

CIVIL TRANSACTIONS IN BREACH OF FORMALITY, NOTARIZATION, AND AUTHENTICATION REQUIREMENTS UNDER VIETNAMESE CIVIL LAW

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Abstract

Under civil law, the form of a transaction is considered one of the constitutive elements for the validity of a civil transaction when required by law. Not all violations of formal, notarization, and authentication requirements in civil transactions give rise to legal consequences. The 2015 Civil Code of Vietnam adopts a more flexible approach than earlier versions, notably through Article 129, which introduces a “remedial mechanism” allowing civil transactions to be upheld if one party has fulfilled at least two-thirds of their obligations. This article analyses the current Vietnamese civil law regulations regarding civil transactions that do not comply with form requirements and notarization/authentication procedures, and examines the shortcomings in their practical enforcement. Based on this analysis, the authors propose legal reforms to strike a balance between adherence to form and notarization, authentication procedures requirements, and voluntariness in civil transactions.

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In the context of a developing market economy, the formation and performance of contracts, as well as the execution of civil transactions in Vietnam, have become increasingly diverse in both substance and form. However, judicial practice in Vietnam reveals that many civil transactions have been declared invalid solely for non-compliance with legal requirements regarding form, notarization, or authentication, even when the parties voluntarily entered into the transaction and had substantially fulfilled their agreed obligations. This raises an important question about the reasonable boundary between the principle of respecting formal requirements, notarization, and authentication procedures, and the need to ensure fairness and voluntariness in the performance of civil obligations. A modern understanding of contract law is better explained by the classical conception of contract as an expression of voluntary commutative justice.¹

¹ Gordley, J. (2025). Freedom of contract. In Chen-Wishart, M. & Saprai, P. (Eds.), *Research Handbook on the Philosophy of Contract Law* (pp. 150-164). Edward Elgar Publishing. <https://doi.org/10.4337/9781800885417.00018>

In principle, a contract of exchange should be enforced when it is both voluntary and economically fair.² A transaction is considered voluntary insofar as each party values what it is to receive more highly than what it is to give, and it is regarded as economically fair where the performance rendered by each party is commensurate in economic value with that which it receives in return.³ Performances are considered economically equivalent when each party is fairly compensated for the risks the contract imposes on them.

In positive law, the distinction between form and procedure (such as notarization, authentication, registration, and so forth) is often misunderstood or inconsistently applied. This reality leads to adverse legal consequences for weaker parties, increases legal costs, and creates barriers to the free will-based formation of agreements between parties.⁴ Given this situation, this article focuses on theoretical and practical issues relating to civil transactions that violate formal requirements under Vietnamese civil law, while comparing it with the laws of some countries with different legal systems. This article aims to determine the reasonable limits of form in civil transactions and to propose legal reforms that better protect the rights of parties while ensuring the stability and transparency of the legal order.

1. Overview of the form of civil transactions

A civil transaction is a contract or a unilateral legal act that gives rise to, changes or terminates civil rights and obligations.⁵ It serves as a common basis for individuals and legal entities to satisfy their needs and is also a primary means of promoting the development of civil exchange. In principle, individuals and legal entities are free to agree upon anything not prohibited by law and not contrary to social ethics,⁶ including the freedom to choose the form of their transactions. The form of a civil transaction is the manner of reflecting the content, through which the rights and obligations of the parties are expressed. Regarding the form of a contract, there is an opinion that it is the external expression of the parties' intent in establishing the contract.⁷ According to the law, a civil transaction shall be expressed verbally, in writing, or through specific acts.⁸ However, due to advances in science and technology, transactions are no longer solely expressed

2 Chu, T.T. A. (2023). Book review: Contract law in East Central Europe, *Vietnamese Journal of Legal Sciences*, 08(01), 110–114. doi: doi.org/10.2478/vjls-2023-0006

3 Aristotle. (1999). *Nicomachean ethics* (T. Irwin, Trans.). Hackett Publishing. (Original work published ca. 350 B.C.E.). V.iv 1132a–1133b.

