

Małgorzata Lubelska-Sazanów

Animals as specific objects of obligations under Polish and German law

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Professor Dr. Dr. h. c. mult. Christian von Bar, FBA, MAE,
Professor Dr. Christoph Busch,
Professor Dr. Hans Schulte-Nölke, MAE, und
Professor Dr. Dr. h. c. Fryderyk Zoll

Małgorzata Lubelska-Sazanów

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List of Shortcuts

ACP	Archiv für die civilistische Praxis
AG	Amtsgericht
APAA	Greek charity Animal Protection Aegina Agistri
Article	Article
B2B	Business to Business Relation
B2C	Business to Consumer Relation
BGB	Bürgerliches Gesetzbuch
BGH	Bundesgerichtshof (German Federal Supreme Court of Justice)
BYIL	British Yearbook of International Law
C2C	Consumer to Consumer Relation
CISG	United Nations Convention on Contracts for the International Sale of Goods
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
DCFR	Draft Common Frame of Reference
Dir.	Directive
EC	European Council
ECHR	European Court of Human Rights
ECJ	European Court of Justice
ECPHRFR	The European Convention for the Protection of Human Rights and Fundamental Freedoms
ed.	Editor
eds.	Editors
etc.	et cetera
EU	European Union
GAWF	Greek Animal Welfare Fund
HGB	Handelsgesetzbuch
i. e.	id est
INP PAN	Instytut Nauk prawnych Polskiej Akademii Nauk
IUCN	The World Conservation Union
JuS	Juristische Schulung Zeitschrift
KC	Kodeks cywilny
KPP	Kwartalnik Prawa Prywatnego

LG	Landesgericht
MoP	Monitor Prawniczy
NGO	Non-government organization
NJW	Neue Juristische Wochenschrift
NJW-RR	Neue Juristische Wochenschrift Rechtsprechung-Report Zivilrecht
No.	Number
OLG	Oberlandesgericht
OJ C	The Official Journal of the European Union, information and notices
OJ L	The Official Journal of the European Union, legislation
OSNCP	Orzecznictwo Sądu Najwyższego – Izba Cywilna/Pracy
OSP	Orzecznictwo Sądów Polskich
P.	page
PAP	Polska Agencja Prasowa
PAWS	Paros Animal Welfare Society
PETI	Committee on Petitions, European Parliament
PiP	Państwo i Prawo
pos.	Position
pp.	pages
PWN	Wydawnictwo Naukowe PWN
PZJ	Polski Związek Jeździecki
RöLF	Rönthenleitfaden (x-ray images guide)
Rome I Regulation	Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations
Rutgers L. Rev	Rutgers Law Rev
S.C.	Studia Cywilistyczne
SN	Sąd Najwyższy (Polish Supreme Court)
System...	System Prawa Prywatnego
TFEU	The Treaty on the Functioning of the European Union
trans.	translated
UN	United Nations
US	United States of America
Vet. Radiol, Ultrasound	Veterinary Radiology & Ultrasound Journal
Vol.	Volume
ZeUP	Zeitschrift für Europäisches Privatrecht
ZGS	Zeitschrift für das gesamte Schuldrecht
ZNUJ	Zeszyty Naukowe Uniwersytetu Jagiellońskiego

Preface

This book is based on a Doctoral Dissertation (Co-tutelle) written in the Faculty of Civil Law and Private International Law of the University of Silesia under the mentorship of prof. dr hab. Ewa Rott-Pietrzyk (UŚ) and in the European Legal Studies Institute of the University of Osnabrück under the mentorship of prof. dr hab. Fryderyk Zoll (UJ and Universität Osnabrück) in 2018.

I would like to send special thanks to my mentors – prof. dr hab. Ewa Rott-Pietrzyk (UŚ) and prof. dr hab. Fryderyk Zoll (UJ and Universität Osnabrück), as well as to the faculty members of the University of Silesia, who have always offered me support and advice. I would also like to express my infinite gratitude to my parents and my husband, who have always believed that this book will finally emerge, and to my sons, without whom I would probably not have enough motivation to make it happen.

I. Introduction

“The day may come, when the rest of the animal creation may acquire those rights which never could have been withholden from them but by the hand of tyranny.”
J. Bentham¹

1. The scope, structure and method of the book

This book looks at the conclusion, performance and results of the non-performance of contracts with animals as their object. The work concerns private law provisions addressed to animals (which can be found by reference in all the civil codes referred to in this book) and not administrative provisions, which are already referred to in numerous publications covered by the field of animal law (in the meaning of the part of law referring to animal rights).² As to the scope of animals covered herein, it had to be established according to their usage in the private law. The animals falling within the scope of this book are all animals that constitute objects of contractual obligations. Therefore, the study refers rather to animals owned by private individuals. Thus, animals destined for slaughter³ or for producing farm products usually do not constitute further objects of

1 J. Bentham, *An Introduction To The Principles Of Morals And Legislation*, pp. 235–236, Clarendon Press Oxford 1907 (1823); J. Bentham, *Wprowadzenie do Zasad Moralności i Prawodawstwa* (Bogdan Nawroczyński trans.), Warszawa 1958, pp. 418–420.

