

2015

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Pablo Salvador-Coderch

Ariadna Aguilera Rull †

Leah Daniels Simon

Sergi Gálvez Duran

Miquel Mirambell Fargas

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Recommended Citation

Salvador-Coderch, Pablo; Aguilera Rull †, Ariadna; Daniels Simon, Leah; Gálvez Duran, Sergi; and Mirambell Fargas, Miquel (2015) "Unenforceability by Will. The Widening of Reciprocity in the Digital Environment," *The Latin American and Iberian Journal of Law and Economics*: Vol. 1: Iss. 2, Article 1.

Available at: <http://laijle.alacde.org/journal/vol1/iss2/1>

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Unenforceability by Will. The Widening of Reciprocity in the Digital Environment*

Pablo Salvador Coderch¹, Ariadna Aguilera Rull †,² Leah Daniels Simon,³ Sergi Gálvez Duran,⁴ and Miquel Mirambell Fargas⁵

Abstract: There is paid work and unpaid work. The former belongs in the sphere of exchange; the latter, in the sphere of reciprocity. Within the sphere of exchange, contracts are paramount. Contracts are binding promises, that is to say, a legal remedy for breach of contract is warranted by law. Within the sphere of reciprocity, gifts, services rendered gratuitously and non-binding promises thrive. The questions analyzed in this essay relate to the dynamics and overlap between both spheres in the digital environment and are answered by giving workable tests to draw their respective boundaries.

Because contracts are binding promises, a legal remedy for breach of contract is warranted by law. Besides contractual promises, there are many private relationships that are not legally binding. The provinces of their realm are family and kinship, friendship and comradeship, neighborhood, collegiality and community.

Purely private and non-binding relationships are sources of trust and reputation, and are also one of the most conspicuous and least analyzed sources of social capital. Therefore, the first goal of this paper is the demarcation of such social relationships, as opposed to legally binding ones, under the light of an integrated analysis of law and social sciences.

* A preliminary Spanish version of this article, titled “Relaciones de complacencia en el entorno digital”, was read as acceptance speech on appointment as member of Acadèmia de Jurisprudència i Legislació de Catalunya on 16 June 2015.

¹ Law Professor at Universitat Pompeu Fabra, UPF; email: pablo.salvador@upf.edu.

² This paper is dedicated to the living memory of Ariadna Aguilera, who passed away when the research was almost finished.

³ Ll. M. in Professional Legal Practice at Universitat Pompeu Fabra, UPF; email: leah.sdaniels@gmail.com.

⁴ Ll. M. in Professional Legal Practice at Escuela Superior de Administración y Dirección de Empresas, ESADE; email: sergigalvezduran@gmail.com.

⁵ Predoctoral Researcher and assistant lecturer at Universitat Pompeu Fabra, UPF; email: miquel.mirambell@upf.edu.

In the Civil Law family, its German and Spanish branches analyze purely private and non-binding relationships to refer to unenforceable agreements (in Spanish, relaciones de complacencia, and in German, Gefälligkeiten).

In a similar way, Common Law analyzes and discusses Non-Binding Agreements, whose content is of a broader nature than that of their Civil Law counterparts. It includes, for instance, gentlemen's agreements in commercial law, or soft law in international relations, institutions that are not dealt with in this paper.

The relevance of private non-binding relationships in the sphere of reciprocity has always been significant: economically speaking, they amount to around 20% - 30% of the gross domestic product in most developed countries.

Second, nowadays, digital technologies have, on the one hand, hugely enlarged the objective and subjective reaches of private relationships unenforceable by design. On the other hand, the internet has allowed legal relationships to be substituted by purely private ones. These relationships can potentially increase our welfare but that does not come without costs, as purely private and non-binding relationships occupy the place and functions of many legal relationships, and disrupt traditional distribution channels of goods and services. The thesis defended in this paper is that this disruption does not necessarily modify the nature of purely private relationships.

The third goal of this paper is to draw a better demarcation of purely and non-binding private relationships, as opposed to legal relationships.

The fourth and last goal is to defend that even though some private relationships are, by the will of the parties who enter into them, unenforceable, they may well generate causes of action based on restitution or unjust enrichment grounds and, of course, parties are not left out of the reach of the law of torts.

Keywords: exchange, reciprocity, social capital, non-binding relationships, unenforceability, Gefälligkeiten, complacencia, friendship, family, kinship, collegiality, neighborhood, comradeship, binding relationships, contractual remedies, tort remedies, restitution.

I. INTRODUCTION: THE SPHERE OF EXCHANGE AND THE SPHERE OF RECIPROCITY

There is paid work and unpaid work. The former belongs in the sphere of exchange; the latter, in the sphere of reciprocity. Sociologists Jonathan Gershuny and Kimberly Fisher have emphasized “the distinction between the sphere of exchange, within which each individual work event has a corresponding payment in money or kind to the worker, and the sphere of reciprocity within which work is undertaken by individuals as a result of general feelings of obligation or responsibility, and without any fixed expectation of immediate return” (Gershuny & Fisher, 2014, p. 14).

Within the sphere of exchange, contracts are paramount. Contracts are binding promises, that is to say, a legal remedy for breach of contract is warranted by law. Within the sphere of reciprocity, gifts, services rendered gratuitously and non-binding promises thrive.⁶ The questions analyzed in this essay relate to the dynamics and overlap between both spheres in the digital environment and are answered by giving workable tests to draw their respective boundaries.

The sphere of reciprocity is mostly filled by family and kinship, friendship and comradeship, neighborhood, collegiality and community. Here, the bond's nature is psychological or social, but not or not necessarily legal. Personal attachments, favors, convenience, altruism, —even reciprocal altruism—, sense of belonging, share of beliefs, ideals, and lifestyle are the original sources of many purely private and non-binding relationships.

The digital revolution has disrupted the traditional boundaries of both the spheres of exchange and reciprocity, their accepted common ground, and even no-man’s land. Digital technologists enable all of us switching from paid work to

⁶ Economists, sociologists, anthropologists and jurists converge in the analysis of the sphere of reciprocity, overlapping with the sphere of exchange. Hildegard Kneeland (1929) pointed out the relevance of unpaid work mostly rendered by women and the fact that economics disregarded this kind of work. Marcel Mauss (1924) emphasized the relationship between gifts and reciprocity. Richard Hyland (2009) masterfully synthesized gift giving in legal and social sightings in Richard Hyland, *Gifts. A Study in Comparative Law*, Oxford: Oxford University Press. The German legal academy analyzed in this essay has always distinguished between *Willenserklärungen* (binding promises or statements) and *Gefälligkeiten* (non-binding promises or statements congenial to the sphere of reciprocity). Kolm & Ythier, 2006, Volume 1 (pp. 1-886, 11-1136), Chapter 1, Section 8, p. 25: "A gift or favour motivated by another gift, for instance the return gift of an initial gift, constitutes the very important social relation of *reciprocity*. This is very different from a self-interested exchange where each transfer (or favour) is provided under the condition that the other is provided, and hence is not a gift (in the proper sense of the term)". The author calls the well-known Adam Smith's statement: Chapter 4, Reciprocity its scope, rationale and consequences, pp. 27-28: "Nature... renders every man the peculiar object of kinship, to the persons to whom he himself has been kind".

unpaid work, or the other way around, in order to get similar results (Esping-Andersen, 1999). This revolution clearly challenges the inherited wisdom on the distinctions between exchange and reciprocity, the law of contracts and unenforceable promises, business law, labor law and tax law. But in this essay, our attention will only focus in the first distinction.⁷ We will try to fruitfully ascertain which relationships fall in the sphere of reciprocity, which ones in the sphere of exchange, and which can fall in both.

II. SOCIAL CAPITAL AND NON-BINDING PRIVATE RELATIONSHIPS

Apart from physical, financial and human capital, social capital needs to be taken into account. Social capital is generated through networks of relationships among people, and produces both trust and reputation. Now, digital technologies have extraordinarily enabled the further development of social capital, with the simultaneous decrease of physical capital needs. As far as purely private relationships are one of the most conspicuous and least analyzed sources of social capital, the first goal of this paper is the demarcation of those life relationships in the frame of a unified approach of law and social sciences.⁸ Social capital reverberates on other forms of capital, hugely increasing their profitability and, consequently, their value. But simultaneously, social capital substitutes other human and material resources, generating and producing disquieting levels of social and economic dislocation. Purely private relationships, unenforceable by design, substitute many legal instruments, particularly in the initial stages of social and economic relationships—before their legal organization becomes essential—. Many legal instruments are also substituted in the final stage of shared collaborative consumption of goods and services, which is now available to approximately half of the people in the world.

Social capital, generated and produced by new purely private and non-binding relationships is, in the words of Kurt Annen, a good surrogate of legal formality (Annen, 2013a, pp. 82-92), a phenomenon until now perhaps better analyzed by historians, sociologists and anthropologists than by economists and

⁷ A prior version of this paper was discussed at the 2015 ALACDE meeting in Santo Domingo. This current one has been included in a symposium on civil law, business law, labor law, tax law in the sharing economy, in Barcelona, December 2015 at Universitat Pompeu Fabra (UPF).

⁸ See Ostrom & Ahn (2007) (Also see: Svendsen & Svendsen, 2008.) “Social capital ... exists in the relations among persons. Just as physical capital and human capital facilitate productive activity, social capital does as well”. (Coleman, 1988.) “[T]he networks, norms, and trust that exist in social organisation that enable coordination and cooperation toward shared objectives”. Robert D. Putnam, cited by Chris Julien (2015, 49:2, pp. 356ff). “[T]he stock of trust, mutual understanding, shared values, and socially held knowledge that facilitates the social coordination of economic activity”. (Goodwin, 2003.)

legal analysts. As we will now see, private and public law compete with purely private relationships that are still too private to be law. Granted, law, be it tax, labor, or commercial law, will react to these digital developments; however, nothing will ever be as it was before the digital revolution, among other reasons because life and social relationships do not stop before the formal boundaries of national institutions nor before the states themselves.

III. LEGAL RELATIONSHIPS AND PRIVATE RELATIONSHIPS UNENFORCEABLE BY WILL

Almost on a daily basis, most of us agree to enter into short or long-lasting relationships whose object is the production and delivery of goods or the rendering of services without any intent to establish a binding agreement and on a reciprocity basis. And nowadays, practically half of the world⁹ is in the position to establish such relationships with almost no costs, as digital technologies enable us to enter into these relationships with decreasing marginal costs.

