It’s a Small World After All: Business Litigation in a World Economy

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Major Challenges in Multinational Litigation

- Gathering Evidence & Conducting Discovery
- Parallel Foreign Litigation

What We'll Cover

- Cross Border Discovery Overview
- Obtaining Evidence in Canada
- Blocking Statutes
- Foreign Antisuit Injunctions

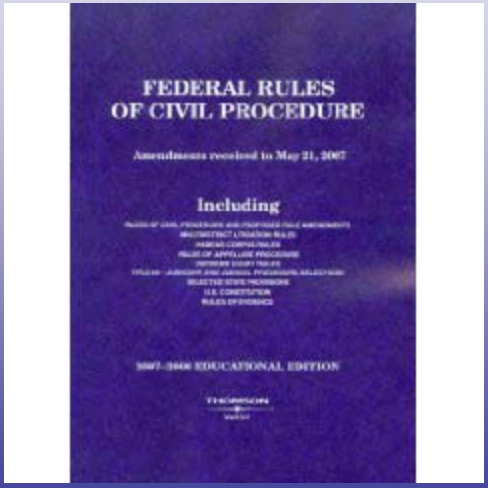
Part 1: Obtaining Evidence in Foreign Jurisdictions

February 13th, 2009

Obtaining Evidence

Two options:

1. Rule 26 – 38 of US Federal Rules
2. Treaty or Convention (e.g. Hague)



Three factor inquiry for use of Convention:

1. Particular facts of the case
2. Sovereign interests at issue
3. Likelihood procedures effective

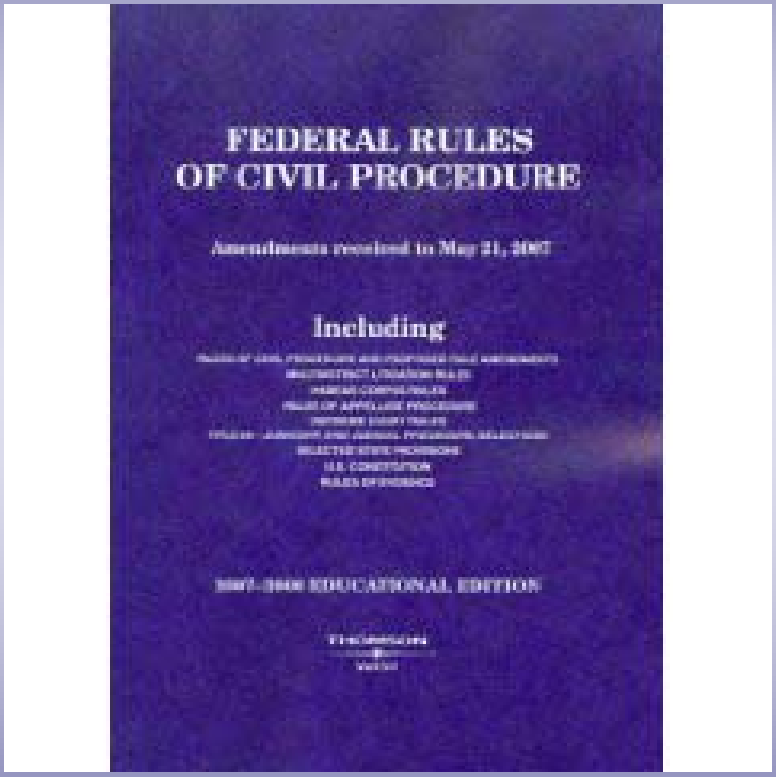
Balancing Test

1. Importance
2. Specificity
3. Origin
4. Alternative means
5. Foreign interests
6. US interests

Rules: Application

Three options:

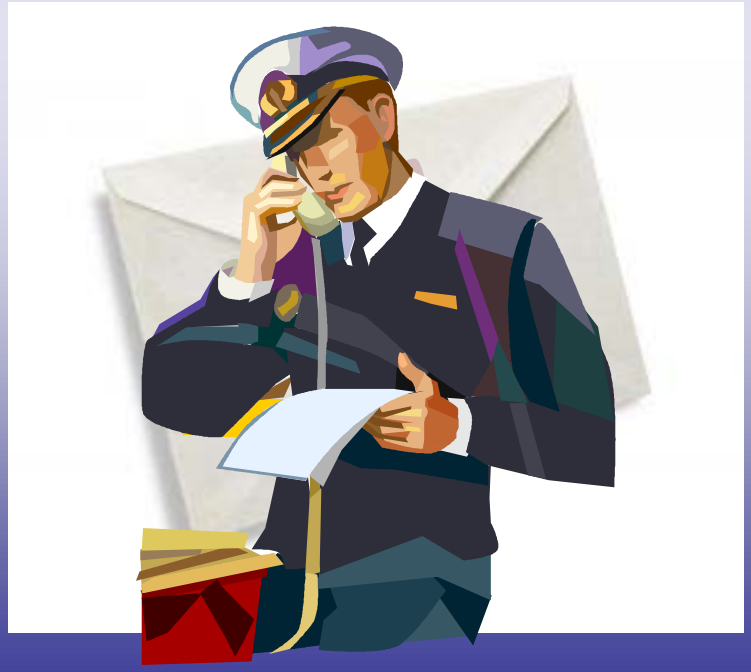
1. Voluntary compliance
2. Rule 45 subpoena
3. S. 1783 subpoena



Convention: Application

- Two options:

1. Letters of Request
2. Officers / Commissioners



Safe Harbor Certification

- The European Commission's 1998 Directive on Data Protection, prohibits the transfer of personal data to non-European Union nations that do not meet the European "adequacy" standard for privacy protection.

- The U.S. Department of Commerce, in consultation with the European Commission, developed the safe harbor framework to bridge the different geographical approaches to privacy between Europe and the United States.

- Being certified, in most instances, permits the company to transfer data between the EU and the US without the need for prior approval as this requirement is waived or automatically granted.

The Best Laid Plans …What Else You Might Have To Consider

- Specific Company/Cultural View of Discovery.
- Government Policies Which Hinder Data Collection.
- What Happens at the Border.
- They Still Don’t Care.

Part 2: Obtaining Evidence in the Great White North

February 13th, 2009

Overview

- Important to plan in advance:
  - Significant differences from US discovery
  - No treaty

Obtaining discovery

- Not a Hague signatory
- Must use Letters of Request:
  1. Motion in US court
  2. Application in Canadian court to enforce

US Motion

- Letter must be issued through hearing
- No notice requirement
- Drafting considerations:
  - Specific
  - Necessary
  - In interests of justice
  - For use in US litigation
  - Substantial likelihood
  - Scope

Canadian Application

- Once Letter obtained, Canadian enforcement application
- Discretion to enforce
- Reputable presumption

Canadian Application, cont'd

Enforcement test:

1. Evidence relevant
2. Necessary for trial
3. Not otherwise obtainable
4. Not contrary to public policy
5. Documents reasonably specified
6. Not unduly burdensome

Conclusions

- Knowledge is key to process
- Involve Canadian counsel early in process

Part 3:
Blocking Statutes

Differing Notions of Privacy: The European Union

- The French Blocking statute:
  - "Subject to international agreements . . . and laws . . . any individual is prohibited from requesting, seeking or disclosing . . . documents or information of an economic, commercial, industrial, financial or technical nature directed toward establishing evidence in view of legal or administrative proceedings abroad or in relation thereto"
  - ". . . any violation to . . . this law shall be punishable by imprisonment of two to six months and a fine of FRF 10,000 to FRF 120,000 or by either one of these two penalties"

- EU Data Protection Directive (95/46) - member nations must implement laws to restrict all manner of "processing" of "personal data" meaning "any information relating to an identified or identifiable natural person" (see EU Directive Article 2)

Litigating: Disclosure versus Privacy

- *Societe Nationale Industrielle Aerospatiale v. Iowa U.S. District* Court, 53 U.S. 522, 556 (1987). U.S. Supreme Court held five factor test set forth in The Restatement (Third) of Foreign Relations Law Section 442(2)(a) is "relevant to any comity analysis . . . ."