2 With reference to the melting difference between private and public law, see: J. Nowacki, *Prawo publiczne – prawo prywatne*, Katowice 1992; W. Popiołek, *Znaczenie przepisów “prawa publicznego” różnych systemów prawnych dla stosunków umownych handlu zagranicznego*, *Problemy Prawne Handlu Zagranicznego* 1988, Issue 12, pp. 56–78; J. Łętowski, *W sprawie granicy między prawem publicznym a prywatnym* [in:] B. Kordasiewicz, E. Łętowska (eds.), *Prace z prawa cywilnego. Wydane dla uczczenia pracy naukowej Profesora Józefa Pią-towskiego*, Wrocław/Warszawa/Kraków/Łódź 1985, pp. 353–362; R. Szczepaniak, *W zamkniętym kręgu podziału na prawo publiczne i prywatne, czyli o możliwości dochodzenia odsetek od zasądzonych kosztów procesu*, *Studia Prawa Prywatnego* 2015, Issue 3, pp. 49–59. See also: ECJ, ruling from 28.7.2016, C-191/15.

3 See more with reference to animals kept for slaughter in: M. Lubelska-Sazanów, *Prawne regulacje dotyczące transportu zwierząt na terenie Unii Europejskiej* [in:] B. Błońska, W. Gogłoza, W. Klaus, D. Woźniakowska-Fajst (eds.), *Sprawiedliwość dla zwierząt*, Warszawa 2017; M. Rudy, A. Rudy, P. Mazur, *Ubój rytualny w prawie administracyjnym*, Warszawa 2013. Compare also: T. Pietrzykowski, *Recenzja książki M. Rudego, A. Rudego, P. Mazura, Ubój rytualny w prawie administracyjnym*, Warszawa 2013, *Prokuratura i Prawo* 2014, Issue 3, pp. 162–167.

contractual obligations (at least from the moment when they reach the slaughterhouses or animal production farms).⁴ However, before that, they are treated as regular objects of potential obligations falling within the scope of this book. Hence, animals that undergo beauty- and health-checks, are sold or offered for lease are privately owned animals and – as such – form the subject of this book. Additionally, the book refers to animals as specific objects of contractual obligations. Therefore the problematic issue of the owner's/keeper's liability *ex delicto* arising as a result of damage caused by an animal is not the subject of these considerations. The problem of the liability of an owner/keeper is very broad and covers, also in the Polish-German context, several differences of its regulation. This problem by itself could constitute the subject of a separate book. Thus, despite a rich vein of German jurisprudence⁵ in this matter, the issue of liability *ex delicto* arising as a result of damage caused by an animal – as a delict, not a contractual obligation – is not the subject of this book, referring strictly to contract law.

Due to private contractual obligations forming a focus point of the book, it was necessary to address also the bond that arises between an animal and its owner. This bond begins morality considerations towards animals and is the main reason for bringing animal ethics into a private law book. Thus, the only aspect that justifies the presentation of a legal philosophy, animal ethics and its impact on a legal culture expressed in private law provisions is the specific object of obligations – animals, as addressed in this book referring to civil law.

The first two chapters constitute background for subsequent civil law considerations concerning the fact that the object of a contractual obligation is an animal, and the impact this has on the conclusion, performance and consequences of non-performance or improper performance of the contract. Chapter I contains introductory remarks referring to the scope, structure and method used in this book, while Chapter II combines the needs to address animal interests in contract law with Polish contract law itself. Chapters III, IV

4 Due to this limitation of the scope of this book, the problem of animal slaughter is not subject of this book. However, at this point it is necessary to mention a famous discussion referring to ritual slaughter of animals, see: E. Tuora-Schwierskott, *Rytualny ubój zwierząt w świetle wolności sumienia i wyznania oraz zasady proporcjonalności w ustawodawstwie i orzecznictwie Niemiec, Szwajcarii i USA*, Państwo i Prawo 2016, Issue 4, pp. 64–73; A. Młynarska-Sobaczewska, *Rytualne ofiary a moralność publiczna. Analiza argumentacji Trybunału Konstytucyjnego (K 52/13) i Sądu Najwyższego USA (508 U.S.520.1993)*, Państwo i Prawo 2017, Issue 4, pp. 34–47.

