

Debt Collection and the Regulation of Legal Tech in Germany

Online-Webinar of Legal Protection International

Markus Hartung

Rechtsanwalt, Mediator

www.markushartung.com

Agenda today

1. Introduction
2. Lawyers and other legal service providers
3. Legal protection insurers as legal service providers?
4. The perfect system – what could possibly go wrong?
5. Access to justice, and what legal tech has to do with it
6. The main disputes
7. The reform proposal
8. Looking into the crystal ball: Will the proposed amendments be implemented?

Draft Act on the Promotion of Consumer-oriented Offers in the Legal Services Market

Bundesministerium der Justiz und für Verbraucherschutz, 11015 Berlin

Chef des Bundeskanzleramtes
11012 Berlin

nachrichtlich:

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für Kultur und Medien

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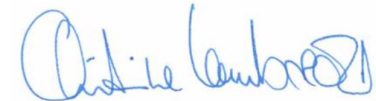
HAUSANSCHRIFT Mohrenstraße 37, 10117 Berlin

TEL +49 (030) 18 580-9024
FAX +49 (030) 18 580-9044

Referat: R B 1 / PG Legal Tech
Referatsleiter: Herr Kaul / Herr Dr. Scholz
(Tel.: 9646 / 8632)

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Gesetzentwurf

der Bundesregierung

Entwurf eines Gesetzes zur Förderung verbrauchergerechter Angebote im Rechtsdienstleistungsmarkt

A. Problem und Ziel

Im Rechtsdienstleistungsrecht besteht aufgrund der jüngeren Entwicklungen im Markt für Rechtsdienstleistungen an verschiedenen Stellen Bedarf an einer Anpassung des Rechtsrahmens. Dies betrifft zunächst die Befugnisse von Rechtsanwältinnen und Rechtsanwälten, bestimmte Vergütungsmodelle anzubieten. Bisher ist diesen die Vereinbarung von Erfolgshonoraren nur in sehr engen Grenzen erlaubt und die Übernahme von Verfahrenskosten vollständig untersagt. Dies gilt für nach § 10 Absatz 1 Satz 1 Nummer 1 des Rechtsdienstleistungsgesetzes (RDG) registrierte Inkassodienstleister nicht, weshalb deren Leistungen insbesondere für die Durchsetzung geringwertiger Forderungen vermehrt nachgefragt werden. Vor diesem Hintergrund stellt sich die Rechtslage beim Vergleich zwischen Inkassodienstleistern und Rechtsanwältinnen und Rechtsanwälten als inkohärent dar. Ein

Legal Services in Germany

Act on Out-of-Court Legal Services (Rechtsdienstleistungsgesetz, RDG)

Full citation: Legal Services Act of 12 December 2007 (Federal Law Gazette I p. 2840)

The Act was adopted by the German Bundestag as Article 1 of the Act of 12 December 2007 (Federal Law Gazette I p. 2840).

https://www.gesetze-im-internet.de/englisch_rdg/englisch_rdg.html#p0027

To start with... a general prohibition

Section 3

Authorisation to provide out-of-court legal services

The independent provision of out-of-court legal services is permissible only to the extent provided for under this Act or by or pursuant to other laws.

— — —

NB: This is a prohibition with the reservation of permission („Verbot mit Erlaubnisvorbehalt“). Such prohibitions are rare nowadays, unless it is a matter of preventing great dangers. The constitutional right of freedom of occupation is designed as a general permission with the possibility of restricting this right by law:

Article 12 Basic Law (Grundgesetz, GG for short, German [Interim] Constitution) [Occupational freedom]

(1) All Germans shall have the right freely to choose their occupation or profession, their place of work and their place of training. The practice of an occupation or profession may be regulated by or pursuant to a law.

What is the RDG intended to achieve?

Section 1

Scope of the Act

- (1) This Act regulates the authorisation to provide out-of-court legal services in the Federal Republic of Germany. It serves to protect the consumers of legal services, legal relations [„Rechtsverkehr“] and the legal system from unqualified legal services.
- (2) Where a legal service is provided exclusively from another state, this Act only applies where its subject matter is German law.

