How American Common Law Doctrines May Inform Mainland China to Achieve Certainty in Land Sale Contracts

Dr. Wei Wen*

I. INTRODUCTION .................................................................................................................. 2
II. A SHORT OUTLINE OF COMPARATIVE METHODOLOGY EMPLOYED IN
This Paper ......................................................................................................................... 3
   A. The Approach of the Comparative Methodology ................................................. 3
   B. The Purpose and Layout of the Comparative Methodology ......................... 5
III. THE PROBLEM: UNCERTAINTY IN LAND SALE CONTRACTS
   FORMALITY IN MAINLAND CHINA ......................................................................... 6
IV. THE ANALYSIS OF THE UNCERTAINTY AND PROPOSED LEGAL
   REFORM INITIATIVE IN MAINLAND CHINA .......................................................... 9
V. THE POSITION IN THE UNITED STATES: THE STATUTE OF FRAUDS AND
   ITS SUCCESSOR LEGISLATION FOR LAND CONTRACTS .................................... 11
VI. THE NEED FOR WRITTEN FORM: FUNCTIONS AND PURPOSES OF
   FORMALITY IN ANGLO-AMERICAN AND SINO-CIVILIAN LAW .................. 12
   A. The First Comparison: the Evidentiary Function and Purpose .................... 13
   B. The Second Comparison: the Cautionary Function and the
      Warning Purpose ..................................................................................................... 16
   C. The Third Comparison: the Channeling Function ....................................... 18
VII. PROFESSOR LLEWELLYN’S EMPIRICAL ANALYSIS AND ITS
    APPLICATION TO LAND SALE CONTRACTS IN MAINLAND CHINA ................ 20
VIII. THE PROPOSED LEGAL REFORM INITIATIVE AND ITS
     SIGNIFICANCE TO MAINLAND CHINA .............................................................. 23
IX. CONCLUSION ............................................................................................................... 26

*Lecturer in Law, University of New England, New South Wales, Australia.
wei.wen@une.edu.au Doctor of Philosophy in Law, University of New South Wales
(Sydney, Australia); Master of Laws in Common Law, Chinese University of Hong Kong
(Hong Kong); Bachelor of Laws in Chinese Law, China University of Political Science
and Law (Beijing, China).
This paper explores one of the most significant problems confronting Mainland China in relation to contract and property law today, which is, whether or not written form is mandatory for land sale contracts. In practice, Chinese courts have delivered contradictory cases in relation to contractual form. Some courts regard the written form as being mandatory and therefore no contractual remedies are available to enforce oral land sale contracts. In contrast, other courts hold the opposite view that oral contracts may still have some degree of contractual effect. This results in uncertainty throughout Mainland China, which may cause injustice and unfairness to claimants and may undermine the authority of the law and the courts. This paper argues that the solution to the problem is to propose a legal reform initiative to articulate that written form is mandatory for land sale contracts. This initiative will end the contradictory cases and ensure claimants are treated equally at law in this particular matter.

In order to support and underpin the legal reform initiative, this paper utilizes American doctrines to enrich the Chinese literature and draws on the American experience in establishing that written form is desirable for land sale contracts in Mainland China. This is through a comparative law approach known as functionalism that examines the similarities and differences of the compared jurisdictions.

The experience in most states in the United States is that written form is mandatory for land contracts due to the attributes of formality. In particular, Professor Lon Fuller argued in his article, Consideration and Form, that written form has doctrinal attributes—formality functions such as the evidentiary, cautionary and channeling functions.¹

A close examination shows that the literature in American and Chinese jurisdictions shares many similarities. One example advanced by Professor Fuller is the evidentiary function, which suggests that written form is one of the most accurate evidentiary prerequisites of contractual terms.² This function is echoed in Mainland China in the form of the “evidentiary purpose”.³ This paper combines the evidentiary function and the evidentiary purpose to establish that written form introduces legal certainty.

Nevertheless, some functions proposed by Professor Fuller have not been discussed in Mainland China but they are even more desirable

¹Lon L. Fuller, Consideration and Form, 41 COLUM. L. REV. 799, 800 (1941).
²Id. at 800.
³(王利明)[WANG LIMING], he tong fa yan jiu di yi juan(合同法研究，第一卷) [STUDIES ON CONTRACT LAW VOLUME I] 485 zhong guo ren min da xue chu ban she(中国人民大学出版社) [China Renmin University Press] 2011).
there. One example is the channeling function, which suggests that law sets out clear rules of written form and the lack of written form incurs sanctions. This paper examines this function’s operation in the Chinese context and argues that one of the reasons for the contradictory Chinese cases is that Chinese law fails to provide clear and consistent rules in relation to contractual form. In other words, to introduce a well performing channeling function is an important purpose of the legal reform.

Moreover, Professor Karl Llewellyn had conducted an empirical study on the necessity of written form in the commercial world. This study not only reinforces the attributes of formality, but demonstrates to Mainland China about the practical significance of written form with empirical evidence.

The analysis contained in this paper examines the theoretical underpinning of the relevant doctrines in the United States and China. It is utilized to produce a practical and realistic solution to the chronic problem that exists in Mainland China. In order to integrate the literature from the compared jurisdictions, this paper employs a methodology of comparative law.

II. A SHORT OUTLINE OF COMPARATIVE METHODOLOGY EMPLOYED IN THIS PAPER

This section will set out the comparative methodology adopted in this paper.

A. The Approach of the Comparative Methodology

This paper employs the functionalism approach of comparative law. Functionalism compares the consequences of law across the different legal systems, and appreciates the rules and concepts for what they do instead of what they say. Comparative law also involves careful attention to the similarities and differences in the legal rules being compared. It is

---


5 See generally Peter Leyland and Andrew Harding, Oppositions and Fragmentations: In Search of a Formula for Comparative Analysis?, in COMPARATIVE LAW IN THE 21ST CENTURY (Andrew Harding and E. Örücü eds., 2002).


argued that the function of a rule and its social purpose are distinguishing features in a comparative study.\(^8\)

In addition, Professor Brand argues that functionalism in comparative law rests on three premises. The first premise is that law is an instrument to channel human behavior and offers answers to social needs.\(^9\) This premise establishes the “problem-solution approach”.\(^10\) This approach begins with a specific and practical problem, examines solutions to this problem by comparing two or more legal systems, and then evaluates the similarities and differences of the solutions offered by these various legal systems.\(^11\) The second premise is that the problems being examined are similar or identical across the legal systems.\(^12\) The third premise is the presumption that each system has similar solutions to reach similar results in response to similar problems.\(^13\)

Moreover, it is acknowledged that there is no simple or unified formula of comparison. It is not easy to draw up a perfectly logical and self-contained methodology of comparative law.\(^14\) Scholars need to work out their own unique approaches that they regard as being useful for particular purposes.\(^15\)

This paper employs the functionalism approach, as the “problem-solution approach” and the premises of functionalism fit the aims of this paper. As will be further discussed, problems occur where the ambiguous rules in the Contract Law of China\(^16\) give rise to contradictory cases relating to whether or not writing for land sale contracts is mandatory.

