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## A COMPARATIVE ANALYSIS OF SINO-AMERICAN CONTRACTUAL WRITING ATTRIBUTES: UNDERPINNINGS FOR CHINA'S FUTURE UNIFORM CIVIL CODE TO MANDATE WRITING FOR LAND SALE CONTRACTS

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*Dr Wei Wen\**

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*In order to demonstrate the desirability of writing, this article advances, integrates, and synthesizes the theoretical, doctrinal, and practical attributes of writing in Sino-American literature; assesses their importance; and separates the core attributes from their derivatives, leading to a much clearer focus on the three core attributes of writing in Sino-American literature. This article identifies the existing attributes that are relevant to writing in order to provide a more informed understanding of the role of writing. This article also draws experience from England, Germany, and Taiwan.*

*This research is timely. China's current Contract Law does not mandate writing for land sale contracts, causing nationwide uncertainty as to whether a writing requirement is a mandatory prerequisite for contractual remedies in land sale contract cases in China. However, parties to land sale contracts should be required to execute their agreements in writing. As a timely opportunity to fill this gap and address this problem, China's supreme legislature, which is now drafting a uniform civil code that will include the new rules of Contract Law, could utilize the comparative analysis of this article as a solid underpinning to mandate writing for land sale contracts and to maximize the benefits of writing. Therefore, it is recommended that the future civil code mandates writing for land sale contracts. This is desperately necessary to effectively address the uncertainty in land sale contract cases. The reform proposed here also fills in the gaps of*

*the current Contract Law and the scholarly civil code drafts that do not have solutions to address the uncertainty problems.*

*Furthermore, the comparative analysis of this article assists to remove the uncertainty in China about the application of the “healing theory,” a remedy given by China’s Contract Law to validate oral contracts, including oral land sale contracts, that would otherwise be invalid for violating the requirement of writing. China’s supreme legislature could also utilize the analysis of this article as a part of its policy-making process, to tighten or loosen the statutory requirement of writing for other types of contracts or agreements (such as lease contracts or building contracts) when drafting the future uniform civil code.*

## I. INTRODUCTION

The purpose of this article is to demonstrate the desirability of written form and provide Chinese legislators, particularly China’s supreme legislature, with solid theoretical underpinnings to mandate writing for land sale contracts. In Anglo-American jurisdictions, certain types of contracts, including land sale contracts, must be evidenced in writing.<sup>1</sup> This writing requirement in the United States derives from the English Statute of Frauds 1677 (the Statute)<sup>2</sup> and is still critical in modern times because Anglo-American literature acknowledges that contractual formality has theoretical and

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<sup>1</sup> RESTATEMENT (SECOND) OF CONTRACTS CH.5, STATUTORY NOTE (AM. LAW INST. 1981).

<sup>2</sup> STATUTE OF FRAUDS, 29 Car. 2 c.3 § 4 (1677). There were evidentiary limitations in seventeenth century England, such as lack of adequate control on juries, dysfunctional parol evidence rules, perjury, and frauds. In order to address the evidentiary limitations, the Statute of Frauds was enacted to require certain types of important contracts to be evidenced in writing, including contracts of dispositions of interests in land and contracts of guarantee so that courts had accurate written evidence on which to rely. J.H BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 290 (2nd ed. 1979); 6 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 388 (1966).

practical justifications. Most of the Anglo-American attributes are echoed and further enriched by their Sino-Civilian counterparts. Although some attributes are not specific to land contracts, they are desirable in land sale contract cases. In order to provide a more informed understand of the role of writing, this article advances, synthesizes, and integrates the theoretical, doctrinal, and practical attributes of writing in Sino-American literature and also identifies the attributes that are not relevant to writing.

Although all the attributes are treated as standalone in Sino-American literature, this article assesses their importance, examines their interrelations, and separates the core attributes from their derivatives; leading to a hierarchy that has a much clearer focus and highlights the three core attributes of written form in Sino-American literature: evidentiary, cautionary, and channeling. In particular, the Anglo-American channeling attribute is not found in Sino-Civilian literature, but this attribute can inform China and persuade it that certainty in land sale contract cases is essential and important. This article also draws experience from other jurisdictions: England, Germany, and Taiwan.

This article is timely. China's supreme legislature is now in the process of drafting its first uniform civil code that will include new rules of Contract Law, and the future civil code will be the most important statute to govern all civil cases (including contract cases) in China.<sup>3</sup> This could and should be an opportunity to mandate writing for land sale contracts and introduce certainty in land sale contract cases.

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<sup>3</sup> See Shierjie Quanguo Renda Changweihui Lifa Guihua (十二届全国人大常委会立法规划) [*Legislative Plans of the 12th Standing Committee of National People's Congress*]; Zhongguo Minfazongze Caoan Chushen Minfadian Shijianbiao Mingque (中国民法总则草案初审 民法典时间表明确) [*First Reading of China's General Principles of Civil Code, the Timetable of Enacting Civil Code is Clear*]; Zhongguo Renda Wang (中国人大网) [NAT'L PEOPLE'S CONGRESS WEB] (June 1, 2015), [http://www.npc.gov.cn/npc/xinwen/2015-08/03/content\\_1942908.htm](http://www.npc.gov.cn/npc/xinwen/2015-08/03/content_1942908.htm); Zhongxinwang (中新网) [CHINA NEWS SERV. WEB] (June 27, 2016), <http://www.chinanews.com/gn/2016/06-27/7919168.shtml> (the timetable is clarified by the Chair of Sub-Committee of Legislative Affairs of the Standing Committee of the National People's Congress).

China's current Contract Law explicitly mandates a writing for seven types of contracts, including lease contracts exceeding six months<sup>4</sup>, building contracts,<sup>5</sup> and technology transfer contracts.<sup>6</sup> This approach is appropriate because it is categorized by the specific types of contracts and each type of contract can be examined on its merits to determine whether it deserves the attention of the writing requirement. However, Contract Law does not expressly mandate writing for land sale contracts and this has caused nationwide uncertainty about whether a writing is mandatory as a prerequisite for contractual remedies in China.<sup>7</sup> Further, land sale contracts deserve to be mandated in writing. When the law was under the review of the supreme legislature two decades ago, China's supreme legislature acknowledged the strengths of writing and once mandated written form for land sale contracts, although the reasons why the requirement was removed in its later draft remain unknown and undocumented.<sup>8</sup> Now it is time to resume the requirement of writing for land sale contracts. Furthermore, the seven types of contracts that are mandated in writing by Contract Law, including lease contracts exceeding six months,<sup>9</sup> arguably encompass less significant implications than land sale contracts. If lease contracts deserve the mandatory requirement of writing, land sale contracts should deserve the same.

As the current Contract Law has missed the opportunity of mandating writing for land sale contracts, this opportunity falls on the future civil code. China's supreme legislature could utilize the comparative analysis of this article as a solid underpinning to clearly

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<sup>4</sup> Hetong Fa (合同法) [CONTRACT LAW] (promulgated by Nat'l People's Cong., Mar. 3, 1999, effective Oct. 1, 1999), at art. 215.

<sup>5</sup> *Id.* at art. 270.

<sup>6</sup> *Id.* at art. 342(2).

<sup>7</sup> This will be further discussed in Part VI.

<sup>8</sup> See Quanguo Renda Changweihui Fazhi Gongzuo Weiyuanhui Mingfashi (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 Hetongfa Lifa Ziliao* (中华人民共和国合同法立法资料选) [Selected Legis. Materials of Contract Law] (1999), at 10, 13, 18, 22, 29, 44, 45, 121, 141.