4 Huang, Y., & Shi, H. (2023). “Clarification and Dilemma of Notarization Practice Area”. *Modern Law Research*, Vol. 4, p. 1.

5 Article 116 of the 2015 Civil Code Law No. 91/2015/QH13 (hereafter 2015 Civil Code).

6 Paragraph 2 Article 3 of the 2015 Civil Code.

7 Ho Chi Minh City University of Law. (2024). *Textbook on contract and tort law (1st edn)*. People's Public Security publisher, p. 124.

8 Paragraph 1 Article 119 of the 2015 Civil Code.

in ordinary paper documents but are also conducted through electronic means, such as data messages, in accordance with the provisions of the 2023 Law on Electronic Transactions, which are considered transactions in writing.⁹ With the above regulations, there are three types of transaction forms, and individuals and legal entities participating in transactions have the right to choose the form that is appropriate and effective for their specific circumstances. However, in cases where the law requires that a civil transaction be expressed in writing and notarised, authenticated, or registered, that regulation must be complied with.¹⁰

The requirement for civil transactions to comply with a specific form, for instance, a cooperation contract must be made in writing,¹¹ is typically imposed when the transaction has a significant impact on the economy, public security, social order, or to protect the weaker party by providing legally valid evidence in case of a dispute. For example, under Vietnamese law, contracts for the transfer of land use rights must be made in writing and notarised or authenticated. This formal requirement not only ensures legal certainty in transactions involving valuable assets but also protects parties, particularly buyers, by providing reliable evidence of the agreement in case of disputes. The mandatory regulation of transaction forms is not unique to Vietnam but is also common in many countries worldwide. Take France and Italy as examples: when a transaction exceeds a certain threshold, the parties must document it in writing. However, the “writing” requirement here only serves as evidence.¹²

In addition to the 2015 Civil Code,¹³ form requirements are also enshrined in several specialised laws. For instance, the 2023 Law on Housing stipulates that housing-related contracts must be agreed upon by the parties and made in writing.¹⁴ A similar provision can also be found in the 2023 Law on Protection of Consumer Rights.¹⁵ The legal significance of form requirements lies not only in their evidentiary function but also in their role as conditions for the validity of the transaction.¹⁶ In cases where the law requires a mandatory form, if the parties fail to comply upon request, the Court may declare the civil transaction invalid.¹⁷

9 Paragraph 2.1 Article 119 of the 2015 Civil Code.

10 Paragraph 2 Article 119 of the 2015 Civil Code.

11 Paragraph 2, Article 504 of the 2015 Civil Code.

12 Do, V. D. (2018). *Vietnamese contract law - Case law and case commentary - Volume 1* (6th edn). Hong Duc - Vietnam Lawyers Association publisher, p. 798.

13 Article 459 of the 2015 Civil Code.

14 Article 163 of the 2023 Law on Housing Law No. 27/2023/QH15 (hereafter Law on Housing 2023).

15 Article 23 of the 2023 Law on Protection of Consumer Rights Law No. 19/2023/QH15 (hereafter Law on Protection of Consumer Rights 2023).

16 Paragraph 2 Article 117 of the 2015 Civil Code.

17 Ho Chi Minh City University of Law. (2021). *Textbook on General Provisions of Civil Law (1st edn)*. Hong Duc publisher, p. 349.