The subject of this paper is the redrawing of the boundaries between reciprocal and non-binding interpersonal promises and binding promises that clearly belong in the sphere of exchange and, consequently, in the realm of the law of contracts, business law and tax law.

As the starting point, and according to the general principle of freedom of contracts (section 1255 of the Spanish Civil Code), it is assumed that the positive freedom to enter into a contract includes the negative freedom of not doing so.¹⁰ Furthermore, it encompasses the exclusion ability of contractual remedies for breach.

Purely private non-binding and interpersonal relationships (*Gefälligkeiten* in German and *relaciones de complacencia* in Spanish) are part of the Civil Law culture. Common Law employs the broader category of Non-Binding Agreements which includes other instances of letters, agreements or recommendations that are legally non-binding, as, for instance, gentlemen's

⁹ The International Telecommunication Union reported that 40% of the world's population had internet access in 2014; www.itu.int/en/ITU-D/Statistics/Pages/facts/default.aspx.

¹⁰ The general principle of freedom of contracts (section 1255 of the Spanish Civil Code) is materialized in the possibility to choose: 1) the law applicable (Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, Rome I [OJEU No. 177, of July 4, 2008]); 2) the competent jurisdiction (section 22 LOPJ, section 54 LEC, section 24 Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Brussels I [OJEU No. 351, of December 20, 2012], section 2 Ley 60/2003, de 23 de diciembre, de Arbitraje [BOE No. 309, of December 26, 2003]); 3) the contract type (section 1255 Spanish Civil Code); 4) the specific content of a transaction or contract (section 1255 Spanish Civil Code). (Vid. Salvador Coderch & Fernández Crende, 2004).

agreements¹¹, informal contracts or soft law in international relationships, none of which are covered in this paper.

In the Civil Law system, and following the influence of the German legal culture, it is useful to start the doctrinal analysis of legal acts dissipating the concept of a legal relationship (*Rechtsverhältnis*);¹² this term implies a life relationship between two or more people which is determined or regulated by law, and includes at least one subjective right.¹³ In case of breach, such a relationship can be judicially enforced (*Anspruch*: right in action).

The validity of purely private relationships (*Gefälligkeiten, relaciones de complacencia*) is based on social norms.¹⁴ These relationships are distinguished from legal relationships in that they are not legally binding and cannot be judicially enforced. It is not the parties' intention to establish a social right, a cause of action, nor the agreement's enforcement in case of breach. These are relationships and agreements whose validity is not based on legal rules and standards, but on social norms.¹⁵

In Common Law, the doctrinal analysis of the law of contracts tends to start with the broader distinction between binding promises and non-binding agreements whose fulfillment cannot be enforced by any court.¹⁶

¹¹ Or letters of intent or sponsorship letters, which are clearly non-binding, among others.

¹² From the work of Friedrich Karl von Savigny (1840, 7, epigraph 4) "... erscheint uns jedes einzelne Rechtsverhältnis als eine Beziehung zwischen Person und Person, durch eine Rechtsregel bestimmt".

¹³ For the concepts of legal relationship and binding legal relationship, see: Flume (1992). Medicus (2010). Larenz & Wolf (2004). Westermann (2004). Looschelders (2012). Grüneberg (2015).

¹⁴ See, *infra*, section 13 of this paper.

¹⁵ Westermann, 2004. Dörner, 2002, Vor § 241, p. 187: "they only have social consequences". Larenz & Wolf, 2004, § 22, Rn. 24, p. 391: "non-binding, social and extrajudicial acts that do not have legal consequences because there is a lack of a clear and explicit will to legally bind them". Bork, 2011, § 17, Rn. 675, p. 264: "their scope is purely social". Busche, 2014, Rn. 14: "social contact". The negative characterization of purely private relationships is frequent: Grüneberg, 2015, Buch. XXXIV Einl. vor § 241, Rn. 7: "acts whose validity basis is exclusively extrajudicial". Looschelders, 2012, Rn. 93, p. 40: "arrangements whose scope is purely social".

¹⁶ "Contracts are promises that the law will enforce. The law provides remedies if a promise is breached or recognizes the performance of a promise as a duty (...) To be legally binding as a contract, a promise must be exchanged for adequate consideration. Adequate consideration is a benefit or detriment, which a party receives which reasonably and fairly induces them to make the promise/contract. (...) For example, promises that are purely gifts are not considered enforceable because the personal satisfaction the grantor of the promise may receive from the act of giving is normally not considered adequate consideration. Certain promises that are not considered contracts may, in limited circumstances, be enforced if one party has relied to his detriment on the assurances of the other party" (Agostino & Lisciandra, 2014). In the classical doctrine, the terms

There is, therefore, a difference between both cultures: in Civil Law, terms such as *Gefälligkeiten* in German and *complacencia* in Spanish are positively associated with personal and family relationships, with friendship, comradeship, neighborhood or community, and collegiality relationships. As a matter of fact, *complacencia* or *Gefälligkeiten* cannot be easily translated into English—this is perhaps the first question I would like to address to the members of my audience, in that if you can further help me in translating *complacencia*, *Gefälligkeiten* and non-binding relationships into English, you will accordingly deserve the merit of having coined a new legal term—. In Common Law, the term “non-binding agreement” has a much broader scope in all fields of private and public law. In continental Europe, the category focuses on family, friends, neighbors, and colleagues. In the Anglo-American culture, it includes business, industry agreements, and public international law.

The following examples may help to illustrate the diversity of purely private relationships.¹⁷ Notice and take into account the many differences of nuances and circumstances and their dynamics. In the beginning, many private relationships are merely social, being too private to become legally binding. However, as time goes by, and more and more people get involved in their development, the relationships are transformed and generalized, and can only function efficiently if they are economically and legally structured.¹⁸ Not all of them, however:

1. A invites B and her family to stay a couple of days in A's home. B joyfully accepts the invitation, but both parties punctiliously specify that neither of them assumes any compromise and, particularly, that neither B may enforce A's promise, nor A claim any price from B. Variations: B may be A's cousin, acquaintance, college roommate, or class colleague. B may be included in A's personal or professional contact list, or in the professional membership directory of their mutual professional organization, or in the announcement board that is open to all the workers of their firm, in the house-exchange announcement board, in an international furniture franchise, or in an internet site. In

“enforceable, void, voidable and unenforceable contracts” are distinguished and refer to situations that differ from non-binding agreements, which are not “contracts”: vid., Calamari & Perillo, 1987, epigraph 1-11, pp. 18ff.

¹⁷ A systematic directory of collaborative consumption platforms can be accessed at www.consumocolaborativo.com.

¹⁸ See, *infra*, section 11 of this paper. Also see: Bernstein & Parisi, 2013.

any of these scenarios, A and B simply agree on the invitation without specifying its nature.¹⁹

2. C, who resides in Barcelona, usually visits his daughter D, who lives in London, every summer for a month.²⁰
3. E and F, two professional *restaurateurs*, close their establishment to the public the first Monday evening of each month to gather and offer a dinner to a score of mutual friends and their companions. The invitees usually bring the food that will be cooked and help in the tasks of cooking, serving, and cleaning. Variations: Some or all of the invitees are professional *restaurateurs* and the dinners take place in their respective establishments by turns; as time goes by, the group expands the option to new invitees; eventually, they create an internet site. In all these scenarios, the *restaurateurs* remark that neither a price nor a reciprocal commitment applies, and that E and F have exclusive rights to admit and exclude invitees (Schindler, 2015).
4. G agrees with her neighbors H and I to share, by weeks, their respective cars to commute to work in order to save expenses. Variations: The three neighbors widen the possibilities of such shared use to third parties and start to use collaborative consumption internet platforms;²¹ G, H and I agree to buy and share a bicycle; some time afterwards, they add other friends or acquaintances, who then acquire new bicycles with a discount from a third party. Eventually, they all establish a bicycle platform, but, for the time being, they do not legally structure it. Two years afterwards, they constitute an association.
5. L asks her neighbor and friend M, a locksmith, for help in changing the lock of her house's main door on a Sunday morning; M accepts and does so.²² Variations: Days afterwards, M asks N, also a neighbor and

¹⁹ For more developed examples, see the www.consumocolaborativo.com directory. Other examples are available at: <http://www.meshing.it>, www.collaborativeconsumption.com or in The Basics of Collaborative Consumption.

²⁰ It could well be the case of the author of these lines, one of whose daughters lives and works in London.

²¹ See, once again, the directory of collaborative consumption platforms at www.consumocolaborativo.com, *carpooling*, *alquiler* (rent), and *carsharing* sections: observe that in the first case there are situations which can potentially be qualified as purely private relationships; rental relationships (*alquiler*), however, are clearly legal relationships (rent of goods or services, in exchange of a price); *carsharing* situations will normally imply legal relationships; the differences between these concepts exist, but they are not always easy to establish. That is why this paper has been written. Also see: Cohen & Sundararajan, 2015.

²² Variation of a real-life example from the meritorious 74th (2015) edition of the Palandt commentary to the German Civil Code (section 241): Grüneberg, 2015 (*Dacharbeit*, roof repair).

pediatrician, to visit M's daughter who is three years old and has a fever; N accepts on a clear good-will basis. One week afterwards, N asks O, who is a tax advisor, to help her with her Annual Income Tax Return; O accepts. Some weeks afterwards, upon completion of the condominium owners' meeting, the participants informally agree to an exchange of the service specific to each one during a few hours each month, and to this effect, the twenty neighbors print one hundred monthly hourly tickets, and render five tickets to each of the twenty neighbors. The condominiums' secretary manages the initiative and periodically informs the community about its developments and circumstances. After some time, all the other condominiums of the suburb ask the founding one to widen the neighborhood exchange services.²³

6. One well-known writer marries her literary agent, who goes on representing her without pay.²⁴ Variation: After an amicable divorce of a business woman and her accountant, the latter goes on rendering his professional services for free.
7. A man and a woman, who share their lives as a couple, agree that she will use contraceptive devices or take drugs to avoid the conception of a common child.²⁵
8. In an internet platform, a recently retired famous mountain guide offers to consider his disinterested participation, without any compromise, in trekking expeditions of his choice. With the passing of time, the guide opens an internet site in which those services are offered, provided that the chosen travelers pay all of his expenses. Another variation: In an internet platform, a still professionally active car racer gratuitously

²³ Observe that, once again, the lawfulness of the relationship depends on its dynamic: when the relationship has an expansive nature, it ultimately requires a stable organization; if the relationship generates steady or increasing income, the initiative becomes a *start-up* and needs a legal and an accounting structure. But this legal structure is not necessary in the relationship's beginning, and the legal question concerns the demarcation of those relationships.