<sup>9</sup> Contract Law, *supra* note 4.

mandate writing for land sale contracts in the future civil code. Accordingly, it is recommended that the future civil code mandates writing for land sale contracts. This would be an effective solution to addressing the nationwide uncertainty problem in land sale contract cases. The core attributes of writing are also conducive to solving the uncertainty relating to an important remedy in land sale contract cases in China.<sup>10</sup> This analysis fills the existing gaps because both the current Contract Law and the civil code drafts proposed by Chinese scholars do not have any section to solve the two identified uncertainty problems. Further, China's supreme legislature could utilize the analysis of this article as a part of its policy-making process to tighten or loosen the statutory requirement of writing for other types of contracts or agreements (such as lease contracts or building contracts) when drafting the future uniform civil code.

The following sections proceed by discussing the desirability of writing—the theoretical, doctrinal, and practical attributes of writing arising from Sino-Civilian literature and Anglo-American literature, in a sequence considering the three core attributes (the evidentiary, the cautionary and the channeling attributes), followed by the derivatives of each core attribute. At the end, this article presents the hierarchy of the attributes in the form of a family tree.

## II. THE FIRST CORE ATTRIBUTE: THE SINO-CIVILIAN EVIDENTIARY PURPOSE AND THE ANGLO-AMERICAN EVIDENTIARY FUNCTION

Sino-Civilian and Anglo-American literature widely acknowledge that signed and written contracts are accurate and persuasive evidence of contractual terms and also increase legal certainty and transactional safety. The evidentiary purpose has been discussed extensively in Sino-Civilian literature. It has been argued that written and signed contracts clarify contractual liabilities and

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<sup>10</sup> This will be further discussed in Part VI.

assist in preventing disputes about contractual content.<sup>11</sup> Formality is also seen as a useful and necessary means to ascertain contractual intention and confirm and assist in interpreting contractual terms.<sup>12</sup> Because written contracts can be documented with identifiable reference,<sup>13</sup> it is convenient to present evidence and clarify liabilities in case of disputes concerning important and complicated contracts.<sup>14</sup> Further, the evidentiary purpose promotes certainty through clarifying contractual rights and obligations.<sup>15</sup> Due to the certainty, written contracts protect claimants and increase transactional safety, which is particularly important for contracts involving large amounts of money.<sup>16</sup>

Notwithstanding this, written form is criticized for increasing the cost of contract formation, because oral form is convenient, low cost, and commonly used in daily life.<sup>17</sup> Written form may also make transactions complicated. Arguably, the more complicated the contractual formality, the more likely claimants will see formality as a burden and abandon it.<sup>18</sup> Hence, claimants may not enjoy the certainty and safety introduced by formality.<sup>19</sup> This may also give dishonest people opportunities to take advantage of bona fide

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<sup>11</sup> Han Shiyuan (韩世远), *Hetongfa Zonglun* (合同法总论) [CONTRACT LAW] 2011, at art.113; Wang Liming (王利明), *Hetongfa Yanjiu Diyijuan* (合同法研究第一卷) [STUDIES ON CONTRACT LAW] 2011, at 485.

<sup>12</sup> Cui Jianyuan (崔建远), *Hetongfa* (合同法) [LAW OF CONTRACT] 2007, at 90; Liming, *supra* note 11, at 485.

<sup>13</sup> Cui Jianyuan (崔建远), *Hetongfa Zonglun Shangjuan* (合同法总论上卷) [ON CONTRACT LAW] 2011, at 251.

<sup>14</sup> *Id.*

<sup>15</sup> Sui Pengsheng (隋彭生), *Hetongfa Yaoyi* (合同法要义) [ESSENCE OF CONTRACT LAW] 2011, at 70; Wagatsuma Sakaw, *Zhaiquan Gelun Shangjuan* (债权各论上卷) [ON OBLIGATION] (Xu Hui (徐慧) trans., 2008), at 27.

<sup>16</sup> Pengsheng, *supra* note 15, at 69.

<sup>17</sup> Jianyuan, *supra* note 13, at 248; Cui Jianyuan et al., (崔建远), *Zhaifa* (债法) [LAW OF OBLIGATION] 2010, at 263.

<sup>18</sup> Dieter Medicus, *Deguo Minfa Zonglun* (德国民法总论) [INTRODUCTION TO GERMAN CIVIL CODE] (Shao Jiandong (邵建东) trans., 2013), at 461; Werner Flume, *Falü Xingwei Lun* (法律行为论) [ON JURISTIC ACTS] (Chi Ying (迟颖) trans., 2013), at 287.

<sup>19</sup> Medicus, *supra* note 18, at 461; Flume, *supra* note 18, at 287–88.



claimants who are not familiar with business practice.<sup>20</sup> Despite criticisms, the voice for written form is getting stronger in China. In particular, it has been argued that the current Contract Law limits the use of oral form for valid reasons, partly because oral contracts fail to draw a clear line between pre-contractual statements and contractual terms.<sup>21</sup> Further, the weaknesses of the oral form have been summarized by a Chinese expression: “Words of mouth have no guarantee.”<sup>22</sup> Hence, it has been suggested that contracts involving large amounts of money should be in writing.<sup>23</sup>

Moreover, the German and Taiwanese legislatures have accepted the evidentiary purpose as a valid reason to tighten up the formality requirement for land sale contracts. The German legislature confirms that compliance with formality permanently evidences the existence and content of legal actions and hence reduces, shortens, and simplifies legal proceedings (“Beweiszwang”).<sup>24</sup> Additionally, compliance with formality clarifies the legal nature of the conduct, as if the complete legal meaning were “cast on a coin” to increase certainty.<sup>25</sup> Because of high economic value of land, Taiwan’s legislature requires land contracts to be notarized in written form in order to increase legal certainty, protect private rights, and prevent lawsuits.<sup>26</sup> This approach is supported by a Taiwanese scholar who agrees that notarized and written documents crystallize contractual content.<sup>27</sup>

With respect to the United States, Professor Fuller argued formality provides clear, convincing, and reliable evidence of

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<sup>20</sup> Medicus, *supra* note 18, at 461; Flume, *supra* note 18, at 287–88.

<sup>21</sup> Pengsheng, *supra* note 15, at 69.

<sup>22</sup> *Id.*

<sup>23</sup> Jianyuan, *supra* note 13, at 248.

<sup>24</sup> Medicus, *supra* note 18, at 461; Flume, *supra* note 18, at 287–88.

<sup>25</sup> Medicus, *supra* note 18, at 461; Flume, *supra* note 18, at 287.

<sup>26</sup> Legislative Yuan Gazette 立法院公報, (Chinese only Lifayuan Gongbao), <http://lis.ly.gov.tw/ttscgi/lgimg?@881301;0252;0513>.

<sup>27</sup> Wang Tzechien (王澤鑾), Minfa Zongze (民法總則) [GENERAL PRINCIPLES OF CIVIL LAW] 328 (2010).

contractual terms (the “evidentiary function”).<sup>28</sup> Professor Posner points out that this function absorbs the value of the fraud-preventing purpose of the statute of frauds.<sup>29</sup> This function has a cost-effective advantage. Claimants are incentivized to create accurate written contractual records as they bear the risk of errors caused by incomplete contractual documents.<sup>30</sup> The same considerations are manifested in relation to the rules governing the validity of testamentary dispositions. The strengths of the evidentiary function ensure the accuracy and authenticity of testamentary intent through recording the intent in a reliable and permanent way (“probative safeguard”). In holographic will cases, handwriting serves an evidentiary function by replacing attestation and assisting in proving the genuineness of the will.<sup>31</sup> By comparison, nuncupative wills perform the evidentiary function unsatisfactorily due to the absence of writing and signatures, and more rigorous formality is required to resolve this problem.<sup>32</sup>

Despite its positive aspects, the statute of frauds has been criticized for serving the evidentiary function unsatisfactorily due to the loose operation of the statute. The first critique is that agreements which do not evidence all transaction details nevertheless satisfy the requirement of writing imposed by the statute.<sup>33</sup> The second critique is that written contracts can be rescinded in oral form, which is allowed by the statute.<sup>34</sup> The third critique is that although the presence of written contractual documents assist in preventing breach of contract, the statute does

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<sup>28</sup> Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800 (1941); Joseph M. Perillo, *The Statute of Frauds in Light of the Functions and Dysfunctions of Form*, 43 FORDHAM L. REV. 39, 64–69 (1974) (exploring the evidentiary function in a historical context).