---

\(^8\) Brand, *supra* n. 6, at 409.


\(^10\) Brand, *supra* n. 6, at 409.


This premise is questioned to be limited, as law is not necessarily a rationally developed entity fulfilling a specific or functional purpose.Brand, *supra* n. 6, at 415-17.

\(^12\) Brand, *supra* n.6, at 409-10. This premise is also contested, as it only survives in an environment where the legal system is in similar, practical terms supported by similar, underlying political, moral and social values. It is pointed out that functionalism has some “blind spots.” For example, it is also argued functionalism reverses the order of cause and social effect by first explaining the latter instead of the former. Brand, *supra* n. 6, at 417-18.

\(^13\) Zweigert, *supra* n. 11, at 39. This premise is questioned, as a problem in this jurisdiction may not be a problem in another jurisdiction, or the problems may not be solved in a similar way.Brand, *supra* n. 6, at 418-19.

\(^14\) Zweigert, *supra* n. 11, at 33.

\(^15\) Reitz, *supra* n. 7, at 617-18.

\(^16\) Infra n. 27.
This has subsequently raised questions of whether written form should be prescribed by law on land sale contracts. The experience in the United States suggests that land sale contracts must be evidenced in written form and this has been underpinned by the attributes of formality such as the evidentiary, cautionary and channeling functions.\(^\text{17}\) This is of academic and practical value to Mainland China.

Furthermore, it is argued that the understanding of differences in the legal cultures of separate jurisdictions is crucial, as a lack of this comprehension may be an obstacle in comparative study.\(^\text{18}\) The differences between the compared jurisdictions may include the different roles and behaviors of judges in common law and civil law systems.\(^\text{19}\) Hence, in order to acknowledge the differences, this paper will introduce the Chinese legal system to Western audiences, and this includes the hierarchy of legal authorities and the legal reasoning approaches of Chinese courts.

**B. The Purpose and Layout of the Comparative Methodology**

Arguably, a comparative approach may serve multiple purposes as there is no one identifiable method.\(^\text{20}\) The purpose of the comparative methodology in this paper is to offer a solution to Mainland China. However, the solution will not and should not be so revolutionary that it fundamentally changes the Chinese legal framework or existing normative rules. Rather, the purpose is to use the comparative analysis to enrich the attributes of formality in Sino-Civilian literature, particularly when viewed through the lens of the formality functions in Anglo-American literature.

As to the layout of a comparative study, arguably it should be organized in a way that emphasizes explicit comparison.\(^\text{21}\) Generally, there are two ways. The first way is to discuss one jurisdiction followed by the discussion of another jurisdiction, and to end with a comparison of the two jurisdictions.\(^\text{22}\) However, this method has been criticized for being simplistic, ineffective and inefficient.\(^\text{23}\) Despite the criticism, it is

---

\(^{17}\) Fuller, *supra* n.1, at 800-01.


\(^{21}\) Reitz, *supra* n. 7, at 633-34.

\(^{22}\) *Id*.

\(^{23}\) *Id*.
necessary where one needs to describe the law before comparing it. A more effective way is to make every section of a study as comparative as possible.

Moreover, a comparative lawyer should examine a legal system from the perspective of an insider of the system. Hence, this paper first discusses the attributes of formality in Anglo-American literature and their counterparts in Sino-Civilian literature before concluding with an overarching discussion of each relevant attribute.

III. THE PROBLEM: UNCERTAINTY IN LAND SALE CONTRACTS FORMALITY IN MAINLAND CHINA

As already stated, there is uncertainty about whether written form is mandatory for land sale contracts in Mainland China. This uncertainty exists for two reasons. The first reason is the ambiguity of the Chinese statutes. The second reason is the contradictory cases.

The current Chinese Contract Law (the “Contract Law”) sets out general provisions for written form that entitles claimants to choose informality. This requirement is not specific to land sale contracts, but

24Id.

25Id.


“di shi tiao : dang shi ren ding li he tong , you shu mian xing shi , kou tou xing shi he qi ta xing shi. Fa lv , xing zheng fa gui gui ding cai yong shu mian xing shi de , ying dang cai yong shu mian xing shi. Dang shi ren yue ding cai yong shu mian xing shi de , ying dang cai yong shu mian xing shi. Di shi yi tiao : shu mian xing shi zhi he tong shu , xin jian he shu ju dian wen (bao kuo dian bao, dian chuan, chuan zhen, dian zi shu ju jiao huan he dian zi you jian) deng ke yi you xing di biao xian suo zai nei rong de xing shi. di san shi er tiao : dang shi ren cai yong he tong shu xing shi ding li he tong de , zi shuang fang dang shi ren qian zi huo zhe gai zhang shi he tong cheng li .”

(Article 10: Contracting parties may employ written, oral or other forms to form contracts; Written form must be employed where the laws or administrative regulations
rather is applicable to all types of contract generally. The written form of land sale contracts is prescribed by other statutes such as the *Urban Real Property Administration* (the “URPA”). However, the URPA exclusively applies to urban areas. There appears to be no clear law for courts to follow in rural land contract cases.

Nevertheless, even in the urban areas where the URPA clearly prescribes written form, contradictory cases emerge. Some courts think written form is mandatory. These courts only accept written and signed contracts to prove the existence of contractual so prescribe. Written form must be employed where the parties so agree.

**Article 11:** Written form refers to a form such as a written contractual agreement, letter, electronic data text (including a telegram, telex, fax, electronic data exchange and e-mail) that can tangibly express the contents contained therein.

**Article 32:** Where contracting parties choose to employ the form of written contractual agreements, the contracts are formed when the written contractual agreements are signed or sealed by the parties.


“第四十一条：房地产转让，应当签订书面转让合同...”

[Article 41: Written contracts shall be signed for real property transfer...]

Other statutes which prescribe written form for land sale contracts are Administrative Regulation on Development and Management of Urban Real Property China (promulgated by St. Council, Jul. 20, 1998, effective Jul. 20, 1998) CHINALAWINFO (last visited Jan. 3, 2015) (P.R.C.).

“第二十八条：商品房销售，当事人双方应当签订书面合同。”

[Article 28: In sales of commercial housing, written contracts shall be signed.]


“第十六条第一款：商品房销售时，房地产开发企业和买受人应当订立书面商品房买卖合同。”

[Article 16(1): Real property development enterprises and the purchasers shall employ written contracts in commercial house selling.]