5 See, e.g.: OLG Hamm, ruling from 22.4.2015 – 14 U 19/14; OLG Koblenz, ruling from 7.1.2016 – 1 U 422/15; BGH, decision from 13.1.2015 – VI ZR 204/14; BGH, ruling from 30.4.2013 – VI ZR 13/12; LG Duisburg, ruling from 27.04.2016 – 8 O 286/14; OLG Koblenz, ruling from 18.1.2017 – 5 U 1021/16; OLG Jena, ruling from 8.6.2016 – 7 U 573/15; BGH, ruling from 14.2.2017 – VI ZR 434/15; OLG Nürnberg, ruling from 29.3.2017 – 4 U 1162/13. See also: S. Hensen, *Die Haftung des Nutztierhalters*, NJW-Spezial 2017, p. 265.

and V refer respectively to contracts transferring the ownership of an animal, service contracts and contracts on the deliberate use of somebody else's animal. Each of these chapters is divided into: a subchapter concerning introductory remarks and subchapters concerning the conclusion, performance and results of non-performance or improper performance of these contracts. However, Chapter IV – referring to service contracts – has a slightly different structure, being divided into subchapters each referring to a different service contract (commission contracts, agency contracts, teaching/training contracts, safe-keeping contracts and other service contracts with an animal as the object of the contractual obligation), and with each of these subchapters being itself divided into subchapters concerning the conclusion, performance and results of non-performance or improper performance of these contracts. Chapter VI, closing the considerations undertaken in this book, summarizes the conclusions made during the research and – most importantly – contains some *de lege ferenda* remarks with reference to possible changes in the Polish Civil Code.

The impact of animals being objects of contractual obligations – especially in reference to the conclusion, performance and consequences of improper performance of a contract, as well as non-performance, has not been addressed comprehensively this way in the Polish legal doctrine and is rarely addressed in Polish jurisprudential records. However, the situation is different in the neighboring country – Germany. Therefore, this country is used as a referential legal system in this book, due to the common roots and broad similarities in the Polish⁶ and German⁷ Civil Codes, but also due to the fact that Germany is globally renowned for its high-quality standards in the areas of breeding, selling, training and competition of horses, as well as of the highest number of horses in Europe (after Great Britain).⁸ At this point, it is worth explaining that the majority of the factual situations described in this book refer to horses, because of their potentially high economic value which affects their frequent presence as

6 The Polish Civil Code in the version promulgated on 23. 4. 1964, last version: J L No. 16, item 93, as amended.

7 The German Civil Code in the version promulgated on 2. 1. 2002, J L of 8. 1. 2002, part I, No. 2, item 2787, as amended.

8 I.e. 1,000,000 of 5,750,000 horses kept in the whole of Europe, according to a study made by C. Liljenstolpe, see: C. Liljenstolpe, *Horses in Europe*, Swedish University of Agricultural Sciences 2009, available at: <http://www.wbfs.org/files/EU%20Equus%202009.pdf> (last visited: 3.3.2018). According to more recent research, Romania is the country with the highest number of horses (though Romania is rather not identified with horse sports and the horse industry as such) and the following three countries (including Germany) show small differences in the number of horses kept there, see: <https://www.statista.com/statistics/414913/eu-european-union-number-of-horses-by-country/> (last visited: 22.6.2018). Nevertheless, there is also different research showing different numbers (though Germany is still in the top 6 of these countries), compare: <https://www.theguardian.com/news/datablog/2015/jun/12/how-many-horses-european-union-eu-equine-census-population> (last visited: 22.6.2018).

objects of contractual obligations. Thus, the annual total expenses in the German horse sector are approximated to be EUR 2.6 billion, with total sales within the sector reaching nearly EUR 5 billion⁹ (the entire turnover of the equestrian industry is estimated to range between five and six billion Euro per year),¹⁰ proof that the horse market is vital for the national economy, which – as a result – means more judicial reasonings and a larger number of doctrinal considerations in this topic. Although there are about the same numbers of cats and dogs in Poland and Germany,¹¹ this does not have such a significant impact on the economy as the horse market, and so leads to fewer judicial reasonings referring to the sale of these animals. Germany, answering the needs of the horse market – namely investors, breeders, horse dealers and other people employed in the horse industry¹² – has sufficient jurisprudence and doctrine to serve as a role model for applying the legal provisions concerning things to animals in Poland. Therefore, I have taken into account the similarities in the Polish and German legal systems and used the method applied in the project “*The Bilateral German-Polish Harmonization of Private Law in the Integration of the European Union. Addition or Opposition?*”¹³ The subject of this project, undertaken by two universities that I attended as a PhD student, was to examine Polish and German law from a case-law perspective. The German cases and the main findings of the German courts were subsequently analyzed from the perspective of the Polish black letter law, as well as from the perspective of the Polish law in action, mainly by analyzing the civil law provisions used in the practice of Polish courts. The method used in the publication produced within this project – “*Limits of Harmonization and Convergence, Dissimilarities and Similarities of Polish and*