²⁴ This example is inspired by the marriage of Leon Tolstoy and Sofía Behrs, who was his agent and editor (an admirable woman of steel, among many other things). Another example: In the acclaimed documentary of Wim Wenders, entitled *The Salt of the Earth*, the life of economist and photographer Sebastiao Salgado is narrated. Salgado's work, absolutely admirable, would have been inconceivable without the constant collaboration of his wife, Lélia Wanick Salgado. Antoni Rubí drew my attention to the marriage of novelist Julian Barnes and his agent Pat Kavanagh, who passed away a few years ago. Paul Samuelson's statement in regards to the GDP is well-known: "What happens to the GDP when a professor marries his servant?". Cited in: Stiglitz, Sen, & Fitoussi, 2009.

²⁵ See the following legal case, solved by the Bundesgerichtshof (Germany's Supreme Court): BGH, NJW 1986, 2043.

offers the possibility to conduct an ice-driving car course in Finland, provided that the interested parties cover the costs and the car racer's stay, and provide the car.

9. A music composer writes a violin sonata as a tribute to a *luhtier*, who is his very good friend, and to whom he dedicates it to: some short time later, the composer promotes its inauguration in the town's concert theaters. A world-famous violinist, and a mutual friend of both, executes the sonata for free and for the first time on the day of the inauguration.²⁶ The record becomes an instant classic.
10. A couple of friends, who are graduate and PhD students, reach an agreement to develop, for free and privately, an open internet platform to develop a speech recognition computer program. The tentative developments are published in an open internet platform that remains accessible to any disinterested person. In two years they succeed in developing a program which is immediately praised as a remarkable improvement in the state of the art in this trade.²⁷

As it has been mentioned, the subject of this paper is purely private relationships of Civil Law whose scope is narrower than Non-Binding Agreements of Common Law, as has also been noted. Again, it is convenient to remark fields not covered by the paper, as, for instance:

11. Non-Binding Agreements—informal agreements—between a business company and a third party. Notice that in some of the following examples there are agreements that would be illegal in almost every jurisdiction, while others would be perfectly legal in all or some. A

²⁶ The German composer Johannes Brahms, fascinated by the virtuosity of clarinetist Richard Mühlfeld, befriended him, composed many works for the clarinet, and they both contributed to the return of the clarinet as a solo instrument. Many examples of inspired dedications of famous artists can be found: Beethoven dedicated his Violin Sonata No. 9, Op. 47 to French violinist Rodolphe Kreutzer, who never performed it. Almost a century later, Tolstoy wrote *The Kreutzer Sonata*, which was immediately censored by the Russian authorities. The citation of theater and cinematographic versions following Tolstoy's work would occupy half a page of this footnote, and the same would occur with the citation of generally-accepted interpretations of Beethoven's sonata.

²⁷ "*Family, Fools and Friends*". As for the possibilities and limitations of "love money", see Cooter & Schaefer, 2007. Once again, the issue of law is related with the relationship's dynamic of growth: it is born as an initiative that is too private to be law but it can ultimately become an economic giant with an extremely complex legal structure. Two classic examples, provided by Toni Terra: Kirkpatrick, 2011, and Isaacson, 2011. Also see: Vise & Malseed, 2008.

parent company sends a sponsorship letter to another business company declaring its confidence in the work done by the administrators of one of the former's subsidiaries (vid. Carrasco Perera, Cordero Lobato, & Marín López, 2008). Some firms belonging to the same industry agree on horizontal and vertical competition restraints. Three companies, whose market share is close to 75% agree on a new technological standard, and ask the European and Spanish antitrust regulatory agencies for its authorization. In a letter of intent, the addressor company tries to clearly demarcate which paragraphs must be undoubtedly understood as non-binding. Firms in an industry publish a code of good practices.

Moreover, and from a legal point of view, "informal", when referring to an agreement, is an extraordinarily ambiguous qualifier, even though from an economic point of view this is not necessarily the case.²⁸ The term "informal" includes many different meanings other than those associated with the concept of non-enforceability, and those different meanings are not analyzed in this paper. A *fortiori*, neither declarations, recommendations nor public international law manifestations of soft law will be covered in this paper, nor will state action in private law (*Drittwirkung*)²⁹ be developed:³⁰

12. Condominium owners informally agree not to rent any apartment in the building to foreign families of non-Caucasian origin. The

²⁸ "Informal agreements" is an expression used in many different ways, as it can refer to perfectly valid and effective contracts in the particular jurisdiction in which it takes place, but which are not formalized in a stable support—parol contracts—, or it can refer to contracts tacitly carried out through conclusive acts, of agreements whose breach does not give rise to contract termination claims and, therefore, "non-binding"; but "informal agreements" can also refer to non-binding agreements between a creditor and a debtor, for instance, or to attached agreements or agreements that are part of a binding contract; it can refer to incomplete contracts, relational contracts, also incomplete, to issues associated with the relation between front-end and back-end contractual costs. See: Fehr, Hart, & Zehnder, 2011. For a review and a theoretical elaboration, see Gil & Zanarone, 2015. The economic theory of "informal agreements" is a clear example of the distance between the economy (a science of behavior) and the law (a science of meaning), but this is not the topic at hand.

²⁹ Cfr. example 7 of this paper: one must not forget to take into account the nullity effect of an agreement due to its infringement of fundamental rights to one of the parties. In these cases, the nullity of the agreement makes it unenforceable.

³⁰ I have developed this topic in: Salvador Coderch (coord.), Münch, & Ferrer i Riba, 1998. In Spanish: Salvador Coderch (coord.), Münch, & Ferrer i Riba, 1997. Now: Díez Picazo Giménez, 2013.

agreement is void for discriminatory reasons and, therefore, unenforceable if one of the co-owners breaches it.

Even more difficult is the legal question raised by those agreements that exclude the intended relationship's enforceability and onerosity, while at the same time imposing non-legal sanctions to the parties in breach:

13. The managers in charge of an internet platform exclude one of the registered members. The platform gives notice that registering to their site does not generate enforceable legal duties, and that the managers remain free to use their discretion to admit or to reject any user, anytime.³¹

Lastly, readers may perhaps understand that the author of this paper leaves the characterization of the following last example of purely private relationships, perhaps justified on academic collegiality, to their own understanding:

14. A law professor and professional legal consultant pre-publishes a working paper on purely private relationships in a public site, and asks his colleagues, without any compromise, for comments, suggestions and critiques to the draft.

³¹ Kurt Annen (2003b) has described this situation well in *Social capital, inclusive networks, and economic performance* (pp. 449-463): people can have tools (physical capital), education and talent (human capital) and a good reputation (social capital), where social capital is the reputation of a social agent due to his or her cooperative behavior in a social networks. But social capital can be exclusive or inclusive: “[e]xclusive social capital is created in social networks which are responding to an increasing complexity constraint by reducing inclusiveness”; [i]nclusive social capital is created in social networks which are able to respond to an increasing complexity constraint by increasing its inclusiveness”.

IV. THE TRADITIONAL FIELDS OF PURELY PRIVATE RELATIONSHIPS IN THE SPHERE OF RECIPROCITY (*RELACIONES DE COMPLACENCIA* AND *GEFÄLLIGKEITEN*) AND THEIR ECONOMIC RELEVANCE IN COMPARISON WITH THE GROSS DOMESTIC PRODUCT

National legal systems, including Spanish law³², demarcate the traditionally most appropriate fields of purely private, interpersonal and non-binding relationships as opposed to legally binding ones: *friendship*³³ and *privacy*³⁴, *family*³⁵ and *kinship*³⁶, *benevolence*³⁷, *neighborhood*³⁸ and *collegiality*.³⁹

In Spanish private contractual law, the principle of legality does not generally apply—as is the case in criminal law and in general administrative law—, nor does the principle of prior definition and prior regulation: civil relationships are established voluntarily, bottom-up, or they are coordinated by private organizations (associations, foundations and charities, companies, and professional and industrial associations), and there is no reason to limit oneself to pre-established statute regulations, or to those already socially well-known. The privatist works by analogy and by recombining all well-known categories.

³² De Castro y Bravo (1967). This paper does not mention legal relationships in which other preexistent relationships are modified or extinguished.

³³ Personal, pure and disinterested affection, shared with another person that is born and strengthened by the persons' behavior (DRAE, Spanish dictionary).

³⁴ More on the concept of privacy is pointed out in this paper, *infra*, on footnote 64.

³⁵ A group of people affiliated with each other who live together. A group of lineal ancestors, descendants, collaterals and family members related by affinity (DRAE). "Families... are in fact essentially a network of reciprocity": Kolm & Ythie, 2006, Volume 1 (pp. 1-886, II-1136).

³⁶ The concept of kinship -bonds by consanguinity, affinity, adoption, marriage or other analogical relationships (such as couples or adoptions; the definition is taken from the Spanish dictionary DRAE) -changes in the different cultures and with the passing of time, although the concept of kinship is relatively stable.

³⁷ Kindness and goodwill towards people (DRAE) and, in this context, life relationships for this reason.

³⁸ The concept of a neighbor, that is, a person who lives near another in the same town, neighborhood or house, in an independent bedroom (DRAE), is different in a town than in a city, but the concept of neighbor has been, at least until recently, reasonably stable: two people from the same city, town or neighborhood immediately understand what one refers to when the other says that a third person is a neighbor of both of them. Digital technologies have deeply modified the concept of a neighbor, as we shall now see.

³⁹ The concept of a colleague, that is, a schoolmate, a fellow member of a profession, staff, or academic faculty (DRAE), is also a reasonably stable concept, but it was broadened, and perhaps devalued, well before the massive implementation of digital technologies: in a bar association, not all of its members know each other: I graduated in Law in 1971, and I am a member of one of the two or three Catalan law school promotions in which all of its members personally know each other or, at least, recognize each other, because we had all studied in the only law school faculty in Catalonia.