29 *URPA, supra* n. 28, art. 2.
terms. Oral land sale contracts are not considered to be valid and will not be contractually enforced. For example, in *Pan Chunsheng v. Fu Yue’e*, the court found that the *URPA* clearly required written and signed land sale contracts. The court held that the absence of written contracts rendered the contractual rights and obligations uncertain and therefore the contract in this case was not formed. A similar judicial view was expressed in *Zhao Delai v. Miao Songlian*. There the court found that even though the intent to sell the land was genuine, the contract did not comply with the *URPA* and therefore was not formed. Although some courts expressly say the written form must be employed for land sale contracts, they do not always articulate which law they are relying on, as demonstrated in the case of *Fang Yinhui v. Fang Tiancai and Others*.

Other courts hold the view that written form is not mandatory. In these instances, oral land sale contracts are valid and contractually enforced. Contrary to the cases above, some courts explicitly set aside the mandatory requirement of written form that is prescribed by the *URPA*. For example, in *Chen WenX v. Li XX*, the trial court held that the law should protect an oral real property sale contract. The appellate court found the contract was the true expression of the parties’ intention and held that it did not violate any law. Moreover, the appellate court decided that the requirement of written form that is prescribed by the *URPA* was not mandatory. Hence the court denied the claim of rendering the oral contract void due to a lack of the statutory requirement of writing.

---

30 *Pan Chunsheng v. Fu Yue’e* (Haikou Interm.Ct. July 4, 2001) (CHINALAWINFO). All the Chinese cases in this paper are translated by the author of this paper.

31 *Id.*


The appellant orally agreed to sell a unit to at a price of ¥430000 (basement included) or ¥400000 (basement excluded). The ¥220000 in cash should be paid before Dec. 8, 2007. The rest should be paid after the mortgage was paid off. The respondent paid ¥10000 on Dec. 15 2007, ¥40000 on Dec. 10, ¥50000 on Dec. 14 and ¥98500 on Dec. 18. The mortgage was paid off on Dec. 26, 2007. However, the respondent did not make the rest of the payment, neither did the respondent occupy the unit.

33 As the respondent failed to pay all of the agreed amount and the unit was not occupied by the respondent.


36 *Id.*

37 *Id.*

38 *Id.*
Some courts avoid rejecting the URPA in their judgments and simply reach the conclusion that written form is optional in a delicate fashion. For example, in Xin RunPeng v. Zhao Shidan, the trial court held that an oral real property sale contract was valid and had been performed by the parties. The trial judgment was upheld on appeal. The appellate court reaffirmed the fact that the appellants had given a receipt to the respondent, the respondent had made payment to the appellant and that the appellant had given the property’s key to the respondent. In the appellate court’s view, this conduct demonstrated the true intention of the parties. More importantly, the appellate court held that the parties did not violate any law.

Now that the two reasons of the uncertainty have been identified, the following section will focus on analyzing the causes of the uncertainty.

IV. THE ANALYSIS OF THE UNCERTAINTY AND PROPOSED LEGAL REFORM INITIATIVE IN MAINLAND CHINA

It is suggested that the Contract Law is mainly responsible for the contradictory cases causing the uncertainty stated above.

The following section will first briefly introduce the hierarchy of legal authorities and legal reasoning approaches in Mainland China to Western audiences before conducting the comparative analysis.

As the doctrine of stare decisis does not apply in China, Chinese courts apply statutes according to their relevance and hierarchy and apply

---


40Id.

41Id.

42Id.

43Higher courts’ judgments, in theory, do not bind lower courts and are not cited in lower courts’ judgments. The Supreme People’s Court has published a series of guiding cases periodically since 2011. The lower courts must refer to these guiding cases when hearing similar cases. Notwithstanding, this does not substantively change the merely guiding and non-binding nature of higher courts’ judgments.


the highest and the most relevant statute (in case of conflicts) to reach conclusions.

In contractual matters, the Contract Law is at the top of the hierarchy, as this law is enacted by the supreme legislature, the National People’s Congress (“NPC”). In contrast, the URPA has lower legal authority than the Contract Law, as the URPA is enacted by the Standing Committee of NPC (“NPCSC”). Furthermore, the laws made by the NPCSC (the URPA) supplement and cannot contradict the basic principles of the laws made by the NPC (the Contract Law). Accordingly, if the URPA contradicts the Contract Law, the courts should apply the Contract Law, unless the Contract Law provides otherwise.

It is prima facie clear that Article 10 of the Contract Law entitles claimants to employ any contractual form in all contracts. This is the general rule of informality. However, Article 10 also specifies that if writing is prescribed by other laws, it should apply. Accordingly the writing requirement for land sale contracts prescribed by the URPA shall apply in urban areas.

Nevertheless, problems and contradictions often occur when the courts apply Article 10. As discussed in section III, some courts expressly cite the URPA and require written and signed contracts. Some omit or even expressly reject the URPA to reach the opposite conclusion, without offering solid reasons for this divergence in their judgments.

There are several reasons causing the problems, contradictions and uncertainty:

First, the courts that require written contracts may genuinely find a conflict between the Contract Law (with higher authority) and the URPA (with lower authority). The URPA makes written form mandatory but this contradicts the general informality rule established by the Contract Law that entitles claimants to choose in formality. Consequently, these courts may decide to apply the general informality rule and reach the conclusion that writing is not mandatory. This reasoning may be why some courts expressly set aside the URPA, as the appellate court did in Chen WenX v.

---

44 Laws made by the NPC have the highest authority. Laws in a narrow sense only refer to those enacted by the National People’s Congress (NPC) and its Standing Committee of National People’s Congress (NPCSC), both legislative bodies. See Articles 7, 8, 9 and 79 of li fa fa (立法法) [Law on Legislation] (promulgated by the Standing Comm. Nat’l People’s Cong., Mar. 15, 2000, effective July 1, 2000) 2000 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. 112, http://www.npc.gov.cn/englishnpc/Law/2007-12/11/content_1383554.htm(P.R.C.).

45 Id.

46 Id.

47 The more accurate interpretation of Article 10 would be that the written form prescribed by the URPA is an exception to the general rule of informality established by the Contract Law.
Alternatively, some courts overlook the URPA. As the Contract Law is the most authoritative, these courts may rely solely on the Contract Law without searching other relevant laws, either intentionally or unintentionally. This may explain why some courts do not even mention the URPA in their judgments, such as Xin RunPeng v. Zhao Shidan cited earlier.

Secondly, the courts that require written contracts may not see any conflicts between the Contract Law and the URPA. They may construe the requirement that the written form prescribed by the URPA is an exception to the general informality rule of the Contract Law. Based on this logic, the courts apply the URPA and reach the conclusion that written form is mandatory for land sale contracts in urban areas. This explains why the URPA is cited expressly in some judgments such as Pan Chunsheng v. Fu Yue’e and Zhao Delai v. Miao Songlian.

