

**FORMALITY, FREEDOM OF CONTRACT AND CHINA'S
NEW CIVIL CODE: A LEGAL REFORM
RECOMMENDATION FOR LAND SALE CONTRACTS**

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ABSTRACT

In China, the freedom of contract principle includes the freedom of contractual formality that entitles claimants to choose formality in contractual matters. Accordingly, where the law mandates written form, claimants arguably lose the freedom to use other types of formality, and this is seen to contradict the freedom of contract principle.

However, this Article argues that the statutory requirement of writing does not contradict but instead safeguards freedom of contract, because writing introduces desirable attributes to protect claimants from the risks that currently exist in China's judicial system. Further, the freedom of contractual formality is well applied in China, as China's new Civil Code (enacted by its supreme legislature) respects this freedom. The Code establishes the general informality rule to allow claimants to choose formality. The Code employs a more advanced approach to recognize digital forms and increases formality freedom in e-commerce. The Code allows claimants to make pre-contractual statements and terminate contracts in any form. The Code also gives claimants the freedom to set writing as a condition for contract formation, makes notarization optional, and maximizes the possibility of upholding contracts despite mandating the requirement of writing.

This Article further proposes a legal reform recommendation that the Civil Code should mandate writing for land sale contracts. This reform could effectively eradicate the nationwide uncertainty in land contract cases, thereby protecting claimants from the

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uncertainty and safeguarding contractual freedom, particularly given the importance of contractual remedies in land cases. This would create a fairer legal environment to advance the judicial reform that is set by China's supreme power.

This research is timely and valuable. The Code took effect recently so there is little literature about the Code or its application to formality freedom. Moreover, only the Code (the most authoritative statute in Chinese civil law matters) can and has provided all claimants across China with the ability to enjoy the freedom fully and completely.

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I. INTRODUCTION

The concept of the freedom of contract principle in Chinese law may differ from that in common law jurisdictions. One aspect of the Chinese freedom of contract principle is the freedom of contractual formality. The freedom of contractual formality entitles claimants to decide what formality they want to use to create, vary, and terminate their contracts. Claimants can choose from three types of formality that are most commonly used in China: oral form, written form, and notarization.¹ Hence, the Chinese version of the freedom of contract principle precludes the law from compelling claimants to use a particular type of formality. If the law mandates written form, for example, this may be seen to contradict the freedom of contract principle.

However, this Article argues that the statutory requirement of writing is an important means to safeguard freedom of contract, as writing introduces attributes to protect claimants from the existing problems in the Chinese judicial system. In this regard, mandating written form does not equate to contradicting the freedom of contract principle.

This Article also argues that the freedom of contractual formality is respected in China, because China's new Civil Code well respects this freedom. The new Civil Code was promulgated by China's supreme legislature (the National People's Congress) in May 2020 and took effect on January 1, 2021.² The Civil Code sets out all the principles and rules that regulate civil law related matters and is now the most authoritative statute on contractual matters in China. Prior to the Civil Code, contractual matters were regulated by China's Contract Law between 1999 and 2020.³ Now, the Contract Law has been repealed and replaced by the Civil Code.⁴

¹ Claimants who wish to have their contracts notarized need to file applications to local public notary offices where the notaries there inform them about the legal consequences of signing the contracts and issue them notarial certificates.

² Minfa Dian (民法典) [Civil Code] (promulgated by the Nat'l People's Cong., May 28, 2020, effective Jan. 1, 2021), art. 1260, CLI.1.342411 (LawinfoChina) [hereinafter Civil Code].

³ Hetong Fa (合同法) [Contract Law] (promulgated by the Nat'l People's Cong., Mar. 3, 1999, effective Oct. 1, 1999, repealed Jan. 1, 2021) CLI.A.528271 (Lawinfochina) [hereinafter Contract Law].

⁴ Civil Code, *supra* note 2, art. 1260. It specifies that the Contract Law is repealed when the Civil Code takes effect on Jan. 1, 2021.

In particular, the new Civil Code establishes the general informality rule to allow claimants to choose formality in contractual matters.⁵ The Civil Code deals specifically with digital form, providing a more advanced method to recognize digital form and increasing formality freedom in the e-commerce era, in comparison with the previous statutes. The Civil Code allows claimants to use any formality to make pre-contractual statements and to terminate contracts and gives claimants the option to make writing a condition for contract formation. The Civil Code does not compel claimants to use notarization, so they can decide whether they want to employ written form or notarization. The Civil Code also maximizes the possibility of upholding contracts and contractual content despite mandating the requirement of writing in certain specific types of contracts to preserve the contractual freedom of claimants.⁶

In addition, and in stark contrast to many other jurisdictions including the United States and England,⁷ China's Civil Code currently does not mandate writing for land sale contracts. This Article recommends that land sale contracts deserve to be mandated in writing by the Civil Code. This reform would effectively eradicate the nationwide uncertainty about whether writing is mandatory for land sale contracts as a prerequisite for contractual remedies in China, through utilizing the authoritative power of the Civil Code and the attributes of written form. Importantly, the reform does not reduce the Civil Code's respect for the freedom of contractual formality. Quite the contrary, the certainty introduced by the reform would safeguard contractual freedom through protecting claimants from the unfair uncertainty in land sale contract cases. This positive result would create a fairer legal environment and advance the judicial reform of China's supreme power. Further, the need for reform is supported by other reasons, including the uniqueness of land, the significance of land sale contracts, and the importance of contractual remedies in land cases.

⁵ Civil Code, *supra* note 2, art. 469.

⁶ Civil Code, *supra* note 2, art. 490.

⁷ The requirement of writing is mandatory for land contracts in most states in the United States and England. RESTATEMENT (SECOND) OF CONTRACTS ch.5, Statutory Note & § 125 (AM. LAW INST., 1981); Law of Property (Miscellaneous Provisions) Act 1989, c. 34, § 2(1) (Eng.).

This research is timely and valuable. The new Civil Code recently took effect so there is currently little relevant academic literature or case law about it. This Article is therefore seeking to comment on why the Civil Code respects the freedom of contractual formality. This analysis is necessary because the Civil Code is the most authoritative statute on civil law matters in China, so only the Civil Code can give all claimants across China the guarantee to enjoy the freedom of contractual formality fully and completely.

The following discussion first introduces the freedom of contract principle and the freedom of contractual formality in China. It then demonstrates that the statutory requirement of writing safeguards the freedom of contract and that China's new Civil Code well respects the freedom of contractual formality. The discussion then proceeds to the legal reform recommendation that the Civil Code should mandate writing for land sale contracts and the reasons supporting this reform.

II. THE FREEDOM OF CONTRACT AND THE FREEDOM OF CONTRACTUAL FORMALITY

In Sino-Civilian literature, the principle of freedom of contract is seen as the freedom enjoyed by claimants to decide all contractual matters within the scope set by law.⁸ The principle of freedom of contract has five dimensions. The first dimension is related to the freedom to decide whether to form contracts.⁹ The second dimension has to do with claimants' freedom to choose with whom to enter into contracts.¹⁰ The third dimension is the freedom of contractual content, meaning claimants are entitled to decide their rights, obligations, risks, liabilities, and other contractual terms.¹¹ The fourth dimension is the freedom to vary contractual terms and terminate contracts.¹² The fifth dimension is the freedom of contractual formality that allows claimants to choose and employ

⁸ CUI JIANYUAN (崔建远), HETONG FA ZONGLUN SHANGJUAN (合同法总论上卷) [GENERAL INTRODUCTION TO CONTRACT LAW VOL. 1] 30 (2011).

⁹ WANG LIMING (王利明), HETONG FA YANJIU DIYIJUAN (合同法研究第一卷) [STUDIES ON CONTRACT LAW VOL. 1] 160–61 (2011); WANG ZEJIAN (王泽鉴), ZHAIFA YUANLI (债法原理) [GENERAL PRINCIPLES OF OBLIGATION LAW] 80 (2009); CUI, *supra* note 8, at 31–33.

¹⁰ WANG LIMING, *supra* note 9, at 160–61. CUI, *supra* note 8, at 31–33.

¹¹ WANG LIMING, *supra* note 9, at 160–61. CUI, *supra* note 8, at 31–33.

¹² WANG LIMING, *supra* note 9, at 160–61. CUI, *supra* note 8, at 31–33.

any formality as they see fit to form, vary and terminate contracts,¹³ such as written form, oral form, or notarization. Arguably, there is a sixth dimension in the freedom to choose contractual remedies and dispute mechanisms.¹⁴ However, this sixth dimension can be absorbed into the third dimension of the freedom of contractual content where claimants already have the freedom to agree on terms such as remedies and dispute resolutions.

Hence, where the formality of writing is mandated by law, it arguably contradicts the fifth dimension of the freedom of contract principle (the freedom of contractual formality). In particular, claimants are presumed to be rational, and they are motivated to maximize their own interests and choose appropriate contractual formality.¹⁵ Claimants are also presumed to be the best judges of their own interests, so if the claimants cannot choose the contractual formality they want to use and have to comply with a statutory requirement of formality, this may be seen as state intervention.¹⁶ However, this Article rebuts this argument, as the focus in this context is not intervention as such; rather, the focus should be how to reserve necessary space for individuals to make their own decisions and let individuals choose to establish and alter legal relations with others within this space.¹⁷ The statutory requirement of formality is also critiqued for going against efficiency and increasing the cost of contract formation, partly because oral form is convenient¹⁸ and partly because economic activities are extraordinarily frequent in modern times.¹⁹

Despite these criticisms, it has been clearly argued that the fundamental principle of freedom of contract has not changed.²⁰ The voice for formality is growing louder in China, and a more persuasive argument is that the statutory requirement of writing

¹³ WANG LIMING, *supra* note 9, at 160–61. CUI, *supra* note 8, at 31–33.

¹⁴ WANG LIMING, *supra* note 9, at 161–62.

¹⁵ *Id.*

¹⁶ Li Qing (李庆), *Hetong Xingshi Qiangzhi Weitan (合同形式强制微探)* [Study on Mandatory Formation for the Contract] (2012) (Masters dissertation, China University of Political Science and Law) (on file with the Graduate School of the China University of Political Science and Law).