<sup>29</sup> Eric Posner, *Norms, Formalities, and the Statute of Frauds: A Comment*, 144 U. PA. L. REV. 1971, 1984 n. 19 (1996).

<sup>30</sup> *Id.* at 1985.

<sup>31</sup> Ashbel Gulliver & Catherine Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 13 (1941); John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 493 (1975).

<sup>32</sup> Langbein, *supra* note 31, at 493.

<sup>33</sup> Michael Braunstein, *Remedy, Reason, and the Statute of Frauds: A Critical Economic Analysis*, 1989 UTAH L. REV. 383, 426–27.

<sup>34</sup> *Id.* at 427–28.

not explain why claimants must use written form to achieve this.<sup>35</sup> Moreover, written form is criticized for being redundant, as claimants are motivated to use written form to protect themselves in the business world.<sup>36</sup> In the United States, an empirical study shows manufacturers preferred using written contracts for operating business smoothly and avoiding uncertainty and risks caused by oral contracts, regardless of what the statute of frauds says.<sup>37</sup> The study substantiates the real need for writing, as business people value the evidentiary attributes and choose to use written form voluntarily. The study also confirms that the statutory requirement of writing respects commercial norms and aligns with business practices.

Despite the criticisms of the statute of frauds, similar to the German and Taiwanese legislatures, the English Law Commission and Parliament have accepted the evidentiary function as a valid reason to tighten the statutory writing requirement for land contracts.<sup>38</sup> This acceptance has resulted in the adoption of a much stricter requirement that “contracts only be made in writing and only by incorporating all the terms in one document”<sup>39</sup> to replace the previous loose approach that merely required contracts to be “evidenced in writing” and allowed the joint reading of several documents.<sup>40</sup> In the views of the English legislature and Law

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<sup>35</sup> Posner, *supra* note 29, at 1985.

<sup>36</sup> 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 *Bijiaofa Yanjiu* (比较法研究) COMP. L. J. 15, 25 (2004).

<sup>37</sup> The empirical study was conducted in 1957 in Connecticut. *The Statute of Frauds and the Business Community: A Re-appraisal in the Light of Prevailing Practices*, 66 *YALE L. J.* 1038, 1042 (1957); Zipporah Batshaw Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 *HARV. L. REV.* 465, 515–19 (1987).

<sup>38</sup> Law Commission, *Transfer of Land: Formalities for Contracts for Sale Etc. of Land* P 2.8 (Law Commission No.164, 1987), available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/228611/0002.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228611/0002.pdf) (this document led to the tightening up of the statutory requirement of writing for land contracts in England in 1989).

<sup>39</sup> Law of Property (Miscellaneous Provisions) Act 1989, c. 34, § 2(1) (Eng.).

<sup>40</sup> Several documents can be jointly read to record essential terms to satisfy the statutory requirement of writing. Law of Property Act 1925, 15 & 16 Geo.5 c. 20, § 40 (Eng.); *Pearce v. Gardner* [1897] QB 688 (Eng.).

Reform Commission, the evidentiary strengths of written form are sufficiently attractive to support this major change and to defeat several attempts to repeal the Statute of Frauds.<sup>41</sup> The English legislature's actions should inform China about the desirability of writing for land sale contracts in China.

Likewise, China's supreme legislature acknowledged the evidentiary strengths of writing and once-required written form for land contracts mandatorily in earlier drafts of Contract Law when the law was under review two decades ago, but the requirement was removed from the final enactment for reasons which remain unknown and undocumented.<sup>42</sup> With the support of the evidentiary attributes, it is now time for China's future uniform civil code to mandate writing for land sale contracts.

#### A. ADDITIONAL STRENGTHS OF THE EVIDENTIARY PURPOSE AND FUNCTION

In addition to increasing certainty and clarity, the evidentiary purpose and function have other strengths. First, formality increases the likelihood of contractual performance and reduces lawsuits. After claimants sign written contracts, they are bound and protected by every contractual term to which they agree. Written contracts may deter claimants from breaching contracts and strengthen their self-discipline. In this regard, written contracts impose dynamics between claimants. Even critics of the statute of frauds, like Professor Braunstein, recognize that "writing is often necessitated by the need to plan and co-ordinate performance."<sup>43</sup> In contrast, oral contracts increase the difficulties of collecting evidence and

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<sup>41</sup> In 1937, The Law Revision Committee in England recommended the repeal of section four of the Statute of Frauds. Editorial Committee of the Modern Law Review, *The Law Revision Committee's Sixth Interim Report*, 1 MOD. L. REV. 97 (1937). In 1953, the Committee made another proposal to repeal the Statute. Cyril Grunfeld, *Statutes and Reports of Committees, Law Reform (Enforcement of Contracts) Act 1954*, 17 MOD. L. REV. 451 (1954).

<sup>42</sup> Civil Law Division of Sub-Committee of Legislative Affairs of the Standing Committee of the National People's Congress, *supra* note 8, at 10, 13, 18, 22, 29, 44, 45, 121, 141.

<sup>43</sup> Braunstein, *supra* note 33, at 425.

distinguishing between opposing views in disputes.<sup>44</sup> Hence, claimants are more likely to pursue lawsuits to their advantage if only bound by oral contracts. Indeed, with written and signed contracts to serve as solid evidence, claimants are less likely to sue. One example is *Chen WenX v. Li XX*, a case in China where one claimant alleged that an oral land sale contract did not exist due to the absence of a written contract.<sup>45</sup> Had there been a signed written contract in this case, the allegation would have had no standing, thereby reducing the incentive to pursue lawsuits.

Secondly, written and signed contracts reduce the likelihood of errors caused by incomplete contractual record and also increase efficiency by providing certainty and clarity. Professor Braunstein, who argued for the repeal of the statute of frauds, concedes that due to the evidentiary function, “written agreements are more certain and less vulnerable to misinterpretation,”<sup>46</sup> and that “courts and juries naturally view allegations of an oral contract with skepticism.”<sup>47</sup> In contrast, oral form increases the difficulties of determining contractual obligations.<sup>48</sup> This uncertainty increases the courts’ difficulties and burden to deliver fair and accurate judgements. These negative results could be further magnified by the limitations of testimony in modern China, which will be discussed later.

Third, written and signed contracts reduce the cost of resolving contractual disputes. With the presence of solid written contractual evidence, claimants may be incentivized to pursue alternative dispute resolutions that are less costly than lawsuits, such as mediation. This is particularly the case in China, where mediation is

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<sup>44</sup> Pengsheng, *supra* note 15, at 69.

<sup>45</sup> *Chen WenX Su Li XX* (陈文 X 诉李 XX) [Chen WenX v. Li XX], CHINALAWINFO (Liuzhou Interm. People’s Ct. June 9, 2012). Chen WenX’s partner and Li XX had an oral land sale contract. However, after the death of Chen WenX’s partner, Chen WenX’s family refused to perform the oral contract. Li XX sued.

<sup>46</sup> Braunstein, *supra* note 33, at 424.

<sup>47</sup> *Id.* at 425.