Thirdly, the uncertainty analyzed so far is only confined to China’s urban areas. The level of uncertainty may further escalate in rural areas where there appears to be no clear rules to follow, as the URPA exclusively apply in urban areas.\textsuperscript{48}

In conclusion, the fundamental reason for the contradictions and uncertainty lies in the Contract Law, the law with the highest authority in contractual matters, fails to articulate that written form is mandatory for land sale contracts. This gives the courts the opportunity to have their own contradictory interpretations on a threshold question—whether written form is mandated by law or not. To some extent, the courts are forced to assume the role of the legislature in deciding the threshold question.

V. THE POSITION IN THE UNITED STATES: THE STATUTE OF FRAUDS AND ITS SUCCESSOR LEGISLATION FOR LAND CONTRACTS

As will be discussed in section VIII, the solution to the uncertainty lies in a legal reform initiative to the Contract Law. In order to underpin this initiative, this section turns to exploring how the experience in the United States may inform and inspire Mainland China.

Compared to Mainland China, the issue of formality in land contract cases is much more certain in the United States. In most of the states in the United States, contracts of dispositions of interests in land must be evidenced in writing. This requirement descends from Section 4 of an English statute, the Statute of Frauds. This statute was enacted to prevent frauds and perjury due to the evidentiary limitations of proving the existence and terms of contracts in seventeenth century England.\textsuperscript{49}

\textsuperscript{48}URPA, supra n. 28, art. 2.

\textsuperscript{49}The evidentiary limitations include lack of adequate control on juries and dysfunctional parol evidence rules. To address this problem, this Statute required certain
Section 4 of the *Statute of Frauds* provides:

No action shall be bought whereby…upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them…unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised.\(^{50}\)

The American statutes remaining in force have generally copied Section 4 of the *Statute of Frauds*.\(^{51}\) In Maryland and New Mexico, the English *Statute of Frauds* is in force by way of judicial decision.\(^{52}\) In every state with the exception of Louisiana, the equivalent legislation of the *Statute of Frauds* exists, although “some provisions [of the equivalent legislation of the *Statute of Frauds*] are omitted in a few states”.\(^{53}\)

VI. THE NEED FOR WRITTEN FORM: FUNCTIONS AND PURPOSES OF FORMALITY IN ANGLO-AMERICAN AND SINO-CIVILIAN LAW

The section focuses on the theoretical underpinning of the Chinese legal reform initiative. The following discussion will examine the attributes of formality in the United States and integrate them into the Chinese legal context.

The literature in these two jurisdictions argues for formality for reasons of theoretical and practical significance. For example, written contracts are the most accurate and original evidence of contractual terms; this is called the “evidentiary function”\(^{54}\) in Anglo-American literature and types of important contracts to be evidenced in writing, including contracts of dispositions of interests in land. With the presence of written form, courts might have more accurate and convincing evidence to rely on.

As to the history of the *Statute of Frauds*, see William Holdsworth, *A History of English Law*§ VI 388 (Methuen Sweet & Maxwell 1966);


\(^{50}\) *Statute of Frauds* 1677, 29 Cha.2 c. 3, § 4 (Eng.).

\(^{51}\) Such as Florida, see Fla. Stat. § 725.01 (2013). As to the statutes in other states, please refer to *Restatement (Second) of Contracts* ch. 5 Statutory Note (1979).

\(^{52}\) *Id.*

\(^{53}\) *Id.* (Regarding the list of the statutes in each state)

\(^{54}\) *Id.*
the “evidentiary purpose”\textsuperscript{55} in Sino-Civilian literature. Furthermore, the action of signing written contracts arguably reminds contracting parties to be cautious and prudent, and of the seriousness of land sale dealings; this is referred to as the “cautionary function”\textsuperscript{56} in Anglo-American literature and the “warning purpose”\textsuperscript{57} in Sino-Civilian literature.

However, not every function can find its Chinese counterpart. For example, the channeling function of formality is said in Anglo-American literature to offer claimants clear and consistent rules to follow.\textsuperscript{58} Only when claimants comply with the legal rules of written form will the law protect their contractual rights. Despite its absence in Mainland China, the channeling function is even more significant there in the light of the contradictory cases discussed earlier, as the role of this function is to provide consistency and introduce certainty.

The following discussion will expand on these points in sequence.

A. The First Comparison: the Evidentiary Function and Purpose

The literature in both jurisdictions widely acknowledges that a written and signed contract is the most persuasive and convincing evidence of contractual content and written form increases the certainty and safety of a transaction.

In the United States, Professor Fuller demonstrated that the evidentiary function of formality provides clear, convincing and reliable evidence of the contract and its terms.\textsuperscript{59} Professor Eric Posner points out that this function absorbs the fraud-preventing purpose of the \textit{Statute of Frauds}.\textsuperscript{60} Furthermore, the evidentiary function is justified from the standpoint of cost. It is argued that the claimants bear almost all the cost of judicial error caused by incompletely documented contracts; hence claimants are incentivized to create good contractual records.\textsuperscript{61} Moreover,

\textsuperscript{55} Scholars have interpreted this purpose. See the discussion below.

\textsuperscript{56} Fuller, \textit{supra} n.1, at 800.

\textsuperscript{57} Some scholars such as Professor Wang Tze-Chien [王澤鑒] in Taiwan have discussed this. It will be further elaborated on in the following discussion (see Wang Tze-Chien, \textit{infra} n. 90).


\textsuperscript{59} Fuller, \textit{supra} n.1, at 800.

\textsuperscript{60} Posner, \textit{supra} n.58, at 1984.

\textsuperscript{61} \textit{Id.} at 1985.
the role of written form and the evidentiary function in testamentary cases is a “probative safeguard” by recording the evidence of testamentary intent in a reliable and permanent form. In particular, holographic wills are almost exclusively justifiable in terms of the evidentiary function and even more convincing than a signature.

The Chinese counterpart to the evidentiary function is the evidentiary purpose. It states that written contracts may clarify contractual liabilities and prevent disputes such as arguments about contractual content. Formality is also a necessary means to ascertain contractual intention, to confirm and interpret contractual terms. Since written contracts are documented and traceable, when disputes arise, it is easier to present evidence and clarify liabilities than oral form, particularly in complicated and important cases. Chinese scholars argue that this purpose introduces certainty as written contracts clarify the parties’ rights and obligations. Hence, written contracts arguably protect claimants and increase the safety of high-value contracts in terms of evidencing the terms.

