors emphasise that protecting children's rights has always been central to the ISS mission. They caution that European debates on kafala often reflect Western perspectives that equate kafala with institutions like adoption, guardianship, or foster care. The authors underscore the importance of maintaining continuity in the child's situation across borders, ensuring legal security, and respecting the child's fundamental human rights.

Recognition of Kafala in European Member States: Need for a Uniform Approach?

Fabienne Jault-Seseke

[The Chapter] addresses whether and under what conditions a kafala issued in an Islamic state may be recognised in European member states. Jault-Seseke highlights the diverse approaches taken by member states and the lack of a uniform EU legislative approach. She argues that any European solution must uphold the EU Charter, the CRC, and the 1996 Child Protection Convention, and respect the cultural context of the child. She concludes that kafala should not not be equated with adoption and that the best interests of the child must be taken into account at both the pronouncement of kafala and recognition stages.

Part VI Additional Topics

The Role of the Court of Justice in Shaping the Right to Maintain Family Unity for Beneficiaries of International Protection

Alessia Voinich

[The Chapter] examines how the CJEU addresses member states' flexibility in establishing more favorable national regimes. It explores the connection between the rights of family members and the asylum rights of their relatives who are beneficiaries of international protection, as well as situations where different member states bear responsibility for international protection and ensuring family unity. The chapter also assesses the impact of recent reforms within the Common European Asylum System (CEAS). Alessia Voinich underscores the high standards of protection for the right to family unity provided by EU secondary law and highlights the CJEU's efforts to prioritise the best interests of the child as a guiding principle. She argues that the CJEU's future decisions will be pivotal in achieving a balanced approach between uniformity and necessary flexibility in individual cases.

Polygamous Marriages and Reunification of Families on the Move Under EU Law: An Overview

Giovanni Zaccaroni

[The Chapter] is dedicated to polygamous marriages that are usually associated with countries outside the EU. Giovanni Zaccaroni shows how questions of the recognition of polygamous marriages and possible rights attached to the status of the spouses have led to intense discussions in the EU. He argues that the prohibition of family reunification under EU law represents an obstacle to free movement and family reunification of migrant families, and, potentially, also to the best interests of the child. But, as Giovanni Zaccaroni argues, at the same time it is rooted in the necessity to protect and promote equal treatment between men and women, enshrined in the EU Charter of Fundamental Rights as well as in the national constitutions. The contribution highlights the need to protect the rights of the weaker parts of the relationship and to avoid the creation of partners of first and second class, thus discriminating among persons in a similar situation and violating their fundamental rights.