<sup>48</sup> Pengsheng, *supra* note 15, at 69.

free.<sup>49</sup> Furthermore, as written contracts increase the likelihood of contractual performance, fewer cases end up in court. Hence, courts have more resources to deal with their existing contractual lawsuits. Even if claimants are determined to sue, with the help of the certainty and clarity introduced by signed contracts, courts can still increase judicial accuracy and efficiency by spending less time investigating contractual terms. Therefore, the additional strengths of the evidentiary attributes of writing further demonstrate the desirability of writing.

*B. THE NEED FOR WRITTEN FORM DUE TO LIMITATIONS  
OF TESTIMONY IN MODERN CHINA*

The need for written form is strong in China, as the evidentiary attributes of written form address the limitations of testimony in modern China effectively. In the United States, Professor Corbin argued that written form should not be mandatory for sale of goods contracts as the background against which the statute of frauds was enacted has disappeared.<sup>50</sup> The statute of frauds was originally enacted to address the evidentiary weaknesses in seventeenth century England, which led to widespread perjury and frauds through requiring important contracts such as those relating to land to be evidenced in writing so that courts had accurate written evidence on which to rely.<sup>51</sup> However, the background against which the statute was enacted—"frauds and perjury"—may still persist in modern China. Perjury and baseless claims are chronic

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<sup>49</sup> Renmin Tiaojie Fa (人民调解法) [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. 1, 2011), at art. 4, CHINALAWINFO.

<sup>50</sup> Professor Corbin argued that written form should not be mandatory for sale of goods contracts that exceed a certain amount of money, as the modern jury system is more functional than the times when the statute of frauds was enacted and a jury is no longer used in contractual disputes in many jurisdictions. Arthur Corbin, *Uniform Commercial Code – Sales: Should it be Enacted*, 59 YALE L. J. 821 (1950).

<sup>51</sup> Baker, *supra* note 2, at 341–49.

problems in Chinese civil litigation<sup>52</sup> and are partially caused by the evidentiary rule that anyone who knows the facts of cases is obligated to stand in the witness box.<sup>53</sup> The purpose of the rule appears to encourage the discovery of facts. However, claimants can take advantage of this rule by hiring “witnesses” who are willing to make incorrect statements and commit perjury, as the “witnesses” simply need to allege knowing the facts to obtain the “legitimacy” to deliver testimony in court.

As the modern Chinese evidentiary rules reflect the reasons why the statute of frauds was enacted in seventeenth century England, the statute of frauds-related experience, in the United States and England, may inform China by explaining the desirability of written form. Courts in China need to rely on the certainty, clarity, and stability introduced by signed contracts. Written contractual evidence plays a significant role in setting factual boundaries and evidentiary matrix. This is important in contractual disputes such as interpretation, termination, and damages, where ascertaining the precise contractual terms is the fundamental pre-condition of

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<sup>52</sup> Some claimants are prosecuted for committing perjury. Zhejiang Tonglu 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. Mar. 22, 2016); 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. Nov. 26, 2015); 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. Oct. 19, 2012). 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) LAW STUDY JOURNAL (2015).

<sup>53</sup> Minshi Susong Fa (民事诉讼法) [Civil Procedure Law] (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., Aug. 31, 2012), at art. 72, CHINALAWINFO. Perjury and baseless claims may also be caused by inadequate cross-examination and the lack of effective lawyers in China. By contrast, cross-examination may be more adequate and there may be more effective lawyers in the United States.

settling the disputes. Additionally, written 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 particularly important in land contract cases due to the significance of contractual remedies in land transactions. Perhaps this is why Professor Corbin questioned the desirability of written form in sale of goods cases but did not question the writing requirement in land contract cases.

In contrast, oral testimony introduces uncertainty and risks. Witnesses may retract their testimony, resulting in compromised findings which may need to be revised or overturned. This prolongs trials and makes them expensive. Further, claimants may exploit the evidentiary rules to make baseless claims and, therefore, commit frauds and perjury. These negative impacts decrease the judicial accuracy and efficiency discussed earlier. It has been radically suggested that witnesses are the second worst source of evidence next to the contracting parties.<sup>54</sup>

After years of experience, China's legislatures and courts have relied more on written contractual evidence and limited the application of testimony. In particular, the Supreme People's Court of China has placed written and signed contracts at the top of the evidentiary hierarchy in terms of persuasiveness.<sup>55</sup> This is because the same signed contract can be presented to courts as different types of evidence for maximizing the chances of discovering truth. For example, a comprehensive signed contract can prove the authenticity of signatures or handwriting (physical evidence), prove contractual content (documentary evidence), set out contractual terms without referring to other evidence (direct evidence) and record firsthand contractual evidence (original evidence).<sup>56</sup> Furthermore, the Supreme People's Court has advised its lower courts by stating that the testimony given by certain witnesses

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<sup>54</sup> OTHMAR JAUERNIG, *Minshi Susong Fa* (民事诉讼法) [CIVIL LITIGATION] 295 (Zhou Cui (周翠) trans., 2003).

<sup>55</sup> *Zuigaoyuan Guangyu Minshi Susong Zhengju De Ruogan Guiding* (最高人民法院关于民事诉讼证据的若干规定) [Provisions of Evidence in Civil Procedures] (promulgated by the Sup. People's Ct., Dec. 21, 2001, effective Apr. 1, 2002), at art. 77.

<sup>56</sup> *Id.*



cannot be the sole basis for determining the facts.<sup>57</sup> This guidance also sets out the rule that testimony provided by spouses and relatives is less convincing than testimony given by other witnesses.<sup>58</sup> The actions taken by the Supreme People's Court demonstrate the desirability of written form.

### III. DERIVATIVES OF THE EVIDENTIARY PURPOSE AND FUNCTION

The evidentiary purpose and function have derivatives. Although derivatives are treated as stand-alone in Sino-Civilian and Anglo-American literature, the derivatives depend on the evidentiary nature of writing—written and signed contracts are original and accurate evidence of contractual content. Despite this dependency, the derivatives enrich the evidentiary attributes.

First, from the perspective of enterprises, written contracts record the content that is used for business convenience, such as making written files organized, inserting profitable contractual terms into written contracts, and keeping administrative information consistent in writing (the “managerial function”).<sup>59</sup>

Second, from the perspective of government, written form is an aid for supervising economic activities and regulating contractual content (the “regulatory function”).<sup>60</sup> Its Chinese counterpart is the “public law purpose” where formality arguably provides a clear and reliable basis for land registration authorities to check and supervise land contracts.<sup>61</sup> The German version is the “public interest purpose” (Öffentliches Interesse) as written contracts facilitate government archival management and supervision in land-related matters.<sup>62</sup> Further, written contracts can be physically taxed and

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<sup>57</sup> *Id.* at art. 69(1)(2)(5), such as the testimony delivered by witnesses who do not make their appearance at court without legitimate reasons.

<sup>58</sup> *Id.* at art. 77(5).

<sup>59</sup> Perillo, *supra* note 28, at 58.

<sup>60</sup> *Id.* at 62.

<sup>61</sup> Wang Hong (王洪), *Hetong Xingshi Yanjiu* (合同形式研究) [Research on Contractual Formality] 48 (2005).

<sup>62</sup> Medicus, *supra* note 18, at 462.

stamped (the “taxation function”).<sup>63</sup> Indeed, the taxation function is particularly important in land transactions. As land transactions are great sources of revenue, they have gone beyond private law domain and have a public significance in many jurisdictions. Government needs written land sale contracts to better achieve the purposes of management, supervision, and revenue collection.