Nevertheless, it is criticized that formality may increase the complexity of transactions. It is argued that the more complicated the formality is, the more likely it is that claimants will disregard it. The result is not only that the claimants will not enjoy the safety benefits, but also that

62 Ashbel Gulliver & Catherine Tilson, Classification of Gratuitous Transfers, 51 Yale L.J. 1, 6 (1941).
63 Id. at 13.
64 John H. Langbein, Substantial Compliance with the Wills Act, 88 Harv. L. Rev. 489, 493 (1975).
68 隋彭生 [Sui Pengsheng], he tong fa yao yi (合同法要义) [Essence of Contract Law] 70 zhong guo ren min da xue chu ban she (中国人民大学出版社 [China Renmin University Press] 2011).
69 Id. at 68.
dishonest parties may harm *bona fide* parties by abusing written form.\textsuperscript{71} Further, formality may be redundant in the transactions where formality is generally disregarded.\textsuperscript{72} Formality may also be used against the parties who are not familiar with business practices.\textsuperscript{73}

Despite the criticism, written form is desirable. This is because in comparison to written contracts, the oral form serves the evidentiary attributes of formality unsatisfactorily. This point has been well made by Professor Sui. He argues that although the strengths of the oral form are speed, convenience and the low cost to form contracts, oral forms makes it difficult to distinguish pre-contractual statements and contractual terms.\textsuperscript{74} In Professor Sui’s view, this is the reason the current *Contract Law* limits the application of the oral form.\textsuperscript{75} He even uses the Chinese expression “words of mouth being no guarantee” to summarize the weaknesses of oral form.\textsuperscript{76} Therefore, he suggests that contracts involving a large amount of money should not employ oral form.\textsuperscript{77}

Indeed, the evidentiary attributes provide clarity and certainty. These attributes are desirable to both claimants and courts, in both the United States and Mainland China.

From the perspective of claimants, formality makes them more likely to honor their contracts. When written contracts are signed, claimants are bound and protected by every contractual term they agree to. Written contracts deter the claimants from breaching contracts and hence strengthen the claimants’ self-discipline. Even Professor Michael Braunstein, who sought to repeal the *Statute of Frauds*, admits that “writing is often necessitated by the need to plan and co-ordinate performance.”\textsuperscript{78} If there is an oral contract, the claimants are more likely to pursue lawsuits to their advantage. By contrast, if written and signed contracts are required as evidence, it is more likely that the claimants will honor their promises and innocent parties will have the best chance of getting contractual remedies.

\textsuperscript{71}Id.

\textsuperscript{72}DIETER MEDICUS, de guo min fa zong lun (德国民法总论) [INTRODUCTION TO GERMAN CIVIL CODE] 461 (邵建东 [Shao Jiandong] trans., fa lv chu ban she 法律出版社 [Law Press]. 2000).

\textsuperscript{73}Id.

\textsuperscript{74}Id.

\textsuperscript{75}Id.

\textsuperscript{76}Id.

\textsuperscript{77}崔建远 [CUI JIANYUAN], 合同法总论上卷 [ON CONTRACT LAW FIRST VOLUME], supra n. 67, at 248.

From the perspective of the courts, written contracts increase judicial accuracy and efficiency. Written contracts introduce certainty and clarity and hence reduce the risk of unfair judgments being made. Furthermore, if written and signed contracts are present, claimants are more likely to settle the disputes out of court. Hence, fewer cases enter the courts and the courts have more resources to concentrate on the existing cases. Even if claimants pursue lawsuits, the courts have accurate, written evidence to rely on to increase the judicial accuracy of disputed matters.\(^79\)

The certainty and clarity brought about by written contracts allow the courts to save time in investigating the existence of a contract and its terms. As argued by Professor Braunstein, “written agreements are more certain and less vulnerable to misinterpretation”\(^80\) and “courts and juries naturally view allegations of an oral contract with skepticism.”\(^81\) In contrast, oral form introduces the difficulties of determining contractual rights and obligations between contracting parties.\(^82\)

In conclusion, the evidentiary attributes of formality are widely acknowledged. Signed and written contracts accurately record original contractual terms. Written contracts not only introduce certainty but also increase judicial accuracy.

B. The Second Comparison: the Cautionary Function and the Warning Purpose

In addition to the evidentiary function/purpose, scholars in both the United States and Mainland China also argue that the action of signing written contracts assists contracting parties to be prudent and cautious.

In the United States, Professor Fuller argued that formality served as a check against unconsidered action, preventing claimants from being incautious, inconsiderate or impulsive (the cautionary function).\(^83\) Hence formality may “influence the habits of the nation by encouraging the reduction of contracts to writing”.\(^84\) The cautionary function promotes deliberation and carefulness, hence prevents mistakes due to the careless

---

\(^79\) The process of judicial authentication is necessary only when courts and claimants have reasonable doubts about the genuineness of contracts.

\(^80\)Braunstein, supra n. 78, at 424.

\(^81\)Id. at 425.

\(^82\)隋彭生 [SUI PENGSHENG], supra n. 68, at 69.

\(^83\)See Fuller, supra n. 1, at 800.

\(^84\)Perillo specifically examines its application in the context of gratuitous contracts between persons in close relationship, gifts, guarantee promises and marriage settlement. Perillo, supra n. 59, at 53-56.
use of language.\textsuperscript{85} Furthermore, in the context of wills, the requirements of writing and the written signature arguably have major cautionary significance, and the formalities associated with attestation also serve cautionary policies.\textsuperscript{86}

However, it has been argued that this function can be fulfilled by the doctrine of consideration instead of formality.\textsuperscript{87} Professor Perillo questions whether written form can perform the function well, as some written documents such as written repudiations do not indicate caution in contract formation, as they are created after the contract is formed.\textsuperscript{88} Professor Braunstein argued that the Statute of Frauds does not serve this function adequately because no particular ceremony is required.\textsuperscript{89}

The Sino-Civilian version of the cautionary function is the warning purpose. It is argued that the warning purpose helps claimants to understand the legal meaning and significance of a contract to avoid hasty and rash decisions.\textsuperscript{90} In Japan, oral donation contracts could be rescinded, as the law uses writing to encourage careful decision-making.\textsuperscript{91} Furthermore, written contracts may make claimants think about contractual content cautiously\textsuperscript{92} and avoid reckless decisions.\textsuperscript{93} The warning purpose may also allow claimants to understand the meaning and consequences of a transaction before signing a contract.\textsuperscript{94}

Indeed, formality guides, leads, and directs insufficiently cautious people to become sufficiently cautious. When parties are talking, they are

\textsuperscript{85}Posner, supra n.58, at 1985-86.

\textsuperscript{86}Langbein, supra n. 64, at 494-96.

\textsuperscript{87}Posner, supra n.58, at 1985-86.

\textsuperscript{88}Although written repudiations may sufficiently evidence contractual terms to satisfy the Statute of Frauds. Perillo, supra n. 59, at 56.