9 C. Liljenstolpe, *Horses in Europe*, Swedish University of Agricultural Sciences 2009, available at: <http://www.wbfsch.org/files/EU%20Equus%202009.pdf> (last visited: 3.3.2018).

10 *Idem*.

11 IBF International Consulting, VetEffecT, Wageningen University & Research Centre (WUR), Istituto Zooprofilattico Sperimentale dell’Abruzzo e del Molise “G. Caporale” (IZSAM), *Study on the welfare of dogs and cats involved in commercial practices* (Specific Contract SANCO 2013/12364 – project financed by the European Commission), available at: https://ec.europa.eu/food/sites/food/files/animals/docs/aw_eu-strategy_study_dogs-cats-commercial-practices_en.pdf (last visited: 3.3.2018).

12 With reference to the scale and importance of horse market in Germany, see: C. Liljenstolpe, *Horses in Europe*, Swedish University of Agricultural Sciences 2009, available at: <http://www.wbfsch.org/files/EU%20Equus%202009.pdf> (last visited: 3.3.2018).

13 “*Die bilaterale deutsch-polnische Privatrechtsharmonisierung im Prozess der Integration der Europäischen Union. Ergänzung oder Opposition?*”/“*Bilateralna niemiecko-polska harmonizacja prawa prywatnego w procesie integracji prawa Unii Europejskiej. Uzupełnienie czy opozycja?*” This monograph is part of a Project financed by the German-Polish Fund for Science (Deutsch-Polnische Wissenschaftsstiftung), Agreement number: 2014–16 from 15.4.2014.

*German Contract Law*¹⁴ – forced me, as one of the authors analyzing the cases of a foreign court, but with a similar legal tradition, to reconsider Polish law. That inspired me to establish the scope of this book.

The tension between the similarity and proximity of the Polish and German legal systems creates a fascinating field for experimentation with the process of the harmonization and unification of law.¹⁵ This, together with the German experience in the sale of horses (and the extraordinary high number of other civil law contracts connected with such a large number of horses kept in Germany) made the choice of the German legal system as referential to the Polish legal system obvious, while the main legal system of this book remains Polish. References to the German legal system occur systematically in this book, since the Polish legal solutions are compared with those offered by the German legal system. Some interesting judicial reasonings of the German courts have been presented applying the method used in the project “*The Bilateral German-Polish Harmonization of Private Law in the Integration of the European Union. Addition or Opposition?*” Thus, first there is a presentation of the facts of each case considered by the German court, followed by its reasoning. Secondly, the same facts of the case have been transposed to the Polish realities, and then considered with reference to the provisions of Polish law. Therefore, this book purposefully refers mostly to German judicial rulings, which are described herein comprehensively in order to show whether it is possible to pattern Polish law constructions on German law solutions referring to animals.

The method mostly used in the book is dogmatic¹⁶, with the use of empirical materials,¹⁷ like the practice of courts of lower instance, legal contracts and

14 M. Jagielska, E. Macierzyńska-Franaszczyk, E. Rott-Pietrzyk, F. Zoll, G. Żmij (eds.), *Limits of Harmonisation and Convergence. Dissimilarities in Similarities of Polish and German Contract Law*, Warszawa 2018.

15 Thus, the similarities, as well as the differences may be very deep-lying, e.g. it was disputable under Polish law whether non-performance and lack of conformity (*rękojmia*) create separate regimes (e.g. M. Podrecka, *Rękojmia za wady prawne rzeczy sprzedanej*, Warszawa 2011, pp. 27–32), while under German law, the lack of conformity (*Mangel*) is a special category of the *Pflichtverletzung* (H. Westermann [in:] *Münchener Kommentar zum BGB*, München 2016, § 434, side-number. 1; F. Faust [in:] H. Bamberger, H. Roth, W. Hau, R. Poseck (eds.), *Beck'sche Online Kommentare, BeckOK, BGB*, 45. Ed., München 2017, BGB § 437, side-number 1, *BeckOnline* (last visited: 12.3.2018); I. Saenger [in:] R. Schulze, H. Dörner, I. Ebert, T. Hoeren, R. Kemper, I. Saenger, K. Schreiber, H. Schulte-Nölke, A. Staudinger (eds.), *Bürgerliches Gesetzbuch. Handkommentar*, Baden-Baden 2016, *Bürgerliches Gesetzbuch. Handkommentar*, Baden-Baden 2016, § 437, side-number 1). See, comprehensively: F. Zoll, *Rękojmia. Odpowiedzialność sprzedawcy*, pp. 1–7; 101–103.