2. Provisions of Vietnamese civil law on civil transactions violating the form

The essence of a contract lies in the freedom and consensus of will. When the parties reach a consensus, expressed through their agreement on the contract's content, the contract is formed. However, in cases where the law prescribes specific formalities or procedural requirements, such form and procedure must be complied with when the transaction is established. To respect the freedom of will of the parties and in accordance with the fundamental nature of a transaction, that is, a contract is not created to be declared void, but to serve the interests and expectations of the parties at the time of its establishment,¹⁸ the 2015 Vietnamese Civil Code introduced a more flexible approach. In order to minimise the invalidation of transactions merely due to non-compliance with formal requirements, Article 129 of the 2015 Civil Code provides the following solutions:

Clause 1 provides that where the law requires a transaction to be made in writing, compliance must extend to all associated legal requirements governing the written form, including language, font type and size, text and background colour, and overall document structure.¹⁹ For example, the 2023 Law on the Protection of Consumer Rights and its guiding decree specify that contracts concluded with consumers must be in the form of standard-form contracts, registered with the competent consumer protection state agency. Furthermore, this contract must be written in Vietnamese using the Times New Roman font, with a minimum font size of 12.²⁰ If a transaction fails to comply with certain formal requirements, yet one party has already performed at least two-thirds of its obligations, the court is required to uphold the validity of the transaction rather than declare it void, thereby reflecting a shift from strict formalism toward a more equitable, performance-based assessment of contractual validity.

Clause 2 limits the possibility of declaring a contract void solely for a formal violation, aligns with legal trends in many other jurisdictions worldwide.²¹ In foreign legal systems, such as Switzerland and Germany,²²

18 Do, V. D. (2018), *supra* note 10, p. 865.

19 Clause 1, Article 129 of the 2015 Civil Code provides that: "If the form of a civil transaction, required to be established in writing, does not comply with regulations of law, but a party or the parties has/have fulfill at least two third of the obligations in the transaction, a court, at his/her/their request(s), shall issue a decision on recognition of the validity of such transaction."

20 Article 231 of the 2023 Law on Protection of Consumer Rights; Para 2, Article 6 of the Decree 55/2024/ND-CP on 16 May 2024 Elaboration on the law on protection of consumer rights.

21 Clause 2, Article 129 of the 2015 Civil Code stipulates that: "If the form of a civil transaction, required to be established in writing, violates against regulations on notarizing or authorization, but a party or the parties has/have fulfill at least two third of the obligations in the transaction, a court, at his/her/their request(s), shall issue a decision on recognition of the validity of such transaction. In this case, the parties need not perform the notarising or authorisation."

22 Do, V. D. (2018), *supra* note 10, pp. 865-66.

the limitations of declaring a contract invalid are increasingly recognised, leading to the development of alternative remedies.

However, notarization and authentication are procedural requirements rather than constitutive elements of a transaction's form. Their inclusion therefore appears conceptually inconsistent with the title of the provision, "Civil transactions invalid due to non-compliance with form requirements", as it conflates formal validity requirements with post-formal procedural safeguards. This regulation has led to the interpretation that notarization and authentication are forms of a transaction. This understanding can be found in several legal provisions, such as Paragraph 2 of Article 119 of the 2015 Civil Code mentioned above,²³ or Article 124 of the 2005 Civil Code, which affirmed that notarization and authentication constitute a form of transaction. Additionally, some opinions have cited Paragraph 1, Article 164 of the 2013 Law on Housing, which stipulates that: "In cases of purchase, lease-purchase, donation, exchange, capital contribution, and mortgage of residential houses, the contract must be notarized or authenticated", and concluded that this is a case where the law stipulates the form of the contract as a condition for its validity.²⁴

These regulations have led the courts to apply the law by treating notarization and authentication as a form of transaction. For instance, in an appellate civil judgment by the People's Court of Phu Yen Province, the court considered a dispute between Mr Tran Ngo D, a plaintiff, and Ms Dang Thi L, a defendant, over a land transfer agreement dated 06 July 2017. The agreement involved the transfer of 200 square meters of agricultural land and was made in writing, signed by the parties and several of the sellers' children. However, the contract was neither notarised nor authenticated, which, according to the court, constitutes a violation of the legal form requirements stipulated in Paragraph 3, Article 167 of the 2013 Land Law. Despite this formal defect, the court found that the contract had been fully performed, where the buyer had already completed the land handover and payment. Relying on Paragraph 2, Article 129 of the 2015 Civil Code, which allows for the recognition of a contract that violates formal requirements if it has been substantially performed, the court ultimately recognised the agreement as legally valid, emphasising that actual performance of the transaction can override formal defects in specific circumstances.²⁵

A similar approach was taken by the People's Court of Ca Mau City in Judgment No. 169/2022/DS-ST, concerning a land use rights transfer dispute between Mr Tran Chi Th (plaintiff) and Ms Dang Be T (defendant). On 17 July 2020, Ms T agreed to transfer 120 square meters of land located in Quarter

23 *Ibid*, p. 807.