Third, from the perspective of claimants, written contracts help to protect them by drawing a clear line between contractual formation and pre-contractual negotiations, and avoiding ambiguities that are caused by their own negligence or other parties’ frauds (the “contractual-party-protection purpose” and “Parteien des Rechtsgeschäfts”).<sup>64</sup> This may be more important to claimants of lower socio-economic status.<sup>65</sup> However, the contractual-party-protection purpose is contested as the unequal economic status of claimants does not constitute illegitimacy at law; what is of legal concern is whether the economic status advantage is obtained by illegitimate means or exploited for imposing undue influence on the claimants’ will.<sup>66</sup> Further, written contracts protect third parties’ interests as they are reliable sources of information about existing legal relations (the “third-party-protection purpose” and “Einzelne Dritte”).<sup>67</sup> Written contracts also arguably serve the “publicity function and purpose,” as they reveal reliable contractual information to protect prospective bona fide purchasers against unknown pre-existing legal relations,<sup>68</sup> to assist them to better understand contractual terms,<sup>69</sup> and to increase public transparency of legal relations.<sup>70</sup> Similarly, where written contracts clearly explain the key issues to prospective consumers, writing serves the “information-providing purpose” (‘Informationszweck’).<sup>71</sup>

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<sup>63</sup> Perillo, *supra* note 28, at 64.

<sup>64</sup> Medicus, *supra* note 18, at 461–62.

<sup>65</sup> Sakaw, *supra* note 15, at 28.

<sup>66</sup> Qingyu, *supra* note 36, at 25.

<sup>67</sup> Medicus, *supra* note 18, at 462; Li Yongjun (李永军), *Hetongfa* (合同法) [LAW OF CONTRACT] 204 (2010).

<sup>68</sup> Perillo, *supra* note 28, at 59.

<sup>69</sup> Pengsheng, *supra* note 15, at 70.

<sup>70</sup> Tzechien, *supra* note 27, at 328.

<sup>71</sup> Shiyuan, *supra* note 11, at 114.

Fourth, writing serves the “circulation purpose,” as written documents are commonly used in commercial law for circulating negotiable securities such as bills and stocks.<sup>72</sup> Writing also serves the “transaction safeguard purpose,” as written contracts increase transaction safety through the precise recording of contractual content.<sup>73</sup>

Lastly, novel derivatives may arise as individuals, enterprises, legislatures, governments, and societies continue to utilize the evidentiary attributes, increasing the desirability of writing in China in the context of land sale contracts.

#### IV. THE SECOND CORE ATTRIBUTE: THE SINO-CIVILIAN WARNING PURPOSE AND THE ANGLO-AMERICAN CAUTIONARY FUNCTION

The second core attribute of formality is the warning purpose in Sino-Civilian literature and its counterpart, the cautionary function in Anglo-American literature, suggests that the action of signing written contracts urges claimants to be prudent and cautious.

In Sino-Civilian literature, the warning purpose arguably assists claimants to understand the legal meaning and significance of contracts and therefore avoid hasty and rash decisions.<sup>74</sup> Additionally, written contracts arguably induce claimants to consider contractual content seriously,<sup>75</sup> to convey intention cautiously,<sup>76</sup> and to better understand contractual consequences.<sup>77</sup> However, these arguments may not explain why claimants must use written form to immutably demonstrate caution.<sup>78</sup>

The German and Taiwanese legislatures have accepted the warning purpose as a valid reason to tighten up their formality requirements for land sale contracts. The German legislature

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<sup>72</sup> Sakaw, *supra* note 15, at 27; Tzechien, *supra* note 27, at 328.

<sup>73</sup> Liming, *supra* note 11, at 501.

<sup>74</sup> Tzechien, *supra* note 27, at 328.

<sup>75</sup> Liming, *supra* note 11, at 485.

<sup>76</sup> Shiyuan, *supra* note 11, at 114.

<sup>77</sup> Jianyuan, *supra* note 13, at 67.

<sup>78</sup> Qingyu, *supra* note 36, at 24.

confirms that compliance with formality gives claimants an intensive awareness of entering into transactions, makes them think twice, and ensures the seriousness of their decisions (“Warnzweck”).<sup>79</sup> Similarly, the Taiwanese legislature thinks that formality is necessary to encourage claimants to be prudent when forming important contracts such as land contracts.<sup>80</sup>

In the United States, Professor Fuller argued that formality acts as a check against unconsidered actions and prevents claimants from being incautious, inconsiderate, or impulsive (the “cautionary function”).<sup>81</sup> Professor Perillo pointed out that the cautionary function changes the habits of the nation through encouraging the use of written form.<sup>82</sup> Further, the cautionary function may prevent mistakes caused by the careless use of language.<sup>83</sup> In particular, the strengths of the cautionary function have successfully persuaded the English legislature to tighten the statutory writing requirement for land contracts.<sup>84</sup> It has been further argued that the cautionary function is also important to justify the requirements of writing and signatures in testamentary cases for serving cautionary policies.<sup>85</sup> Nevertheless, the statute of frauds is criticized for performing the cautionary function unsatisfactorily. For example, written repudiations are created after contract formation and do not manifest the prudence of contract formation, but the repudiations still satisfy the statute through evidencing contractual terms.<sup>86</sup> Likewise, claimants may not have the idea of entering into contracts when signing or creating some written memoranda that nevertheless satisfy the statute because there are cases in the United States where the sellers have only signed the agency agreements and do not have

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<sup>79</sup> Flume, *supra* note 18, at 287; Medicus, *supra* note 18, at 461.

<sup>80</sup> <http://lis.ly.gov.tw/ttscgi/lgimg?@980501;0248;0327>;  
<http://lis.ly.gov.tw/ttscgi/lgimg?@881301;0252;0513> (Legislative Yuan Gazette 立法院公報, Chinese only (Lifayuan Gongbao)).

<sup>81</sup> Fuller, *supra* note 28, at 800.

<sup>82</sup> Perillo, *supra* note 28, at 56. Professor Perillo examined the operation of the cautionary function in the context of gratuitous contracts, gifts, guarantee promises, and marriage settlement.

<sup>83</sup> Posner, *supra* note 29, at 1985.

<sup>84</sup> Law Commission, *supra* note 38, at 2.10.

<sup>85</sup> Langbein, *supra* note 31, at 494–96.

<sup>86</sup> Perillo, *supra* note 28, at 53–56.

in mind the formation of sale contracts with the buyers when signing the contracts.<sup>87</sup> Further, as consideration is carefully bargained for between claimants, this cautionary attribute can be manifested by consideration instead of the statute of frauds.<sup>88</sup>

Indeed, formality guides, leads, and directs claimants to become more cautious and prudent. When claimants talk, they are more likely to formulate ideas and communicate as opposed to forming contracts. In contrast, when claimants put words on paper and sign it, they may become more cautious and have mental awareness of entering into transactions. This mental activity can be applied universally. A common phenomenon helps illustrate. When people pay with cash and count the actual banknotes in their hands, they have an intense feeling of spending money. As a result, they may think twice and buy less. In contrast, when people use credit cards, they simply swipe the cards and buy more, as they do not have the actual feeling of spending money. Signing written contracts is similar to paying with cash as it makes claimants think twice about contractual content. In contrast, making oral contracts is similar to swiping credit cards in the sense that it makes claimants care less about contractual content.

Moreover, the cautionary function and the warning purpose increases the chance of successful contractual performance in a similar fashion to the evidentiary function and purpose.<sup>89</sup> Professor Braunstein acknowledges that “the ceremony of writing encourages the parties to take their undertaking seriously, thus increasing the likelihood of performance.”<sup>90</sup> Braunstein further concedes that, although written repudiations do not indicate cautiousness of contract formation, the repudiations show the deliberation of contractual termination.<sup>91</sup> These cautionary attributes require claimants to be prudent at different stages of contractual arrangements, such as contract formation, variations, and termination.

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<sup>87</sup> Braunstein, *supra* note 33, at 430.