¹⁷ LONG WEIQIU (龙卫球), *MINFA ZONGLUN (民法总论)* [GENERAL INTRODUCTION TO CIVIL LAW] 421 (2002).

¹⁸ CUI JIANYUAN ET AL., (崔建远), *ZHAIFA (债法)* [LAW OF OBLIGATION] 263 (1st ed. 2010).

¹⁹ Li, *supra* note 16.

²⁰ WANG LIMING, *supra* note 9, at 500.

does not contradict the freedom of contract principle, or the freedom of contractual formality. Even in the laissez-faire era, the classical version of freedom of contract theory was subject to limitations and restricted by law.²¹ Similarly, the modern version of freedom of contract and freedom of contractual formality also has boundaries and is not absolute. One obvious example is that writing is commonly mandated to protect consumers.²² In this regard, prescribing formality is not so much restricting the freedom of contract; instead, it is for the purpose of clearly and efficiently managing transactions that are increasingly complicated due to the development of markets and appropriately dealing with relations between claimants of different social and economic status.²³ The requirement of writing can also protect rights in special types of contracts involving state and public interests.²⁴ Hence, freedom of contract and the requirement of writing are not in real conflict.²⁵ This is perhaps why, even if the statutory requirement of writing were state intervention, it should be seen as the most modest form of intervention.²⁶

Moreover, Chinese law limits the usage of oral form for valid reasons, namely because oral contracts fail to draw a clear line between pre-contractual statements and contractual terms.²⁷ When disputes arise, oral contracts make it difficult to collect evidence and distinguish between opposing views.²⁸ The weaknesses of oral form have been summarized by a Chinese expression: “words of mouth

²¹ FAZHI LINIAN YU ZHIDU (法治: 理念与制度) [RULE OF LAW: THE CONCEPT AND SYSTEM] 342–344 (Gao Hongjun (高鸿钧) ed., 2002); WANG LIMING, *supra* note 9, at 177; WANG LIMING (王利明), HETONG FA XINWENTI YANJIU (合同法新问题研究) [STUDIES ON THE NEW ISSUES OF CONTRACT LAW] 48–54 (2011).

²² WANG LIMING, *supra* note 9, at 500; LIANG HUIXING (梁慧星), MINFA ZONGLUN (民法总论) [GENERAL INTRODUCTION TO CIVIL LAW] 164 (2011).

²³ WAGATSUMA SAKAE, ZHAIQUAN GELUN SHANGJUAN (債權各論上卷) [LAW OF OBLIGATION VOL. 1] 27 (Xu Hui (徐慧) trans., 2008).

²⁴ WANG LIMING, *supra* note 9, at 500.

²⁵ Pertti Muukkonen, *Formal Provisions and the Elimination of Their Detrimental Consequences*, 5 SCANDINAVIAN STUDS. L. 79, 81 (1961).

²⁶ DIETER MEDICUS, DEGUO ZHAIFA ZONGLUN (德国债法总论) [GENERAL INTRODUCTION TO THE LAW OF OBLIGATION] 84 (Du Jinglin (杜景林) trans., 2009).

²⁷ SUI PENGSHENG (隋彭生), HETONG FA YAOSI (合同法要义) [ESSENCE OF CONTRACT LAW] 64 (2018).

²⁸ *Id.*

being no guarantee.”²⁹ Accordingly, contracts involving large amounts of money should be evidenced in writing.³⁰

In addition to the existing arguments, this Article further demonstrates that writing is an important means to safeguard the freedom of contract, and China’s new Civil Code is seen to respect the freedom of contractual formality.

III. THE STATUTORY REQUIREMENT OF WRITING SAFEGUARDS CONTRACTUAL FREEDOM

Writing has desirable attributes in protecting claimants from the risks and uncertainty that exist in China’s judicial system. Hence, writing is an important means to safeguard the freedom of contract.

A. *The Desirable Attributes of Written Form*

Signed contractual evidence plays a significant role in setting factual boundaries and evidentiary matrices. This is particularly important in contractual disputes such as interpretation, termination, and damages, where ascertaining the precise contractual terms is the fundamental pre-condition for settling disputes. With the help of signed contracts, courts can enforce contracts on their exact terms and grant the most appropriate contractual remedies. This upholds the freedom of contract principle, given contracts are formed by the free will of claimants. As will be further discussed, signed contracts increase judicial accuracy, reduce the possibilities of relying on oral testimony and reduce the risks of perjury and baseless contractual claims. These evidentiary strengths are crucial in land contract cases due to the importance of contractual remedies in land transactions.

Indeed, writing has evidentiary attributes and introduces transactional safety. Signed contracts provide the most convincing and original evidence of contractual terms³¹ and have been

²⁹ *Id.* at 64.

³⁰ CUI, *supra* note 8, at 248.

³¹ Wei Wen, *How American Common Law Doctrines May Inform Mainland China to Achieve Certainty in Land Sale Contracts*, 17 ASIAN-PAC. L. & POL’Y J. 1, 12–16 (2015).

described as “an external manifestation of contractual content.”³² The application of the freedom of contract principle heavily relies on clear written evidence. Where disputes arise, if solid evidence (particularly signed contracts) can be presented in court, this can effectively prove contractual terms and enforce the contracts. Signed contracts are also tangible and conceivable vehicles to convey contractual intention to the outside world, and this is important in resolving contractual disputes. Without signed contracts, it may be difficult for the law to accurately ascertain the intention of claimants.³³ If contractual intention stays inside the mind of claimants and cannot be recorded in a reliable way, such as in the form of writing, the freedom of contract cannot be achieved satisfactorily.³⁴ Those are the reasons why contractual formality is a means to safeguard the free will of claimants,³⁵ is necessary in any society³⁶ and can protect claimants in complicated transactions.³⁷

In contrast, oral form introduces uncertainty and risks. If oral contracts fail to be sufficiently proven or evidenced by written form, it increases the difficulty and cost for courts to interpret, protect, and uphold those contracts. Hence, important contracts with a large amount of money involved should not be in oral form.³⁸ From a comparative law perspective, the 1804 French Civil Code underrates formality and regards contracts as simple consensus, and this gives rise to a series of evidentiary problems.³⁹

Writing also introduces legal certainty (the channeling-certainty function). This channeling-certainty function originates from the United States and is also desirable in China.⁴⁰ In the context of the statutory requirement of writing, the channeling-certainty function requires the law to provide consistent and clear

³² WANG LIMING, *supra* note 9, at 486.

³³ WANG LIMING & CUI JIANYUAN (王利明, 崔建远), HETONG FA XINLUN ZONGZE (合同法新论总则) [GENERAL PRINCIPLES OF CONTRACT LAW] 224 (2000).

³⁴ SUI, *supra* note 27, at 67.

³⁵ Zhu Qingyu (朱庆育), *Yisi Biaoshi yu Falü Xingwei* (意思表示与法律行为) [Expression of Intention and Juristic Acts], 1 Bijiao Fa Yanjiu (比较法研究) [COMP. L. J.] 15, 25–26 (2004).

³⁶ WANG & CUI, *supra* note 33, at 224.

³⁷ WAGATSUMA, *supra* note 23, at 27.

³⁸ CUI, *supra* note 8, at 248.

³⁹ *Id.* at 247.

⁴⁰ Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 801–02 (1941); Joseph M. Perillo, *The Statute of Frauds in Light of the Functions and Dysfunctions of Form*, 43 FORDHAM L. REV. 39, 49 (1974).

rules in relation to whether written form is mandatory as a prerequisite for contractual remedies so claimants can make contractual arrangements, signal their desire for the enforcement of rights and predict consequences accordingly.⁴¹ Likewise, courts have clear rules to apply to deliver consistent and fair judgments.⁴² Claimants need this legal certainty to make informed decisions and exercise their contractual freedom.

Furthermore, writing reduces the cost of resolving disputes. If there are only oral contracts, claimants are more likely to pursue lawsuits to their advantage. In contrast, the existence of signed contracts increases the likelihood of contractual performance, as claimants are bound and protected by every contractual term in writing clearly and securely. In case of disputes, where claimants have signed contracts in hand as solid evidence, they are more motivated to consider mediation and avoid expensive and time-consuming lawsuits for economic reasons, particularly given mediation is free of charge in China.⁴³ Even if claimants choose to bring lawsuits, courts are greatly assisted by signed contracts which point the arguments directly to contractual damages, interpretation or other disputes, so judges do not need to spend time investigating the existence of contracts or contractual terms. This increases judicial efficiency, accuracy, certainty and thereby reduces the cost of upholding contractual freedom.

Written form has additional benefits which are specific to land transactions. Signed contracts can give land registration authorities clear information to supervise and regulate contractual content and other land-related matters.⁴⁴ Signed land contracts also make tax collection more convenient in comparison with oral contracts.⁴⁵ This is important, because land transactions are great sources of revenue. However, it has been argued that those

⁴¹ Wen, *supra* note 31, at 18–20.

⁴² *Id.*

⁴³ Zhonghua Renmin Gongheguo Tiaojie Fa (调解法) [People's Mediation Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 28, 2010, effective Jan. 01, 2011), 2010 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 6, art. 4.

⁴⁴ WANG HONG (王洪), HETONG XINGSHI YANJIU (合同形式研究) [RESEARCH ON CONTRACTUAL FORMALITY] 48 (2005); MEDICUS, *supra* note 26, at 462.

⁴⁵ Perillo, *supra* note 40, at 68.

additional attributes are not stand-alone but instead are derived from the evidentiary attributes of writing.⁴⁶

B. The Need for Written Form in Light of the Existing Problems in the Chinese Judicial System

The attributes introduced by written form are desirable in land sale contract cases considering the existing problems in the Chinese judicial system, such as misconduct of judges, nationwide uncertainty in land sale contract cases and limitations of testimony. Innocent claimants need written form to deal with the problems to exercise their contractual freedom in a fair environment.

The evidentiary and channeling-certainty attributes of written form can protect claimants from the misconduct of judges. Statistics have shown that some judges are guilty of bribery, corruption, abuse of power and other crimes.⁴⁷ Even the Supreme People's Court expressly admits that there is "a series of challenges and difficulties" in implementing judicial reform, and government officials interfere with the results of civil cases to ensure their own interests, as well as those of their families and friends unfairly.⁴⁸ This can happen in land contract cases where innocent and disadvantaged claimants desperately need signed contracts to defend their rights and protect themselves from unfair results.