— — —

NB: Legal advice and representation in legal matters are considered very important in Germany for several reasons. Therefore, out-of-court legal advice is also regulated and generally reserved for lawyers. This is different in other European countries. - As far as representation in legal matters in court is concerned, this is regulated in the Code of Civil Procedure ("ZPO")

RDG and lawyers

Section 3 RDG

Authorisation to provide out-of-court legal services

The independent provision of out-of-court legal services is permissible only to the extent provided for under this Act or by or pursuant to other laws.

Section 3 Federal Lawyers' Act*

The right to provide legal advice and right of representation

- (1) A Rechtsanwalt is an appointed and independent advisor and representative in all legal matters.
- (2) A Rechtsanwalt's right to appear before courts, arbitral tribunals or authorities of any kind may only be restricted by an Act of the Federal Parliament.
- (3) ...

— — —

NB: A general exemption from the RDG applies to lawyers - once they are admitted to the bar, the RDG is no longer applicable to their professional activity, only the BRAO is.

What is the RDG intended to achieve?

Section 1

Scope of the Act

- (1) This Act regulates the authorisation to provide out-of-court legal services in the Federal Republic of Germany. It serves to protect the consumers of legal services, legal relations [„Rechtsverkehr“] and the legal system from unqualified legal advice.
- (2) Where a legal service is provided exclusively in the territory of a Member State, this Act only applies where its subject matter is connected with that State.

What is the RDG NOT intended to achieve?

— — —

NB: Legal advice and representation in legal matters are considered very important in Germany for several reasons. Therefore, out-of-court legal advice is also regulated and generally reserved for lawyers. This is different in other European countries. - As far as representation in legal matters in court is concerned, this is regulated in the Code of Civil Procedure ("ZPO")

What is a legal service?

Section 2

Definition of a legal service

- (1) A legal service is any activity related to the concrete affairs of others as soon as it requires a legal assessment of the individual case.
- (2) Regardless of whether the conditions of subsection (1) are met, the collection of third-party claims or claims assigned for the purpose of collection for account of a third party is a legal service if the debt collection is conducted as a stand-alone business (collection service). Assigned claims are not regarded as third-party claims of the previous obligee.
- (3) ...

What is a legal service? (ctd.)

Section 2

Definition of a legal service

- (1) A legal service is any activity related to the concrete affairs of others as soon as it requires a legal assessment of the individual case.

Whether the concept of legal services is to be interpreted broadly or narrowly was highly contentious in the legislative process at the time. However, the Federal Supreme Court (Bundesgerichtshof, or **BGH** for short) takes a very expansive view of the term:

„The concept of legal services in § 2 (1) RDG covers every concrete subsumption of a factual situation under the relevant legal provisions that goes beyond a mere schematic application of legal norms without further legal examination; whether it is a simple or difficult legal question is irrelevant in this respect. ...“

(BGH v. 14 January 2016 – I ZR 107/14, NJW-RR 2016, 1056, 1060 Rn. 43)

Exemptions from the general prohibition of sec. 3 RDG without authorisation (ancillary legal services or by „non-registered persons“)

Section 5

Legal services provided in connection with another activity

(1) Legal services may be provided in connection with another activity if they represent a service which is ancillary to a profession or activity. Whether a service is ancillary is to be assessed on the basis of its content, scope and material connection to the main activity having regard to the legal knowledge required to perform the main activity.

Part 2

Legal services provided by non-registered persons

Section 6

Free legal services

Section 7

Professional associations, interest groupings, cooperatives

Section 8

Public and officially recognised bodies

Legal services by registered persons

Part 3

Legal services provided by registered persons

Section 10

Legal services on the basis of special expertise

(1) Natural and legal persons and companies without legal personality registered with the competent authority (registered persons) may provide legal services in the following fields on the basis of special expertise:

1. collection services (section 2 (2), first sentence),
2. pension advisory services relating to the statutory pension and accident insurance scheme, social compensation law, other social insurance and disability law relating to a statutory pension scheme, as well as occupational and professional pension provision,
3. legal services under foreign law (...)

(2) ...

What about Legal Protection Insurers?