16 With reference to methods of research, see also: Z. Ziemiński, *Metodologiczne zagadnienia prawoznawstwa*, Warszawa 1974, p. 80. For a comprehensive summary about dogmatic method, see: T. Pietrzykowski, *Naturalizm i granice nauk prawnych. Esej z metodologii prawoznawstwa*, Warszawa 2017, pp. 46–68.

forms (used in the market practice of the problems mentioned in the book), the mass media (press articles) and – in particular – materials from foreign law of a different nature. Thus, the book was written with support from the comparative method.¹⁸ Nevertheless, this is also not a typical comparative work, since the German legal system has been used only as a reference (with the Polish legal system being the main subject of the legal analysis in this book) in order to obtain a broader scope of possibilities with reference to the changes proposed to Polish law. Therefore the dogmatic method and the method of adjusting the various legal solutions acknowledged by some representatives of the doctrine (i. e. animal ethics philosophers),¹⁹ to the actual law in practice (i. e. jurisprudence of the German courts), has been strengthened by elements of legal comparison.²⁰ The German legal solutions serve here as a reference and as source of consideration as to whether such solutions could be applicable in the Polish legal system as well. In the end, I see this book as a dogmatic work, strengthened by a functional analysis of legal solutions acknowledged by the law in action in another legal system (legal comparison).²¹ Therefore, my primary goal was to find the most appropriate legal solutions to the problems considered in this book after analyzing the positivist, as well as empirical materials of both the Polish and German legal systems.²² In the end, the book may also serve in the future as a practical instruction on how to deal with various factual situations concerning animals, and result in reference to contractual obligations that have not yet been addressed (in this scope) by the Polish jurisprudence and doctrine.

17 With reference to legal science, legal positivism and empiricism, see: C. Sandgren, *On Empirical Legal Science*, Scandinavian studies in law 2000, Issue 40, pp. 445–482; T. S. Ulen, *A Nobel Prize in Legal Science: Theory, Empirical Work, and the Scientific Method in the Study of Law*, Illinois Law Review 2002, Issue 4, pp. 875–920.

18 With reference to the comparative method, see: J. Husa, *Methodology of Comparative Law Today: From Paradoxes to Flexibility?*, Revue Internationale de Droit Comparé 2006, Vol. 58, No. 4, pp. 1095–1117.

19 See: T. Pietrzykowski, *Naturalizm i granice nauk prawnych...*, pp. 46–68.

20 With reference to methodologies used for the legal doctrine, see: M. Van Hoecke (ed.), *Methodology of Legal Research. What Kind of Method for What Kind of Discipline?* Oxford/Portland 2011, Chapter I, especially pp. 11–17.

21 With reference to the trends towards empiricism and legal theory in the legal science, see: T. S. Ulen, *A Nobel Prize in Legal Science: Theory, Empirical Work, and the Scientific Method in the Study of Law*, Illinois Law Review 2002, Issue 4, pp. 875–920.

22 With reference to definitions of legal positivism and empirical legal science, see: C. Sandgren, *On Empirical Legal Science*, Scandinavian studies in law 2000, Issue 40, pp. 445–482.

2. The main areas of focus of the book

The main areas of focus of the book concern the role that animals play in civil law contracts (in particular concerning obligation law). Since this role cannot be simply limited to the technical issues connected with the process of contracting and using an animal, the book also covers, to a more limited extent, topics from the borders of legal philosophy and ethics. Thus, what is typical for contracts involving animals and what turns out to be most important in the main chapters (i. e. Chapters III–V) of this book, is the emotional bond between an animal and its owner. The observance of the practice and the problems arising from the improper performance of contracts shows that it is this bond that makes animal as an object of a contract so special. Therefore, the idea that animals used by people should not be treated like inanimate possessions, but should be protected from actions that might cause suffering, is very old and already widespread in human society.²³ Animals should not be treated merely as property, and this is also dealt with in legal provisions in all European countries.²⁴ However, what is

23 So: D. Broom, *Sentience and Animal Welfare*, Wallingford, 2014, p. 200. Compare: European Parliament, *Animal Welfare in the European Union*, a study for the PETI- Committee, available at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583114/IPOL_STU\(2017\)583114_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583114/IPOL_STU(2017)583114_EN.pdf) (last visited: 5.9.2017).