\textsuperscript{89}Professor Braunstein quotes a case where the seller had only signed the agency agreement and obviously did not have in mind the making of a sale contract with the buyer when he signed it. Professor Braunstein uses the example of written repudiations, which evidences the contract, to make the point that the Statute fails to preclude the haphazard formation of contracts. See Braunstein, supra n. 78, at 430.

\textsuperscript{90}王澤鑑 [WANG TZE-Chien], min fa zong ze (民法總則) [General Principles of Civil Law] 328 (自版 [Published by the Author of this Book] 2010).

\textsuperscript{91}WAGATSUMA SAKAE, zhai quan ge lun shang juan min fa jiang yi liu (債權各論上巻民法講義 VI) [ON EACH OBLIGATION FIRST VOLUME WAGATSUMASAKAE CIVIL LAW LECTURE NOTES VI] (徐慧[Xu Hui] trans., zhong guo fa zhi chu ban she 中国法制出版社 27 [China Legal Publishing House] 2008).

\textsuperscript{92}王利明 [WANG LIMING], supra n.3, at 485.

\textsuperscript{93}韩世远 [HAN SHIYUAN], supra n.65, at 114.

\textsuperscript{94}崔建远 [CUI JIANYUAN], 合同法总论上卷 [ON CONTRACT LAW FIRST VOLUME], supra n.67, at 67.
more likely to be formulating ideas or communicating rather than contracting deals. By contrast, when they put words on paper and sign it, they may become more cautious and prudent. This mental tendency applies universally.

However, it has been argued that caution can be achieved through oral form. Employing oral form does not imply carelessness. This argument is rebutted as written contracts are more likely to induce parties to perform contractual obligations. Indeed, written contracts also increase the likelihood of contractual performance through serving the cautionary function/warning purpose. This is partly due to claimants’ realization that signing of a written contract means they have already been reasonably cautious. As pointed out by Professor Braunstein, “the ceremony of writing encourages the parties to take their undertaking seriously thus increasing the likelihood of performance.”

In conclusion, the comparative analysis shows that the cautionary function/warning purpose is acknowledged. Signed and written contracts assist contracting parties to be prudent, and increase the accuracy of contractual language and the likelihood of contractual performance in both the United States and Mainland China.

C. The Third Comparison: the Channeling Function

In Anglo-American literature, Professor Fuller proposed that formality serves the channeling function, arguing that writing offers a legal framework or channel for the legally effective expression of intention. In order to accomplish objectives at law, a person needs to tailor spontaneous thoughts into defined and recognizable channels. In the context of the Statute of Frauds, the absence of writing indicates the unwillingness of being bound. However, Professor Fuller disagreed that this function fully relieves judges from ascertaining whether a legal transaction is intended, as this exaggerates the role of formality.

\[95\text{朱庆育 [Zhu Qingyu], yi si biao yu fa lv xing (意思表示与法律行为) [Expression of Intention and Juristic Acts], 比较法研究 [JOURNAL OF COMPARATIVE LAW] 15, 24 (2004).}\
\[96\text{隋彭生[SUI PENGSHENG], supra n.68, at 70.}\
\[97\text{Braunstein, supra n.78, at 425.}\
\[98\text{Fuller, supra n.1, at 801.}\
\[99\text{Id. at 801-02.}\
\[100\text{Id. at 802.}\
\[101\text{Id. at 801.}\

The channeling function is further interpreted in the United States. It is pointed out that complying with the Statute of Frauds exhibits the claimants’ contractual intention. 102 Professor Posner argues that the presence of writing signals the claimants’ desire for legal enforcement of contracts, while the lack of writing does the opposite. 103 However, the desire for legal enforcement could also be expressed orally. 104 As a result, the channeling function justifies a writing requirement, at most, as a default rule but not as an immutable rule. 105 Additionally, in the context of wills, the channeling function arguably applies in a way that the standardization of testation achieved under will acts to lower the costs of routinized judicial administration. 106 An example is the compliance with formalities for executing witnessed wills saves courts the trouble of deciding whether the document was meant to be a will. 107

In line with Professor Posner, this paper adopts the view that the channeling function requires law to offer consistent and clear rules in relation to whether written form is mandatory for land sale contracts. This is the role of many laws—to settle disputes by laying clear standards.

Although Sino-Civilian literature does not appear to have the counterpart of the channeling function, the underlying principle of this function ought to apply and as important there. The Chinese courts hold the opposite views as to whether writing is mandatory by law for granting contractual remedies. Furthermore, it has been established that the fundamental problem lies in the Contract Law’s failure to articulate that written form is mandatory. Hence, both Chinese laws and courts fail to perform the channeling function. They do not provide a consistent guideline regarding the obligation to reduce land sale contracts to written form.

By contrast, the American version of the Statute of Frauds legislation performs this function more satisfactorily. All the American legislation, as introduced, unambiguously articulates that land sale contracts must be evidenced in writing. Regarding this particular legal matter, both American courts and claimants have clear rules to follow.

The lack of a channeling function introduces legal uncertainty and may undermine the authority of Chinese law and courts. This also imposes injustice to claimants. As will be discussed in section VIII, in order to solve these problems, a legal reform initiative to the Contract Law should be proposed. This is because, as stated, the Contract Law is enacted by the

102 Perillo, supra n.59, at 49.
104 Id.
105 Id.
106 Langbein, supra n.64, at 493-94.
107 Id. at 494.
National People’s Congress and this law has the highest authority in contractual matters. The Contract Law can and should set out consistent and clear rules in the matter of written form for land sale contracts with its highest authority for Chinese courts and claimants.

The courts will have clear rules to apply—land sale contracts must employ the written form before being upheld. The possibility of overlooking the requirement of written form no longer exists. This makes judgments consistent in relation to whether written form is mandatory.

Claimants will have clear rules to follow and this clarifies contractual consequences. Once the claimants employ land sale contracts in written form by complying with the Contract Law, they are entitled to expect that their contractual rights will be recognized and protected by the national law.

In conclusion, the channeling function in Anglo-American literature suggests that law should set out clear and consistent rules in relation to contractual form. Despite its absence in Mainland China, it is more desirable there, particularly because the contradictory cases emerge and the certainty of law needs to be increased. Further, a legal reform initiative can be proposed to the Contract Law to address the uncertainty of law and cases. This is because the Contract Law best performs the channeling function due to its highest authority in contractual matters.

VII. PROFESSOR LLEWELLYN’S EMPIRICAL ANALYSIS AND ITS APPLICATION TO LAND SALE CONTRACTS IN MAINLAND CHINA

There is a more moderate attitude towards the statutory requirement of the written form, and that is to operate the Statute of Frauds in a flexible way to suit the commercial world.