Section 4

Incompatibility with another obligation to perform

Legal services which might have a direct influence on the fulfilment of another obligation to perform may not be provided if this jeopardises the due provision of the legal service.

— — —

NB: This provision is commonly known as the “Lex Rechtsschutzversicherung” („Lex Legal Protection Insurers“). It stems from a decision of the BGH in February 1961:

Negotiations of a legal protection insurer with the opponents of its policyholders on claims for the enforcement of which the policyholders have taken out a legal protection insurance constitute a procurement of third party legal matters within the meaning of Art. 1 § 1 RBeratG, do not fall under the exemption provision of Art. 1 § 5 No. 1 RBeratG and are therefore inadmissible without official permission.

(BGH, Urteil vom 20 February 1961 - II ZR 139/59, NJW 1961, 1113)

The perfect system – what could possibly go wrong?

- Issues with Access to Justice (A2J) in Germany?
 - 70% of the population prefer not to go to a lawyer (in the 19-28 age group it is 80%, according to a 2013 study by the GdV*).
 - The number of cases filed in civil courts is declining
 - E-commerce has increased by 10% in each of the last few years, companies like PayPal, ebay etc. provide their own dispute resolutions tools and services
 - Headline-grabbing cases are increasingly no longer conducted in individual proceedings, but by way of bundling of claims (similar to class actions)
 - Is the traditional system of judiciary unsuitable for many typical consumer claims, in particular low value damages („Streu- und Bagatellschäden“)? Problem of "rational disinterest"?

For consumers, legal tech mainly stands for a new, convenient and risk-free access to the law - which they get from non-lawyer service providers



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ZU DEN DOKUMENTEN


Logo: e GARANTIE

Logo: TÜV PROFI

Logo: Serverstandort Deutschland

Legal protection insurers also want to join this party – although they are not allowed to, see above

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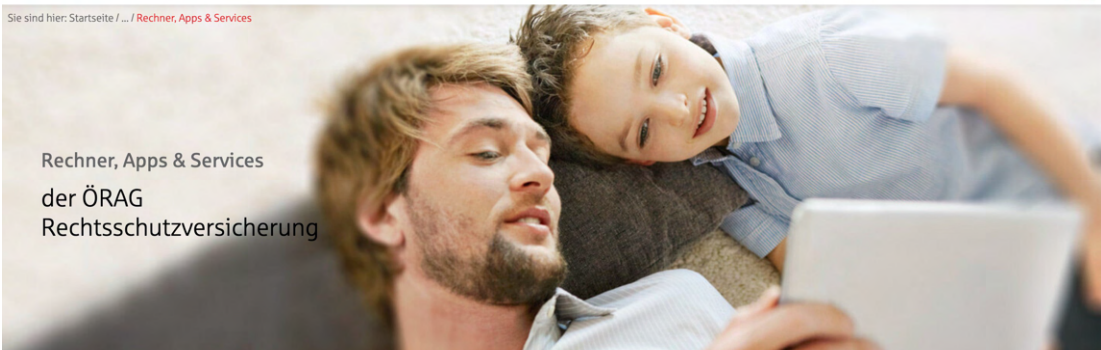
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The situation before the law reform: a perfect storm:
far too expansive definition of the term "legal service"
vs.
very expansive definition of the term "debt collection"

Federal Supreme Court, I. Senate, January 2016

„The concept of legal services in § 2 (1) RDG covers every concrete subsumption of a factual situation under the relevant legal provisions that goes beyond a mere schematic application of legal norms without further legal examination; whether it is a simple or difficult legal question is irrelevant in this respect. ...“

(BGH v. 14 January 2016 – I ZR 107/14, NJW-RR 2016, 1056, 1060 Rn. 43)

Federal Supreme Court, VIII. Senate, November 2019

"The concept of legal services in the form of debt collection services (...) is not to be understood in too narrow a sense. Rather - within the protective purpose pursued by this Act, namely to protect the clients of the law, legal transactions and the legal system from unqualified legal services (Section 1 (1) sentence 2 RDG) - a rather generous view is called for (...).“

(BGH v. 27 November 2019 – VIII ZR 285/18, NJW 2020, 208 [Key Statement No 1], 225 Rn. 141 – wenigermiete I)

Why change the system?