In the same vein, the traditional fields of those interpersonal relationships have always been open to broadening by analogy: these include close, or very close, life relationships in which gratuity prevails, or if an exchange does take place, it is usually unenforceable and rarely implies money exchange, but, at most, a bartering of goods and services (perhaps expected reciprocity in the future or a tit for tat social norm). Also, in these relationships there is no organized economic activity because the developed relationship is more of a self-consumption leisure kind than a productive economic activity. Parties in such a relationship do what they do in order to live their lives following their desires, wishes, possibilities and aspirations, or to improve their lifestyles, but do not intend to make a living out of these activities and behaviors which are not the source of their livelihood.

But given that the distinction between lifestyle and earning a living is continuously and intensively being affected by technological changes, the challenges raised to traditional legal systems and their conceptual institutions lie in that those services that were formerly rendered by benevolence, help and friendship to a reduced number of persons—friends and family members, acquaintances, neighbors and colleagues—, can now be rendered to millions, and, as far as any favor can be reciprocated, the exchange of favors is now potentially universal, and its economic reach is consequently huge. Reciprocity without legal bonds is now attainable by more and more people due to repeated interactions that enable trust and reputation to be generated in social networks built on digital technologies.

To some extent, reciprocity without legal bonds has always been around. However, it remained somewhat inconspicuous because the gross domestic product (GDP)—the final demand of goods and services produced in a country in a year—has not systematically taken into account interpersonal and non-binding relationships, even if they are perhaps those that comprise the best part of our lives, as Robert Francis Kennedy articulated many years ago:

“[T]he gross national product does not allow for the health of our children, the quality of their education, or the joy of their play. It does not include the beauty of our poetry or the strength of our marriages; the intelligence of our public debate or the integrity of our public officials. It measures neither our wit nor our courage; neither our wisdom nor our learning; neither our compassion nor our devotion to our country; it measures everything in short, except that which makes life worthwhile.”⁴⁰

⁴⁰ Address at University of Kansas, 18 March 1968. Cited in: Hawkins, 2014

Indeed, market transactions—which are legally enforceable relationships—are the starting point of GDP calculations⁴¹, but those leave aside an infinity of non-market transactions, such as self-consumed goods (family gardens, bricolage) and services (domestic work) produced and consumed by family members. Economists Stiglitz, Sen and Fitoussi estimate those relationships to be around 30% of GDP.⁴²

Similarly, GDP does not include the value of time allocated to *leisure*, when leisure itself does not consist of market activities. In 2009, the above mentioned authors gathered the following information which is relevant to this paper: given that the day has 24 hours, that is to say 1440 minutes, in 2005 an American older than 16 years of age allocated on average to his or her daily personal care (to eat, to clean, to sleep, and so on) 611 minutes; 227 to paid work; 18 to education; 213 to non-paid work, 349 to *leisure*, and 22 minutes to non-specified activities. Similarly, in 1998 the numbers for a French citizen were, respectively, 642, 201, 114, 215, 333 and 36. In 2003, for an Italian, the minutes dedicated to leisure amounted to 616, and in 1998 for a Finn, 402.

As there is an overlap between personal care and leisure, the above-mentioned authors conventionally decided that half of the time allocated to eating and drinking belonged to leisure (Stiglitz, Sen & Fitoussi, 2009, p. 127). This overlap makes evaluating leisure—that which is neither business nor personal care—certainly difficult, above all because the standard test to do such an evaluation is an opportunity of cost—what would have been gained if instead of remaining idle, one would have continued working, up to a life limit, of course—. ⁴³ In any case, estimations in developed countries give as a result an increase of the nominal disposable income in the range between 20% and 30%. It does not take much focus regarding these figures and the circumstance that leisure is neither necessarily, nor perhaps predominantly, structured by legal relationships, but rather by pure benevolence, to conclude that the scope of private and non-binding relationships is much broader than that which we perhaps, intuitively, are prompted to believe.

In Spain, for instance, one well-grounded evaluation of non-paid work in the home was equivalent to more than half of GDP in the year 2012.⁴⁴ This is, as

⁴¹ Stiglitz, Sen & Fitoussi, 2009, p. 86. On the Multinational Time Use Study (MTUS), see: Centre for Time Use Research (retrieved December 15, 2015, from <http://www.timeuse.org/mtus>).

⁴² Stiglitz, Sen & Fitoussi, 2009, p. 90. Also see pp. 103-104 and p. 130. Nevertheless, notice that hypothetical incomes are included. Example given: the value of periodic payments that the owners of a family house would pay to themselves.

⁴³ And note that those who are retired, for instance, are not included.

⁴⁴ Durán Heras, C, 2012: non-paid work, whose biggest percentage includes the care of children, the elderly and the ill, equals 53% of the GDP.

we shall see, one of the reasons why these kinds of relationships exclude the agreement's enforceability, but they do not necessarily exclude restitution or unjust enrichment claims that can be generated by the basic relationship's developments. Therefore, unjust enrichment claims substitute enforceable duties and obligations.

Thus, the transfers of market activities to non-market settings, or vice-versa, can be very relevant even if national accounts may not take some of them into account. Take the hypothetical case, once again exemplified by Stiglitz, Sen & Fitoussi⁴⁵, of a family composed of two parents and two children with an annual disposable income of 50.000 euros, where only one of the parents works in the labor market, while the other performs domestic and family tasks. Now, compare this example with another case in which both parents work in the labor market and share the same mutual income of 50.000 euros, but as far as they do not have a lot of time to perform family and domestic tasks, they must pay third persons to do them. Even though in the second case the disposable income is remarkably reduced compared to the first case, the standard measure of quality of life will not take this fact into account. Additionally, if in both cases the parents divorce, a forceable claim of unjust enrichment will most probably be more successful in the first case than in the second: national accounts, welfare and law are not always aligned.

V. DIGITAL TECHNOLOGIES AND THE DISRUPTION OF THE BOUNDARIES BETWEEN BINDING PROMISES AND PURELY PRIVATE AND NON-BINDING RELATIONSHIPS

Information digitalization⁴⁶ overflows traditional riverbeds of purely private and non-binding relationships because it multiplies the utility of collaborative consumption of economic resources without requiring their owners to enter into any contract: in some instances, simply widening the scope of purely private relationships is more than enough to reach the same goals. At least until a certain point, and to improve their welfare, owners do not need law because they can multiply their interpersonal networks by simply applying digital technologies to the search for potentially reliable friends, comrades (buddies, roommates, classmates, or sport team members, among others), neighbors, and life style companions, among which there are those who accept that their reliability be tested in advance, those who answer a questionnaire, or those who offer some recommendations: digital technologies enable the disruptive expansion of the

⁴⁵ *Ibidem*, p. 125

⁴⁶ Information digitalization is understood in this paper taking into account the well-known definition of Carl Shapiro and Hal Varian: "encod[ing] information as a stream of bits", *Information Rules: a strategic guide to the network economy*, Harvard Business School Press, cop., Boston (1999), citation of Erik Brynjolfsson and Andrew McAfee (2014, pp. 60-61).

scope of social norms at the cost of the traditional scope of legal rules and standards.

In this sense, and as Erik Brynjolfsson & Andrew McAfee write, “the digital world does not respect any boundaries”⁴⁷, multiplying its profitability in favor of those who control and use it, while at the same time marginalizing and even excluding from the social and economic agency those who do not do so. The digital world enables the exponential increase of the number of interpersonal relationships because it makes it possible, in many cases, for legal relationships to be substituted by purely private relationships at zero marginal costs. In the global village, we are all potential friends, neighbors, colleagues or companions of everyone else in the world or, at least, of that part of the world that we believe, with good reason, is similar to us. Friends do not need, at least when their relationship begins, to become legal partners.

The massive application of digital technologies has been disruptive and very costly, on top of being very profitable—as was also the case with steam, electric and internal combustion machines, or even nuclear energy (Mokyr, 1990)—. Today, marginal costs of contacting potential partners in trust tend to zero⁴⁸. But marginal profit can be very high with the numeric explosion of the number of interconnected people. Digitalization permits us to do so with instantaneous ease, although with a mistake rate that, without any shadow of a doubt, and given the human condition, is not zero: the law, expelled by the front door, will, nonetheless, come back through the window when conflicts arise.

Thus, half of the adult users of Facebook claim to have more than two hundred friends, and 15% to have more than five hundred⁴⁹. Similarly, internet has eliminated physical distances of potential neighborhood relationships by literally making us neighbors of everyone, and thus, making us inhabitants, finally, of the global village (McLuhan, 1989, 1967, 1962). By doing so, internet has gotten rid of legal and formal borders.

Therefore, people can try to establish purely private relationships, instead of legally binding ones, in order to maximize the utility of the use and consumption of resources, to improve their reputation, to make a profit, or to share their lifestyles (Hamari, Sjöklint, & Ukkonen, 2015) with many more

⁴⁷ *Ibidem*.

⁴⁸ And the consumption of information (which is necessary to consent to the new relationship) is neither exclusive nor selective (*non rivalrous*). But the risk of encountering a problem is not inexistent and can turn out to be very costly.

⁴⁹ Pew Research Center’s internet Project survey, Factank, August 7-September 16, 2013; www.pewresearch.org/fact-tank/2014/02/03/6-new-facts-about-facebook/.

people and organizations than those accessible to them by the traditional scope of purely private relationships in a non-digitalized world.

Thus, individuals, firms and non-business organizations, and also terrorists and criminal gangs establish platforms where they can systematically or professionally manage purely private relationships between the platform's users, and where they can also manage legally binding relationships between the users themselves, or between the platform managers and third parties⁵⁰.

Eventually, the need to distinguish between collaborative consumption of economic resources and economic activities of reproduction and distribution of goods and services emerges because it is one thing to share the gratuitous use and enjoyment of one's own resources in the realm of a purely private relationship, and it is quite another to perform an economically productive activity in the field of an apparently non-binding relationship, in both cases thanks to an online platform⁵¹.

The following questions, then, are raised: Is it enough to exclude the accrual of an enforceable claim for the promisor's breach in order to qualify the relationship as unenforceable? How must the relationship be characterized if the bond has social non-legal effects which are exclusively reputational but significant? What happens if the only consequence of breaching the assumed agreement is the exclusion of membership status in an organized internet platform? Is gratuitously registering in an internet site equivalent to acquiring membership status in an association, for instance, in a factual consumer cooperative? Does a factual relationship become legal only because it was established through a platform structured as a legal entity?