Professor Llewellyn sought to modify the application of the Statute of Frauds in sale of goods contracts, particularly to merchants. 108 Professor Llewellyn attempted to maintain the balance of, on the one hand, retaining enough of the Statute of Frauds to encourage what he considered to be the better practice of writing down agreements, and on the other hand, eliminating the rewards to “sharpers” who would invoke the Statute of Frauds to benefit from changes in market price. 109 In Professor Llewellyn’s mind, the Statute of Frauds went beyond reflecting the usual merchant practice to better serve commercial purposes. 110 “The practice of “confirming” oral or telephone deals was today so ingrained that the Statute of Frauds no longer cost the price in occasional hardship,

---

108 Wiseman, supra n. 4, at 515.
109 Id.
110 Id. at 518.
which it cost a century ago.”111 In order to foster better practices by all, Professor Llewellyn was willing to tolerate an occasional injustice against the sloppy merchant while not allowing the Statute of Frauds to be intentionally used by “sharers” to secure an unfair advantage.112

Furthermore, Professor Llewellyn demonstrated that the majority of business people reduced their agreements to writing and that the Statute of Frauds was in line with business practice.113 An empirical study conducted in 1957 showed that most manufacturers in Connecticut preferred to have written documents (including contracts) regardless of the Statute of Frauds.114 The manufacturers preferred written contracts in order to ensure smooth business operations and avoid any uncertainty and risks caused by oral contracts.115 This study confirmed that industry felt that there was a real need for writing regardless of the Statute of Frauds.

Although Professor Llewellyn’s approach is raised in the context of sale of goods contracts that are mostly between merchants, the approach may equally apply to land sale contracts that are likely to be between two non-merchants. The approach may prove that the written form is desirable in the context of land contracts for several reasons.

First, the Statute of Frauds is highly desirable to individuals in land sale contracts. As discussed, written form is the best evidence of land sale contracts. Courts are greatly assisted by written evidence of agreements when resolving disputes to better protect contractual rights. This is particularly so where land transactions take place between a merchant and a non-merchant. Given the financial limitations of individuals, the sale of land is one of the most important transactions they could possibly make and land is often their most valuable asset. Hence, individuals have every reason and motivation to protect themselves and to take the transaction very seriously with written evidence.

Secondly, Professor Llewellyn’s empirical study provides a rationale for the written form in the land sale context. The English Law Commission accepts that the writing requirement for land sale contracts reflects the desire of people to use writing.116 Indeed, an empirical study

111 Id. (quoting Revised Uniform Sales Act 1941 (Report and Second Draft), at comment (3) on § 4)

112 Id.

Professor Llewellyn, in another article, expresses the similar view that reduction of uncertainty in business dealings makes occasional injustice less condemnable. See Karl Llewellyn, What Price Contract – An Essay in Perspective, 40 Yale Law Journal 704 (1931).

113 Wiseman, supra n. 4, at 518.


115 Id.

116 See the “Is Land Different?” discussion, The Law Commission, Transfer of
does not necessarily offer a reason to repeal a law. The traffic law is an example. The well-established right-driving traffic law in China respects and reflects the right-driving practice of Chinese people who need the traffic law to maintain road traffic order and safety.

Likewise, if an empirical study were to be conducted in Mainland China, it may show a result similar to that discovered by Professor Llewellyn: that most claimants would reduce these important land sale contracts into writing, regardless of what the law says. This is one way to understand Professor Braunstein’s argument that the Statute of Frauds is the only reason to use writing and there are good reasons independent of and more compelling than the Statute of Frauds to employ writing such as the “need for written evidence of agreements” and “increasing the likelihood of performance”.

However, Professor Braunstein’s arguments against the Statute of Frauds become the arguments for the Statute of Frauds. If claimants have an independent motivation to reduce contracts to writing, the statutory requirement of writing respects and reflects their motivation and desire. Additionally, the requirement does so by bringing about the evidentiary and cautionary attributes of formality. Since the common practice is to employ writing, the likelihood of compliance with the Statute of Frauds is high. In these circumstances, the commercial reality, which could be the reason to repeal the law of the written form, becomes a reason to maintain the written form.

Thirdly, there are rules surrounding the Statute of Frauds and the statutory requirement of writing. These rules are useful for dealing with the circumstances where claimants fail to reduce the contracts to writing. In this case, the rules step in to settle disputes, such as the doctrine of part performance and estoppel in the United States and Article 36 of the Contract Law in Mainland China. This is very similar to the traffic law example above, which shows that although some laws seem to deal only with exceptions, this does not mean they are unimportant.


Braunstein, supra n.78, at 423-26.

The informal land sale contracts could be “saved” by part performance and estoppel where plaintiffs demonstrate acting in reliance on defendants’ representations. 2 E. Allan Farnsworth, Farnsworth on Contracts §6.9, 183-87 (Aspen Publishers 3d ed. 2004). Restatement (Second) of Contracts ch. 5 Statutory Note (1979).

Contract Law art. 36. By the operation of Article 36 of the Contract Law, oral contracts that violate the statutory requirement of written form can be nevertheless enforced where the main contractual obligation of the contracts is performed and accepted by the contracting parties.
Lastly, Professor Llewellyn’s empirical analysis further proves that written form performs the channeling function well. The channeling function requires law to set out clear rules. If there is a real need and motivation to employ writing regardless of the law, the chance that contracts to be upheld by satisfying the writing requirement is higher, hence the rules of written form can be better observed and complied with. Furthermore, the rules surrounding the written form step in to deal with the situation where claimants use oral form, where the claimants have another set of clear rules to follow in case of not observing the rules of written form.

In conclusion, Professor Llewellyn’s empirical study explains why written form is desirable in commercial settings. This study not only echoes the attributes of formality (evidentiary, cautionary and channeling), but also demonstrates to Mainland China that there is a practical need for written form.

VIII. THE PROPOSED LEGAL REFORM INITIATIVE AND ITS SIGNIFICANCE TO MAINLAND CHINA

So far, the paper has raised the problem that there are conflicting cases about whether or not written form is mandatory in Mainland China. In order to solve this problem, this paper proposes a legal reform initiative to the Contract Law. It recommends the Contract Law should require that written form is mandatory for land sale contracts. This solution will effectively end the contradictory cases. This is because the Contract Law has the highest level of legal authority in contractual matters and nationwide application. It is almost impossible for Chinese courts to overlook the requirement of written form. This is particularly important to rural areas where there appears to be no clear rules for courts to follow. Furthermore, the reform initiative has been underpinned by the attributes of formality such as the functions and purposes in Anglo-American and Sino-Civilian literature.

This section will highlight the significance of the legal reform initiative.