In particular, too much power rests with judges and this may increase the possibility of misconduct. Although the mechanism of "people's assessors" has been established to restrict the power of judges, the role of the people's assessors has been questioned. This

⁴⁶ Wei Wen, *A Comparative Analysis of Sino-American Contractual Writing Attributes: Underpinnings for China's Future Uniform Civil Code to Mandate Writing for Land Sale Contracts*, 16 S.C. J. INT'L L. & BUS. 23, 38–39 (2020).

⁴⁷ Jiang Chao (蒋超), *Sanshinianlai Zhongguo Faguan Weifa Fanzui Wenti Yige Tongji Fenxi* (三十年来中国法官违法犯罪问题: 一个统计分析) [*The Criminal Activities of Chinese Judges in the Past 30 Years: A Statistical Analysis*], 4 NINGXIA SHEHUI KEXUEYUAN (宁夏社会科学) [J. NINGXIA SOC. SCI.] 9 (2010); see generally Yu Zhong (喻中), *Ershi Nianlai Zhongguo Faguan Weifa Fanzui Wenti de Fenxi* (二十年来中国法官违法犯罪问题的分析) [*An Analysis of the Crimes Committed by Chinese Judges in the Past Twenty Years*], 1 DANGDAI ZHONGGUO YANJIU (当代中国研究) [J. MOD. CHINA STUD.] (2004); Yang Jun (杨军), *Xuezhexing Faguan Jiuneng Bufubai* (学者型法官就能不腐败?) [*Can Scholarly Judges Be Immune to Corruption and Bribery?*], NANFENGCHUANG (南风窗) [S. REV.] (2009).

⁴⁸ *Legal Reform, Judging Judges*, THE ECONOMIST, Sept. 24, 2015, at 1.

is partly because the assessors do not effectively place restrictions on judges or participate in a trial, and the selection process of the people's assessors is not democratic.⁴⁹ Furthermore, even if the mechanism of people's assessors is effective, it has limited application because bench trials are predominant in China. It is only possible to have assessors in cases at first instance, and all appellate cases are heard by judges.⁵⁰ Judges of appellate courts not only review matters of law, but also examine the matters of fact on which trial cases are based.⁵¹ All this discretion may increase the possibility of misconduct. Even if the assessor mechanism is improved, it is still necessary to utilize the attributes of written form to give innocent claimants the certainty, security, and protection they deserve to enjoy. If the mechanism is less effective in the future, the need for written form then becomes stronger.

Moreover, the judicial misconduct problem may be further exacerbated by the uncertainty in land sale contract cases. As pointed out, there is nationwide uncertainty in China in relation to whether the statutory requirement of writing is mandatory for land sale contracts as a prerequisite for granting contractual remedies.⁵² One group of urban courts considers writing to be optional and enforces oral land sale contracts, but the other group does the opposite.⁵³ Because of the conflict of rules between the relevant statutes, both contradictory conclusions can be justified.⁵⁴ This

⁴⁹ Ke Lan (柯岚), *Renmin Peishenyuan Peierbushen Buru Bupaiershen Duixianxing Renmin Peishenyuan Zhidu de Jidian Zhiyi* (人民陪审员: 陪而不审不如不陪而审—对现行人民陪审员制度的几点质疑) [*The Problems of the People's Assessor Mechanism*], 9 FALÜ SHIYONG (法律适用) [J. L. APPLICATION] 2 (2005); Zhou Yongkun (周永坤), *Renmin Peishenyuan Buyi Jingyinghua* (人民陪审员不宜精英化) [*People's Assessors Should not be Elitist*], 10 FAXUE (法学) [J. LEGAL SCI.] 9 (2005); Cai Lin (蔡琳), *Renmin Peishenyuan Zhuli Juese zhi Shizheng Kaocha* (人民陪审员助理角色之实证考察) [*An Empirical Study on the Role of People's Assessors*], 8 FAXUE (法学) [J. LEGAL SCI.] 37 (2013).

⁵⁰ *Zhonghua Renmin Gongheguo Minshi Susong Fa* (中华人民共和国民事诉讼法) [Civil Procedure Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 09, 1991, effective Apr. 09, 1991; rev'd by the Standing Comm. Nat'l People's Cong., June 27, 2017), arts. 39.1, 40.1 (China).

⁵¹ Civil Procedure Law, art. 168.

⁵² Wei Wen, *The Need for Certainty and Written Form in Land Sale Contracts in China: A Legal Reform Recommendation*, 3 CARDOZO INT'L COMP. POL'Y & ETHICS L. REV 383 (2020).

⁵³ *Id.* at 387–90.

⁵⁴ *Id.* at 392–97.

uncertainty is even greater in rural areas.⁵⁵ The root of the nationwide uncertainty is that the old Contract Law (the previous most authoritative statute that was enacted by the supreme legislature on contractual matters) did not clarify whether written form was mandated for land sale contracts, and this gave courts the wide discretion to decide whether written form was mandatory or optional.⁵⁶ Now the new Civil Code (the current most authoritative statute that should have solved this uncertainty) has nevertheless inherited the same problem from the Contract Law and does not have any rule to clarify the same matter. Section 469 of the Civil Code establishes the general informality rule but leaves this matter unresolved. Although the Civil Code has general and specific rules in relation to sale contracts and real property, these rules also remain silent on the matter of writing requirements for land sale contracts, despite their relevance.⁵⁷ As a result, the uncertainty will continue after the Civil Code takes effect. This nationwide uncertainty is concerning given the importance of contractual remedies in land sale contract cases. This is not conducive to protecting the contractual freedom of claimants.

There is also an extra layer of uncertainty as Chinese courts continue to deliver inconsistent and contradictory judgments about the application of the “healing theory” nationwide. The healing theory is a statutory and general remedy (formerly section 36 of the repealed Contract Law and now section 490(2) of the current Civil Code), and it can be applied to validate oral land sale contracts that would otherwise be invalid for violating the requirement of writing, if courts consider writing to be mandatory.⁵⁸ The healing theory is triggered after claimants have performed and accepted the main obligation of the oral contracts.⁵⁹ However, courts have contradictory views about what the “main obligation” should be, so the same conduct can trigger the healing theory in one case but not

⁵⁵ *Id.* at 390–91.

⁵⁶ *Id.* at 394–95.

⁵⁷ The Civil Code has 53 sections to regulate sale contracts and has 258 sections to deal with property related matters (both real property and chattels). *See* Civil Code, *supra* note 2, arts. 595–647, 205–462.

⁵⁸ Wei Wen, *Advancing the ‘Healing Theory’ of China’s Contract Law for Oral Land Sale Contracts: A Legal Reform Recommendation*, 19 AUSTRALIAN J. ASIAN L. 265, 265–66 (2019).

⁵⁹ *Id.*

in another case, and vice versa.⁶⁰ This uncertainty was caused by the failure of Section 36 of the Contract Law to articulate the specific conduct constituting the main obligation and thus gave courts too much discretion to justify their contradictory judgments.⁶¹ Unfortunately, section 490(2) of the Civil Code has inherited the cause of this uncertainty through copying almost the exact same wordings of section 36 of the Contract Law.⁶² Hence, little difference has been made. One of the underpinnings of the healing theory is the freedom of contract principle. This is because after performing oral contracts voluntarily, claimants are seen as having chosen to act upon their oral contractual arrangements and set aside the lack of writing obstacle so that their freedom shall be respected and upheld.⁶³ However, the uncertainty has made it more challenging and unpredictable for claimants to exercise contractual freedom.⁶⁴ If writing was instead mandated and employed, this uncertainty could be eliminated, as the healing theory would be much less likely to apply.

All this uncertainty provides an opportunity for “irrelevant factors,” such as bribery and corruption, to influence the outcomes of cases. As judges have discretion to decide whether writing is mandatory or optional and how the healing theory should be applied in each case, it becomes much less costly for judges to show bias to one party. This is particularly likely where innocent claimants do not have signed contracts as convincing evidence to support their claims. Moreover, given that the relevant rules are administered in a way that results in uncertainty, even unbiased judges who are not bribed may deliver contradictory judgments and create unfairness. Hence, the contractual rights of claimants cannot be protected in an

⁶⁰ *Id.* at 266–68.

⁶¹ *Id.* at 268. Section 36 of the repealed Contract Law provided that “Where written form is mandated by law and administrative regulations or is required as agreed by claimants, if the claimants fail to employ the written form, the contracts are nevertheless formed where one party has performed the main obligations and the other party has accepted the performance.” Contract Law, *supra* note 3, art. 36.

⁶² Civil Code, *supra* note 2, art. 490(2). Section 490(2) of the current Civil Code provides that “Where written form is mandated by law and administrative regulations or is required as agreed by claimants, if the claimants fail to employ the written form, the contracts are nevertheless formed when one party has performed the main obligations and the other party has accepted the performance.”

⁶³ Wen, *supra* note 58, at 270.

⁶⁴ *Id.* at 271.

unbiased, consistent or predictable way, and contractual freedom cannot be upheld fairly.

Furthermore, the identified risks and uncertainty can be magnified and aggravated by the limitations of testimony. Perjury and baseless claims have long been problems in China's civil litigation,⁶⁵ which are partially caused by the evidentiary rule that anyone who knows the facts of a case is obligated to testify in the witness box.⁶⁶ The rule appears to encourage the discovery of facts. However, claimants can take advantage of this rule by hiring "witnesses" to commit perjury, as the "witnesses" simply need to allege knowing the facts to obtain the "legitimacy" of delivering testimony. It has been radically suggested that witnesses are the second-worst source of evidence next to contracting parties.⁶⁷ Due to this weaknesses, the Supreme People's Court has limited the application of testimony and banned testimony given by certain categories of witnesses from acting as the basis for determining facts of cases. This ban includes testimony given by witnesses who do not appear in court without legitimate reasons⁶⁸ and witnesses who are closely related to one of the parties or their attorneys.⁶⁹

⁶⁵ Some claimants are prosecuted for committing perjury. *See, e.g.*, Zhejiang Tongluxian Renmin Jianchayuan Su Wen Xjia (浙江桐庐县人民检察院诉闻某甲) [Zhejiang Tonglu County People's Procuratorate v. Wen Xjia], CHINALAWINFO (Zhejiang Tonglu County People's Ct. 2016) (China); Jilin Yitongxian Renmin Jianchayuan Su Gao XX (吉林伊通县人民检察院诉高某某) [Jilin Yitong County People's Procuratorate v. GaoXX], CHINALAWINFO (Jilin Yitong County People's Ct. 2015) (China); Ningbo Yinzhouqu Renmin Jianchayuan Su Hong Shanxiang (宁波鄞州区人民检察院诉洪善祥) [Ningbo Yinzhou Dist. People's Procuratorate v. Hong Shanxiang], CHINALAWINFO (Ningbo Yinzhou Dist. People's Ct. 2012) (China); Hou Guoyun & Xu Meng (侯国云,徐梦), *Dui Weizhengzui de Xiuding Yu Zhenghe—Jianlun Jidai Zengjia de Liangge Zuiming (对伪证罪的修订与整合—兼论亟待增加的两个罪名)* [The Review of Perjury and the Two Crimes that Should be Urgently Added], 1 Fazhi Yanjiu (法治研究) [L. STUD. J.] 76 (2015).