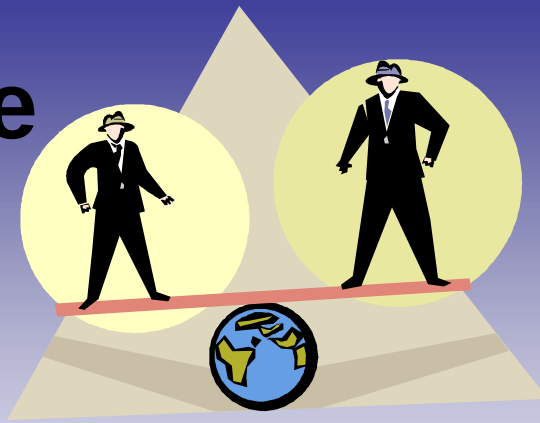
- Restatement: If disclosure of information located outside the United States is prohibited by a law, regulation, or order of a court of the state in which information or prospective witness is located, or of the state of which a prospective witness is a national:

  - a court or agency may require person to make a good faith effort to secure permission from foreign authorities to make the information available;
  - a court or agency should not ordinarily impose sanctions of contempt, dismissal, or default except in cases of deliberate concealment or removal of information or of failure to make a good faith effort

Columbia Pictures case

- In *Columbia Pictures v. Bunnell*, 245 F.R.D. 443 (C.D. Cal. 2007), plaintiff motion picture studios sued for copyright infringement against defendants alleging defendants knowingly enable and profit from online piracy of plaintiffs' copyrighted works via the internet.
- Defendants argued that disclosure of the data would violate the Netherlands Personal Data Protection law.
- Magistrate analyzes factors under the Restatement and orders disclosure of data. District Court Judge agrees.

The Balancing Test Under the Restatement:



Trial court should balance the following factors where information sought is subject to the privacy laws in another foreign jurisdiction:

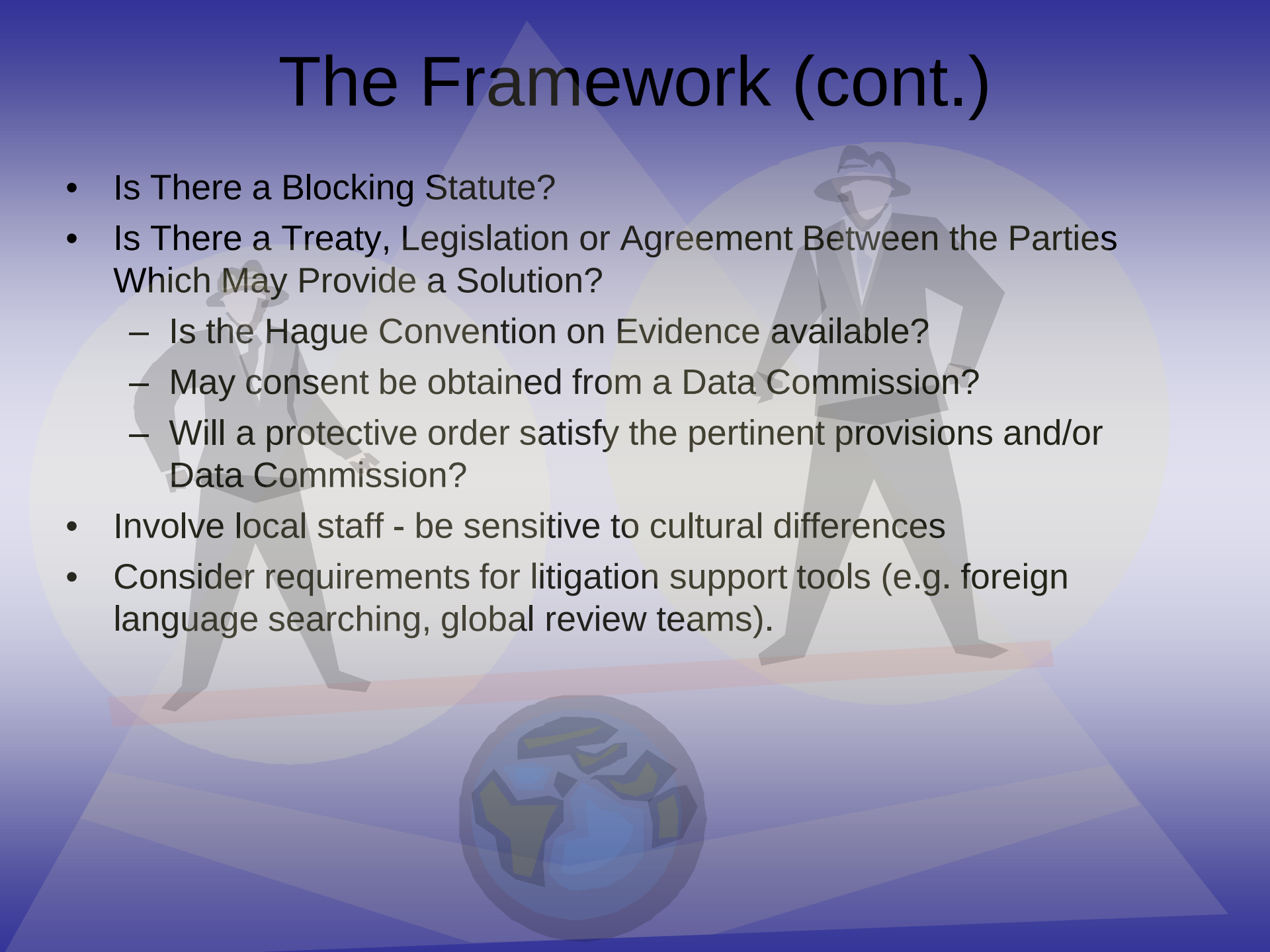
- the significance of the discovery/disclosure to issues in the case;
- the degree of specificity of request;
- whether the information originated in the jurisdiction from which it is being requested;
- the availability of alternative means of securing the information sought in the discovery/disclosure request;
- the extent to which noncompliance would undermine the foreign sovereign's interest in the information requested