1. Are there really issues with A2J in Germany? There is no generally accepted study on this, but the numbers of those who turn to legal tech companies (or to their legal protection insurers) speak for themselves
2. Acknowledge reality: If people take other paths to get legal advice, then you have to acknowledge that and adjust the system accordingly
3. No level playing field: BRAO & BORA do not allow lawyers to make attractive offers to consumers in low value/small claims cases
4. Ambiguity of the term „debt collection“: Since debt collectors have been taking action against the automotive industry (diesel cases, cartels), doubts have arisen as to whether this could still be regarded as „debt collection“ - or rather a clever circumvention of lawyers' professional law
5. Criticism of bundled mass proceedings has been gratefully received by the courts of first instance - because courts are not yet equipped to deal with lawsuits in which thousands of claims are bundled together and in which pleadings of several thousand pages are filed
6. Renaissance of the "Lex Legal Protection Insurer" as "Lex Legal Tech": (i) bundling of claims and (ii) combination of debt collection/ litigation financing under attack
7. This dispute is not only a legal theory, but is actually carried out on the backs of the consumers (or generally: plaintiffs), who are threatened with the loss of their claims (because of the possible limitation of their claims)

Essential contents of the draft law

1. Although the Act is intended by its title to promote claims for consumers, it also clarifies legal issues that have been problematic in lawsuits brought by companies as plaintiffs (in particular in diesel and cartel cases)
2. Level playing field: Allowing contingency fees and litigation funding (for lawyers)
3. Restriction of debt collection license: legal advice etc. only if it directly serves the collection of debts
4. General clarification: combination of debt collection and litigation financing is permitted (however, even after this, the direct influence of litigation financiers on the conduct of litigation is not permitted, even if the consumer is instructed about this).
5. Wide ranging information obligations of debt collection agencies when acting on behalf of consumers (it follows from these information obligations, for example, that bundled claims are permitted)
6. Legal tech debt collectors must provide detailed information on their business model in the licensing procedure (this is to ensure that the licence can no longer be challenged in lawsuits)
7. Higher requirements for the expertise of debt collection agencies

The bill does **not** provide any specific protection against the loss of claims in the event that a court still holds that the licence is void.

Expert Hearing before the Committee on Legal Affairs and Consumer Protection of the German Bundestag

- On 5 May, eight experts gave their opinions on the draft law (the opinions and the video recording of the hearing are attached).
- The German Federal Bar („BRAK“) (together with Prof Wolf) firmly rejects the draft because contingency fees and litigation funding for lawyers would impair lawyers' independence and, as a result, worsen access to justice.
- The German Bar Association („DAV“) is rather unhappy with the draft for similar reasons
- The Legal Tech Association is generally in favour of the draft, even if there are minor points that should be ironed out
- The other four experts (independents) are generally in favour of the reform, even if there are a number of open questions. In particular, there was criticism that although lawyers are now allowed to do more, it is still less overall than debt collectors, even if they do exactly the same. The criticism is: the new law does not create a coherent regime, but only a less incoherent one.
- ...

... and what about the „Lex Rechtsschutzversicherung“?

An amendment of sec. 4 RDG in favour of legal protection insurers was not part of the draft bill, despite a motion by the GdV.