⁶⁶ *See* Civil Procedure Law, art. 72 (P.R.C.). Perjury and baseless claims may also be caused by inadequate cross-examination and the lack of effective attorneys in China. By contrast, cross-examination may be more adequate and there may be more effective attorneys in the United States.

⁶⁷ OTHMAR JAUERNIG, MINSHI SUSONG FA (民事诉讼法) [CIVIL LITIGATION] 287 (Zhou Cui (周翠) trans., 2003).

⁶⁸ Zuigao Renmin Fayuan Guanyu Minshi Susong Zhengju de Ruogan Guiding, Fashi [2019] Shijiu Hao(最高人民法院关于民事诉讼证据的若干规定, 法释[2019]19号) [Decision of the Supreme People's Court to Amend Some Provisions on Evidence in Civil Procedures, Judicial Interpretation No.19 [2019]] (promulgated by the Sup. People's Ct., Dec. 21, 2001, effective Apr. 1, 2002; rev'd by the Sup. People's Ct., Dec. 25, 2019), art. 76, Sup. People's Ct. Gaz., Dec. 25, 2019 (China).

⁶⁹ *Id.* art. 102(3).

Contrary to testimony, signed contracts speak for themselves, as they can be physically authenticated and examined. The same signed contract can be presented to courts as different types of strong evidence in order to maximize the chances of discovering the truth. A signed contract is physical evidence because it can prove the authenticity of signatures or handwriting, documentary evidence as it proves contractual content, direct evidence because it sets out contractual terms without referring to other content, and original evidence for recording firsthand contractual terms.

Indeed, courts in China have a growing need to rely on the certainty, clarity, and stability introduced by signed contracts. Without them, courts may have to rely on and accept oral testimony, causing uncertainty and risk. For example, if witnesses retract their testimony, findings relying upon it would need to be revised or overturned. This prolongs trials, makes them expensive and increases the possibility of the “irrelevant factors.” Claimants may also exploit the evidentiary rules to make baseless claims and commit fraud and perjury. These negatively reduce judicial accuracy and efficiency in contract cases. In contrast, if signed contracts are present as solid evidence, this introduces certainty and reduces the need for relying on oral testimony. As a result, even if the “irrelevant factors” play a role, jeopardized claimants have a good chance of appeal or can resort to other dispute resolution processes to protect their contractual rights and freedom.

Written form may also advance the goals of the Chinese Government by safeguarding contractual freedom and combating misconduct. China’s supreme power has made progress in its national campaign against corruption.⁷⁰ The President of the Supreme People’s Court has expressed a determination to eliminate bribery, corruption and judicial misconduct.⁷¹ They both have

⁷⁰ Xi Jinping (习近平), *Quanmian Shenru Zuohao Xinshidai Zhengfa Gexiang Gongzuo Cujin Shehui Gongping Zhengyi Baozhang Renmin Anjüleye* (全面深入做好新时代政法各项工作, 促进社会公平正义, 保障人民安居乐业) [Perform Duties in Political and Legal Affairs, Promote Social Fairness and Justice, and Ensure the Quality of Life of People], ZHONGGUO GONGCHANDANG XINWENWANG (中国共产党新闻网) [CHINESE COMMUNIST PARTY OFFICIAL NEWS] (Jan. 17, 2019), <http://cpc.people.com.cn/n1/2019/0117/c64094-30560032.html> [<https://perma.cc/N79R-VJX5>].

⁷¹ Zhou Qiang (周强), *Nuli Rang Renmin Qunzhong Zai Meiyige Sifa Anjian Zhong Ganshoudao Gongping Zhengyi* (努力让人民群众在每一个司法案件中感受到公平正义) [Endeavor to Let People Feel the Fairness and Justice in Every Single Judicial Case],

emphasized the importance of “letting people feel the fairness and justice in every single judicial case.”⁷² Certainly, this fairness and justice should extend to important land sale contract cases. With the assistance of a written form, the possibility of judicial misconduct can be reduced, and claimants are more likely to have fairness and justice. In this regard, the findings of this research are in line with the aspirations of China’s supreme power and the Supreme People’s Court.

IV. CHINA’S NEW CIVIL CODE RESPECTS THE FREEDOM OF CONTRACTUAL FORMALITY

In the United States, it has been suggested that there are three alternative ways to treat the statutory requirement of writing—to strictly enforce the requirement, to enforce the requirement with exceptions, or to repeal the requirement entirely.⁷³

China’s new Civil Code adopts the second way. Section 469 of the Civil Code specifies a general rule about the statutory requirement of writing. It reads:

“Claimants may form contracts in oral form, written form or other form. Written form refers to contractual agreements, letters, telegrams, faxes that can tangibly record content therein. Data exchange, emails and other digital form are regarded as written form, providing they can record content and be retrieved and examined at all times.”⁷⁴

Section 469 of the Civil Code explicitly gives claimants the freedom to employ written, oral and other forms (the general informality rule).⁷⁵ The Civil Code also makes certain exceptions to the general informality rule. This strikes a satisfactory balance between informality and formality.

ZUIGAO RENMIN FAYUAN (最高人民法院) [SUP. PEOPLE’S CT.] (June 14, 2018), <http://www.court.gov.cn/zixun-xiangqing-101712.html> 2018-06-14 [https://perma.cc/J4R3-SVEN].

⁷² *Id.*

⁷³ Michael Braunstein, *Remedy, Reason, and the Statute of Frauds: A Critical Economic Analysis*, 1989 UTAH L. REV. 383, 390–91 (1989).

⁷⁴ Civil Code, *supra* note 2, art. 469.

⁷⁵ Civil Code, *supra* note 2, art. 469.

The Civil Code lists nineteen types of contracts that are commonly used by claimants and has rules to regulate those contracts, such as sale contracts and lease contracts. Some of them are mandated in writing, including easement contracts,⁷⁶ lease contracts exceeding six months,⁷⁷ loan contracts,⁷⁸ guarantee contracts,⁷⁹ mortgage contracts,⁸⁰ contracts for dispositions of land-use rights for construction purposes,⁸¹ and building contracts.⁸² Those contracts can be complicated and should merit the statutory requirement of writing, which is consistent with the practice of other jurisdictions such as the United States, England, and Germany.⁸³

Other than that, claimants have been given ample freedom to use any formality that suits their commercial or individual needs. In particular, the types of contracts listed by the Civil Code that do not have a written requirement include sale contracts⁸⁴, donation contracts⁸⁵, agency contracts⁸⁶, storage contracts⁸⁷, brokerage contracts,⁸⁸ and partnership contracts.⁸⁹ Claimants can form these contracts in oral, written, notarized, digital, or other forms and expect their contracts to be valid. Claimants can also create their

⁷⁶ Civil Code, *supra* note 2, art. 373(1).

⁷⁷ If written form is not employed and the duration of leases is unclear, it is deemed to be periodical leases. Civil Code, *supra* note 2, art. 707.

⁷⁸ Unless agreed otherwise by individuals. Civil Code, *supra* note 2, art. 668(1)

⁷⁹ Civil Code, *supra* note 2, art. 685(1).

⁸⁰ Civil Code, *supra* note 2, art. 400(1).

⁸¹ Where the right is disposed of by transfer, mortgage, exchange, appraisal for investments or donation. Civil Code, *supra* note 2, arts 348(1), 354.

⁸² Civil Code, *supra* note 2, art. 789.

⁸³ See *supra* note 7. Section 766 of the German Civil Code mandates writing for guarantee contracts. BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 766 (Ger.). The Civil Code of China also mandates writing for other contracts. See Civil Code, *supra* note 2, art. 367(1) (denoting contracts to establish the right of habitation); Civil Code, *supra* note 2, art. 427(1) (denoting pledge contracts); Civil Code, *supra* note 2, art. 736(2) (denoting financial leasing contracts); Civil Code, *supra* note 2, art. 762(2) (denoting factoring contracts); Civil Code, *supra* note 2, art. 851(3) (denoting technology development contracts); Civil Code, *supra* note 2, art. 863(3) (denoting technology transfer and franchise contracts); Civil Code, *supra* note 2, art. 938(3) (denoting real property management and services contracts).

⁸⁴ Civil Code, *supra* note 2, arts. 595–647.

⁸⁵ Civil Code, *supra* note 2, arts. 657–666.

⁸⁶ Civil Code, *supra* note 2, arts. 919–936.

⁸⁷ Civil Code, *supra* note 2, arts. 904–918.

⁸⁸ Civil Code, *supra* note 2, arts. 951–960.

⁸⁹ Civil Code, *supra* note 2, arts. 967–978.

own novel types of contracts that are not listed by the Civil Code.⁹⁰ If claimants choose to create new types of contracts, such as “consultation contracts,” they are also free to employ any form. Further, the “other form” in section 469 includes the freedom to form contracts by conduct.⁹¹ Where writing is not mandated, claimants can silently exchange goods with money to form contracts without making any oral or written statement.

In addition to the general informality rule and its limited exceptions, this Article argues that the Civil Code has respected the freedom of contractual formality from other perspectives. This analysis is fundamental, because only the Civil Code can guarantee that claimants enjoy freedom of contract across China.