The Framework (cont.)

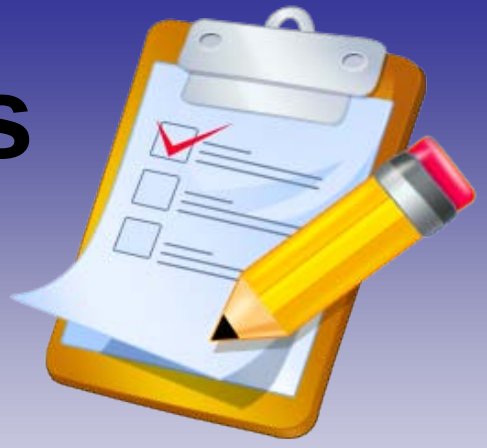
- Determine Whether the Data is Subject to a Provision Limiting Cross-Border Transfer
  - Consider the character of the data
    - Personal?
    - Sensitive (technological, national security, certain financial/company data)?
    - Industry-specific (medical information, telecommunications)?
  - Consider the jurisdiction of the limiting provisions
    - Regional (E.U. Directives)
    - Country privacy laws
    - Industry-specific (financial, anti-trust, technological)
  - Are there derogations or exceptions to the limiting provisions?
  - Can the data be made to fit the limitations of the provisions?
    - De-identification (stripping of identifiers)
    - Consent/Notice of data subjects/authors
    - Limitation of data request (proportionality)

The Framework (cont.)

- Is There a Blocking Statute?
- Is There a Treaty, Legislation or Agreement Between the Parties Which May Provide a Solution?
  - Is the Hague Convention on Evidence available?
  - May consent be obtained from a Data Commission?
  - Will a protective order satisfy the pertinent provisions and/or Data Commission?
- Involve local staff - be sensitive to cultural differences
- Consider requirements for litigation support tools (e.g. foreign language searching, global review teams).