24 The need to change the way animals are treated by the law has been expressed in numerous petitions addressed by EU citizens in the years 2013–2014 alone, listed in the reference list of the European Parliament, *Animal Welfare in the European Union*, a study for the PETI- Committee, available at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583114/IPOL_STU\(2017\)583114_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583114/IPOL_STU(2017)583114_EN.pdf) (last visited: 5.9.2017), i. e.: Petition to the European Parliament 0103/2013 by Joron Dominique (French), on banning the use of animals in circuses in the EU; Petition to the European Parliament 0214/2013 by Ronald Schirmer and Annekatrin Pötschulat (German) on fur farming in Germany; Petition to the European Parliament 0337/2013 by Lorenzo Croce (Italian) on the online sale of pets; Petition to the European Parliament 0471/2013 by Gian Marco Prampolini (Italian), bearing 27 signatures, on animal testing and vivisection for cosmetic research purposes; Petition to the European Parliament 0691/2013 by Julia Knorr Alonso (Spanish), on animal welfare in Spain and the European Union; Petition to the European Parliament 1024/2013 by Aurore Bardeau (French) seeking provisions to regulate animal euthanasia; Petition to the European Parliament 1158/2013 by T.Ch. (Belgian), on Animal rights; Petition to the European Parliament 1248/2013 by Pedro Pozas Terrados (Spanish) representing Projecto Gran Simio; Petition to the European Parliament 1553/2013 by Diana Patricia Giraldo Tejada (Spanish) on the protection of animal rights in Spain; Petition to the European Parliament 1619/2013 by C.J. (German), on a ban on hunting all songbirds and penalties for countries failing to comply; Petition to the European Parliament 1690/2013 by Sylvia Van Atta (unknown), on behalf of Many Tears Animal Rescue, on animal rights; Petition to the European Parliament 2218/2013 by C.J. (German) on banning the import of leather, leather goods and fur from China; Petition to the European Parliament 2377/2013 by G.J. (German) on the use of ear tags for the identification of livestock; Petition to the European Parliament 2391/2013 by C.J. (Dutch), on a ban on birdcages containing zinc; Petition to the European Parliament 0251/2014 by Pia Berrend (Luxembourgish) on the mistreatment of stray dogs in Romania; Petition to the

interesting is that the main reason for animal protection in civil law contracts is the connection between the animal and its owner.²⁵ Hence, is the law protecting the interests of the animal, or the interests of its owner?

If an animal has an owner who does not care for its well-being, other humans have very limited means of counteracting the owner's actions against the animal. In this case, there are only animal rights that can protect the individual animal, and these rights are only public law provisions. Therefore, although treating animals as sentient beings is guaranteed not only in local civil law provisions, but also in the Treaty of Lisbon,²⁶ the real fate of a privately owned animal

European Parliament 0561/2014 by Sven Niederstrasser (German) on the abolition of the compulsory use of ear tags on free-range calves; Petition to the European Parliament 0721/2014 by Joanna Swabe (British), on behalf of Human Society International, and two signatories, on the Routine docking of pigs' tails; Petition to the European Parliament 0723/2014 by M-J.F. (Portuguese / Canadian) on Food safety and Free trade agreements; Petition to the European Parliament 1071/2014 by Linda Mäki-Sulkava (Finnish) on breeding of unhealthy traits in animals (dogs); Petition to the European Parliament 1141/2014 by Fredrick Federley (Swedish), on the cutting of pigs' tails; Petition to the European Parliament 1307/2014 by A. K. (German) bearing 582 signatures, on a ban on the use of ear tags for the identification of cattle; Petition to the European Parliament 1546/2014 by R. P. S. (Spanish) against the immobilisation of horses with pliers; Petition to the European Parliament 1560/2014 by Corinna Haussmann (German) on the use of helium in place of CO₂ for stunning animals for slaughter; Petition to the European Parliament 2301/2014 by Moona Hellsten (Finnish), on the cruel treatment of animals in a zoo (Zoo du Mont) in Toulon, France; Petition to the European Parliament 0094/2015 by Pia Berrend, on the terminology used for stray domestic animals in the proposal for a Regulation of the European Parliament and of the Council on Animal Health (COM/2013/0260); Petition to the European Parliament 0545/2015 by Dieter Soßna (German) on the transport of animals for slaughter; Petition 0820/2015 by Annick Pillard (French) on prohibition of the glue traps to catch rodents in the EU; Petition to the European Parliament 1320/2015 by Susanne Prahm (German) supported by eight co-signatories, on the ill-treatment of cats and dogs in China; Petition to the European Parliament 1336/2015 by Patrick Katzer (German) on a ban on scientific experiments on primates; Petition to the European Parliament 1379/2015 by Gisela Urban and Gabriele Menzel (German) on behalf of several animal welfare organisations, supported by 4.680 co-signatories, on the protection of humans and animals against toxins and pesticides; Petition to the European Parliament 1417/2015 by M.V. (Italian) on animal cruelty in China; Petition to the European Parliament 2015 on the Welfare of Dairy Cows by 18 animal protection societies; Petition to the European Parliament 0224/2016 by P.A. (Italian) on cruelty to dogs in China. Thus, in recent years, knowledge of animal functioning, particularly their behaviour and physiology, has increased rapidly and has been the subject of much media attention. This is a major reason for increased concern about the welfare of animals. So: European Parliament, *Animal Welfare in the European Union*, a study for the PETI-Committee, p. 36, available at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583114/IPOL_STU\(2017\)583114_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583114/IPOL_STU(2017)583114_EN.pdf) (last visited: 5.9.2017).