Analyzing and solving these questions requires the participation of labor law, business law, and tax law specialists. For now, the much more modest task proposed in this paper is to demarcate purely private relationships as opposed to legal contractual relationships.

⁵⁰ A new technology that ends up being imposed in a culture combines the supply of goods and services, that is, their production, but the new technology also combines the way those goods and services are used and enjoyed (Brynjolfsson and McAfee, 2014).

⁵¹ Hamari, Sjöklint, & Ukkonen, 2015. The definition of "collaborative consumption" is defined as the shared use of a good or service by a group through an online platform. Then, the same authors distinguish two types of exchange: the access (use and enjoyment of) the property, and the transfer of such property. Observe that, in this definition, economic production activities of economic resources are mixed with consumption activities.

VI. DEMARCATION BETWEEN PURELY PRIVATE AND NON-BINDING RELATIONSHIPS AND LEGALLY BINDING ONES

As has been noticed, the agreements characterized as purely private relationships rest on the parties' will to exclude the agreement's judicial enforceability.

This has always been possible in the framework of freedom of contracts because, first, the positive freedom to contract, to marry or to enter into an association includes the negative freedom to not contract, to not marry or to not associate. And, second, this freedom has always allowed the establishment of purely private relationships, similar to legal ones, but whose enforceability the parties want or try to exclude.

The civil doctrinal analysis—particularly the German one—has noted the need of having clear and reasonable demarcation tests between legal relationships and purely private relationships.

Obviously, the first demarcation test is the existence of a clear (explicit or tacit) agreement to exclude its enforceability. Nevertheless, very often parties do not specify the agreement's non-binding nature, among other reasons because that might negatively affect the relationship itself⁵².

Therefore, according to German private law professor Karl Larenz, qualifying a relationship as purely private does not depend on the internal and non-declared will, and, thus, the unrecognizable will, of one party, of the other, or of both. In fact, and in the absence of an explicit and recognizable manifestation of will, a legal interpretation task must be performed in order to discern whether or not to assume a common legally binding will given the general and particular circumstances, the parties' interests, and their usages or practices. In this task, objective criteria should be applied with the purpose of identifying the recognizable will (Larenz & Wolf, 2004).

The rest of the majoritarian German doctrine pronounces itself similarly. Overall, the characterization of the 74th (2015) edition of the Palandt Commentary to the German Civil Code (section 241) relating to the characterizations of purely private relationships can be quoted here: "Agreements that solely refer to a non-legal validity basis, such as friendship, collegiality and neighborhood, do not generate any enforceable claim for breach... [To this effect], the internal will is not decisive, but rather depends on how the objective observer

⁵² Friends are gained or lost, but they are not bought, although anyone may try to establish a friendship with some of their clients and suppliers, with their employees or employers, with their equals or even with their superiors.

would have understood the parties' behavior after having taken all the relevant circumstances into account⁵³.

VII. *EX POST* FICTION OF AN ENFORCEABILITY EXCLUSION WILL?

One objection to the majority view was raised by a minority, although authorized opinion, of German private law analysts, and was formulated by Werner Flume and Dieter Medicus. They pointed out that in many instances, perhaps in most of so-called purely private relationships, the parties, *ex ante* when they agree to establish the relationship do not even think either of its enforceability or of its exclusion. The legal question is only raised when, *ex post*, complications arise and one of the parties, usually the one who does not want to perform his or her obligation, claims that there was no mutual will to enter into any enforceable agreement, while the other party, the beneficiary, affirms its enforceability. So, as the above-mentioned authors wrote, the *ex post* assumption of an *ex ante* mutual will to exclude the agreement's enforceability is only a fiction because when the relationship was established, the parties, in most cases, did not foresee that many future complications could arise, nor were they conscious of the agreement's legal facts which varies depending on the relationship's qualification as either legally binding or legally non-binding⁵⁴.

In a classic German case, four friends had established and maintained an agreement to buy, by turns, a specific number of a lottery ticket, but in one fateful occasion, the person in charge of buying the number forgot to do so. The number was valued at 10.000 Deutsche Mark. Two of the group members judicially claimed this amount from the forgetful and former friend. The parties disputed the agreement's enforceability before the court. The court rejected the claim because

⁵³ Grüneberg, 2015, § 17, Rn. 676-677. Busche, 2015, Vor § 241, Rn. 18; Westermann, 2004, § 241, Nr. 16-17, p. 624-625. Looschelders, 2012, Rn. 94-95, p. 40.

⁵⁴ For the great Werner Flume, in everyday purely private relationships only a guarantor position is established, *ex lege*, and a will to exclude the agreement's enforceability if one of the parties were to breach it should not be hypothesized: simply put, such a will did not exist. (Flume, 1992, epigraph 7, No. 5, in relation with the mandate; epigraph 7, in general). However, this thesis obliged the above-mentioned author to develop those agreements that have a legally non-binding will as an independent category (Flume, 1992, epigraph 8), in relation with the inclusion of a possible unjust enrichment claim. The also great Civil Law specialist Dieter Medicus plainly and simply reformulated the objection: who uses the expression "declaration" (of will) when accepting a dinner invitation? (Medicus, 2010, epigraph 18, II, I, No. 187, p. 84). Once again, however, the objection derives from the limitation of the scope of purely private relationships to those that do not have an asset value (the example of invitations, *ibidem*, No. 185, p. 83). But these have a much wider range of application: Flume and Medicus' thesis presupposes a very narrow framework of purely private relationships.

it assumed that the enforceability of a relationship seriously affecting the debtor's social existence had to clearly result from the agreement itself⁵⁵.

The objection can be overcome but only after having taken it into account, because a mutual will of enforceability cannot simply be hypostasized, but rather an extremely careful effort of legal interpretation has to be performed which has to take into consideration the independent circumstances and queues, i.e. the interests in conflict. The goal is to discern if the parties had reasonably agreed to exclude every enforceability claim of the purely private relationship, if they had only agreed to exclude the favored party's consideration (gift, gratuitous rendering of services), if they had additionally tried to waive law of torts claims (something that in principle cannot easily be done), or even if they had wanted to exclude possible unjust enrichment claims (which are much more difficult to exclude than specific contractual claims)⁵⁶.

Granted, in many cases of the most simple daily life relationships, parties do not even think of legally binding themselves in the sense that, naturally, they do not agree on the exclusion of a judicial claim for the agreement's breach. But this is so because, given the circumstances and from the interpretation of what was said and done, such will never have existed. In fact, law has never established the enforcement of that which no-one has ever thought could be claimed before a court. Contractual liability derives, precisely, from putting positive freedom of contracts in action. In purely private and non-binding relationships, it is not that the existence of a mutual will of enforcement exclusion is pretended. It is, more simply put, that in each case it may be reasonably inferred that there was no mutual will of the agreement's enforcement. In order to be legally bound, parties have to agree in being so. Another thing is that once the existence of a mutual contract will is excluded, on top of that, it implies the intention of excluding duties of care derived from social contract—that is to say, from the law of torts and from restitution or unjust enrichment claims—. The latter is not usually the case, as we shall now see.

⁵⁵ BGH, NJW 1974, 1750; A good summary in Dieter MEDICUS, *Allgemeiner Teil des BGB*, 10. neu bearb. Aufl., Müller, cop., Heidelberg (2010) § 18, Rn. 192, p. 86.

⁵⁶ Karl Larenz & Manfred Wolf (2004, epigraph 28, No. 27, p. 400) reduce the objection to the distinction between, on the one hand, an internal will and, on the other, a declared, objective and recognizable will by the opposing party. The latter should be considered through a clearly objective interpretation of what occurred, given the circumstances. The dominant doctrine follows this orientation. Among the contemporary treaties writers, see Bork, 2011, epigraph 17, No. 676, p. 264: Flume and Medicus' objection is too reductive, since the set out issues are not exclusively those related with precaution duties—that certainly derive from the law—, but the issues cover the beginning, or not, of enforceability and unjust enrichment claims. The reason is that in almost all cases, the possibility that the parties had decided to establish the right to require the agreement's enforceability always existed. Therefore, it is necessary to figure out what the parties truly intended, what they truly wanted, a task that corresponds to the legal interpretation.

However, the closer the established relationship is to those that usually, according to uses and practices, are contractual (therefore, binding), the clearer the enforceability exclusionary will should be. Contrarily, the farther the relationship is from those usually enforceable and the closer to those that are not, the easier it will be to exclude enforceability.

Indeed, it is the legal analyst's task to offer reasonable and legally founded working tests to distinguish between these different cases. Such tests, luckily, exist and are well established⁵⁷.

VIII. OBJECTIVE TESTS OF AN UNENFORCEABILITY WILL

In an absence of an explicit or tacit agreement excluding enforceability, possible objective tests, facts or known circumstances that enable to reasonable infer an exclusionary will are to be analyzed:

Nature of the relationship: If *gratuitous*, a non-binding nature is easier to accept than if it projects itself on relationships that are, usually, covered by contracts for pecuniary interest (onerous contracts). But notice that the Spanish Civil Code regulates binding gratuitous contracts, such as gratuitous deposits (*depósito*), or agency (*mandato*), or free of charge loans (*comodato*).

Legal basis and purpose: Relationships that usually emerge within kinship relationships, or through friendship, collegiality or neighborhood, or those that pursue the relationship's establishment, continuance, or reinforcement are more easily categorized as purely private than those that are born in the typical fields of business or industrial relationships. Thus, the aim is relevant: even between friends and acquaintances or colleagues, one thing is to plan an organized trip to the nearest city hills, and a very different one is to organize a complex trekking trip to Nepal.

Meaning and scope (economical and legal) for the parties: To be absent from one's home and, therefore, to frustrate a dinner invitation offered to a neighbor of the same block is less inappropriate than doing the same with an acquaintance who was supposed to travel thousands of miles accompanied by his or her family in order to stay in the inviter's home, an invitation that was reasonably to be *relied on*.

⁵⁷ The interested and perhaps skeptical reader will find a parallel and equivalent analysis projected to public international law and diplomacy in: U.S. Department of State Guidance on Non-Binding Agreements, retrieved December 15, 2015, from <http://www.state.gov/s/l/treaty/guidance/>. Indeed, tests can be difficult to build in, but they do exist, and are successfully applied in many fields. What has been fruitfully attempted in public international law can be mimicked in purely private law.