Practical Solutions



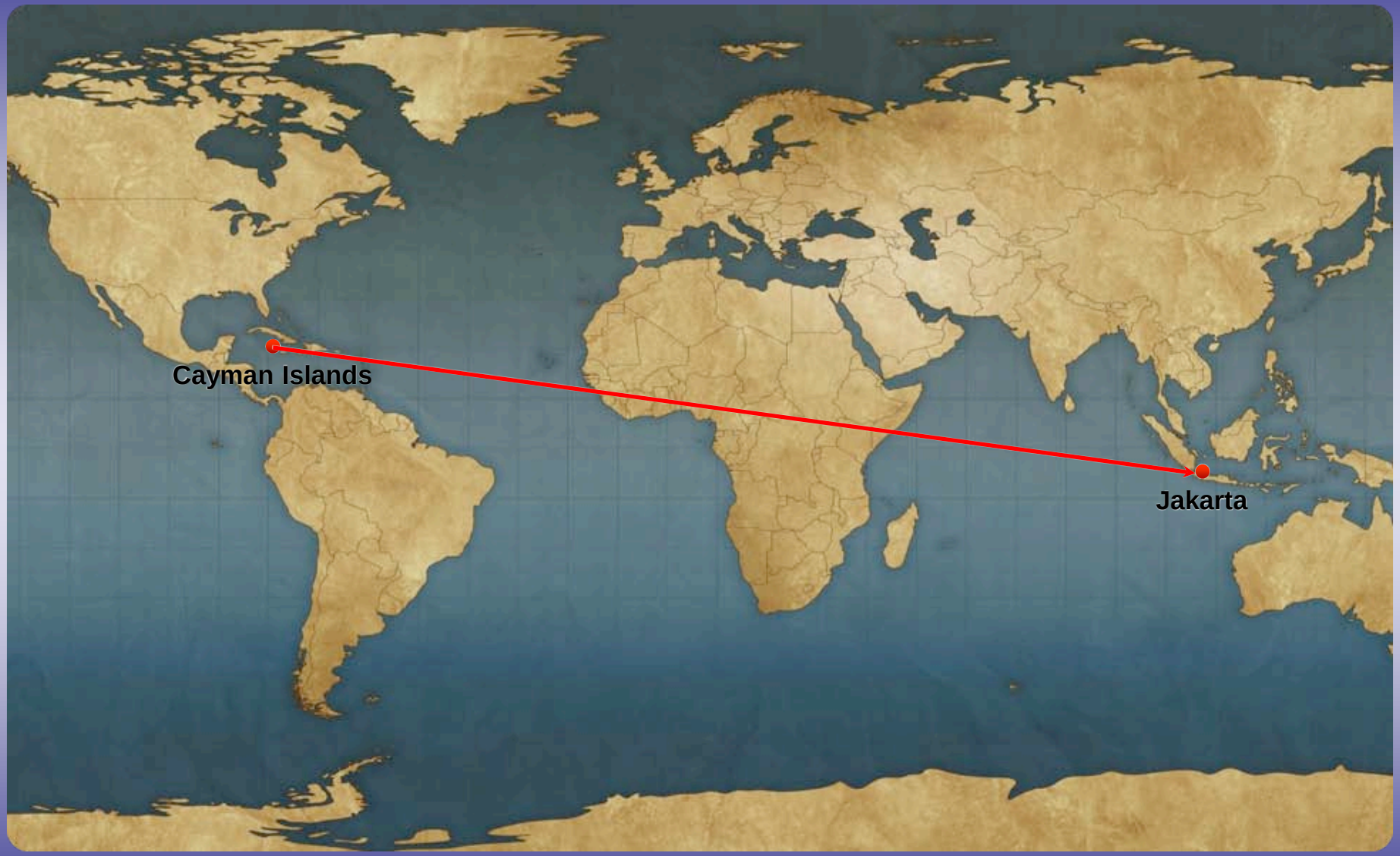
- Early Planning
- Engage local country representatives
- Use advisers with local language capabilities
- Communication with Works Council to ensure understanding of procedures
- Develop practical solutions to ensure compliance with discovery timetable, such as in-country processing for ‘problem’ jurisdictions
- Ensure processing and review tools can manage local country issues / languages
- Consider sampling