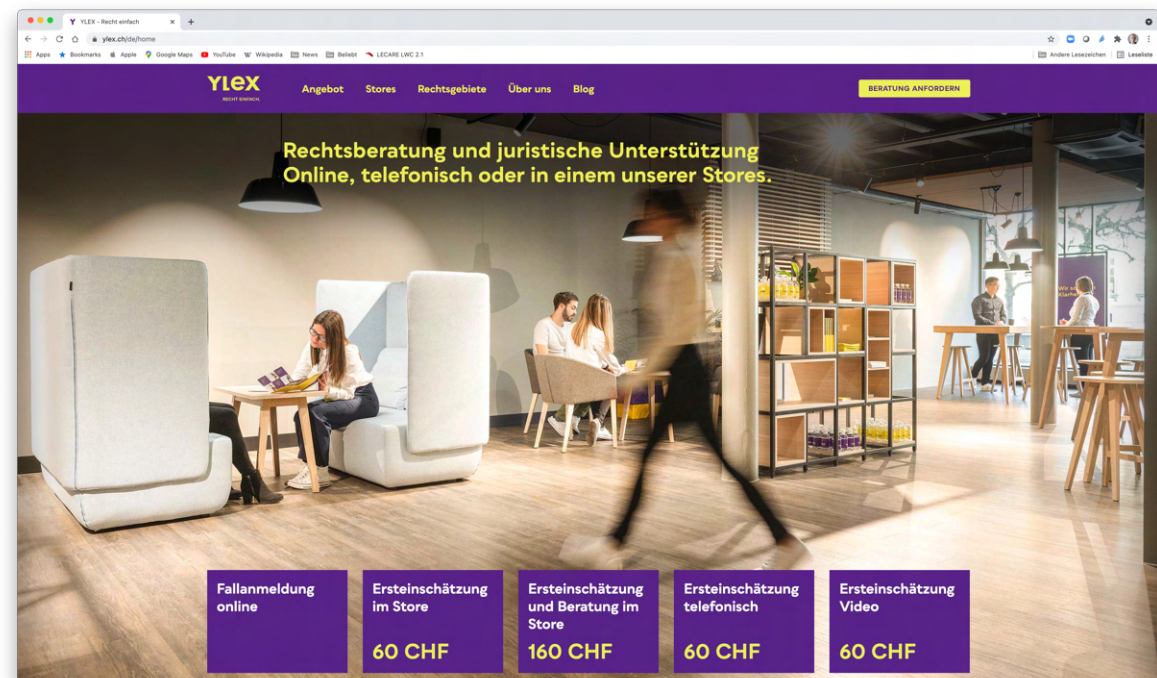
Therefore, for legal protection insurers in Germany, it's still: Just pay.



German legal protection insurers abroad – a different picture, e.g. ARAG:

„in 2018, we received 127,000 calls and managed 67,000 legal protection cases, 92 per cent of which are completely handled by our own lawyers.“

<https://www.arag.com/de/konzern/standorte/niederlande/>



YLEX is an offer of the Swiss Coop Rechtsschutz AG, <https://ylex.ch/de/impressum>

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7. The reform proposal
8. **Looking into the crystal ball: Will the proposed amendments be implemented?**

Hot off the press !!

... apparently the coalition parties have reached an agreement after all. However, the exact text is not yet available.



Annex, Literature

Expert hearing on 5 Mai 2021 – list of experts, expert opinions (in German language), video recording

5 May 2021: Legal Tech-Inkasso (Promotion of Consumer-oriented offers etc.)

https://www.bundestag.de/ausschuesse/a06_Recht/anhoerungen?url=L2F1c3NjaHVlc3NIL2EwNI9SZWNodC9hbmhvZXJ1bmdlbi84MzY3ODAtODM2Nzgw&mod=mod554370

CV Markus Hartung

- Born 1957
- 1976 to 1981: Civil servant
- 1981 to 1985: Law School in Cologne and Berlin
- 1989: Sole practitioner in Berlin-Kreuzberg
- 1993: Associate and Junior Partner in Rädler Raupach Bezenberger (RRB)
- 1996: Partner in Oppenhoff & Rädler (O&R), Litigation & Arbitration
- 1998: Member Executive Committee of O&R, in charge for IT
- 1999: Managing Partner of O&R
- 2001: German Managing Partner of Linklaters, member of Linklaters' Global Executive Committee (ExCom)
- Since 2006: Member of the Committee on Professional Regulation of the German Bar Association (Chairman from 2011 to Dec. 2019)
- 2009: Founder of The Law Firm Companion, www.TLFC.de
- 2010: Founder and Director of the Bucerius Center on the Legal Profession (CLP) at Bucerius Law School, Hamburg
- Since 2019: Senior Fellow at Bucerius CLP
- Since 2019: Managing Partner of Chevalier Law Firm, www.chevalier.law

More on: www.markushartung.com
[Mailto:mh@markushartung.com](mailto:mh@markushartung.com)



Literature

Was Sie in diesem Buch erwartet

Markus Hartung, Dr. Micha-Manuel Bues, Dr. Gernot Halbleib

In diesem Buch finden Sie Legal Tech in den meisten seiner Facetten beschrieben, und diese 1 kurze Einführung soll Sie an die Hand nehmen und zeigen, was Sie erwartet.