Circumstances and reasoned expectations, particularly, in the addressee of the unfulfilled promise: Was a legitimate expectation of performance raised? Is this the case in similar occasions? Were there feasible and cost-free, or almost cost-free, alternatives?

Risks assumed by the promiser: This is, once again, the case of a specific lottery ticket number that was eventually prized but had not been bought by a former friend's group who was supposed to do so. Indeed, it is not to be presumed that someone should assume the risk of having to cover the prize's very high amount, even though the odds were uneven, without having explicitly or at least very clearly agreed to do so.

Interests at stake for either party: To take the neighbor's children to school is not the same thing than to leave them unattended for the whole weekend; nor is it to offer them a snack or help with their homework than to promise to medically treat them in an emergency or before a sudden fever excess; nor is the same thing to assume, also for a couple of days, to water the neighbor's plants than to promise to feed and walk his or her cats or dogs, to take care of his or her toddlers or his or her father who has a chronic condition.

The relationship is usually or almost always legally binding. Offering to be a guide normally has different reaches depending on whether the activity is a difficult mountain trekking activity at the Andes, or if it takes place at nearby hills, or whether it consists on visiting a town, answering a passing car-driver's questions in the street—who is asking for directions to an address—, or trying to help the driver, clumsily and with terrible results, to park the car.

Costs for either party: Our visitor, frustrated by our lack of seriousness, is our next-door neighbor, our same-suburbs neighbor, or a neighbor whose house is in a distant street of our same town or village, or in a distant country. Or we temporarily host a friend or his or her whole family, or we invite all the suburban colleagues of our class, or all our friends or our friend's acquaintances the day of his or her birthday.

Requirement of a stable organization (or a significant investment) in order to fulfill the given promise: of the room—occasionally or temporarily empty at home—, in a farm, in a rural cottage, or a high-mountain refuge. In the same group of cases, the need to make *specific investments* enforces the probability of the agreement's enforcement, such as the case of a host who has to accommodate a painter's study.

Private or public nature of the invitation or offer: It is advisable to distinguish between a personal invitation, an invitation sent to a few friends or acquaintances, an invitation addressed to a general public, a poetry reading, the

performance of a piano sonata, the watching of a broadcast, a friends gathering, a club association, or a public talk show (which is a non-for profit legal entity).

Number of interested parties, as well as the activity's *recurrence*: The common and massive repetition of the promised performance, or the amount of people who have acquired the condition of legitimate party by simply registering in a platform. It is not the same thing to host a friend at home than to do the same with many individuals each month.

Lifestyle (living life) distinguished from *earning a living*: Lifestyle defines the way we live our lives—our habits, attitudes, tastes, social and moral standards, and economic and socio cultural status—. It also answers the question on how we spend our time and resources. Earning a living refers to the economic activities we perform to live and finance our lifestyle, and answers the question on how we acquire the necessary resources to live the way we do. One of the disruptions, although beneficial in this case, that the massive application of digital technologies has caused consists in the blur of the boundaries that define the distinction between lifestyle and one's trade, profession or job, and the distinction between leisure and work, which, until recently, was only characteristic of farmers, inventors, artists, craftsmen, entrepreneurs, self-employed professionals—from farmers to artists, including solo lawyers—. Internet has enabled the fusion between leisure and work, home and office, home and study, private and professional life. To many people, internet is the end of work. Or perhaps, more correctly, it is the end of work as we have conceived it since the Industrial Revolution.

Controversy's avoidance is, clearly, a circumstance that indicates the existence of a legally-binding out-of-court settlement, which is legally relevant (sections 1809ff of the Spanish Civil Code), but before settling it, non-binding informal mediation and good offices⁵⁸ may take place.

Time: Giving a friend or a neighbor a hand in the evening, late at night or during the weekend is not the same thing than to perform the same task during working hours and days⁵⁹. Once again, the recurrence and regularity in the repetition of a usually economic activity are queues of its legal enforceability.

⁵⁸ See the classic work of Luis Díez-Picazo y Ponce de León, *El Arbitrio de un tercero en los negocios jurídicos* (1957).

⁵⁹ But the darkness of the night does not permit, in itself, to infer non-enforceability: “Moonlighting”, in English, “Schwarzarbeit”, in German, “travail au noir”, in French, or “lavoro nero”, in Italian, mean “second or third informal employment” (“trabajo en negro”, in Spanish). They complicate the characterization of the relationship as a legally non-binding one, the tendency of individuals, on the one hand, to conceal taxable items feigning a legally non-binding relationship, and, on the other, the propensity of public regulators and their inspection services to cross the barriers of private life and of the citizens’ relationships.

Platform distinguished from its users (occasional or registered): The platform itself will normally belong to an individual or to a legal entity that acts for profit ("*Platform-Kapitalismus*")⁶⁰, but there are many peer-to-peer gratuitous platforms that are purely altruistic or that are not established for profit⁶¹.

Features of the employed equipment: a house, car, car-truck, computer, pruning shears. Also of things: fruit trees or fruits; using pruning shears or driving a tractor; a private car, a big van or moving-truck; consumption goods, a mower or a farmer's capital equipment item. Here, the distinction between *consumption and equipment goods* helps.

Terms used by parties: "invitation", "without any compromise", "for free", "gentlemen's agreement", "as a favor"—which is more ambiguous—, "help"—which is more neutral—. However, compare with the following ones: "offer", "try it", "take it for granted", "promised". Words are always uttered in a *context*, and the most appropriate field to understand daily purely private relationships is the context, demarcated by an environment in which the relationship is usually informally established without any binding content. In private relationships, context is as important, if not more, than the uttered words.

The circumstance that the promised *activity* is characteristic of the promiser's *profession, trade or job*. Except for clearly contrary circumstances, the hotelier, accountant, lawyer, architect, carpenter, physician, painter, plumber, and so on, who promise or accept to perform an activity of his or her trade, do not usually speak idly. In these cases, the relevant circumstances that indicate the relationship's non-enforceability should concur *ex ante* and should be understood in agreement with the general understanding of reliability and self-liability standards: among strangers, gratuitousness is not to be presumed; but between parents and children, onerosity is not to be presumed. However, there is an infinite number of situations in the middle where, in case of a conflict, courts will evaluate all concurring circumstances, as, for instance, within the framework of

⁶⁰ "Über den Plattform-Kapitalismus (und mehr)": www.deutsche-startups.de/2015/02/23/ueber-den-plattform-kapitalismus-und-mehr. The standard and now very popular critique is associated with the German philosopher, of Korean origin, Byung-Chul Han, who may perhaps be the most distinguished successor of the French philosopher Pierre Bourdieu, who founded and developed in his work the notion of symbolic capital. Both deserve the merit of having known how to see, from the Post-Marxist theory, the importance of non-physical capital and of social relationships in brilliant and, at the same time, reductive analysis. However, the also very popular work of French economist Thomas Piketty emphasizes physical and financial capital, marginalizing human capital and, of course, social capital. More *décontracté* is the work of the lucid publicist and blogger Sasha Lobo. In Spain, read Ángel Carrasco's critique (2015).

⁶¹ It is common that legally organized platforms resort to groups of relationships, legal and legally non-binding, to achieve their own objectives and to enable that their registered users do the same. The issue of demarcating the nature of each relationship is not insignificant.

physical neighborhood relationships established due to the mediation of a social network, or due to a business internet platform.

IX. FUNDAMENTAL RIGHTS AND INTERPERSONAL UNENFORCEABLE RELATIONSHIPS

As it is well-known, in many cases of personal freedoms, enforceability is excluded by constitutional fiat, by statute, or by the relationship's nature itself. In these fields, the object of the exclusion is precisely the binding effects of the individual will—the negative freedom not to marry, the voidness of the promise of marriage (section 42 Spanish Civil Code), or the perpetual contract for rendering services (section 1583 Spanish Civil Code)—. Therefore, given the agreement's voidness rules, unjust enrichment issues may be raised. However, in spite of the voidness mandatory rule, parties, being conscious of the agreement's non-enforceability, are not prevented from agreeing to give or do something.

In an illustrative German case, a heterosexual couple had agreed that the woman would use contraceptives. However, whatever the reasons, the woman did not perform, got pregnant, and gave birth to a child. Then, the man, waiving the agreement, refused to honor his parental duties, a claim that the German court, of course, rejected, not just because the agreement was unenforceable, but mainly because family mandatory law was to be applied in favor of the son, a third party in the relationship. Purely private relationships do not necessarily exclude enforceability of whatever legal duties are raised by the relationship itself (Medicus, 2010, § 18, Rn. 193 a, p. 87).

X. WHO MY FRIENDS ARE IS NONE OF THE GOVERNMENT'S BUSINESS

As we have seen, digital technologies have permitted the number and relevance of many purely private relationships to expand, which would have been unthinkable a generation ago. This has hugely increased, but still not in a quantifiable way, the possibilities that we all have now to develop our personality and to improve our lifestyles.

But not all interpersonal relationships are equivalent; not all effectively enable a boundless broadening without the need of the legislative or the government's intervention:

To start, the subjective scope of purely private relationships that derive from family law (marriage, non-married couples, parenthood) is strictly regulated: The freedom to marry implies that everyone may choose his or her partner if the latter is willing to do the same, but nobody can enter into a polygamous relationship, nor can one marry his or her nephew or niece because the rules of impediments to marry duly apply. Similarly, parenthood and the degree of kinship

are well-defined and regulated by law to many effects, such as in private law, labor law, procedural law or tax law⁶².

Friendship is a radically different relationship⁶³. Here, the main principle is that I choose my friends, and not my government because establishing and terminating friendships is none of the government's business⁶⁴, nor can it be commodified by private law. Everybody can buy or sell something to a friend, even at a favorable price, but no one can buy a friend, as it is well known (by definition friendship is a bond of mutual and disinterested affection)⁶⁵; *a fortiori*, the government may not enforce or exclude a friendship by fiat. However, consider that in private law there are limits to activities I can perform with my friends because, for instance, my condominium neighbors may establish limits to the number of visitors I can meet at home every day, whom I host there, or to how many I accommodate⁶⁶. And, of course, legislators and governments may take into account friendship in order to challenge a judge or civil servant, or the concept of related individuals can be widened or shortened in the regulations of any conflicts of interests whatsoever (loyalty duties regulation in company law, administrative law, and so on). Certainly, the government not only can but also should prosecute illicit activities performed under the subterfuge of friendship (gangs and terrorist networks)⁶⁷.