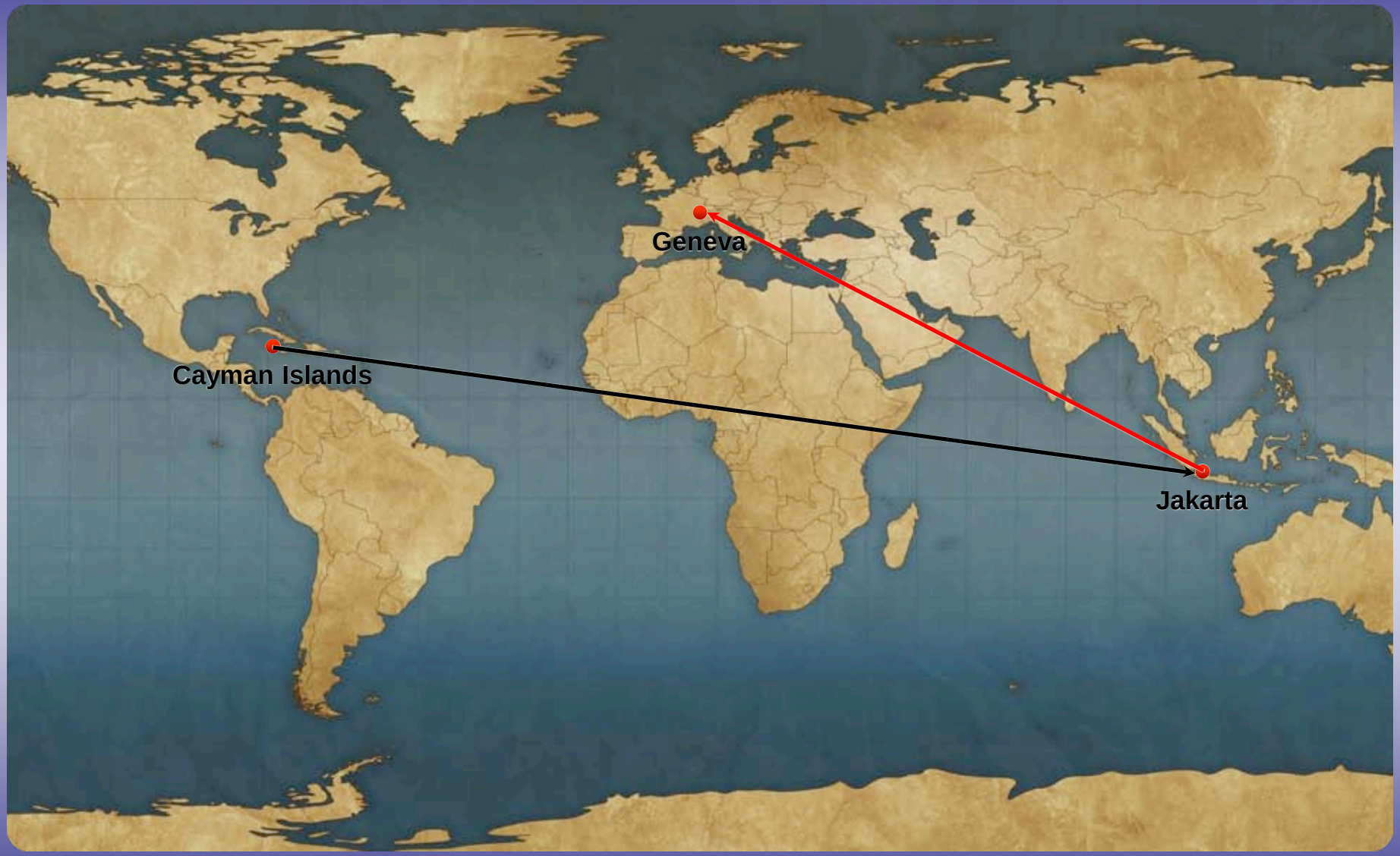
Part 4:
Foreign Antisuit Injunctions

The Problem

- As illustrated by *Karaha Bodas*, 500 F.3d 111 (2d Cir. 2007)