<sup>88</sup> Posner, *supra* note 29, at 1985–86.

<sup>89</sup> Pengsheng, *supra* note 15, at 70.

<sup>90</sup> Braunstein, *supra* note 33, at 425.

<sup>91</sup> *Id.* at 430–31.

Professor Perillo raises the question of what types of contracts deserve a statutory requirement of writing and its cautionary function.<sup>92</sup> This question is relevant in Chinese law because land sale contracts in China also deserve the operation of cautionary function. For most Chinese individuals, purchasing land is likely to be one of the most important decisions they make in their lives. In particular, statistics show that the housing prices in Chinese major cities are increasingly unaffordable.<sup>93</sup> Written forms help purchasers weigh and consider contractual terms and consequences. This exercise involving the written forms matches the importance and seriousness of land contracts and echoes the idea of intensive awareness of entering into transactions stated by the German legislature.<sup>94</sup>

## V. DERIVATIVES OF THE WARNING PURPOSE AND THE CAUTIONARY FUNCTION

The warning purpose and the cautionary function of writing has derivatives. Although these derivatives are seen to stand-alone by Sino-Civilian and Anglo-American scholars, these derivatives depend on the nature of the cautionary attributes—the action of signing written contracts helps claimants to be prudent and cautious.

One derivative is the educational function. Written form encourages claimants to read and understand the written contractual content, although arguably the statute of frauds is not concerned with the educational function.<sup>95</sup> Another derivative is the clarity function; claimants may discover more disagreements after reading written transaction details and hence clarify contractual content.<sup>96</sup>

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<sup>92</sup> Perillo, *supra* note 28, at 56.

<sup>93</sup> Erlingyijiu Nian Wuyuefen Qishige Dazhong Chengshi Shangpin Zhuzhai Xiaoshou Jiage Biandong Qingkuang, (2019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 2019*], Guojia Tongjiju 国家统计局 [NATIONAL BUREAU OF STATISTICS] (June 18, 2019) [http://www.stats.gov.cn/Tjsj/zxfb/201906/t20190618\\_1670960.html](http://www.stats.gov.cn/Tjsj/zxfb/201906/t20190618_1670960.html).

<sup>94</sup> Medicus, *supra* note 18.

<sup>95</sup> Perillo, *supra* note 28, at 60–62.

<sup>96</sup> *Id.* at 56–57.

The clarity function is a hybrid derivative of both the evidentiary attributes and the cautionary attributes. The evidentiary attributes increase clarity through recording contractual content accurately. The cautionary attributes promote clarity. Through cautious reading, claimants may discover and address ambiguities before signing the contracts. Consequently, wholly written contracts may become more clear, certain, and complete than oral contracts.

Other derivatives include the magical function, the sacramental function, and the psychological function. In ancient times, claimants had to take an oath when forming contracts that parties-in-breach would be cursed and sanctioned by supernatural powers.<sup>97</sup> The ancient rigorous procedures of contract formation remind claimants of the “rightfulness” of performing their contracts despite changes of subsequent circumstances.<sup>98</sup>

I propose a new function as a derivative of the cautionary attributes—the ceremonial function, because the conduct of burning or tearing signed contracts is a form of celebration or expression of seriousness.

In the late 1940s and early 1950s, farmers in China celebrated their liberation by burning the deeds they signed with landlords. For example, in July 1951, the farmers in Nanping Township, Hechuan County burned land deeds to celebrate the victory of the land reform;<sup>99</sup> they believed their dream of owning the land was finally achieved. Although the pre-existing land system was not abolished by the conduct of burning the deeds itself, the deeds were considered to be a symbol of the old land system. Burning the deeds was a way by which the farmers expressed their hope of starting a new life and having new social status. This is similar to freedom of speech in the modern sense; Chinese farmers expressed their feelings by burning their deeds in a similar way that Americans express their freedom of

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<sup>97</sup> *Id.* at 44.

<sup>98</sup> *Id.* at 45.

<sup>99</sup> Those scenes were captured by photos and one of the photos can be found online. Zhongguo Zhiming Sheyingjia Zuopin Dangan, (中国知名摄影家作品档) [*Gallery of China's Top Photographer*], <http://www.fotocn.org/shipanqi/42599> (last visited July 17, 2019).

speech through flag-burning.<sup>100</sup> Likewise, the conduct of tearing signed contracts nowadays is a ceremony of expressing claimants' determination and seriousness of waiving their contractual rights because, in doing so, the claimants would lose the best evidence to prove the existence and formation of their contracts.

## VI. THE THIRD CORE ATTRIBUTE: THE ANGLO-AMERICAN CHANNELING FUNCTION

In the United States, Professor Fuller argued that formality serves as a test of legal intention and enforceability (the channeling function). In the context of the statute of frauds, the absence of writing indicates that claimants do not intend to be bound.<sup>101</sup> Similarly, Professor Perillo argued that employing written form in compliance with the statute of frauds manifests contractual intention.<sup>102</sup> Further, the cost-effective advantage of the channeling function extends to testamentary cases; the compliance with formality such as executing wills saves courts the trouble of ascertaining the presence of testamentary intention. Additionally, the standardization of testation lowers the cost of judicial administration in will-related cases.<sup>103</sup>

However, Professor Fuller pointed out that the channeling function does not fully relieve judges from ascertaining the intention of legal transactions; otherwise, the effect of formality would be exaggerated.<sup>104</sup> There are cases in which the written documents satisfy the requirement imposed by the statute of frauds but fail to reveal whether an enforceable relationship is intended or which type of relationship is intended. This is because there are cases in the United States where the signed document that satisfies the statute of

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<sup>100</sup> *Texas v. Johnson*, 491 U.S. 397 (1989).

<sup>101</sup> Fuller, *supra* note 28, at 801–802.

<sup>102</sup> Perillo, *supra* note 28, at 49.

<sup>103</sup> Perillo, *supra* note 28, at 49–50; Langbein, *supra* note 31, at 493–94.

<sup>104</sup> Fuller, *supra* note 28, at 801.



frauds records pre-contractual negotiations and thereby does not indicate contractual intention.<sup>105</sup>

Indeed, the presence of signed and written contracts may indicate contractual intention and assent. This explains the importance of signatures on written contracts in case law such as the classic rule derived from *L'Estrange v F Graucob Ltd*: claimants' signatures on written contracts are a sign of their intention and assent to be bound by the contracts regardless of whether the claimants have read the contracts.<sup>106</sup> However, the presence of written form and signatures is not the sole test: other factors, such as vitiating factors, are also relevant in ascertaining intention and assent. For example, fraud and misrepresentation are exceptions to the *L'Estrange* rule despite the presence of signed written contracts. Furthermore, the evidentiary attributes play a more important role through recording the content revealing such intention and assent.

Professor Posner interprets the channeling function from the perspective of legal enforcement, arguing that the function gives claimants a way to signal to courts their desire for contractual enforcement; the presence of writing manifests such desire while the absence of writing does the opposite.<sup>107</sup> This argument is partially rebutted as the desire for enforcement could also be expressed orally,<sup>108</sup> and the channeling function justifies written form as a default rule, but not as an immutable rule for signaling enforcement.<sup>109</sup>

Indeed, claimants need clear rules to signal their desire for enforcement of contractual rights. In the context of writing, the channeling function requires the law to provide consistent and clear rules with respect to the threshold question of whether written form is mandatory for land sale contracts as a prerequisite for contractual remedies. If claimants have clear rules with which to comply, they can make contractual arrangements and predict contractual consequences accordingly. Complying with the statutory

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<sup>105</sup> Braunstein, *supra* note 33, at 428–30.

<sup>106</sup> [1934] 2 KB 394 (Eng.).

