2. PAPERCHASE
by Jonathan R.M. Foster

The growth of a separate body of reinsurance law is a recent phenomenon which evidences a change in the practice of the market.

As a consequence, "the discovery process" is of increasing significance for all who work on the litigious side of this industry. This phrase denotes a preoccupation with a major weapon in the attorney's arsenal. Is it not, after all, the American practitioner who has developed the line of arguments which led to the extensive searches in long forgotten basements to discover policies decades old which covered asbestos-related risks? Is it not he who, through exhaustive procedures, seems to leave no leaf unturned, whether or not ultimately relevant to the questions raised by the pleadings, in his thorough preparation for trial? The American practitioner's search for paper in the pre-trial discovery stage of litigation is greatly more extensive than his English counterpart. It is on this aspect that this note is to focus.

Rules of Federal Procedure set out the scope of discovery (see Federal Rules, Rule 25). If information sought appears reasonably calculated to lead to the discovery of admissible evidence, then though the information is not itself admissible it may be discoverable. Any thought that this is the manifestation of some wider American discovery rule appears at first dispelled by a look at the Rules of the Supreme Court. For here in England, discovery is not limited to documents admissible in evidence but extends to any document which may fairly lead a party to a train of inquiry which may enable him to advance his own case or damage his adversary's. So what is it that gives rise in some quarters of this industry to the alarm at what is perceived as a licence for the opposing faction to trawl, apparently unfettered by restriction, through all the paper in sight, and most that is in the basement?

One view of American discovery procedures prompted an American plaintiff suing in the Commercial Court in London to seek an injunction restraining the defendants from proceeding under an order for discovery obtained in an American court.

The case was *South Carolina Insurance Co.* v. *Assurantie Maatschappij "De Zeven Provincien" N.V.* (1987) AC 24. The first difference shows up in the headnote: the American order for pre-trial discovery was not against a party to the action. Unlike the English rules, the Federal rules do not limit discovery to documents which are or have been in the possession, custody or power of parties, and do not therefore limit discovery to parties to the action.

A second limit on the scope of the English rules is that discovery takes place only after the issues have been defined by the close of pleadings. The power of the English court to order discovery at any other stage of an action is rarely exercised, and then only on special grounds. No such limitation appears in the general description of the American rule.

There is power under the Federal Rules to compel the giving of oral testimony in discovery by way of deposition. The nearest equivalent under English rules ordinarily is to compel a witness to attend and give evidence at trial. This does not contribute to the process of establishing the extent of the available evidence and thus the strength of a case at the earlier stage of pre-trial procedure. The same must be said of the power to compel a witness (not a party) to attend and produce documents at a trial.

The final difference to be mentioned is in the practice, common in American litigation, of ordering interrogatories to obtain information and to establish the existence of documents.

There appear to be two conclusions to be drawn at this stage from these differences in pre-trial practice and procedures; first, the means of information-gathering open to an American attorney are more varied and more extensive, and are not restricted to parties to the action. Second, their use is not limited to the issues which have been defined by the pleadings. Thus, it would appear that American prodecures permit a wider range of issues to be explored in discovery, and a wider range of procedures is available for use against a wider class of persons.

In providing for assistance to be rendered to foreign tribunals in the obtaining of evidence, The United States Code empowers US courts to order that all or part of the practice and procedure of the foreign tribunal should apply. It is noteworthy that if the US court does not so specify, then the Federal rules apply in default. Happily the Federal Courts have expressed themselves disinclined to make available to a litigant processes of law to which he is not entitled in the courts before which his action is proceeding.

The American courts may thus be unlikely to make available discovery procedures to expand those available in a case before the English courts, even where a party is an American company. Such decisions are however left to the American Courts by the decision in the *South Carolina* case. There is even less comfort to those whose papers may come within the purview of an American Court in the course of an American action. For the niceties which enable the American courts to apply the English rules, apply when their assistance is sought in an English action: they are of course wholly absent where an action is brought before the American courts.

At the end of this paper trail two questions seem to remain; does this exhaustive discovery process more nearly achieve the avoidance of surprises at trial which is a part of English procedure? And does it remove the uncertainties of trial by a piecemeal dress rehearsal beforehand?