25 At least in the current legal situation. See, arguments for animal personhood in: S. M. Wise, *Rattling the cage. Towards Legal Rights for Animals*, Cambridge, Mass.: Perseus Books, 2000.

26 However, it is still not included in all European Regulations (i.e. Regulation (EU) No. 576/2013 of the European Parliament and the Council of 12 June 2013 on the non-commercial movement of pet animals and repealing Regulation (EC) No 998/2003, OJ 178, 28.6.2013, pp. 1–26).

depends on its owner's attitude. The administrative rules, which could protect it from maltreatment, are difficult to execute, as mistreatment by a private owner is hard to prove.²⁷ Nevertheless, private and public law are intertwined.²⁸ Hence, public law provisions may also impact the content of a contractual obligation.²⁹ This is also the case of contractual obligations with an animal as its object under Polish law, where, for example, the content of the Polish Animal Protection Act from 21.8.1997,³⁰ referring to the competence of the Polish public authorities, may affect either the content of the right of an animal owner or, to some extent, the content of the contractual obligation. Thus, according to Articles 1.1, 5 and 6 of the Polish Animal Protection Act, an animal owner has to treat his or her animal with respect, so it is forbidden to cause harm to this animal, to beat it, to overload it, to scare it, etc.³¹ This example shows³² how the borders between public and private law are melting in reference to legal provisions concerning animals.³³ Would it not be easier if animals had their own civil rights? Although I

27 With reference to the melting difference between private and public law, see: J. Nowacki, *Prawo publiczne – prawo prywatne*, Katowice 1992; W. Popiołek, *Znaczenie przepisów "prawa publicznego" różnych systemów prawnych dla stosunków umownych handlu zagranicznego*, *Problemy Prawne Handlu Zagranicznego* 1988, Issue 12, pp. 56–78; J. Łętowski, *W sprawie granicy międzyprawem publicznym a prywatnym* [in:] B. Kordasiewicz, E. Łętowska (eds.), *Prace z prawa cywilnego. Wydane dla uczczenia pracy naukowej Profesora Józefa Piątoskiego*, pp. 353–362; R. Szczepaniak, *W zamkniętym kręgu podziału na prawo publiczne i prywatne, czyli o możliwości dochodzenia odsetek od zasądzonych kosztów procesu*, *Studia Prawa Prywatnego* 2015, Issue 3, pp. 49–59.

28 The same refers to other European countries national legislations, since animals are still treated as objects of law and the only provisions that could grant them protection are public law provisions (since they do not have legal personality). In Germany, although the obligation to treat animals with care can be found in the German Civil Code, the legal act that comprehensively covers these matters is the German Animal Protection Act from 24.7.1972 in the version of 18.4.2006 (German J.L. I of 2006, p. 1206, item 1313), latest amendment of 17.12.2018 (German J.L. I of 2018, p. 2586).

29 So: W. Popiołek, *Znaczenie przepisów "prawa publicznego" różnych systemów prawnych dla stosunków umownych handlu zagranicznego*, *Problemy Prawne Handlu Zagranicznego* 1988, Issue 12, pp. 56–78.

30 Polish Animal Protection Act from 21.8.1997 (J.L. of 2013, item 856), see especially Arts: 1, 5, 6, etc.

31 See: content of Article 6 of the Polish Animal Protection Act from 21.8.1997.

32 See also, exemplary: Article 56 of the Polish Act on the animal's health protection and prevention of contagious diseases of animals, J.L. of 2004, No. 69, position 625 (*Ustawa o ochronie zdrowia zwierząt oraz zwalczaniu chorób zakaźnych zwierząt*) referring to the duty to vaccinate animals; Council Regulation (EC) No 1/2005 of 22 December 2004 on the protection of animals during transport and related operations and amending Directives 64/432/EEC and 93/119/EC and Regulation (EC) No. 1255/97 referring to the duties of persons transporting living animals.

