

KRANENBURG

Werner R. Kranenburg
Attorney & Counselor-at-Law
No. 1 Poultry | First Floor
London EC2R 8JR | United Kingdom
<http://kranenburgesq.com>
werner@kranenburgesq.com
+44 20 3174 0365

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Legal Developments: Transatlantic Reforms

*US courts to remain venue of choice for investor litigation against UK corporations, by **Werner R. Kranenburg**[^]*

The UK's Company Law Reform Bill has recently been the topic of debate among among corporate lawyers – specifically, whether the Bill's reforms should be considered as a step towards the import of US-style securities litigation to the UK. It has been argued extensively elsewhere that that will not be the case.

However, that debate seems – at least in the UK – to have focused on the influence of the Bill in the UK and on cases brought here. What could equally be of interest is to look at it the other way around: whether or not the Bill, if and when enacted, has any influence in the US.

Many UK-listed companies have a dual listing on a US stock exchange – about 100 as of the end of 2003 (latest official data) – and report to the Securities and Exchange Commission. Some of those have been the subject of US securities and derivative actions. The question asked here is whether the Bill could be a factor in US civil actions (as opposed to criminal or regulatory) where the defendant is a 'foreign private issuer' (as defined in the US Securities Exchange Act of 1934) or, specifically, a corporation with its principal location of business and primary stock exchange listing in the UK.

Examples of UK corporations that are currently, or have recently been, defendants in US securities actions are Vodafone Group, Cable and Wireless (C&W) and The Shell Transport and Trading Company. All are listed in both London and New York, the latter listing giving rise to a US jurisdiction claim under the 1934 Act.

In March 2005, Vodafone settled the securities class action (against the

[^]Mr Kranenburg is an attorney admitted to practice law in New York State and various US federal courts and is a qualified arbitrator. He is a native of the Netherlands and his law practice, Kranenburg, is based in the heart of the financial centre of London, England. The focus of his practice is cross-border litigation and arbitration, in particular securities and corporate litigation, and advising on transatlantic legal matters.

company for investors' damages) pending against it in a New York District Court by agreeing to pay, with its insurers, the sum of \$24.5m (£14.1m), including \$6.9m (£3.98m) in attorneys' fees, to create a settlement fund for plaintiff shareholders. In this case though, the class of plaintiffs was defined as purchasers of Vodafone's American Depository Shares, thereby limiting the class to US investors only.

C&W settled a similar action, pending in a Virginia District Court, in May 2005. It settled for \$7m (£4.04m). The definition of the class of plaintiffs who would benefit from this settlement was markedly different: the court had denied C&W's motion to dismiss claims of non-US purchasers and so the proposed settlement notice specifically noted the fact that all publicly-traded C&W securities – common stock, American Depository Receipts (ADRs) and bonds – were covered, regardless of which exchange they were listed on.

Shell Transport – more precisely Royal Dutch Petroleum Company, listed in Amsterdam, and Shell Transport, collectively known as Shell in these proceedings, and Royal Dutch Shell since July 2005's unification – was a defendant in a derivative action (against the directors for corporate governance purposes) which it settled in August 2005. It paid \$9.2m (£5.3m) in attorneys' fees and agreed to make changes to its corporate governance. A current, separate securities class action is still pending in New Jersey, on behalf of purchasers of ordinary shares and ADRs.

The main legal issues in all four actions are the same: alleged violations of certain sections of the 1934 Act and rules promulgated thereunder relating to material misrepresentations that misled the respective class of investors.

The Vodafone action excluded foreign investors, so, though no case was brought in the UK, based on the same facts and allegations, the Bill would not have affected the US action.

The doctrine of *res judicata* would arguably prevent a US action on behalf of UK investors to proceed against a UK corporation if and when the parties had settled, or the defendant been convicted in an English court. But no group litigation orders or derivative claims were even filed in England against C&W or Shell Transport.

The Bill will arguably not lead to increased litigation in the UK, which in turn means it has negligible influence in the US: it will not lead to a decrease in US actions. US plaintiff firms will continue to enforce the law by way of civil actions in US courts against UK corporations on behalf of US and foreign investors, including those situated in the UK.