C. *Further Relaxing Digital Form Requirements in E-Commerce Compared to the Pre-Civil Code Statutes*

Compared to the pre-Civil Code contract statutes, the Civil Code employs a more advanced approach that recognizes digital form, gives claimants more options, and reinforces the freedom of contractual formality.

Prior to the Civil Code, there were three contract statutes enforced between 1982 and 1998: the Law of Economic Contracts,⁹² the Law of Economic Contracts Involving Foreign Interests,⁹³ and the Law of Technology Contracts.⁹⁴ These repealed statutes all imposed extremely strict requirements of written forms on all

⁹⁰ Civil Code, *supra* note 2, art. 467; WANG ET AL., MINFAXUE (民法学) [CIVIL LAW] 567–68 (2020).

⁹¹ WANG LIMING (王利明), MINFA (民法) [CIVIL LAW] 106 (2020).

⁹² Jingji Hetong Fa (经济合同法) [Law of Economic Contracts] (promulgated by Nat'l People's Cong., Dec. 13, 1981, effective July 1, 1982, repealed Oct. 1, 1999), MINISTRY OF COM., <http://english.mofcom.gov.cn/aarticle/lawsdata/chineselaw/200211/20021100053738.html> [<https://perma.cc/Y4LN-4K26>] (China) [hereinafter Law of Economic Contracts].

⁹³ Shewai Jingji Hetong Fa (涉外经济合同法) [Law of Economic Contracts Involving Foreign Interests] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 21, 1985, effective July 1, 1985, repealed Oct. 1, 1999), MINISTRY OF FOREIGN AFFS., <https://www.mfa.gov.cn/ce/cohk/chn/topic/tzzg/tzfg/t50582.htm> [<https://perma.cc/4KJT-TSDM>] (China) [hereinafter Law of Economic Contracts Involving Foreign Interests].

⁹⁴ Jishu Hetong Fa (技术合同法) [Law of Technology Contracts] (promulgated by the Standing Comm. Nat'l People's Cong., June 23, 1987, effective Dec. 1, 1987, repealed Oct. 1, 1999), MINISTRY OF FOREIGN AFFS., <https://www.mfa.gov.cn/ce/cgsf/eng/kj/wjfg/t43950.htm> [<https://perma.cc/LU6W-5NWL>] (China) [hereinafter Law of Technology Contracts].

contract types, except for contracts that could be settled on the spot immediately when transactions took place.⁹⁵ Writing was also mandated for contractual formation, variation, and termination throughout all contractual stages.⁹⁶ The legislative intent was to implement state economic plans when economic life was heavily dominated by the state,⁹⁷ because signed contracts helped authorities understand, control, and supervise contractual terms.⁹⁸

China's Economic Reform and Opening Policy deepened gradually in the 1990s. As a result, the Contract Law that took effect in 1999 extensively relaxed the strict writing requirement, repealed the three outdated statutes, and did not impose a written form for contract termination by agreement. The Contract Law also expanded the application of the oral form, reflected the freedom of formality, and weighed safety equally with convenience.⁹⁹ This was consistent with the development of China's market economy and international practice and conducive to judicial practice.¹⁰⁰

Now, the new Civil Code has effectively inherited all the formality freedom made by the old Contract Law by establishing the

⁹⁵ Law of Economic Contracts, *supra* note 92, art. 3; Law of Economic Contracts Involving Foreign Interests, *supra* note 93, art. 7(1).

⁹⁶ Law of Technology Contracts, *supra* note 94, art. 9; Law of Economic Contracts, *supra* note 92, art. 27; Law of Economic Contracts Involving Foreign Interests, *supra* note 93, art. 32.

⁹⁷ Law of Economic Contracts, *supra* note 92, arts 1, 4, 27.

⁹⁸ Yao Xinhua (姚新华), *Qiyue Ziyou Lun (契约自由论) [Freedom of Contract]*, 1 BILIAOFA YANJIU (比较法研究) [COMP. L. J.] 19, 29 (1997).

⁹⁹ Teng Shuzhen & Lai Jia (滕淑珍, 赖佳), *Qianyi Xinhetongfa Zai Hetong Xingshi Fangmian De Tupo (浅议新合同法在合同形式方面的突破) [The Improvements Made by the New Contract Law in Contractual Formality Matters]*, 4 SHANDONG FAXUE (山东法学) [J. SHANGDONG L. SCI.] 41 (1999).

¹⁰⁰ *Id.* Further, before the Contract Law was enforced, when the Chinese Government ratified the United Nations Convention on Contracts for the International Sale of Goods, the Chinese Government made a reservation on Article 11 of the Convention because Article 11 gave claimants the freedom to choose contractual formality, but this was contrary to the extremely strict formality requirements imposed by the three repealed statutes. However, the situation was fundamentally changed since the Contract Law respected the freedom of contractual form, and this was consistent with Article 11 of the Convention. Hence, the Chinese Government officially revoked the reservation. *Wo Hetongfa Yu Lianheguo Guoji Huowu Xiaoshou Hetong Gongyue Duiyu Hetong Xingshi de Guiding Ji Shiyong Quyue Tongyi (我合同法与联合国国际货物销售合同公约对于合同形式的规定及适用趋于统一) [China's Contract Law and the United Nations Convention on Contracts of International Sales of Goods are Now Consistent in Contractual Formality]*, SHANGWUBU (商务部) [MINISTRY OF COMM.] (Feb. 22, 2013), <http://www.mofcom.gov.cn/article/ae/ai/201302/20130200034951.shtml> [<https://perma.cc/V2PM-7WBM>].

general informality rule and making certain reasonable exceptions. Further, compared to the Contract Law, the Civil Code uses a more advanced and flexible criterion to recognize the legitimacy of digital form. This gives claimants more freedom to employ a digital form without weakening the evidentiary attributes of writing.

Section 11 of the old Contract Law previously provided that “written form refers to contractual agreements, letters, electronic data (including telegrams, telexes, faxes, data exchange and emails) that can record content tangibly.”¹⁰¹ The Contract Law used the same criterion (the ability of recording content) to assess and recognize both digital and traditional written forms, thereby failing to recognize the differences between the two. In contrast, the Civil Code separates both and uses two different criteria to determine their legitimacy, where section 469(2) (the ability of recording content) applies to the traditional written form while section 469(3) (the ability of being retrievable and examinable at all times) applies to digital form. It has been observed that the Civil Code borrows the digital form rule from article 6(1) of the Model Law on Electronic Commerce adopted by the United Nations Commission on International Trade Law, putting the Civil Code in line with international e-commerce practice.¹⁰²

Indeed, unlike signed contracts that have physical form, digital data is usually stored on online servers, may be removed subsequently and is subject to different risks. Digital data itself is intangible and can be deleted or modified in an untraceable way.¹⁰³ Accordingly, whether data can be retrieved and examined becomes important, particularly in complex and expensive online transactions, because courts need the most reliable, accurate, and genuine firsthand evidence to ascertain contractual content. If the original digital evidence cannot be found, disputes may arise and this weakens the evidentiary value of digital form. By requiring digital data to be retrievable and examinable, the new rule reinforces the evidentiary attributes of digital form and reflects its unique nature to a greater extent. The new rule also keeps the Civil Code updated with the rapid development of technology. The Civil Code now

¹⁰¹ Contract Law, *supra* note 3, art. 11.

¹⁰² WANG, *supra* note 91, at 105.

¹⁰³ WANG LIMING (王利明), ZHONGGUO MINFADIAN SHIPING HETONGPIAN TONGZE (中国民法典释评·合同编通则) [INTERPRETATIONS AND COMMENTS ON THE CIVIL CODE: THE GENERAL RULES OF CONTRACT] 56 (2020).

recognizes all retrievable and examinable digital forms and this is broad enough to include new qualified digital forms in the future.

Further, the new rule has positive commercial and economic significance, because it boosts the prosperous e-commerce in China and aligns with business practice. Online retail sales in China were worth approximately 1.414 trillion US dollars in 2020 and are still rapidly growing.¹⁰⁴ The online-shopping industry is likely to continue soaring after the COVID-19 pandemic.¹⁰⁵ Those transactions take place in digital form, many of which occur on retailer websites with online payments and order details recorded, even without electronic signatures.¹⁰⁶ It is also increasingly common for claimants and business circles to communicate virtually via smart phone apps and computers on a daily basis. The new rule gives claimants more formality freedom and options to form contracts with the legal assurance that their digital contracts are protected by the authoritative Civil Code. In this regard, the new rule makes China better prepared for the e-commerce era.

D. Recognizing the Freedom to Use any Formality at the Pre-Contractual Stage, Terminate Contracts, and Agree to a Written Form as a Condition for Contract Formation

The Civil Code allows claimants to choose any formality at the pre-contractual stage, terminate contracts, and agree to writing as a condition for contract formation where writing is not mandated by law. Analysis of this issue is important, but Sino-Civilian literature has very little discussion in this sphere.

The Civil Code does not mandate written form for pre-contractual statements, because it should not apply at this stage. The evidentiary attributes of writing require signed contracts to serve as permanent and final records of contractual terms and intention. However, pre-contractual statements are made before

¹⁰⁴ Press Release, United Nations Conference on Trade and Development, Global E-Commerce Jumps to \$26.7 Trillion, Covid-19 Boosts Online Retail Sales (May 3, 2021), <https://unctad.org/press-material/global-e-commerce-jumps-267-trillion-covid-19-boosts-online-retail-sales> [<https://perma.cc/JWZ2-N73X>].

¹⁰⁵ *Id.*

¹⁰⁶ Zhongguo Dianzi Shangwu Baogao (中国电子商务报告) [E-commerce in China], SHANGWUBU (商务部) [MINISTRY OF COMM.] (May 2020), <http://images.mofcom.gov.cn/wzs2/202007/20200703162035768.pdf> (compiling a comprehensive and informative report on e-commerce in China).

contract formation and generally do not manifest contractual intention or contain all binding terms to which claimants finally agree. Pre-contractual statements may be of value for contractual interpretation and other matters, but it is unnecessary to mandate writing at this stage and then sanction claimants for failure to use written form. Further, with the help of modern technology, claimants are free to communicate anytime and anywhere by phone, online face-to-face video, or voice message for convenience and to suit their commercial needs. Hence, pre-contractual communications, such as invitations to treat, offer, and counteroffer, can be valid in any form.