Cayman Islands


Cayman Islands
Jakarta


Geneva
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Geneva
Houston
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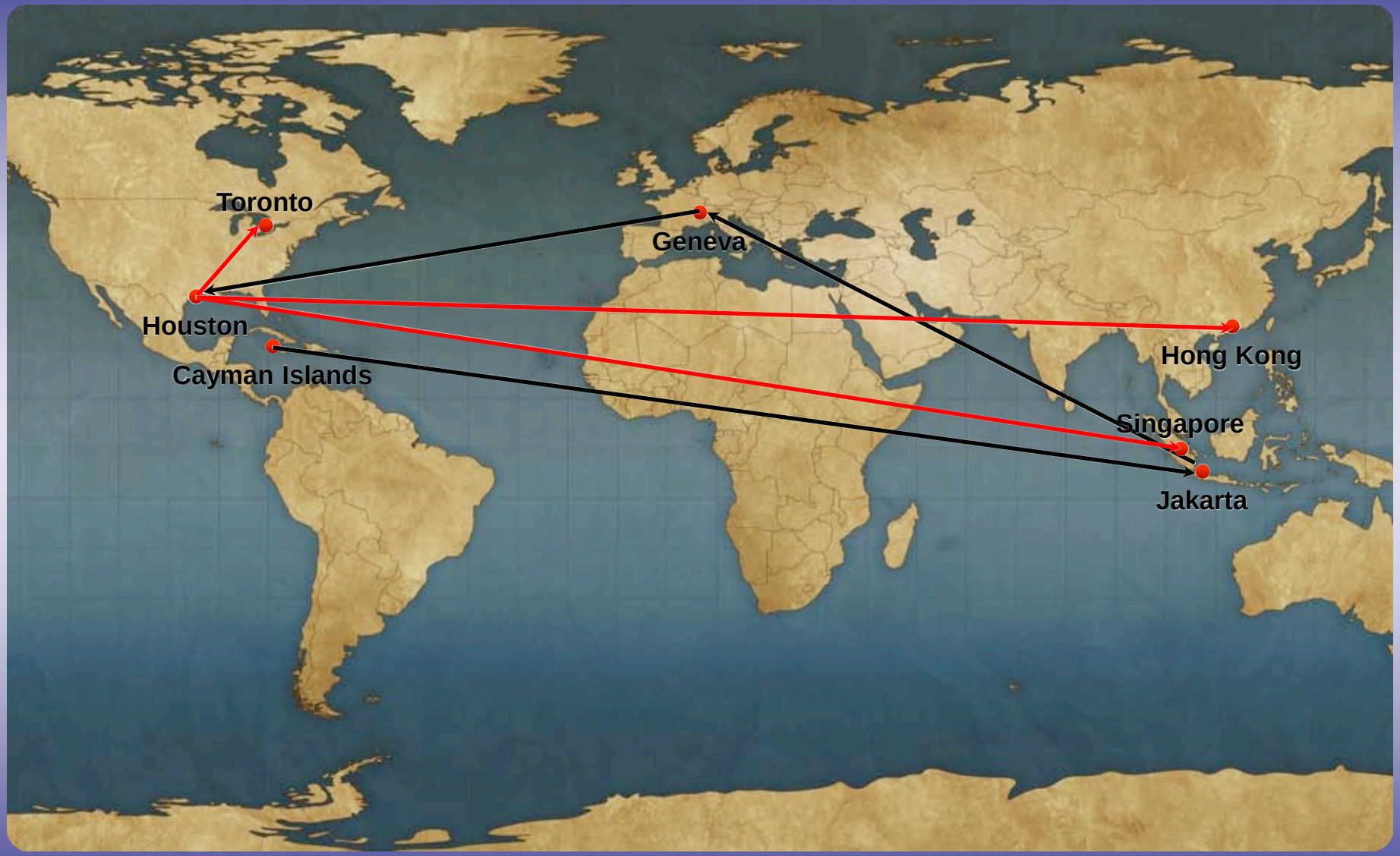
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Solutions

- Foreign Anti-Suit Injunctions
- During Litigation or After Judgment
- Comity
- Circuit Splits

Injunctions Prior to Final Judgment

- Presumption that Parallel Proceedings Should be Allowed to Proceed
  Laker Airways, 731 F.2d 909 (D.C. Cir. 1984)
- Show Inequitable or Vexatious Conduct
- Or Serious Interference with Court's Jurisdiction

Injunctions After US Court Has Reached a Final Judgment

- More Justification for Issuing Injunction
- Protect Court's Jurisdiction, Res Judicata
- But – Eighth Circuit in *Goss Int'l*, 491 F.3d 355 (8th Cir. 2007) (Court loses jurisdiction to issue injunction once judgment is satisfied)

Comity

- Third, Sixth & Eighth Circuits – Most Restrictive “Conservative Approach”
- First, Second & D.C. Circuits – Traditional Conservative Approach
- Fifth, Seventh & Ninth Circuits – Liberal Approach

QUESTIONS?