Similarly, the issue of whether an individual who claims to have five thousand friends in this or that social network really has, with each and every one of them, a relationship coincidental or very close to the one traditionally expressed by the meaning of “friendship” can more than reasonably be raised. As a matter of principle, that would be very improbable in order to challenge a judge or witness, or to apply the tax or business regulations on related individuals.

And the government has always taxed wealth—perhaps increased by collaborative consumption that internet has extraordinarily eased—, capital gains, and consumption itself based on its intensity: An explicitly legally non-binding agreement reached by four or five friends in order to share the use of the same car

⁶² Think on the concept of related individuals.

⁶³ Although the tendency of some legislators to establish legal binding effects to purely factual relationships produces unthinkable consequences in the own fields of friendship. In these cases, it is crucial to carefully define the concept of coexistence and its nature.

⁶⁴ This is the dominant conception of privacy because, as Daniel Solove (2008) has masterfully written, it is not about individuals not having anything to hide, to conceal; it is, simply put, that there are many things in life that are none of the government's business, that are none of the government's concern.

⁶⁵ See, although limited to the moral point of view, Sandel, 2013, Chapter 3.

⁶⁶ Vid. section 553-40 of the Catalan Civil Code.

⁶⁷ The legal issues concerning the government's intervention in people's lives and in their personal communications are not dealt with in this paper.

increases the car use's intensity, and the government—for example the town—can take this circumstance into account to reasonably tax the consumption (but notice: Will more or less cars be driven in town, on balance? Will car sales increase or decrease? What effects would the widespread increase of these kinds of agreements have in the car market?). In the same way, the car insurance company may have a say and could exclude liability for second, third, or fourth drivers.

Digital technologies have also affected the concept of neighborhood and the relationships it affects, but only indirectly: We can certainly repeat the idea that the global village has now become a reality, but the nuclear concept of a neighbor as an individual who resides in our same neighborhood, village or town has not changed. Nor the specific regulations of neighborhood relationships have changed—for instance, those that imply adjacency, or almost⁶⁸—.

However, digital technologies extraordinarily facilitate, as is the case with friendship, collegial relationships of any kind, even though many of them are legally defined by national legal systems, although not all of them, nevertheless: this is the case of the physician or of the lawyer, but not of the plastic artist or the writer.

Last but not least, purely private relationships have always been possible between strangers—and between strangers that enter into a relationship only once in their lives: those who answer a casual question from a stranger or give him or her useful information for free—. These relationships have also been affected by digital technologies because today it is possible to voluntarily participate without charge in a world initiative. Perhaps the legal minimum would be given by the prohibition to remain anonymous (but with the possibility of confidentiality) for security reasons, or simply for tax ones, but these subjects are not covered in this paper.

XI. PRIVATE, ALL TOO PRIVATE: TOO PRIVATE TO BE LAW

The line of reasoning followed in this paper inescapably leads to inquire about the outer limits of private law. On the one hand, private law borders with other branches of the legal system, such as labor law and administrative, criminal and, of course, tax law. But on the other hand, it borders with social norms (Posner, 1997, pp. 365-369; Cooter, 1998; Farnsworth, 2007; McAdams & Rasmusen, 2007, p. 1573; Benabou & Tirole, 2011; Acemoglu & Jackson, 2014), that is to say, with behavioral guidelines that are socially and psychologically assumed as mandatory⁶⁹, and, specifically, with relationships that are so private that they are

⁶⁸ Sections 546.1ff of the Catalan Civil Code.

⁶⁹ Usual behavioral guidelines are standards, since regular performances that are not additionally felt like obligatory—or at least as suitable—are not norms.

primarily not assumed as legally binding ones, or that they cannot even be so without losing their specific nature, or that they cannot be transformed into legally binding relationships because that is forbidden by statute.

Thus, it is not only that the government should not mingle in some private relationships, it is also that private law itself should not do so because it is socially understood that law is not an appropriate tool to channel them. Some social relationships are so intrinsically private that if we try to harness them with legal instruments, we simply destroy them. In the same way as some species of animals cannot be tamed, some human relationships cannot be legalized through coercion. We cannot enter into a contract for the characteristic performance of a personal relationship. There is not, as it has been noticed, a market for friends, even if everyone can try to gain a new friend among his or her colleagues, clients, providers, employees or employers, for instance⁷⁰.

Social norms are defined by the circumstance that they are not supposed to be applied neither by public authorities, nor by courts. Rather, their enforcement is private, be it individual or psychological (emotions of humiliation, guilt, remorse, or loss of self-esteem derived from the breach), or social or economic (diminishing or loss of reputation, marginalization, exclusion or boycott). Effective social norms can be aligned with goals and ends of law, it can be indifferent, neutral, but it can be contradictory with law ends themselves. That non-binding relationships do not generate enforceable claims does not imply that their breach may not have costly consequences for the party in breach: and sometimes, social or individual punishment can be extraordinarily burdensome. And digital technologies reinforce social application of duties assumed in a legally non-binding environment and does so in all fields in which possession is not relevant: Even if the agreement excludes remedies for breach, if the party in breach is in possession of the building—the legal instrument given to him or her by the other party—, it will be necessary to bring the party in breach before the court in order for the other party to be granted repossession of his or her belonging. But in internet, most relationships are only virtual: someone's exclusion from a social network does not imply a material dispossession⁷¹. Perhaps a new kind of legally relevant internet possession will develop in the future.

⁷⁰ The issue on the duty to reveal conflicts of interests derived from friendships is not covered in this paper, as it is *only* affirmed that friendship is not a legal relationship.

⁷¹ It is possible, however, in the internet field to build legal positions that are quasi-possessory as, for instance, to concede possessory protection to the registered member of an internet platform who has a dominant possession. But this issue is not dealt with in this paper.

XII. LEGAL CENTRALISM: TOP-DOWN AND BOTTOMS-UP RELATIONSHIPS AND THE DYNAMIC OF PURELY PRIVATE RELATIONSHIPS

Very diverse doctrinal approaches have always insisted on the idea that countless legal institutions have originated in purely private fields of spontaneous orders (bottoms-up), and have not been the result of decisions taken by public authorities, governments, or courts, that is to say, that they are relationships that were not hierarchically imposed (top-down)⁷², although almost all of them could be, in a very early stage of their development, coordinated by firms, or coordinated and regulated by public authorities. So, purely private relationships are found in the origin of many legally established relationships, contracts and legal entities, but their increasing complexity will eventually require a legal regulation by private and public law. Barter deals or swaps took place prior to states and political organizations, but without the latter, sales law is inconceivable (being money coining a defining trait of states). Private law requires public law, and vice versa. But both law branches are built on social consensus and on individual agreements that are not legally enforceable and that, as we have already seen, are not even included in the national account systems. Therefore, purely private relationships can be analyzed from the perspective of the dynamics of incoming binding agreements and legal entities⁷³. But the fact that, in the end, their legalization is possible, or even necessary, does not imply that in early stages of their development they remain as purely private and non-binding relationships.

XIII. MUST CONTRACTUAL WILL ADDRESS MAIN LEGAL CONSEQUENCES OR ONLY ECONOMIC AND SOCIAL EFFECTS?

In Civil Law, in order to demarcate purely private and non-binding relationships from enforceable promises, one (perhaps unnecessarily added) difficulty is the

⁷² Robert C. Ellickson published *Order Without Law: How Neighbors Settle Disputes* (1991). The Scottish Enlightenment, Adam Ferguson, in the 18th century, the Classical liberalism of the 19th century, John Stuart Mill, or in the 20th century the Austrian School, Friedrich Hayek, exemplify well this direction of thought. By the same token, the cited literature on social norms and, in law, the ancient literature referred to custom as a source of law: for all, de Castro y Bravo, 1949-1952; Emily Kadens (2012) is very critical with the pseudo-hakeyan rhetoric of the *Law Merchant*, of the practices and customs idealization between merchants as a source of a (new) law: The relationships between medieval merchants were legally articulated through contracts as old as sales and the practices were fundamentally local. But this does not astonish the Civil Law specialist: the sale has been a consensual contract of the roman *Ius Gentium* since more than two millenniums ago, not only one. Now, see Bernstein & Parisi (2013).

⁷³ See, for instance, www.freecycle.org, and altruistic—and controversial—platform for the exchange of products that their owners do not need anymore and who prefer to give for free instead of throwing them away. The platform handles the exchange of gifts and, of course, it cannot manage without specific rules to organize the exchange itself. All of this is done independently of the fact that private law rules on the law of torts and multiple public regulations are applicable.

prevalence in some jurisdictions of the economic and social consequences doctrine, as opposed to the main legal consequences one.

In fact, in Spanish law and since the classic book of Federico de Castro (1903-1983) entitled *El Negocio Jurídico* (1967), doctrinal analysis has defended that it is enough that contractual will addresses and contemplates “practical purpose”—social or economic—, that is defined by its “actual social meaning”, and that “the doctrine of legal effects is being left aside” because, specifically in Spain, the former is “more appropriate to the causalist and spiritualist conception of our legal system” (De Castro y Bravo, 1967, Epigraph 28, pp. 30-31).

This doctrine, even though it is well-deservedly respected, perhaps does not help in the legal understanding of purely private relationships: In those relationships and by hypothesis, the question raised is precisely the existence or absence of a will or consent to become legally-bound, or on whether the agreement is such that, given the circumstances, it is clear that parties have not wanted to establish a legally binding relationship, a subjective right in favor of one or both of them to waive a legal remedy for breach before a court. The criticized doctrine falls in the fallacy of affirmation of the consequence because that which has to be proven is precisely the common will to become legally bound or its non-existence⁷⁴.

This analyzed doctrine confuses two moments, *ex ante* and *ex post*, preceding and following, respectively, the relationship’s establishment and, so, it confounds two successive but different issues. The first one is whether the parties reasonably wanted to establish a legally binding relationship or a legally non-binding one. Once the first issue is resolved in one sense or the other, depending on the reality of the parties’ will, the second legal issue is to qualify, through legal interpretation, what is the specific kind of established relationship, what was the scope of the legal effects exclusion, and what legal consequences might not be excludable by the parties’ will or by statute, as, for example, tort remedies for some harms derived from social contact⁷⁵.