First, the initiative has social significance. The certainty brought about by the initiative is important to the Chinese people. One study showed that housing in China is becoming increasingly unaffordable.\footnote{Jing Wu, Joseph Gyourko & Yongheng Deng, Evaluating Conditions in Major Chinese Housing Market (National Bureau of Economic Research, Working Paper No. 16189, July 2010), available at...}
Indeed, one of the top priorities of the Chinese Government is to provide its people with a fair and transparent real property market. One way to achieve this is to offer the Chinese people a set of clear rules that govern the contractual form of land sale contracts. However, while the Chinese people devote their entire lives to acquiring real property, the Chinese courts currently provide them with two contradictory answers as to whether they are obliged to sign written land sale contracts or not. The solution proposed in this paper will clarify such a requirement and remove this legal obstacle for the Chinese people in pursuing their dreams of real property ownership.

Secondly, the initiative has political significance. It will help to achieve the political goals set by China’s supreme authority. On 15 November 2013, the Communist Party of China (‘‘CPC’’) Central Committee’s Decision on Major Issues Concerning Comprehensively Deepening Reforms (‘‘the Decision of the Communist Party of China’’) was issued. This document provides a roadmap for China's further development by setting the goals of accelerating the process of developing a fair, efficient and authoritative socialist judicial system; protecting the people’s rights; and letting the people feel fairness and justice in every single judicial case. One of the ways to achieve this goal is to give Chinese people consistent and clear rules and judgments in land contracts cases.

The political significance also lies in the certainty brought about by the initiative assists the Chinese Government in implementing its ambiguous plan of integration of urban and rural areas. This plan, which has been repeatedly emphasized in the Chinese Government’s reports, aims to eliminate the huge disparity between the two areas. Moreover,


This study shows that the housing price-to-income ratio in Chinese major cities such as Beijing and Shenzhen is over 15. It also describes the booming of the real property market in Mainland China.

122 Approved at the Third Plenary Session of the 18th CPC Central Committee held from Nov. 9 to 12, 2013, in Beijing. Decision on the CCCPC on Some Major Issues Concerning Comprehensively Deepening the Reform, CHINA.ORG.CN, (Jan. 17, 2014), http://www.china.org.cn/chinese/2014-01/17/content_31226494.htm [hereinafter CCCPC]

123 Id.

124 For example, the plan of “integration of urban and rural areas” was addressed by the then Prime Minister, Wen Jiabao in his Government Report, see zhong hua ren min gong he guo zhong yang ren min zheng fu (中华人民共和国中央人民政府) [THE CENTRAL PEOPLE’S GOV’T OF THE PEOPLE’S REPUBLIC OF CHINA], zheng fu gong zuo bao gao zai shi er jie quan guo ren da yi ci hui yi shang(政府工作报告 - 在十二届全国人大一次会议上) [GOV’T REPORT IN THE 12TH NAT’L PEOPLE’S CONGRESS] (Mar. 18, 2013), see original at http://www.gov.cn/2013zfbgjjd/content_2363807.htm.
the Decision of the Communist Party of China issued in 2013 stated a similar plan to “form a unified construction land market for both urban and rural areas.”

Under this plan, the land market in the countryside has great potential because more rural land may go into the market. The certainty introduced by the initiative will fill the gap in rural areas where there appears to be no clear rules for courts to follow. It will boost the rural land market, and assist in unifying the rules applicable to urban and rural areas in land transactions.

Thirdly, the certainty has significance to the Chinese national economy. The real property industry is a very important component of the Chinese national economy. It accounts for approximately 6% of the world’s second largest economy by GDP in 2014. Moreover, as acknowledged in the Chinese State Council’s White Paper, a legal system plays a significant role in developing a socialist market economy. However, the uncertain laws and contradictory cases in land sale contracts are an obstacle to building a functional legal system. Given the economic significance of the real property industry, the legal reform proposed in this paper aims to address this problem. It will increase legal certainty and consistency in land contract cases, as part of transitional China’s march towards a “healthy socialist market economy.”

Finally, the certainty has significance in Chinese legal reform. A unified China Civil Code is on the agenda of the National People’s

---

125 This plan allows rural, collectively owned profit-oriented construction land to be sold, leased. The rural land may go to the market with the same rights and at the same prices as the urban state-owned land. CCCPC, supra n. 122 at 3.

126 An article in The Economist magazine has suggested that the restrictions of land transactions in the vast Chinese countryside may be loosened and a far-reaching land reform may be taking place in China. See A World to Turn Upside Down, THE ECONOMIST (London), Nov. 2, 2013 at 23.

127 The proportion is approximately 4.607% in 2005, 4.794% in 2006, 5.195% in 2007, 4.694% in 2008, 5.471% in 2009, 5.674% in 2010, 5.661% in 2011, 5.652% in 2012 and 5.9% in 2013, respectively. The percentage is calculated by the author of this paper by reference to the statistics provided by zhong hua ren min gong he guo jia tong ji ju (National Bureau of Statistics of China), jin zhuan guo jia lian he tong ji shou ce (Joint Statistical Handbook of the BRIC Countries (2015)), Oct. 09, 2015, see original at http://www.stats.gov.cn/tjzc/ztfx/jz2015/201507/t20150709_1211956.html.


129 Id.
This provides a great opportunity to incorporate the initiative into this new code.

IX. CONCLUSION

This paper has examined the on-going problem of the Chinese courts delivering contradictory cases on whether written form is mandatory for land sale contracts. It has been established that the Contract Law is responsible for the contradictory cases. In order to solve the problem, this paper has proposed a legal reform initiative to the Contract Law. It recommends that the Contract Law should require that written form is mandatory for land sale contracts, as this law has the highest legal authority in contractual matters in Mainland China and best performs the channeling function.

In order to underpin the legal reform initiative, this paper has employed the comparative methodology of functionalism and has explored American doctrines and experience to inform Mainland China. In particular, this paper has integrated the evidentiary and cautionary attributes of formality in Anglo-American literature with their counterparts in Sino-Civilian literature. The attribute of the channeling function in the Anglo-American literature does not appear to have a counterpart in Mainland China. However, the underlying principle of the channeling function is even more important in Mainland China, particularly in the light of the contradictory Chinese cases in relation to contractual form.

Furthermore, this paper has analyzed Professor Llewellyn’s empirical study as to why written form is desirable in commercial settings. This study not only reinforces the attributes of formality, but also provides Mainland China with empirical evidence of the operation of written form in the real world.

Finally, this paper explained the social, political and economic and legal significance of the legal reform initiative and the possible impact of the initiative on a transitional China.

---

130 The National People’s Congress reveals this agenda on its website, see 乔晓阳[QiaoXiaoyang], 关于中国特色社会主义法律体系的构成、特征和内容[On the Composition, Specialties and Content of the Socialist Legal System with Chinese Characteristics], 中国人大网[中国人大网] [Nat’l People’s Congress Web] (Jun., 25, 2013), see original at http://www.npc.gov.cn/npc/xinwen/2013-06/25/content_1798341.htm.