The statutory requirement of writing only applies to contract formation and variation. When contracts are formed, contractual intention and all final terms are clearly present so there should be signed records to fulfill the evidentiary attributes of writing. The requirement also applies to contract variation for two reasons. First, changing contractual terms is as important as contract formation because the amended terms impose different contractual obligations on claimants, so this also requires permanent and signed records. Second, once writing is mandated for contract formation, it should also be mandated for contract variation, otherwise the statutory requirement of writing could be easily outflanked through orally changing a majority of the written terms.

Nevertheless, claimants are free to employ any form to terminate their contracts. If a written form were mandated at this stage, it would not put claimants in a better position, because oral termination would be invalid for violating the written form and the claimants would still be bound by the contracts which they choose to abandon mutually. There is a potential risk where one party regrets oral termination and use signed copies of contracts as evidence to sue for enforcement while the other party has to prove that the contracts have been terminated orally and effectively. However, if claimants agree to accept oral termination, they have an obligation to minimize the risk. The freedom of contractual formality allows claimants to consider whether they want to take this risk and use the evidentiary attributes of writing to protect themselves in case of oral termination. After all, claimants who already sign contracts should also have signed records of contractual termination when their contractual relations end.

Moreover, the Civil Code expressly allows claimants to choose writing as a condition for contract formation where writing is not mandated by law, in which case their contracts are formed only when agreements are executed.¹⁰⁷ Indeed, where writing is mandated by law, claimants must comply and cannot rule it out. In contrast, where writing is not mandated, claimants are free to agree writing as a condition precedent to contract formation. Obviously, the source of this agreed formality comes from the free will of claimants. This flexible approach of the Civil Code further respects the freedom of contractual formality.

E. Respecting the Freedom of Choosing between Writing and Notarization

In China, both notarization and writing are well-established types of formality. Claimants can choose notarization to verify their signatures on contracts, and if they choose to do so, China's notarization law requires them to go to local notary offices to file applications to start the process.¹⁰⁸ The notaries review the applications and inform the claimants in person of the legal consequences of signing the contracts.¹⁰⁹ The statements made by the notaries are recorded and kept on file.¹¹⁰ Then, the notary offices bind the signed contracts to notarial certificates (sealed by the notary offices and signed by the notaries).¹¹¹ The documents have legal effect immediately upon being issued to the claimants.¹¹²

The Civil Code wisely and economically selects written form, instead of notarization, as the statutory requirement of formality. The Civil Code does not compel claimants to use notarization so that they can decide whether they want to use writing or notarization. This freedom of choice is necessary because notarization imposes extra costs and inconvenience on claimants. However, Sino-Civilian literature contains very little

¹⁰⁷ Civil Code, *supra* note 2, art. 490.

¹⁰⁸ Claimants can choose to have contracts, wills and other legal documents notarized. Gongzheng Fa (公证法) [Notary Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 28, 2005, effective Mar. 3, 2006; rev'd by the Standing Comm. Nat'l People's Cong., Sept. 1, 2017), CLI.1.252618 (Lawinfochina) [hereinafter Notary Law].

¹⁰⁹ *Id.* art. 27.

¹¹⁰ *Id.* art. 27(2).

¹¹¹ *Id.* art. 32(1).

¹¹² *Id.*

discussion about the differences between mandating written form and notarization or their consequences, both generally and specifically in land sale contract cases.¹¹³

First, the procedures of notarization appear to be rigorous, but notarization does not necessarily increase legal clarity or achieve the evidentiary attributes satisfactorily. The notarization law allows notarized documents to be overturned by courts.¹¹⁴ It is not uncommon for courts to overturn or refuse to accept notarized legal documents.¹¹⁵ Additionally, notarization does not always guarantee clarity, as claimants can question the content of notarized documents¹¹⁶ and they do bring such lawsuits in practice.¹¹⁷ Notarized documents can also be tainted by illegality and thus be overturned.¹¹⁸ All these factors cast doubt on the evidentiary effectiveness of notarization. Further, the requirement of writing has already achieved the channeling-certainty attribute by providing a clear and consistent rule to determine contractual validity—compliance with the writing requirement renders contracts valid and

¹¹³ *But see* Li Yuwen (李玉文), *Jianli Budongchan Qiyue Gongzheng Zhidu de Yiyi* (建立不动产契约公证制度的意义) [*The Significance of Notarization in Land Sale Contracts*], 8 FAXUE 法学 [LEGAL SCI. MONTHLY] 119 (2004); Li Yuwen (李玉文), *Lun Woguo Budongchan Qiyue Gongzheng Zhidu zhi Goujian* (论我国不动产契约公证制度之构建) [*The Construction of Notary System for Land Sale Contracts*], 3 FAXUE PINGLUN (法学评论) [J. L. REV.] 116 (2005).

¹¹⁴ Notary Law, *supra* note 108, arts 36, 40.

¹¹⁵ *See* Beijing Ciwen Yingshi Zhizuo Youxian Gongsi Su Zhongguo Dianxin Gufen Youxian Gongsi Guangxi Fengongsi (北京慈文影视制作有限公司诉中国电信股份有限公司广西分公司) [Beijing Ciwen Productions Corporation Ltd v. China Telecom Corporation Ltd. Guangxi Branch] CHINALAWINFO (Guangxi Autonomous Region High People's Ct. 2009) (noting that the notarized document was not accepted by the court); Lu Chaofan Su Zuo Bagen (芦超凡诉左八根) [Lu Chaofan v. Zuo Bagen] CHINALAWINFO (Guangdong Province High People's Ct. 2006) (noting that the notarized document was reversed by the court).

¹¹⁶ Notary Law, *supra* note 108, art. 40.

¹¹⁷ *See* Wen Xiang Su Qinganxian Xingguozhen Weilin Cunweihui (文翔诉秦安县兴国镇蔚林村委会) [Wen Xiang v. Wei Lin Village Council] CHINALAWINFO (Gansu Province Tianshui Intermediate People's Ct. 2010) (noting that the notarized land sale contract was not accepted by the court because of the mistakes, defects and contradictions made by the notary institute). Li Jinzeng Su Wang Yuxin, Lushanxian Gongzhengchu Ji Li Xiaowei (李金增诉王玉欣、鲁山县公证处及李小伟) [Li Jinzeng v. Wang Yuxin, Lushan County Notary Institute and Li Xiaowei] CHINALAWINFO (Lushan County People's Ct. 2011) (noting that the notarized will was found to be defective and not accepted by the court, because the will was signed several months after the will was notarized).

¹¹⁸ Notary Law, *supra* note 108, art. 39. XX Su XX (XX 诉 XX) [X v. X (names concealed due to privacy protection)] CHINALAWINFO (Shanghai Pudong People's Ct. 2011) (noting that the notarized document was not accepted by the court, as the materials on which the notarization was based were forged).

failure to do so does the opposite. This makes it even more unnecessary to mandate notarization to replace the written form.

Second, notarization creates more physical inconvenience than written form. This is particularly true for land-related contracts because notarization must be conducted in the specific notary institutes where the real property is located.¹¹⁹ If the Civil Code were to mandate notarization, this requirement would cause significant inconvenience for claimants who prefer signing land sale contracts outside of the locations of the real property. This inconvenience is even greater for businesspeople who are more likely to travel frequently and sign more contracts in various locations. In contrast, a writing requirement is not subject to these limitations, so claimants can sign contracts anywhere, even in foreign jurisdictions, to easily meet their personal and business needs.

Third, the process of completing notarization is more time consuming and riskier than the process of executing writing. In order to have contracts notarized, claimants need to be physically present before the notary offices.¹²⁰ If the Civil Code were to mandate notarization, even signed contracts would not be valid until notarization were completely observed. As a result, if contracting parties were in the process of applying for notarization, one party could still have the chance to set aside their signed contracts. In contrast, written form introduces much less risk. Once contracts are signed, the contracts become valid and give claimants contractual remedies immediately. Consequently, claimants who breach these contracts are subject to contractual liability.

Fourth, notarization is not free and incurs extra costs.¹²¹ However, land sale contracts have already been taxed by many

¹¹⁹ Notary Law, *supra* note 108, art. 25(2).

¹²⁰ *Id. supra* note 108, art. 25(1).

¹²¹ *Id. supra* note 108, arts 34, 46. However, the Notary Law does not specify the fee scale. The fee scale is specified in other government documents. See Guojia Jiwei Sifabu Guanyu Yingfa Gongzheng Fuwu Shoufei Guanli Banfa De Tongzhi (国家计委司法部关于印发公证服务收费管理办法的通知) [The Notice on Promulgating the Notary Service Fee Scale] (promulgated by the Ministry of Just. & Nat'l Dev. & Reform Comm'n, Mar. 3, 1997), LAW-LIB, http://www.law-lib.com/law/law_view.asp?id=13138 [<https://perma.cc/G5S6-DNWK>]; Guojia Fazhan Jihua Weiyuanhui Sifabu Guanyu Tiaozheng Gongzheng Fuwu Shoufei Biaozhun de Tongzhi (国家发展计划委员会司法部关于调整公证服务收费标准的通知) [Adjustments of the Notary Service Fee Scale] (promulgated by the Ministry of Just. & Nat'l Dev. & Reform Comm'n, May 6, 1998),

different public authorities, and claimants have been subject to stamp duty, deed tax, land tax, and income tax.¹²² If the real property is purchased for commercial purposes, claimants and corporations are subject to additional tax duties, such as land-use tax and land value-added tax.¹²³ Hence, it is not economically sound or reasonable to further increase the financial burden on claimants through imposing a notarization requirement. In contrast, where writing is mandated, the economic cost is no more than a pen and paper to write down contractual terms and signatures, but this small cost is more than sufficient to meet the statutory writing requirement for contractual validity.

Fifth, once notarization were mandated for contract formation, notarization must also be mandated for contract variation, otherwise notarization could easily be avoided and rendered null through using written form to slightly vary all the terms of the entire notarized contracts. Moreover, if claimants genuinely want to vary contracts, they would be forced to choose notarization and thus

LAW-LIB, http://www.law-lib.com/law/law_view.asp?id=13918 [<https://perma.cc/5YGY-AMUQ>] (China).