In Teil 1 finden Sie Beiträge der Herausgeber zum Thema Digitalisierung im Rechtsmarkt, 2 beginnend mit grundsätzlichen Überlegungen, Definitionen und Kategorien, sodann eine Schilderung von Herausforderungen und Erfolgsfaktoren der Digitalisierung allgemein und im Rechtsmarkt und schließlich eine konkrete Anleitung dazu, wie eine Digitalisierungsstrategie in Kanzleien aufgesetzt wird.

In Teil 2 finden Sie Länderberichte – Beschreibungen der Legal Tech-Szene in Deutschland, 3 den USA und in Großbritannien. Es gibt auch in vielen anderen Ländern sehr lebendige Legal Tech-Szenen, aber das hätte den Rahmen dieses Buches gesprengt. Die USA und Großbritannien sind am weitesten in ihrer Entwicklung, und die Lektüre dieser Kapitel gibt Ihnen einen Eindruck davon, was auf uns noch zukommen kann.

In den dann folgenden Teilen 3 und 4 befassen wir uns mit Legal Tech in Kanzleien. Dabei 4 teilen wir die Betrachtungen auf in große wirtschaftsberatende Kanzleien sowie Kanzleien der großen Wirtschaftsprüfungs-Gesellschaften einerseits (Teil 3) und mittlere und kleinere Kanzleien andererseits (Teil 4). Es sind keine allgemeinen theoretischen Schilderungen, sondern sehr konkrete Beispiele, wie sich bestimmte Kanzleien aufgestellt haben und wie sie Legal Tech heute schon einsetzen. Dies reicht von der Automatisierung interner Prozesse, der Kommunikation mit Mandanten, dem Einsatz künstlicher Intelligenz, der Entwicklung eines „digital mindset“ bis hin zur Errichtung eines kanzleieigenen Inkubators für Legal Tech-Start-Ups. Dabei wird deutlich, dass Legal Tech kein Privileg der „Großen“ sein muss, sondern dass auch kleine Kanzleien viel gewinnen können, wenn sie die Chancen aus Legal Tech konsequent verfolgen.

In diesem Teil findet sich auch ein besonderes Kapitel über die ehemalige Legal Tech-Kanzlei 5 Clearspire, die vor Jahren so spektakulär gestartet wie dann gescheitert ist. Wenn Legal Tech heute sehr viel mit Hoffnung zu tun hat, zeigt diese Fallstudie, wie auch vielversprechende Ideen scheitern können. Da das in den USA aber nicht als Versagen gilt und der Autor damit sehr offen umgeht, betrachten wir dieses Kapitel als Lehrbuchbeispiel dafür, was man als anwaltlicher Unternehmer oder Manager einer Kanzlei heute anders machen oder auf jeden Fall beachten sollte.

Legal Tech spielt in Unternehmen eine ebenso wichtige Rolle wie in Kanzleien – damit be- 6 fasst sich der Teil 5, wiederum mit konkreten Beispielen aus Rechtsabteilungen und von Legal Tech-Unternehmen, die Lösungen für Rechtsabteilungen anbieten.

Außerhalb von Kanzleien und Rechtsabteilungen betrifft Legal Tech auch andere Akteure 7 im Rechtsmarkt und angrenzenden Bereichen. Das behandeln wir in Teil 6 und schauen auf die Justiz und mögliche private Schlichtungsstellen („Online Dispute Resolution“). Verlage und Universitäten. In diesem Teil geht es auch um die rechtlichen Rahmenbedingungen. Dazu finden Sie zwei Beiträge: zum einen eine Behandlung des Status Quo der berufsrechtlichen Regulierung in Deutschland, und zum anderen einen ganz anderen, sehr modernen Ansatz der