24 Ho Chi Minh city University of Law, *supra* note 5, p. 124.

25 Judgment No. 3A/23/DS-PT dated 14 February 2023, of the People's Court of Phu Yen Province.

5, Ward 9, Ca Mau City, for 250 million Vietnamese dong. The agreement was handwritten and lacked notarization or authentication. The plaintiff paid the full amount, and the defendant promised to deliver the land-use rights certificate within two months, stating that it was currently mortgaged with a bank. However, she failed to fulfil this promise. The plaintiff then filed a lawsuit requesting the court to recognise the agreement. The court acknowledged that due to the lack of notarization and authentication, the contract violated formal requirements under Point a, Clause 3, Article 167 of the 2013 Land Law, but cited Clause 2, Article 129 of the 2015 Civil Code, which allows a transaction to be recognised if one party has fulfilled their obligations. Unlike the Phu Yen case, where the buyer had both paid and received the land, this case involved only partial performance: the buyer had paid in full, but the seller had not delivered the land. Nevertheless, the court applied the same legal reasoning, further reinforcing the judicial trend of recognising informally executed contracts when substantial performance is evident.

In addition, Precedent No. 55/2022/AL on recognising the validity of a contract violating formal requirements also treats notarization and authentication as a form of contract. The case involved in the precedent concerns a land use rights transfer agreement established before 01 January 2017, which was not notarised or authenticated, but the transferee had already fulfilled two-thirds of their obligations.²⁶ Thus, both the aforementioned court judgments and Precedent No. 55/2022/AL hold that a contract lacking notarization or authentication violates the formal requirements. However, as previously discussed, the form of a civil transaction comprises only three types: verbal, written, and specific act. Meanwhile, notarization and authentication are not forms of a transaction but rather procedures to verify the authenticity and legality of a written transaction and serve as the point in time when the transaction is legally recognized.²⁷ This conceptual conflation between form and procedure may therefore lead to doctrinal inconsistency in the interpretation and application of formal validity requirements under Vietnamese civil law.

Overall, Paragraph 1 and 2 of Article 129 of the 2015 Civil Code apply to a specific category of defective transactions: written transactions that fail to comply with statutory requirements or mandatory notarization and authentication procedures. However, their scope is comparatively narrow, as they do not expressly regulate situations in which the law requires a transaction to be in writing, but the parties instead conclude it orally or by conduct. This omission creates a doctrinal gap in the treatment of form-defective transactions,

26 Precedent No. 55/2022/AL was adopted by the Council of Judges of the Supreme People's Court on 7 September 2022, and was published pursuant to Decision No. 323/QĐ-CA dated 14 October 2022, by the Chief Justice of the Supreme People's Court.

27 Para 1, Article 5 of the 2023 Law on Notarization Law No. 53/2014/QH13.

particularly where non-compliance concerns the absence of the required form itself rather than defects within an already existing written instrument. In such cases, it remains unclear whether the remedial mechanism under Article 129 may be analogously applied or whether the transaction must be treated as void *ab initio*. Consequently, this limitation raises questions regarding the consistency and completeness of the 2015 Civil Code's approach to form requirements, as well as the balance between legal certainty and substantive justice in validating parties' actual intent and performance. For example, under the 2023 Law on Housing, it is stipulated that:

"Housing contracts shall be agreed upon by the parties, recorded in writing... in cases where organizations donate gratitude houses, charity houses, or great unity houses; purchase, lease-purchase state-owned housing; purchase, lease-purchase houses where one party is an organization, including social housing, housing for the people's armed forces, resettlement housing; contributing capital with houses where one party is an organization; leasing, borrowing, lodging, and authorizing the management of houses, contract notarization, and authentication are not required, unless specified by the parties."²⁸

This raises a practical and doctrinal question: where parties nonetheless conclude such a housing transaction orally, how should the legal consequences be determined if one or both parties have already performed their obligations? From a purposive and equity-oriented perspective, a rigid invalidation of the transaction may undermine legitimate expectations and disrupt completed performance, particularly where reliance and partial execution are evident. In this regard, the authors suggest that these cases may be resolved by analogy with Paragraph 1 and 2 of Article 129 of the 2015 Civil Code, which recognise partially performed contracts where at least two-thirds of the obligations have been fulfilled. A further interpretative basis may be drawn from Precedent No. 03/2016/AL, which reflects the judiciary's willingness to prioritise substantive performance and the protection of completed transactional effects over strict formal non-compliance.²⁹ This approach would better align with the principle of legal stability while preserving flexibility in addressing form-defective transactions in practice. In this context, the provision on the fulfillment of two-thirds of obligations in a transaction is stated in both Paragraph 1 and 2 of Article 129 of the 2015 Civil Code, which stipulate "If

28 Article 163, 164 of the 2023 Law on Housing.

29 It is ruled that: "In case the parents have given the child and his/her spouse an area of land and the child and his/her spouse have built a permanent house on that area of land for residence, when the child and his/her spouse built the house, the parents and other family members had no objections; the child and his/her spouse have used the house and land continuously, publicly, and stably, and have declared the land and been granted a land use right certificate, it must be determined that the child and his/her spouse have been given the right to use the land." See more: Precedent No. 03/2016/AL was adopted by the Council of Judges of the Supreme People's Court on 4 June 2016, and was published pursuant to Decision No. 220/QĐ-CA dated 6 April 2016, by the Chief Justice of the Supreme People's Court.

one or both parties have performed at least two-thirds of their obligations in the transaction, the court shall, at the request of one or both parties, issue a decision recognizing the validity of such transaction.”

However, this formulation raises a fundamental interpretative question: what constitutes “two-thirds of the obligations in a transaction”? At present, this threshold is subject to divergent understandings. One view suggests that two-thirds is based on the volume of the obligations already performed by one or both parties. According to this perspective, the volume of obligations fulfilled serves as evidence of the parties’ intention to carry out the transaction.³⁰ Nevertheless, this interpretation remains conceptually underdeveloped, as it does not clearly define what is meant by “volume of obligations.” In particular, it leaves unresolved how such volume should be measured, and what criteria or unit of assessment—whether monetary value, quantity of performance, or another metric—should be applied.

According to statutory provisions, “A contract is an agreement between the parties to establish, modify, or terminate civil rights and obligations”.³¹ Regarding the content of a contract, the parties may agree on matters such as the object of the contract, quantity and quality, price and payment method, duration, location, manner of performance, and other rights and obligations.³² Thus, in a contract, particularly, and in a transaction generally, the parties may agree to multiple obligations. In each transaction, each party may bear several obligations. If Article 129 of the 2015 Civil Code is interpreted strictly in a literal sense, in proceedings concerning a request to declare a civil transaction void on the ground of non-compliance with formal requirements, the court must first identify all obligations arising from the specific transaction and subsequently assess whether one or both parties have performed at least two-thirds of those obligations in order to determine whether the transaction may be recognised as valid.

