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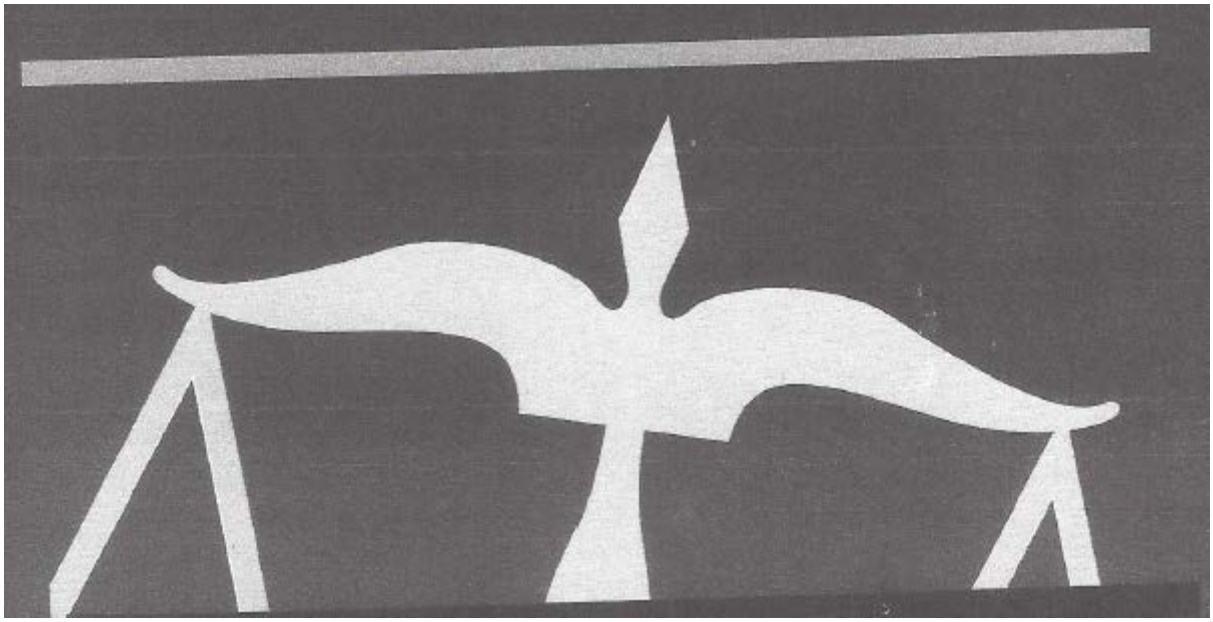
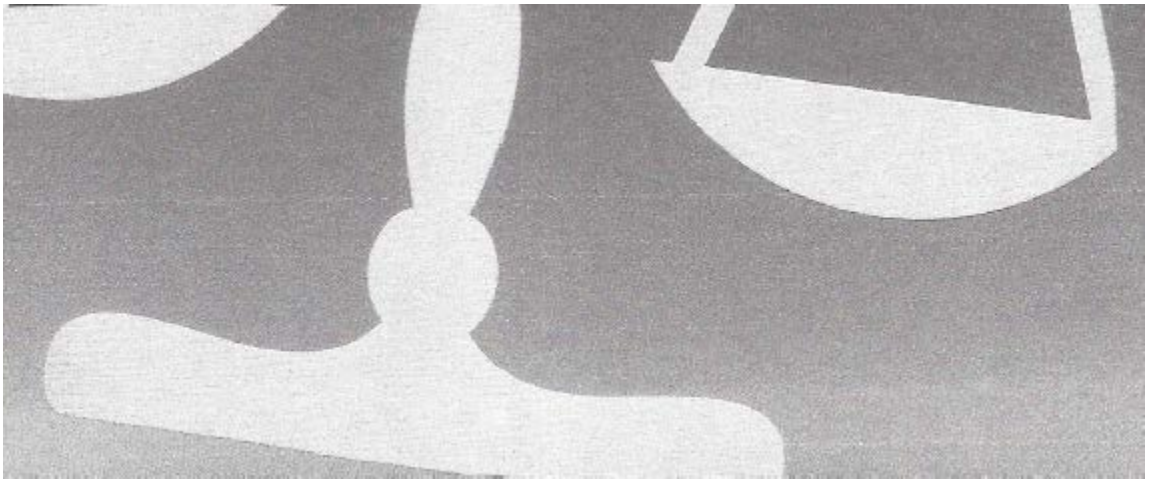


THE MAIN CIVIL CONTRACTS



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[…] preparatory, preliminary contract, or promissory agreement. The promissory agreement is a true contract, a meeting of the minds which obligates the parties to comply with the promise, an agreement by means of which the parties agree to enter into a future contract. There are doctrinal sectors that, following the German terminology, make the error of calling the promissory agreement a *pre-contract*. As a matter of fact, the *pre-contract* represents a stage prior to the contract, without any meeting of the minds which perfects a legal transaction, and this refers to mere preliminary negotiations or, which is the same, the stage of the generation of the agreement (*supra*).