33 J. Zwolińska, *Sześć zasad prawa ochrony zwierząt* [in:] T. Gardocka, A. Gruszczńska, *Status zwierzęcia, zagadnienia filozoficzne i prawne*, Toruń 2013, pp. 351–364.

am not the first to formulate this question,³⁴ I am leaving the answer open and trying to find an answer in the further part of this book.

The book aims to show whether such a legal solution would be possible at all, and whether it would bring any positive effects to contract law. However, my goal was also to show how often an animal is the object of a civil contract between private parties, and to prove that Poland does not yet have sufficient legislation, jurisprudence or literature covering these matters. At the same time, I have looked for solutions for these problems in the German law system, defined what could be changed in Polish law, and checked whether this change could be patterned on respective provisions of the German Civil Code.

At the beginning of this book, I want to make an assessment that the fact that an animal constitutes the object of a contractual obligation has a direct and significant impact on the conclusion, performance and results of the non-performance/improper performance of that contract. Without any deep analysis, it seems obvious that an animal – being the object of a contractual obligation – creates a different bond of duties to the parties to the contract. The scope of these duties, with reference to all stages – conclusion, performance and results of non-performance, as well as improper performance of the contract – has been the subject of research performed for the purpose of this book. Nevertheless, these legal problems are inseparably connected with the place that animals take in the legal systems of modern European countries, the ethics, legal culture and philosophical background justifying the current situation.

In conclusion, the main area of focus of the book was answering the following questions:

1. What impact does the fact that an animal constitutes the object of a contractual obligation have on the conclusion, performance and results of the non-performance/improper performance of the contract?
2. Is it necessary – in order to sufficiently protect animals in the civil law – to grant them the status of legal persons, or would it be sufficient to define them as a separate group of objects of law, and to address more provisions of the civil code to animals, differentiating their treatment from the treatment of things?
3. What legal position does Polish contract law grant to animals and – after comparison with the German legal systems – what changes to the law would be advisable? Which of the attitudes presented above would be advisable to introduce in the Polish Civil Code in the future?

³⁴ See (especially, though among many others): P. Singer, *Wyzwolenie Zwierząt* [Animal Liberation] (Anna Alichniewicz, Anna Szczesna trans.), Warszawa 2004; S. M. Wise, *Rattling the cage. Towards Legal Rights for Animals*.

II. The bridge between the law of obligations and animal ethics

1. Man and animal – a philosophical and ethical background

Anywhere there have been human beings, there have always been animals as well – and not only dogs,³⁵ but also other pets. Some of these animals have even gained the status of “holy” animals, like cows in India³⁶ or cats in ancient Egypt.³⁷ In a country with widespread agriculture like Poland, keeping animals was very often a necessity. Therefore, before agricultural technology, transport and logistics became as advanced as they are nowadays, almost every household needed their own chickens and cows (not mentioning the use of horses and cattle for agricultural purposes, though that was rather the case where the family ran a larger business). Even though animals in former times were used mostly as tools needed to perform work that people had to do in order to provide food and money, animals then appeared to be more respected than they are nowadays. Acquiring a farm animal was a challenge that could only be made by undertaking a long trip to a marketplace, where cows and pigs were offered, or to a different farm where they were bred. Such a trip could sometimes take more than a day, as the family had to walk the animal back home again. The same applied to other farm animals, though smaller animals could be transported more easily. Thus, small animals could have been transported on vehicles that were available on farms (a cage with chickens could even be attached to a bicycle), and horses could be ridden back home. Nevertheless, acquiring an animal was always connected with a lot of effort and money and it was a very time-consuming process. Therefore, animal owners have always taken good care of their animals. They knew that it is not that easy to replace them, and that their psychical and health condition is important, as the state of medicine and technology available

35 A. Banaszak-Kulka, *Kilka uwag o psach służbowych* [in:] B. Banaszak (ed.), *Przegląd Prawa i Administracji*, Vol. LXII, Wrocław 2004, pp. 127–128.

36 T. Gadacz, B. Milerski, *Religia: Encyklopedia PWN*, Vol. 6, Warszawa 2002, p. 145.

37 So also: M. Lubelska-Sazanów, *Odpowiedzialność z tytułu rękojmi za wady fizyczne przy sprzedaży zwierząt*, *Transformacje Prawa Prywatnego* 2015, No. 4, pp. 21–22.