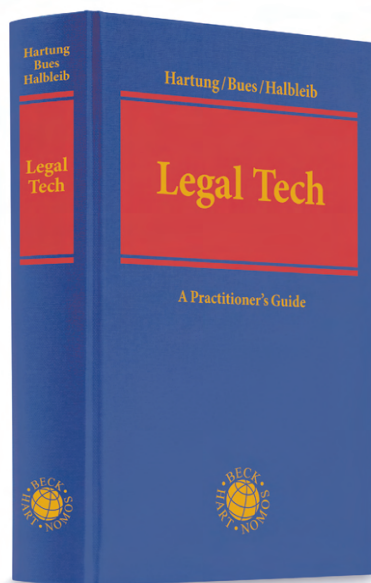


Markus Hartung
Micha-Manuel Bues
Gernot Halbleib (Ed.)

1. Aufl. 2018



Legal Tech across the Globe.



Hartung/Bues/Halbleib
Legal Tech
A Practitioner's Guide
Hardback
400 pp, 2018
€ 200.00
ISBN 978-3-406-72924-9
≡ www.beck-shop.de/cdmggf

This new handbook comprehensively analyzes the current and future states of digital transformation in the legal market and its implications from a global perspective. It provides a multi-faceted overview of the use of Legal Tech in law firms and legal departments in different parts of the world (including Africa, Australia, Brazil, Canada, China, Europe, Russia, and the United States) and formulates clear-cut strategic advice for a successful digital transformation. With concrete examples, best practices and first hand experience reports, more than 50 renowned international experts explain how and to what extent Legal Tech – through automation and technology – will change the way legal services are delivered. The reader learns what strategic decisions and steps are necessary to equip the legal industry for the changes to come. Future developments (e.g. Smart Contracts, Blockchain, Artificial Intelligence) are also explained and analysed in this unique book.

The benefits at a glance:

- Overview of the state of Legal Tech in many countries across the globe
- A practically-oriented use cases approach
- A vivid illustration of future developments

The book is written for lawyers, law firms, legal departments, companies and publishers. Parts of it have been published in a German edition before.

About the editors:

- Markus **Hartung** is an attorney-at-law and a mediator as well as director of the Bucerius Center of the Legal Profession (CLP) at the Bucerius Law School, Hamburg.
- Dr Micha-Manuel **Bues** is Co-Founder and Managing Director at BRYTER, Vice President of ELTA, as well as member of the Executive Faculty of the Bucerius CLP.
- Dr Gernot **Halbleib** is a legal professional, entrepreneur and consultant for law firms, corporate legal departments and Legal Tech startups in the fields of Legal Tech and business development. He is also a member of the Executive Faculty of the Bucerius CLP.

„Legal Tech – A Practitioner's Guide“ is the 2018 international edition of the German book. The international edition presents additional and new chapters plus country reports providing in-depth knowledge from local experts on the state of play of the digitalization in their home markets, from Australia to the US.



Literature

Successful managing partners of national and international law firms provide an overview of the range of law firm management and show practical procedures and examples.

The book is aimed at lawyers, accountants and tax advisors from both small and large firms, professionals in the business services of law firms, as well as consultants for whom it provides guidance on specific issues facing law firms. For the fourth edition, the book has been comprehensively updated and a chapter on medium-sized multidisciplinary law firms has been added.

Markus Hartung has written two chapters in this book:

Ch. 2: Strategic Planning of Law Firms.

Ch. 6: Career paths and becoming a partner



4. vollst. überarb. u. erg. Auflage,
Wiesbaden 2019

Literature

Thomas Wegerich, Markus Hartung (Hrsg.):
Der Rechtsmarkt in Deutschland, Frankfurt 2014

The 360-degree view of the legal market - compass, analysis, insights

The increasing competitive pressure on German companies is putting the cooperation between companies and law firms to the test. Increased cost pressure is being passed on, leading to internal law firm structures being questioned and applicable principles being overruled.

The handbook by the two editors Thomas Wegerich and Markus Hartung fills a gap in the literature. Top-class authors, all experienced practitioners, have intensively dealt with the various facets of the legal market and offer answers to questions such as.

- Which business models are viable in a dramatically changing economic environment?
- What expectations do companies have of professional and efficient legal services?



Printausgabe,
Ca. 500 Seiten,
Frankfurt 2014