In our environment, the promissory agreement is a consensual contract, not regulated or atypical, nameless, a main contract, subject to free discussion, a preparatory agreement, which may be unilateral or bilateral, free of charge or for consideration, which is generally consensual and mainly creates a duty to proceed *to enter into a promised contract*. As a result, it is an agreement which is independent, distinct, and different from the promised agreement, whose purpose is a future and definite agreement. Even though our legislation does not regulate it, its admission does not create any doubts within the scope of contractual freedom (Article 1106 of the Civil Code); it must fulfill the necessary requirements for the validity of agreements in general.

1.2. Usefulness of the Promissory Agreement.

As a means which makes it possible to stipulate the signing of any type of agreement, therefore, the *promise of purchase and sale agreement*, *the promise to create a pledge or mortgage*, etc. can be stipulated. Its usefulness resides in the fact that it allows persons to ensure the subsequent signing of an agreement whenever, based on any circumstances, they are unwilling or unable to enter into such an agreement immediately.

Historically, it is known that the promissory agreement was not a concept which was developed by Roman Law, considering that,

because this is a formalist system, the mere promise to agree to enter into an agreement lacked effectiveness in Rome. As pointed out by **PEREZ VIVEZ**[53], persons were required to subject themselves to all rites and formalities of the respective act; when they did, the agreement was perfected. Under Spanish law, consensual promise already appears. French law enshrined the promise: unilateral and bilateral promise. In the first case, one single party assumes the obligation to enter into an agreement; in the second case, both parties agree thereto.

2. Promise of Purchase and Sale.

We have already pointed out that positive law is not concerned about the promise in general, but rather about certain promises such as the promise of purchase and sale, like in the case of Spanish law, on which our law is based, unlike other laws which enshrine the same, like in the case of Chilean, Colombian, Mexican, and Costa-Rican law. As a result, furthermore supported by the established precedents and the writings of our legal scholars, we will specifically present the general aspects of the promise of purchase and sale.

2.1. Concept. According to **ARROYO**[54], a promise of purchase and sale is an agreement under which one of the parties agrees to buy or sell, or the two parties mutually agree, where one party agrees to sell and the other party agrees to buy something specific or something which can be specified, for a specific price or for a price which can be specified, within the period that is set forth or in case a specified condition is met, and in compliance with the other legal requirements.

Our legislator, while regulating contracts, does not define its understanding of the meaning of promissory agreement […]

53 PEREZ VIVEZ, Alvaro: *Teoría General de las Obligaciones* [General Theory of Obligations], Volume Editorial Temis, Bogotá, 966 page 15.
54 ARROYO CAMACHO, Dulio: *Op. cit.*, page 45.

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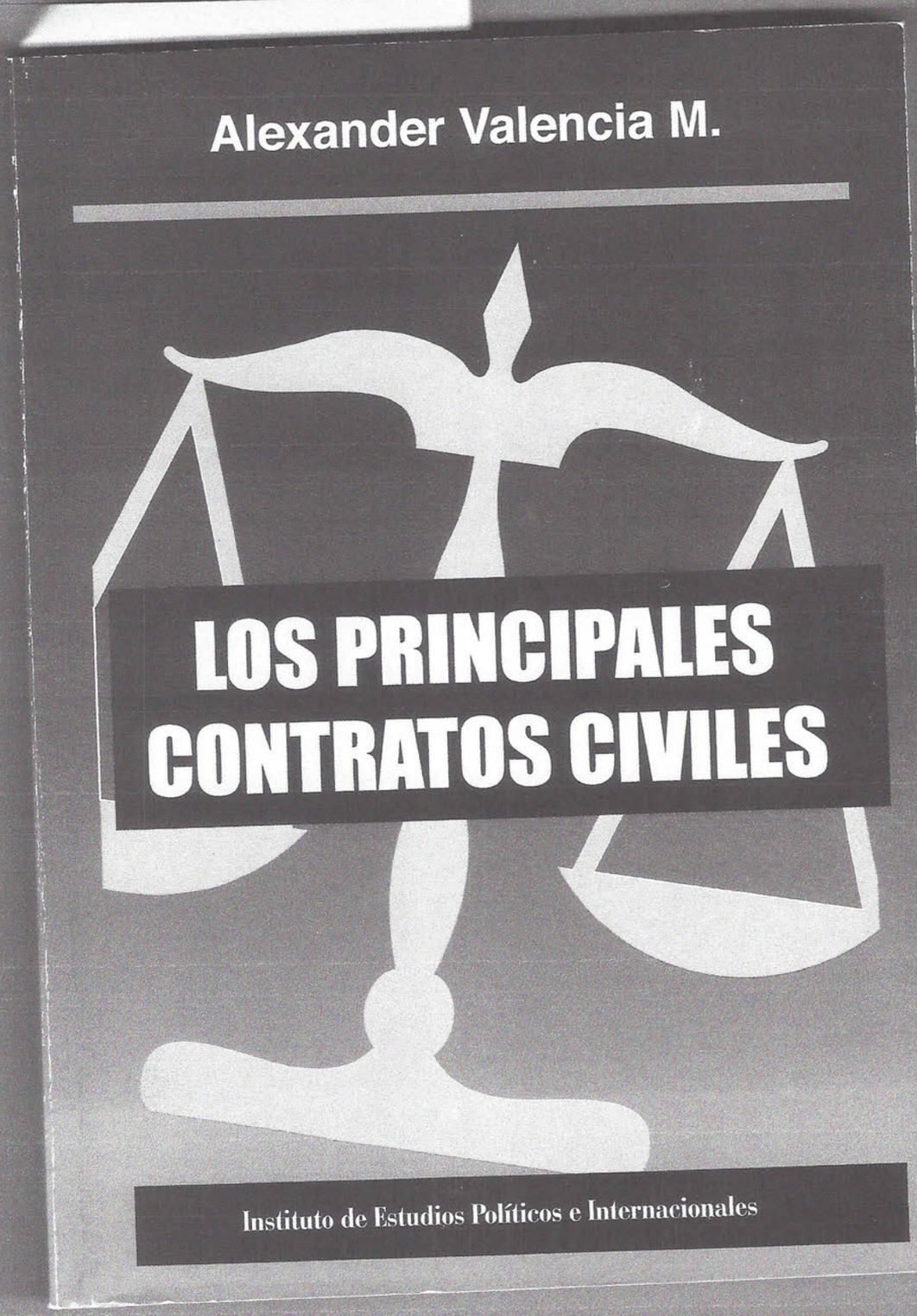
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LOS PRINCIPALES CONTRATOS CIVILES
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preparatorio, contrato preliminar o contrato de promesa. La promesa de contrato es un verdadero contrato, un acuerdo de voluntades que obliga a las partes a cumplir lo prometido, es un contrato por el cual las partes se obligan a concluir un contrato futuro. Hay sectores doctrinales que siguiendo la terminología alemana incurren en el error de denominar *precontrato* a la promesa de contrato. Y es que el *precontrato* es un etapa previa al contrato, en donde no aparece ese acuerdo de voluntades que perfeccionan un negocio jurídico, se trata de simples negociaciones preliminares, o lo que es lo mismo, la etapa de la generación contractual *(supra)*.