¹²² Qishui Fa (契税法) [Real Property Deed Tax Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 11, 2020, effective Sept. 01, 2021), CLI.1.345090 (Lawinfochina); Fangchanshui Zanxing Tiaoli (房产税暂行条例) [Provisional Regulations on Real Property Tax] (promulgated by the State Council, Sep.15, 1986, effective Oct. 1, 1986; rev'd by the State Council, Jan. 8, 2011), CLI.2.2972 (Lawinfochina); Yinhuashui Fa (印花税法) [Stamp Duty Law] (promulgated by the Standing Comm. Nat'l People's Cong., June 10, 2021, effective July 1, 2022); Geren Suodeshui Fa (个人所得税法) [Income Tax Law] (promulgated by the Standing Comm. Nat'l People's Cong., Sep. 10, 1980, effective Sep. 10, 1980; rev'd by the Standing Comm. Nat'l People's Cong., Aug. 31, 2018), CLI.1.5015161 (LawinfoChina); Guojia Shuiwu Zongju Guanyu Geren Zhufang Zhuanrang Suode Zhengshou Geren Suodeshui Youguan Wenti de Tongzhi (国家税务总局关于个人住房转让所得征收个人所得税有关问题的通知) [The Notice on Imposing Individual Income Tax on Real Property Transactions] (promulgated by the State Tax'n Admin., July 18, 2006, effective July 18, 2006), STATE TAX'N ADMIN., <http://www.chinatax.gov.cn/chinatax/n810341/n810765/n812183/200607/c1197073/content.html> [<https://perma.cc/A3D3-TVTW>] (China).

¹²³ Chengzhen Tudi Shiyongshui Zanxing Tiaoli (城镇土地使用税暂行条例) [Provisional Regulations on Urban Land Use Tax] (promulgated by the State Council, Sep. 27, 1988, effective Nov. 1, 1988; rev'd by the State Council, Mar. 2, 2019), State Tax'n Admin., <http://www.chinatax.gov.cn/chinatax/n368/c1405/content.html> [<https://perma.cc/8MD8-55F8>] (China); Tudi Zengzhishui Zanxing Tiaoli (土地增值税暂行条例) [Provisional Regulations on Land Value-added Tax] (promulgated by the State Council, Dec. 13, 1993, effective Jan. 1, 1994; rev'd by the State Council, Jan. 8, 2011), State Tax'n Admin., <http://www.chinatax.gov.cn/chinatax/n810341/n810755/c4540677/content.html> [<https://perma.cc/8XA9-ZMUC>] (China).

undergo all the risks, costs, and inconvenience associated with notarization for every trivial change of contractual terms. This could make it more difficult for claimants to exercise their freedom of contract to modify their rights and obligations.

Finally, if notarization were mandated, even signed contracts would be invalid. However, most people would have difficulty understanding why well-drafted and signed contracts provided by experienced attorneys would become invalid. Further, government authorities provide contract samples for real property dealings.¹²⁴ If notarization were to become compulsory, claimants who fill in and sign the government standard form contracts would be deprived of contractual validity. This result would be difficult to accept, because governments ensure the credibility of those sound contracts, and this is why the general public tends to rely on them. All these factors would increase the difficulty of enforcing a mandatory requirement of notarization in China.

This Article considers that the approach taken by section 658 of the Civil Code is commendable because it makes the choice of formality more flexible. According to section 658, claimants are not obliged to (but are free to) have donation contracts notarized.¹²⁵ When claimants choose to do so, the legal consequences are different, as notarized donation contracts cannot be revoked, but donation contracts that are in written or oral form can be revoked.¹²⁶ Hence, the approach of section 658 gives claimants the ability to choose notarization if they expect to encounter different legal consequences. This is a preferable way of using the notarization requirement to ensure freedom of formality in contract law.

Indeed, where a written form is mandated, claimants are entitled to decide whether to adopt notarization based on their unique practical needs. In contrast, if notarization were mandated,

¹²⁴ For example, a standard contract is available at Zhufang Chengxiang Jianshebu Gongshang Zongju Guangyu Yingfa Shangpingfang Maimai Hetong Shifan Wenben de Tongzhi (住房和城乡建设部工商总局关于印发商品房买卖合同示范文本的通知) [The Notice on Publishing Sample Contracts for Real Property Sale], ZHUFANG HE CHENGXIANG JIAN SHEBU GUOJIA GONGSHANG XINGZHENG GUANLI ZONGJU (住房和城乡建设部, 国家工商行政管理总局) [MINISTRY OF HOUSING & URB.-RURAL DEV., ST. ADMIN. FOR INDUSTRY & COM.] (Apr. 9, 2014), <http://www.faxin.cn/lib/zyfl/ZyflSimple.aspx?gid=A204408&libid=> [\[https://perma.cc/P3ZR-RKBV\]](https://perma.cc/P3ZR-RKBV).

¹²⁵ Civil Code, *supra* note 2, art. 658.

¹²⁶ Civil Code, *supra* note 2, art. 658.

the freedom of formality would no longer stand as notarization would become a legal obligation, and the extra costs and risks would be thrust upon claimants. This is unreasonable, particularly because signed contracts already perform the evidentiary and channeling-certainty attributes satisfactorily but in a much more affordable and less risky manner. Although claimants are free to seek more costly alternatives, including the use of notarization and attorneys, this should be a voluntary choice instead of a compulsory obligation.

Therefore, through giving claimants the freedom to choose between written form and notarization, the Civil Code respects the freedom of contractual formality.

F. Maximizing the Possibility of Upholding Legitimate Contractual Expectations

Perhaps the strongest objection to the statutory requirement of writing is that sanctioning oral contracts that fail to meet the formality requirement may defeat contractual expectations. As pointed out in Anglo-American literature, “non-compliance with form[ality] . . . permits a party to renege on his pledged word [and] thereby defeats the justified expectation of the other party.”¹²⁷ Although this argument is raised in the United States, the same criticism applies equally in the Chinese context because non-compliant oral contracts are not given contractual effect in Chinese law.

However, this Article respectfully disagrees with this objection for the following reasons.

First, the Civil Code has wisely chosen the formality of written form to uphold contractual expectations. Notarization entails time-consuming and inconvenient procedures, thereby introducing a real risk of rendering signed contracts invalid. In contrast, the requirement of written form significantly reduces this risk because contracts only need to be signed to be valid.

Second, signed contracts are solid evidence which can protect contractual expectations. If claimants do have an oral contract but the contract cannot be sufficiently proven due to lack of written evidence, this legitimate contract cannot be enforced by

¹²⁷ Perillo, *supra* note 40, at 70.

courts. This is not conducive to the reinforcement of the freedom of contract. This negative result is more likely to occur when the “irrelevant factors” affect the outcomes of cases. In contrast, with the presence of signed contracts, even if there are unfair judgments delivered by trial courts, claimants can rely on their signed contracts as solid evidence to file for appeal, overturn the original unfair judgments, and sue for full contractual remedies.

Third, the Civil Code has been cautious in rendering contracts invalid, although the Code is enacted by China’s supreme legislature and is the foremost authority for invalidating contracts. The Code only expressly renders very limited types of contracts invalid on exceptional grounds, including contracts that expressly violate law and public policy,¹²⁸ contracts made by claimants who harbor disingenuous intentions,¹²⁹ and contracts made by claimants who jointly and intentionally damage the interests of others.¹³⁰ These are legitimate and common reasons for striking down contracts, and the scope of invalidity is quite narrow. Further, the Civil Code has also minimized the possibility of invalidating contractual content. The Code clarifies that when a contract is rendered invalid, provided that the invalid portions can be severed from the rest of the contract, the remaining portions are untainted and valid.¹³¹

Finally, the statutory requirement of writing does not apply to pre-contractual statements or termination by agreement. Furthermore, the healing theory, despite its uncertainty, can apply to validate oral contracts that would otherwise be invalid.¹³² Thus, the limited application of the statutory writing requirement and the operation of the healing theory both further limit the instances of contractual invalidity. A narrowly applied invalid contractual consequence is less likely to defeat contractual expectations.

¹²⁸ Civil Code, *supra* note 2, art. 153.

¹²⁹ Civil Code, *supra* note 2, art. 146.

¹³⁰ Civil Code, *supra* note 2, art. 154.

¹³¹ Civil Code, *supra* note 2, art. 156.

¹³² Wen, *supra* note 58.

V. LAND SALE CONTRACTS DESERVE THE STATUTORY REQUIREMENT OF WRITING IN THE CIVIL CODE

After demonstrating that written form is an important means of safeguarding the freedom of contract and the Civil Code's respect for the freedom of contractual formality, this Article now argues that the Civil Code should mandate a statutory writing requirement for land sale contracts.

As previously mentioned, the Civil Code makes exceptions to the general informality rule and mandates a writing requirement for certain types of contracts. This approach is appropriate because the exceptions are categorized by the specific type of contract, and each type of contract can be examined on its merits to determine whether it warrants a writing requirement. This approach also maintains a satisfactory balance between informality and formality. However, the exceptions to informality currently do not include land sale contracts.

The land system in China is unique. In China's urban areas, the state owns the land,¹³³ but individuals and organizations can own real property and enjoy the land-use rights on which the real property is built.¹³⁴ Urban land-use rights for residential purposes are valid for 70 years¹³⁵ and can be renewed after expiring.¹³⁶ In China's rural areas, the collective owns the land, and rural residents can own real property, but the transfer of rural land-use rights is subject to restrictions.¹³⁷ Hence, the subject matter of land sale contracts in a Chinese law context includes the transfer of real property ownership and the attached land-use rights. Although the land system in China can be different from that in common law

¹³³ XIANFA art. 10, § 1 (1982) (China).

¹³⁴ Chengshi Fangdichan Guanli Fa (城市房地产管理法) [Urban Real Property Administration Law] (promulgated by the Standing Comm. Nat'l People's Cong., July 5, 1994, effective Jan. 1, 1995; rev'd by the Standing Comm. Nat'l People's Cong., Aug. 26, 2019), art. 8, CLI.1.9585 (Lawinfochina).

