

Don't Tell the Court "Keine Rechtsprechung"

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In *Accessdata Corp. v. Alste Techs. GmbH*, 2010 U.S. Dist. LEXIS 4566 (D. Utah Jan. 21, 2010), a United States based company entered into a contract with a German company to sell electronic discovery forensic software in Germany. Litigation followed after the German Defendant failed to pay the Plaintiff for software sales. The Defendant objected to producing electronic discovery of third parties based on German law and the Hague Convention.

Given the gamesmanship of producing native files as scanned PDF's as I discussed in the *The Form of Production Battle of the Bulge: Scanned PDF's Not a Reasonably Useable Form*, the outcome was no surprise.

The German e-Discovery Straßensperre

The Court quickly defeated the Defendant's objections based on German law and the Hauge Convention, citing the US Supreme Court case *Societe Nationale Industrielle Aerospatiale v. United States District Court*, 482 U.S. 522, 544 (1987).

Blocking statutes "...do not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute." *Accessdata Corp.* at *6, citing *Societe Nationale Industrielle Aerospatiale* at 544 n.29.

Further citing the United States Supreme Court, the Court relied upon the American Law Institute Restatement on blocking statutes and discovery, which stated:

"[W]hen a state has jurisdiction to prescribe and its courts have jurisdiction to adjudicate, adjudication should (subject to generally applicable rules of evidence) take place on the basis of the best information available [Blocking] statutes that frustrate this goal need not be given the same deference by courts of the United States as substantive rules of law at variance with the law of the United States."

Accessdata Corp. at *6, citing *Societe Nationale Industrielle Aerospatiale* quoting the Restatement of Foreign Relations Law of the United States (Revised) § 437, Reporter's Note 5 (1986)).

Bow Tie Thoughts

The lesson to take away is United States Courts do not like being told "No, you have no power over us."

More importantly, conducting discovery in a way that frustrates the legal system (printing ESI as paper and then scanning it as TIFFs when the plaintiff actually makes e-Discovery software) is a sure-fire way to ensure that any objections you muster get shot down.