La promesa de contrato es en nuestro medio un contrato consensual no regulado o atípico, innominado, principal, de libre discusión, preparatorio, puede ser unilateral o bilateral, gratuito u oneroso, es generalmente consensual y engendra principalmente una obligación de hacer *la celebración de un contrato prometido.* Amén de ser un contrato independiente, distinto y diferente del contrato prometido, cuyo objeto es un contrato futuro y definitivo. Aunque nuestra legislación no la regula, su admisión no ofrece dudas, al amparo de la libertad contractual (art. 1106 del C.c.); ha de reunir los requisitos necesarios para la validez de los contratos en general.

1.2. Utilidad de la Promesa de Contrato.

Como medio que permite estipular la conclusión de cualquier tipo de contrato, puede así celebrarse la *promesa de compraventa, promesa de constituir prenda o hipoteca, etc.* Su utilidad está dada por la permisibilidad a las personas de asegurar la celebración posterior de un contrato, cuando por algunas circunstancias no quieren o no pueden celebrarlo de inmediato.

Históricamente se conoce que la promesa de contrato no fue una institución desarrollada por el Derecho Romano, ya que por

ser un sistema formalista, la simple promesa de obligarse a celebr un contrato carecía de eficacia en Roma. Advierte **PEREZ VIVEZ** [53], era necesario que las personas se sometieran a todos l ritos y formalidades del acto respectivo; al hacerlo quedal perfeccionado el contrato. En el derecho español, aparece ya promesa consensual. El derecho francés consagró la prome unilateral y la bilateral. Mediante la primera, una sola de las part contrae la obligación de celebrar un contrato; mediante la segun las dos partes se comprometen a ello.

2. Promesa de Compraventa.

Ya hemos advertido que el derecho positivo no se ocupa d la promesa en general, pero si de ciertas promesas como la d compraventa, como sucede en el derecho español, de donde s nutre nuestro derecho, a diferencia de otras legislaciones que si consagran, es el caso de la legislación chilena, colombian mexicana y costarricense. Así, apoyados además, de la labo jurisprudencial y nuestra doctrina expondremos con precisió aspectos generales de la promesa de compraventa.

2.1. Concepto. En concepto de **ARROYO**[54], promesa de compraventa es el convenio por el cual una de l partes se obliga a comprar o a vender, o las dos partes se obliga recíprocamente, la una a vender y la otra a comprar una co determinada o determinable, por un precio determinado determinable, en el plazo que se señale o en el evento de cumplir la condición que se estipule, cumpliendo los demás requisit legales.

Nuestro legislador, si bien regula el contrato, no brinda u concepto de lo que entiende por contrato de promesa d

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[53] PEREZ VIVEZ, Alvaro: *Teoría General de las Obligaciones,* tomo Editorial Temis, Bogotá, 966 p. 15

[54] ARROYO CAMACHO, Dulio: *Ob. Cit.* p. 45