¹³⁵ Chengzhen Guoyou Tudi Shiyongquan Churang He Zhuanrang Zanxing Tiaoli (城镇国有土地使用权出让和转让暂行条例) [Provisional Regulation on the Assignment and Transfer of Land-use Right of Urban State-owned Land] (promulgated by the State Council, May 19, 1990, effective May 19, 1990; rev'd by the State Council, Nov. 29, 2020), art. 12(1), CLI.2.348773 (Lawinfochina).

¹³⁶ Civil Code, *supra* note 2, art. 359(1).

¹³⁷ XIANFA art. 10, § 2 (1982) (China).

jurisdictions, they both share the same underpinnings for mandating written forms for land sale contracts so experiences from common law jurisdictions can be borrowed to inform China.

In particular, land sale contracts deserve a statutory requirement of written form due to the importance of land. The United Kingdom Law Commission considers that land sale contracts should be treated differently, because land is scarce and non-renewable resource, land has particular characteristics, and each piece of land is unique.¹³⁸ In the United States, some scholars object to the statutory writing requirement for sale of goods contracts, but these objections do not extend to land sale contracts because of the uniqueness and importance of land.¹³⁹ Those scholars use the reasonableness of the writing requirement for land sale contracts to prove the redundancy of the same requirement for sale of goods contracts.¹⁴⁰ A scholar who criticizes the sale of goods writing describes land transactions as “solemn” and argues that the sale of land writing requirement is in accord with common sense and usual practice.¹⁴¹

The underlying reasons for mandating a writing requirement for land contracts in common law jurisdictions apply equally, or perhaps even more strongly, in the Chinese context. The sale of land has economic significance in China (the world’s second-largest economic entity by GDP).¹⁴² Land in China has become

¹³⁸ LAW COMMISSION, TRANSFER OF LAND: FORMALITIES FOR CONTRACTS FOR SALE ETC. OF LAND, 1987, HC 2, ¶ 5.3, 5.4, 2.12 (UK), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228611/0002.pdf [<https://perma.cc/P25W-GN2T>].

¹³⁹ Arthur Corbin, *Uniform Commercial Code—Sales: Should it be Enacted?*, 59 YALE L.J. 821, 829 (1950).

¹⁴⁰ Judge Stephen posed no objection to land sale contract writing and considered writing for land sale contracts to be necessary. James Stephen & Frederick Pollock, *Section Seventeen of the Statute of Frauds*, L.Q. REV. 1 (1885).

¹⁴¹ S. Berger, *Comment, Statute of Frauds: Section Seventeen in the Light of Two and a Half Centuries*, 13 CORNELL L.Q. 303, 308 (1928).

¹⁴² The real property industry accounts for approximately 7.8% of China’s GDP in the first quarter of 2021. 2021 Nian Yijidu Guonei Shengchan Zongzhi Chubu Hesuan Jieguo (2021 年一季度国内生产总值初步核算结果) [*The GDP Data in the First Quarter of 2021*], GUOJIA TONGJITU (国家统计局) [NAT’L BUREAU OF STATS.] (Apr. 17, 2021), http://www.stats.gov.cn/tjsj/zxfb/202104/t20210416_1816518.html [<https://perma.cc/7HGM-ZBD7>]. The proportion was approximately 4.6% in 2005, 4.8% in 2006, 5.2% in 2007, 4.7% in 2008, 5.5% in 2009, 5.7% in 2010, 5.7% in 2011, 5.7% in 2012, 5.9% in 2013, 6% in 2014, 6% in 2015, 6.5% in 2016 and 6.5% in 2017, respectively. *Jinzhuang Guojia Lianhe Tongji Shouce* (金砖国家联合统计手册) [*Joint Stat. Handbook of BRIC Countries 2018*], GUOJIA TONGJITU (国家统计局) [NAT’L BUREAU OF STATS.]

increasingly expensive and unaffordable.¹⁴³ For many individuals, the most important transactions they will ever participate in can be those relating to the purchase and sale of dwelling houses or apartments. Land sale contracts are complicated transactions that take time and consideration, so they deserve a decent writing requirement. This is in line with the scholarly suggestion that contractual formality should apply to important and complicated contracts.¹⁴⁴

Furthermore, there are two practical criteria that are used to mandate writing requirements, and land sale contracts satisfy both criteria. The first criterion is the monetary value involved in contracts. Written form is mandated for contracts that exceed a certain monetary value or amount, and this is the practice adopted by the United States, France, and Russia.¹⁴⁵ This first criterion was once considered by China's supreme legislature when the Contract Law was under review: it was suggested that a writing requirement should be mandated for contracts that involved a value exceeding 100,000 Chinese Yuan. However, the reasons for abandoning this approach were not documented and remain unknown.¹⁴⁶ The other criterion considers whether the nature of the interests involved in contracts needs written form as a special means for protection. Land sale contracts also meet this criterion.¹⁴⁷ Hence, no matter which criterion is used, land sale contracts are certainly qualified to

(Oct. 2018), <http://www.stats.gov.cn/zjtj/ztsj/jzgjltjzsc/jz2018/201811/P020181127540140744591.pdf> [https://perma.cc/R429-CHMX]. All the percentages are calculated by the author of this article by reference to the statistics.

¹⁴³ 2021 Nian Wuyuefen 70 ge Dazhong Chengshi Shangpin Zhuzhai Xiaoshou Jiage Biandong Qingkuang (2021 年 5 月份 70 个大中城市商品住宅销售价格变动情况) [Changes in Housing Prices at Seventy Major Cities in May 2021], GUOJIA TONGJITU 国家统计局 [NAT'L BUREAU OF STATS.] (June 11, 2021) http://www.stats.gov.cn/tjsj/zxfb/202106/t20210617_1818500.html [https://perma.cc/8V3E-CMEF].

¹⁴⁴ CUI, *supra* note 8, at 247.

¹⁴⁵ PENG SAIHONG (彭塞红), HETONG XINGSHI DE GUOJIA GANYU YANJIU (合同形式的国家干预研究) [STUDIES ON CONTRACTUAL FORMALITY AND STATE INTERVENTION] 112–13 (2010).

¹⁴⁶ There was discussion about whether that standard was too high. QUANGUO RENDA CHANGWEIHUI FAZHI GONGZUO WEIYUANHUI MINFASHI (全国人大常委会法制工作委员会民法室) [CIVIL LAW DIVISION OF SUB-COMMITTEE OF LEGISLATIVE AFFAIRS OF THE STANDING COMMITTEE OF THE NATIONAL PEOPLE'S CONGRESS], ZHONGHUA RENMIN GONGHEGUO HETONG FA LIFA ZILIAOXUAN (中华人民共和国合同法立法资料选) [LEGISLATIVE MATERIALS OF THE CONTRACT LAW] 10, 29, 121 (1999).

¹⁴⁷ PENG, *supra* note 145, at 112–14.

be mandated in written form, because land sale contracts involve a large amount of money and have important legal interests that deserve to be protected by the form of writing. Although some of these arguments were raised when the old Contract Law was enacted, these reasons have only become more valid over time due to the increased value of land throughout China.

The need for written form has become even stronger since the new Civil Code took effect. In fact, China's supreme legislature acknowledged the evidentiary strengths of writing and once-mandated written form for land sale contracts in the earlier drafts of the Contract Law two decades ago, although it is unclear why this requirement was removed from the final draft of the Contract Law.¹⁴⁸ It has been overdue for the supreme legislature to remandate the writing requirement for land sale contracts in the Civil Code. This is particularly the case given that the Civil Code currently mandates written form for lease contracts exceeding six months¹⁴⁹ and easement contracts,¹⁵⁰ even though these contracts are less important than land sale contracts. If these two types of contracts deserve the mandatory writing requirement, so do land sale contracts.

Indeed, whether a written form is mandatory for land sale contracts as a prerequisite for contractual remedies is a fundamentally important threshold question that should be clarified by the Civil Code, the most authoritative statute in contractual matters in China. If the Civil Code could clarify this requirement, it would bind all courts and claimants across China, thereby effectively ending the uncertainty about whether writing is mandatory in land contract cases. This clarification would also reduce the uncertainty surrounding the healing theory, as the healing theory would be less likely to apply in land contract cases when claimants use written form. All these positive outcomes would protect claimants from the problems of uncertainty and safeguard their contractual freedom. In this regard, the reform does not reduce the Civil Code's respect for the freedom of contractual formality or the freedom of contract principle. In addition, this legal reform

¹⁴⁸ Civil Law Division, *supra* note 146, at 10, 13, 18, 22, 29, 44, 45, 121, 141.

¹⁴⁹ Civil Code, *supra* note 2, art. 707.

¹⁵⁰ Civil Code, *supra* note 2, art. 373.

would advance the judicial reform of China's supreme power through creating a fairer legal environment.

Therefore, it is recommended that China's supreme legislature (the National People's Congress) adds a new section, which should read, "*Land sale contracts shall be in written form and signed*" (or the equivalent) into the Civil Code, should the Civil Code be amended in the future.

VI. CONCLUSION

In China, the freedom of contract principle includes the freedom of contractual formality that entitles claimants to choose their preferred types of formality. Hence, when a written form is mandated by law, this arguably restricts the freedom of contract and the freedom of contractual formality.

This article has argued that the freedom of contractual formality is well respected in China, and the statutory requirement of written form does not contradict the freedom of contract principle. Written form is an important means to safeguard the freedom of contract because it introduces desirable attributes to protect claimants from the nationwide uncertainty in land sale contract cases and evidentiary risks in the judicial system.

In particular, China's new Civil Code respects the freedom of contractual formality. The Civil Code establishes the general informality rule, further relaxes the digital form to boost e-commerce, restricts the application of the statutory writing requirement at different contractual stages, and gives claimants the freedom to set a written form as a condition for contract formation when it is not mandated. Additionally, the Civil Code allows claimants to choose between writing and notarization, thus maximizing the possibility of upholding contracts.

This Article has also proposed a legal reform recommendation that the Civil Code should mandate written form for land sale contracts. This reform would protect claimants from the identified uncertainty and risks in land sale contract cases and thereby safeguard contractual freedom. This reform and protection are particularly necessary given the importance of contractual remedies in land cases.

This research is timely and valuable, partly because the Civil Code took effect recently, and partly because only the Civil Code—

the most authoritative statute in civil law matters that is enacted by the supreme legislature—can guarantee that all claimants across China fully enjoy the freedom of contractual formality.