<sup>107</sup> Posner, *supra* note 29, at 1984.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

requirement of writing enables contracts to be protected by law, while noncompliance does the opposite. Likewise, courts have clear guidelines to apply for delivering consistent cases. This is the role of many laws—to settle disputes by laying clear standards and rules, even in pre-industrial eras.<sup>110</sup> In particular, the English legislature confirms that the certainty introduced by this function is attractive and justifies imposing a much stricter statutory requirement of writing for land contracts.<sup>111</sup>

The Anglo-American channeling function informs China as to how to achieve certainty in land sale contract cases. There is nationwide uncertainty in urban and rural China in relation to whether signed contracts are mandatory as a prerequisite for contractual remedies in land sale contract cases.<sup>112</sup> Some Chinese urban courts consider signed contracts to be mandatory, but other urban courts have delivered the opposite judgements.<sup>113</sup> The cause of the uncertainty is the conflict of rules between Contract Law and urban real property administration law. Contract Law sets out the general rule that writing is optional and does not mandate writing for land contracts, but urban real property administration law (which has lower authority than Contract Law) mandates writing for urban land sale contracts.<sup>114</sup> This uncertainty is even greater in rural areas.<sup>115</sup> This overall nationwide uncertainty is particularly

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<sup>110</sup> Mechanisms other than law may perform the channeling function, even in pre-industrial eras. For example, Professor Karl Llewellyn, together with an anthropologist, conducted an empirical study on an aboriginal Cheyenne tribe in America. He found that even in the absence of a government in the modern sense, disputes were solved and behaviors were regulated without violence in this primitive tribe. William L. Twining, *KARL LLEWELLYN AND THE REALIST MOVEMENT* 153–69 (1985).

<sup>111</sup> Law Commission, *supra* note 38, at §§ 2.7, 2.11.

<sup>112</sup> Wei Wen, *The Need for Certainty and Written Form in Land Sale Contracts in China: A Legal Reform Recommendation*, 3 *INT'L COMP., POL'Y & ETHICS L. REV.*, 383–402 (2020).

<sup>113</sup> *Id.*

<sup>114</sup> 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., Jul. 5, 1994, effective Jan. 1, 1995; rev'd by the Standing Comm. Nat'l People's Cong., Aug. 27, 2009), at art. 41, CHINALAWINFO.

<sup>115</sup> Wen, *supra* note 112.

concerning given the importance of land sale contracts and contractual remedies in land related cases. The solution to addressing this uncertainty is to clearly mandate writing for land sale contracts so all courts and claimants have to follow this rule.<sup>116</sup> Because China's supreme legislature is now drafting the uniform civil code, the highest nationwide authority in contractual and private law, it is recommended that the civil code mandates writing for land sale contracts. Among other things, the civil code should specifically include a section to articulate that "[l]and sale contracts shall be in written form and signed by claimants" (or the equivalent). This is recommended in order to eradicate the common element of uncertainty and thereby perform the channeling function more satisfactorily. A comparative analysis of the attributes of Sino-Civilian and Anglo-American writing within this article firmly underpins this recommendation.

Furthermore, Chinese courts have inconsistent and contradictory judgements about the application of the "healing theory."<sup>117</sup> The healing theory is a remedy given by China's Contract Law to validate oral contracts, including oral land sale contracts, that would otherwise be invalid for violating the requirement of writing (if courts consider writing to be mandatory or writing is mandated by law).<sup>118</sup> The healing theory is triggered after claimants perform and accept the "main obligation" of oral land sale contracts.<sup>119</sup> However, Contract Law does not specify what the main obligation is, so courts have delivered contradictory judgements about what conduct constitutes the main obligation in land sale contract cases.<sup>120</sup> As a result, the same conduct that triggers the healing theory in one case may not trigger it in another case, and vice versa. This has caused unfairness to Chinese claimants.<sup>121</sup> As pointed out, the healing theory is designed to be a

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<sup>116</sup> *Id.*

<sup>117</sup> 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. 1, 2 (2019).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*; Contract Law, *supra* note 4, at art. 36.

<sup>120</sup> Wen, *supra* note 117, at 3–4.

<sup>121</sup> *Id.*

substitute for writing.<sup>122</sup> Because this article has identified that writing has three core attributes, the substitute for writing must satisfy the following: (1) clearly prove oral contracts (the evidentiary attribute); (2) remind claimants to be cautious (the cautionary attribute); and (3) provide clear rules to avoid uncertainty (the channeling attribute).<sup>123</sup> Only through this analysis can the two specific types of conduct be identified and pinpointed in order to make the scope of the main obligation clear and precise in land sale contract cases.<sup>124</sup> The analysis of the attributes of writing in this article is conducive to resolving the widespread uncertainty brought on by land sale contracts. Accordingly, it is recommended that the future civil code adds the two specific types of conduct—make full, part, or advance payments; and transfer real property ownership—to clarify the application of the healing theory and to address the uncertainty.<sup>125</sup>

Moreover, the two legal reform recommendations that are underpinned by the comparative analysis of this article also fill the gaps. These recommendations act as gap fillers because both the current Contract Law and the civil code drafts to date proposed by Chinese scholars do not have any section to mandate writing for land sale contracts, and they do not clarify the application of the healing theory.<sup>126</sup>

Therefore, because the channeling function is desirable to resolve the uncertainty problems in China in land sale contract cases, it is more important in China. The channeling function maintains its importance despite the fact that Sino-Civilian literature does not embrace the notion of the Anglo-American channeling

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<sup>122</sup> *Id.* at 5.

<sup>123</sup> The attributes of writing also underpin the legitimacy of the healing theory and justify its existence in Contract Law. *Id.*

<sup>124</sup> *Id.* at 7–10.

<sup>125</sup> *Id.* at 12–13.

<sup>126</sup> Liang Huixing (梁慧星), *Zhongguo Minfadian Caoan Jianyigao* (中国民法典草案建议稿) [A DRAFT OF CIVIL CODE OF CHINA] 166 (2011); Wang Liming (王利明), *Zhongguo Minfadian Xuezhe Jianyigao Ji Lifa Liyou Zhaifa Zongzhepian Hetongpian* (中国民法典学者建议稿及立法理由 债法总则篇 合同篇) [CIVIL CODE DRAFT AND ITS LEGISLATIVE RATIONALE, LAW OF OBLIGATIONS AND CONTRACT] 202 (2005).

function. After all, the certainty would enable contractual rights to be protected in a consistent, predictable, and fair manner. The certainty and fairness introduced by the channeling function would also make claimants less incentivized to pursue lawsuits. This would lead to a heightened value of the evidentiary attributes and cautionary attributes in reducing the courts' workloads and increasing the likelihood of contractual performance.

## VII. DERIVATIVES OF THE CHANNELING FUNCTION

Although the channeling function is understood to make the presence of written form the sole and absolute test of ascertaining contractual intention,<sup>127</sup> the channeling function has derivatives. While these derivatives are treated as stand-alone, they nevertheless depend on the idea that written form is an immutable sign of contractual intention.

One such derivative is the "earmarking of intention to contract" function in the United States. The execution of written form, particularly if signed, earmarks the presence of contractual intention and the departure of pre-contractual negotiations.<sup>128</sup> However, this is arguably not an immutable sign.<sup>129</sup> The Sino-Civilian counterpart is the "line-drawing purpose" ("Trennungslinie"), suggesting that written form draws a line between pre-contractual negotiations and contract formation.<sup>130</sup> The line-drawing purpose is seen to be particularly important in land contracts cases, as negotiations are usually time-consuming and the binding effects of the meeting of minds are always in dispute.<sup>131</sup> The presence of written contracts may eliminate these disputes as claimants may comprehend that oral pre-contractual expressions are not binding until formal written contracts are signed.<sup>132</sup> Furthermore, where the more rigorous requirements of writing earmark the more important types of

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<sup>127</sup> Perillo, *supra* note 28, at 49.