⁷⁴ Although, naturally and as it has already been noticed, there are cases in which the legal system excludes *ex lege* the binding obligation. The aim is to decide in all those other countless cases—where an alternative between the inclusion or exclusion of legal effects exists—, if the decision belongs *ex ante* to the parties or, rather, if it is the competence of the public officials or the judge in charge of applying the objective right (causal assessment and *ex post*).

⁷⁵ But, observe one again, that such tort claims will derive from a new relationship, the one derived *ex lege* by a damage caused by negligence (section 1902 Spanish Civil Code), or by any other act or fact that the law associates with the accrual of an obligation to compensate for damages. In this paper and as we shall see, the first relationship is only of interest in order to analyze whether the legal effects exclusionary will has reached or not those derived from the

XIV. OPTING-IN AND OPTING-OUT

A reasonable rule of default (Thaler & Sunstein, 2008) is to be taken into account when determining the parties' will and behavior and assessing the relevance of custom, general and specific circumstances, interests at stake, assumed risks, and costs, among others.

Indeed, beyond purely private and unenforceable relationships similar to contracts, legislators may have established a general regime by which a new relationship generates binding legal effects only if the parties have expressed their will to establish a legal one (*opting-in*) or, contrarily, the legislators may have decided that legal effects follow in an absence of a clear exclusionary consent to legal effects; but given that the statute is not mandatory, parties can waive its application with more or less formalities (*opting-out*)⁷⁶.

The issue will be raised when legislators have not established a rule of default in any sense, neither *opting-in* nor *opting-out*. In the field of private relationships analyzed in this paper, the parties' will, expressed or inferred from facts and circumstances described in the former paragraphs, will be decisive. And perhaps, the standard by defect in private law is *in dubio pro libertate*, not *in dubio pro vinculatione* nor, much less so, *sine dubio pro vinculatione*.

Naturally, the contract, the voluntary transfer of economic resources by the parties' agreement, is economically preferable to a coerced allocation of such resources because coerced allocation, as it is well known, produces a net social loss as it simultaneously diminishes consumer and producer surpluses. It is what the economists call deadweight loss⁷⁷. And in the end, the party who is not supposed to pay for the resources transferred to him or her, has no incentives to further allocate them to more efficient activities than those historically decided by his or her former and expropriated owner, a result that the law of contracts avoids: contracts are legal tools designed to allocate resources from those who value them less to those who are eager to acquire them because they value them more and will pay a higher price.

Nevertheless, when designing the statute of purely private and non-binding relationships in each specific instance, and when determining what the best default rule is, costs and mistakes of the affected parties' decisions are to be assessed. As Cass Sunstein (2014, p. 5) has written, if deciding is more profitable

causation of a damage and, if this is the case, whether the legal system admits or not the risk assumption in each case.

⁷⁶ Sunstein, 2014. Retrieved from <http://ssrn.com/abstract=2377364>. Also retrieved February 10, 2014, from <http://dx.doi.org/10.2139/ssrn.2377364>. See more citations in the link.

⁷⁷ Varian, 2010, chapters 16 and 24. Varian, emeritus professor at Berkeley, is the chief economist of Google.

than costly because the affected parties positively evaluate the taking of the decision itself, then there is an additional reason to apply an opting-in default rule. But on the contrary, if the mistake costs are high because, for example, the subject matter is intricate and complex, there are good grounds to prefer an opting-out rule of default. In this paper, these questions can only be summarized because their resolution in each case depends on the specific relationship: friendship cannot be imposed by default, but neighborhood is almost always a given; collegiality is only so indirectly; marriage is necessarily consensual, but non-marital relationships with legal effects are only subjected to constitutional limits. Given that this paper focuses on purely private relationships analogous to contractual ones, an opting-in default rule, an active decision, seems reasonable because forced contracts are the exception, not the rule.

XV. CONCLUSIONS: THE LEGAL REGIME OF PURELY PRIVATE AND UNENFORCEABLE RELATIONSHIPS

Many discussions on the differences between non-binding relationships and binding ones could perhaps be settled if a basic distinction between the different classical obligational remedies was made.

In authentic purely private unenforceable relationships, parties exclude the rise of specific remedies for the contract's breach (basically, a specific performance and damages). But that does not mean that, on top of that, other remedies are to be excluded, such as those related with the law of torts and restitution:

- a) *Exclusion of contractual remedies for breach (particularly, specific performance and contractual damages).* It is essential to purely private unenforceable relationships that parties exclude their binding nature, that is to say, none of them can judicially claim the agreement's fulfillment. Neither the invitee—when this expression is used in social life—is obliged to pay for the dinner, nor does the inviter make the invitation to be paid for the dinner, room or travel price. At least in our legal system, the condition of a “paying guest” has to be clearly established when an invitation is made.
- b) *Non-exclusion of Law of Torts remedies.* However, the social fact of receiving friends, guests, acquaintances, or more persons as invitees in the inviter's home, or inviting them to share a car, to a trip, or to a tracking or hiking activity does not enable inviters to bypass their duties of care towards their guests or travel companions. That is to say, these facts *do not place them in a worse position than a third party would be*. So, general duties of care to avoid causing harm to third parties in social relationships

are not automatically excluded by purely private relationships that are unenforceable by design.

Therefore, rules, standards and case law on the law of torts are to be applied to those relationships, although three remarks are to be made:

First: All activities imply typical risks, and these can be adjusted to the specific circumstances of the case, that is to say, one can assume a dangerous activity's characteristic risk (a mountain trip is not the same as practicing alpinism). In this sense, the scope of tort law can be adjusted according to established legal and regulatory limits and to case law (in some cases, perhaps, a professional license is required, or a mandatory insurance, and so on). Moreover, specific duties of care can be expected to be fulfilled from the person who, because of his or her job or experience, assumes guarantor positions (*Garantenstellungen*).

Second: Under Spanish law there is no general rule or standard limiting tort law remedies to intentional or reckless infliction of harm.

And third: As in most cases of bilateral care or comparative negligence, the possibility of apportionment of damages is to be taken into account. The rule is that the existence of purely private relationships does not worsen the parties' position compared to pure strangers, third parties, who have not entered into any kind of relationship with the injurer, whether legally binding or not.

- c) *Non-exclusion of classic extra-contractual claims, that is to say, restitution or unjust enrichment claims when their causes of action are given:* The person who, because of friendship, organizes a trip with other people and his or her family, and covers the full trip's expenses, can ask for its reimbursement if the trip is frustrated by the other parties' breach, even though the friendly manager had accepted the task without any former agency compromise (but notice that given the informal agreement, section 1888 of the Spanish Civil Code is not to be applied). The rule of default obliges the parties to cover the expenses of cancellation, termination or frustration of legitimate and reliable expectations, except if a restitution compensation was explicitly or otherwise clearly excluded. Circumstances will be decisive in many instances: The host that invited an acquaintance, coming from a distant town, and that later breached with his or her social duties, could become liable for the expenses of the frustrated invitee (costs of travel, hotel, and the invitee's reasonable expenses). Lastly, no one can impose a contract to a third party: Even if an activity is very costly for the renderer of a service, and clearly profitable to the addressee, if the latter clearly rejected to enter into any kind of agreement,

the former cannot claim neither reliance nor expectation damages. This would be the rule in the case of condominium owners because even though internet has, perhaps, made us half of the world's neighbors, it has not converted us into co-owners of half of the planet.

Thus, think of the example of the managers of an exchange internet platform that offer legally non-binding room sharing services. The web site announces that the one and only consequence of failing to comply with the exchange's conditions and requirements is the infractor's exclusion from the group of the platform's registered users. In a specific case, one or some users are excluded from the platform.

In the thesis defended in this paper, the rule of principle is that the non-contractual liability general regime is applicable to purely private and unenforceable relationships: If friendship cannot be mandatorily established or terminated, everybody is under a general duty of care to not harm others, and we cannot unjustly enrich ourselves to the detriment of others, or, more specifically, we should stop participating in a boycott campaign when the victim's isolation strongly affects his or her social existence with serious consequences perhaps close to "civil death". Possible abuse of dominant positions will be crucial in some cases to decide on the analyzed behavior's legality. One thing is to be excluded from one among hundreds of similar and competing platforms, and another is to be excluded from the only relevant one in a specific activity sector ("The Only Game in Town"). Another test may be the possible discriminatory mistreatment—unequal, unjustified and intolerable because of its symbolic impact—on the excluded platform's member. A third test derives from the more than millenary good faith and fair dealing standard: if the decision adopted by the platform managers is manifestly taken in bad faith, or if it can only be understood by malevolence on the excluded member. Ill-will is never upheld by law. Then, and always within the limits of private law—that is to say, excluding probable public law consequences—, the specific requirements of the law of torts (section 1902 Spanish Civil Code) or of restitution remedies (section 1901 Spanish Civil Code) may be relevant.

Without either the need of many material resources and equipment (physical capital), or of a lot of money (financial capital), an increasing amount of people can now use digital technologies to attain reliance and reputation (social capital) in uncountable social networks. These reverberate on the talent and education (human capital) of those who actively participate in them, and on their ability to share in the enjoyment of their own resources, which eventually increases their utility and value. This can be achieved, in many instances, without using legal tools or, at least, using them less frequently or less intensively than

that which was necessary until the digital revolution started: To a certain extent, purely private relationships, unenforceable by express or tacit will, invade fields formerly reserved to binding agreements and legal entities, or, at least, they adjourn the time and the organizational level of life relationships after legal tools become necessary.

The world of private and unenforceable relationships in the digital environment is fascinating, but it has also disrupted our relationship systems. And it is also costly and can even become perverse. In this paper we have only tried to bring to light the importance of those life relationships, which until now have been all but ignored by our legal analysts—with the main exception, in Spain, of Federico de Castro—. We have also tried to build legally-founded working tests to demarcate the boundaries of private and unenforceable relationships that define and thrive in the sphere of reciprocity, as opposed to contractual ones that belong in the sphere of exchange. This has been a first attempt and, of course, there is still a long way to go: the analysis of the consequences of those relationships in business law, labor law, administrative law, and tax law is a pending task whose realization I would like to encourage my colleagues who will know how to do so in a much better way than the Civil Law specialist who has written these modest lines, and who leaves them here with his best wishes. All friends.

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