



Uniwersytet
ŁÓDZKI



WYDZIAŁ PRAWA
I ADMINISTRACJI

Bartosz Trocha

*Zawisłość sprawy przed sądem zagranicznym w postępowaniu cywilnym
- ujęcie prawnoporównawcze*

*(Lis Alibi Pendens in International Civil Proceedings:
A Comparative Study)*

SUMMARY

PhD Thesis prepared at the Civil Procedure
Department 1 under the supervision of
dr hab. Sławomir Cieślak, prof. nadzw. UŁ

Łódź 2016

The problem of *lis alibi pendens* (litispendance, pendency of another action, lawsuit pending elsewhere) is one of the most vital issues in the contemporary doctrine of international civil procedural law. It is also an essential element of many key legal acts devoted to jurisdiction and recognition and enforcement of judgments. It is often distinguished as a separate issue located in the course of the proceedings between the two above-mentioned; sometimes, however, it is presented as pertinent the domain of jurisdiction. In each of these views its meaning remains relevant from the perspective of the efficient functioning of global justice. As a result, it deserves to be a subject of scientific analysis. In Polish literature this topic has already been discussed; nevertheless, the time that has passed from that moment and the numerous and the ongoing changes in law encourage its reexamination within this monograph, the first one in Polish literature.

The aim of this thesis is to analyze the effect of litispendance before a court of one state from the point of view of another state's law. This means especially the influence of such a pendency on the possibility of conducting proceedings in the same matter before a court in another country. Stressing this particular element allows to keep the due notional precision. In fact, the attention is focused not on the entirety of issues related to the fact of litispendance before courts of particular foreign states (such a thesis would have to be based on a comparison of all internal legal regulations concerning *lis pendens*, including problems pertaining to substantive law) but merely the one procedural effect of such a pendency, concerning the possibility of hearing the same case in another country. That is also how the title of the thesis should be interpreted.

Given the need for precision, a clear distinction in meaning in which legal orders of two states involved should be understood is also required. It is natural that each lawmaker addresses their rules to their own courts and that they cannot impose anything on foreign courts. Due to that fact the regulation of effects of pendency in state A for the courts of state B always belongs to the sphere of legal order of state B. Rules of state A may be relevant as long as the court of state B needs to assess whether (and when) the pendency in state A really took place. Nevertheless, the question of how that court should react falls completely within the procedural law of state B. As a result, the main source for the analysis will be the law of the state the court of which needs to refer to the problem of

litispendance, as it is that law (or sometimes an international regulation) that determines the above-mentioned influence. The court before which the action pends will be invariably described as the “foreign” one, while the court which has to decide how to react on that pendency - as the “home” one, irrespective of the states discussed in a given fragment of the thesis. In consequence, the point of view of Polish courts is not exposed at the forefront but it constitutes a part of wider, comparative view.

To make the cross-border effect of *lis pendens* the centre of interest it is necessary to realize that the meaning of *lis pendens* as such emerges mainly when proceedings in the same case are opened (or are supposed to be opened) before a court of a different state than the one where the pendency already took place. In literature such cases are often described as cases of parallel proceedings. The will of preventing them, following from the commonly accepted rule “*ne bis in idem*”, makes us search for solutions that would allow to settle the problem of competition between courts of different states. Using the traditional concept of *lis pendens* familiar to different legal orders for ages seems to be a good answer here. In the cross-border dimension it additionally becomes an important example of the principle of respecting jurisdiction of foreign courts, as by taking notice of litispendance the home court accepts the fact that the foreign court found itself competent in a given case and that the expected foreign judgment will in the end be recognized.

Therefore, it can be said that the problem of parallel proceedings creates a context in which the role of *lis pendens* idea may be fully visible. At the same time, however, it should be stressed that using the *lis pendens* doctrine is only one of a few options of dealing with the problem of parallel proceedings that exist in legal orders all over the world. The main alternatives to the idea of respecting foreign proceedings because of its priority in time have been elaborated on in common-law countries. To present a full range of issues relating to *lis alibi pendens doctrine* it seems desirable to describe both the wider context mentioned above as well as the most important alternative ideas.

All these reflections stand at the core of the idea of dividing the present thesis into two parts, which is already common practice in France, where for many years such a model has been used in legal texts, as it allows for a clear explanation of all the elements of the

analyzed topic. The first part is entitled “The problem (phenomenon) of parallel proceedings in an international aspect as a context for the institution of *lis alibi pendens*”. It consists of two chapters. The first one is devoted to the nature, reasons and effects of parallel proceedings before courts of different states. Those are key issues when highlighting the role of *lis alibi pendens* idea in contemporary private law. Due to the considerable discrepancies in literature, the nature of this problem has been presented inclusively of the numerous opinions of Polish and foreign scholars. As for the sphere of reasons and effects, their classification has been based on the criteria that allow to reflect the weight of each reason and each effect in the best possible way. The models of solutions to a problem so identified are described in chapter two. It contains a wide analysis of possible approaches suggested in literature, as well as the ones that function on a regular basis in the most important legal orders. The option of respecting the *lis alibi pendens* will be compared to the above-mentioned alternative solutions. The analysis allows to make their variety visible and to look at the problem of parallel proceedings from different vantage points before making detailed remarks on the *lis alibi pendens* doctrine.

The second part of the thesis is entitled “Respecting *lis alibi pendens* by the home court: the idea, the conditions and the consequences”. It contains another three chapters devoted to *lis pendens* in the classic, “continental” meaning, typical for the Polish law, as well as the law of the EU. In chapter three the birth of idea of respecting the foreign litispendance is described by using the broad historical perspective. The analysis starts from the origins of *lis pendens* institution, its shaping and its contemporary meaning in the law of Poland and the laws of the most important foreign states. Next, the evolution of concept suggesting the application of *lis pendens* to cases where the competing court is the court of another state is examined. Such a structure was adopted in response to the request posed in literature, according to which “to duly understand the *lis pendens* problem in its international dimension it is necessary to first explain its meaning in the field of internal legal order”. Chapter four comprises detailed remarks on the circumstances being the conditions of respecting the *lis alibi pendens*. Besides the fundamental issues such as the identity of cases or the time priority the conditions in cross-border dimension also include so-called positive prognosis with regard to the possibility of recognizing the future foreign

judgment and to the duration of proceedings before the foreign court. Finally, in chapter five the problem of consequences following from respecting the foreign litispendance by a home court has been presented. The considerations concern the possible forms of decision in which this respect may be expressed, as well as the effects of opening the concurrent proceedings before the home court after finding that those proceedings may not be continued. An important element of this part is the question concerning the consequences of situation when the litispendance is not respected despite the fact that such an obligation is required by the law that governs the proceedings.

The sequence of chapters allows to fully address the most important aspects of the topic. It makes possible to present the problem of parallel proceedings at the beginning, then the possible methods of dealing with it in general, and finally the doctrine of *lis alibi pendens* itself, which remains one of the most crucial among these methods. Still, some issues, although similar to the problem of *lis pendens*, must be treated as separate institutions of procedural law and therefore fall beyond the scope of the present work. As a result, no reference will be made to the issue of related actions (*connexité*), nor to the issue of parallel litigation and arbitration proceedings in the same case. Moreover, the frames of the thesis allow neither for a deeper analysis of the problem of plurality of cross-border insolvency proceedings nor for their effects for cross-border civil litigation and *vice versa*. Each of these issues, due to its complexity, should be treated as a subject for a separate dissertation.

Barbara Tuckler