<sup>128</sup> *Id.* at 48–52.

<sup>129</sup> *Id.* at 50.

<sup>130</sup> Shiyuan, *supra* note 11, at 114.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

commercial transactions, writing arguably has the earmarking-transaction-type function.<sup>133</sup>

Notwithstanding, ascertaining contractual intention is not a major task of the statutory requirement of writing despite the fact that signed and written documents may record the legal content revealing such intention. For example, in the Chinese legal system, invitations to treat can be evidenced in signed and written form to defeat contractual formation and intention.<sup>134</sup> Similarly, in the United States, signed documents with “subject to contract” clauses may lack contractual intention despite the presence of written form and signatures. In particular, arguably there are real possibilities where claimants do not intend to be contractually bound despite the presence of written documents, such as making “gentlemen’s agreements” in writing.<sup>135</sup> Further, the earmarking-transaction-type function is also not a task of writing. Claimants can always employ writing to record less important contracts, and the contractual content plays a more decisive role to determine whether the contracts in question are serious commercial transactions.

Hence, the channeling function should be seen to require law to set out clear rules in contractual formality matters. When claimants comply with the legal rules, their contractual rights will be enforced by law. By this definition, the channeling function may overlap with the derivatives of the evidentiary function and the evidentiary purpose. Examples include the circulation purpose and the transaction safeguard purpose. As the channeling function enables written negotiable securities to be protected by law because of compliance with the statutory requirement of writing, the channeling function increases the security of transactions and boosts the circulation of negotiable securities.

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<sup>133</sup> *Id.* at 50–52.

<sup>134</sup> Contract Law, *supra* note 4, at art. 14 & 15.

<sup>135</sup> 1 EDWARD ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 3.7, at 213–20 (3d ed. 2004) (discussing the possibilities where claimants do not intend to be contractually bound, such as making “gentlemen’s agreements”).

## VIII. THE HIERARCHY OF THE ATTRIBUTES OF WRITING IN SINO-AMERICAN LITERATURE

The discussion so far evaluated the attributes of formality in China and the United States. This part focuses on their hierarchy. As noted by Professor Fuller, there is “an intimate connection” between the attributes.<sup>136</sup> Although each attribute of writing is treated to be stand-alone in Sino-Civilian and Anglo-American literature, the attributes have a hierarchy. The evidentiary, cautionary, and channeling attributes are three fundamental core attributes and the three core attributes have derivatives.

The evidentiary purpose (the evidentiary function) and the warning purpose (the cautionary function) are the first and second core attributes of formality. The evidentiary attributes are desirable for addressing the limitations of testimony in modern China. Furthermore, the English, Taiwanese, and German legislatures have accepted the evidentiary and cautionary attributes as valid reasons to tighten up the statutory requirement of formality for land sale contracts. This is a valuable experience to inform China about the desirability of writing.

The channeling function is the third core attribute of formality. This function requires the law to provide clear and consistent rules in relation to contractual form matters. Accordingly, the courts have a clear basis to deliver consistent cases and claimants have clear rules to follow. The English legislature considers that the certainty introduced by the function justifies imposing a much stricter statutory requirement of writing for land contracts. As this function eradicates the uncertainty problems in China in land sale contract cases, this function is much more desirable there despite the fact that Sino-Civilian literature does not embrace the notion of this function.

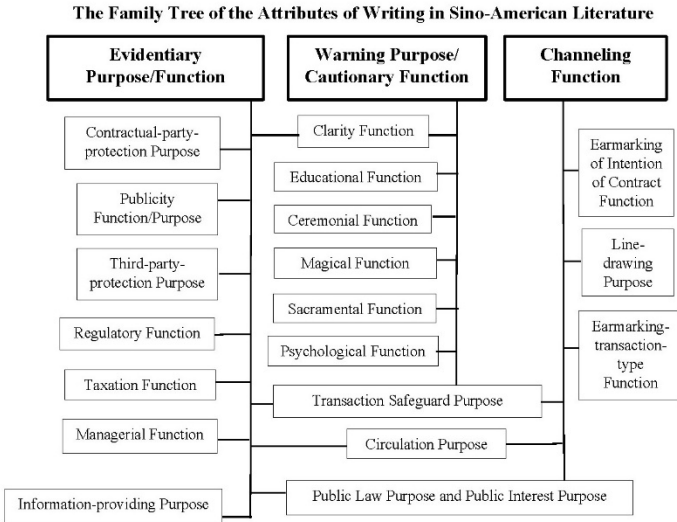
Moreover, the attributes augment each other. As the channeling function increases legal certainty that leads to claimants being less incentivized to pursue lawsuits, this function augments the evidentiary attributes by reducing the numbers of lawsuits and increasing the likelihood of contractual performance.

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<sup>136</sup> Fuller, *supra* note 28, at 803.

Novel attributes of formality may arise as individuals, enterprises, legislatures, governments, and societies continue to utilize the existing attributes. At least for now, the benefits introduced by writing have gone far beyond the evidentiary function, which was the original legislative intent of the statute of frauds, and have firmly embraced other attributes. This explains why the statutory requirement of writing for land contracts has outlived the statute of frauds’ legislative background and has become much stricter in England 300 years after its enactment. It also explains not only why written form is still desirable in the United States, but also why the need for formality has become stronger in Taiwan and Germany. The attributes of writing are solid underpinnings in China to mandate writing for land sale contracts and clarify the application of the healing theory in China’s future uniform civil code. This is done in order to address the uncertainty problems there in land sale contract cases.

As a summary, the family tree below unfolds the hierarchy of all attributes in a clear and novel fashion.





## IX. CONCLUSION

In order to demonstrate the desirability of written form and provide solid underpinnings to mandate writing for land sale contracts, this article advances, synthesizes, and integrates the theoretical, doctrinal, and practical attributes of writing in Sino-American literature. In particular, the Anglo-American channeling attribute is not found in Sino-Civilian literature, but it is important to inform China as to how to achieve certainty in land sale contract cases. This article also borrows experience from other jurisdictions (England, Germany, and Taiwan).

Although all the attributes are treated as stand-alone in Sino-American literature, this article assesses the levels of their importance, separates the core attributes from their derivatives, and creates a hierarchy in the form of a family tree. This is done in order to have a much clearer focus and emphasis to highlight and apply the three core attributes of written form (the evidentiary, the cautionary, and the channeling attributes) in Sino-American literature. This article also identifies the attributes that are not relevant to writing in order to have a more informed understanding of the role of writing.

This article is timely. China's current Contract Law does not mandate writing for land sale contracts. This has caused nationwide uncertainty in relation to whether the requirement of writing is mandatory as a prerequisite for contractual remedies in land sale contract cases. Further, land sale contracts deserve to be mandated in writing. As a timely opportunity to fill this gap and address this problem, China's supreme legislature is now drafting the uniform civil code and could utilize the comparative analysis in this article as a solid underpinning to justify mandating writing for land sale contracts in the code. Hence, it is recommended that the future civil code mandates writing for land sale contracts and has a section to articulate that "[l]and sale contracts shall be in written form and signed by claimants" (or the equivalent). This is an effective solution to addressing the nationwide uncertainty in China about whether writing is mandatory in land sale contract cases. The analysis of the core attributes of writing is also conducive to solving the uncertainty relating to the contradictory application of the healing theory of the Contract Law in land sale contract cases.

Further, China's supreme legislature could utilize the analysis of this article as a part of its policy making process, to tighten or loosen the statutory requirement of writing for other types of contracts or agreements (such as lease contracts or building contracts) when drafting the future uniform civil code.