However, in judicial practice, courts tend to assess the “two-thirds” threshold primarily by reference to the performance of a principal or essential obligation, rather than undertaking a comprehensive evaluation of all obligations arising under the transaction. While this approach may appear pragmatic, the authors contend that it is not fully consistent with the statutory framework. Specifically, the aforementioned Precedent No. 55/2022/AL did not identify how many obligations the transferor and transferee each had. Instead, the court relied on the fact that the plaintiff had paid more than two-thirds of the transaction value to recognise the validity of the land use rights transfer contract, even though the obligation to make payment is only one of several obligations the transferee bears in such a transaction. This

30 Ho Chi Minh City University of Law, *supra* note 15, p. 350.

31 Article 385 of the 2015 Civil Code.

32 Article 398 of the 2015 Civil Code.

lack of specification raises concerns regarding the methodological basis upon which courts determine compliance with Article 129, potentially leading to inconsistent assessments rather than a structured and legally grounded evaluation of contractual obligations.

3. Different approaches to non-compliance with formal requirements in civil transactions

Across the two major legal traditions, common law and civil law, the formality requirements for civil transactions are approached differently, reflecting distinct legislative philosophies and the underlying objective of protecting the parties' legal interests. In the common law system, the general principle is freedom of form.³³ Contracts can be formed through oral agreements, conduct, or in writing, so long as the essential legal elements, including offer, acceptance, consideration, and intention to create legal relations, are satisfied.³⁴ Nevertheless, there are exceptions in which the law mandates specific forms to ensure legal certainty and prevent risks. For instance, transfers of land must be made in writing and signed by or on behalf of each party to the contract; guarantees must be expressed in writing and signed; and gratuitous promises are enforceable only if made in the form of a deed,³⁵ a formal written instrument signed by the promisor and witnesses.³⁶

By contrast, the civil law system imposes stricter, more detailed requirements on the form of legal transactions. Many types of contracts are only legally effective if executed in writing and comply with additional formalities, such as notarization, authentication, or public registration.³⁷ For example, under Article 931 of the French Civil Code, all acts containing a gift among living persons shall be executed before a notary, in the normal form of contracts; and the original shall remain with the notary, on the pain of invalidity (*acte authentique*). Besides, marriage contracts (Article 1394) and notarial wills (Article 971) must also be executed before a notary. These documents carry absolute evidentiary value (*force probante*) and immediate enforceability (*force exécutoire*). Failure to meet notarization requirements results in absolute nullity (*nullité absolue*) due to a formal defect (*vice de forme*). In Germany, Section 311b of the German Civil Code stipulates that contracts for the transfer of real estate must be notarised to be valid; otherwise, they are legally void

33 Harty, J. (2015). *Constraint and freedom in the common law*. Ann Arbor, MI: Michigan Publishing, University of Michigan Library, 1-27, p. 4. <http://hdl.handle.net/2027/spo.3521354.0015.025>

34 Obiaraeri N.O. (2025, October 22). Guiding principles on the role of a legal practitioner in the formation of contract- a contemporary overview. *International Journal of Comparative Law And Legal Philosophy*, 6 (3), 74-79. <https://nigerianjournalsonline.org/index.php/IJOCLEP/article/view/2015/1886>

35 Robert, A. P. (2007). "Law &" gratuitous promises. *University of Illinois Law Review*, Vol. 2007, p. 881.

36 Martin, A. H. (2010). Promise: The neglected obligation in European private law. *International & Comparative Law Quarterly*, 59(2), p. 461. <https://www.jstor.org/stable/40835397>

37 Nguyen, T. B.A., & Phan, T. K.T. (2024). Recommendations for the Shortcomings of Notary Office Establishment. *Internationals Journal of Law Management & Humanities*, 7(1), 1606-1632. <https://doi.org/10.1000/IJLMH.116837>

(*nichtig*). Similarly, under Section 518 of the Civil Code, gift contracts that are not immediately performed must be notarised; otherwise, they are invalid, except in cases where performance has already occurred. In these cases, notarization serves as a condition of validity (*Wirksamkeitsvoraussetzung*), and failure to comply renders the transaction void. In contrast, within the English legal system, notarization does not function as a condition of validity.³⁸ Even the most formal type of contract, a deed, does not require a notary public. Instead, it must be signed by the party executing it and proper witnesses, as prescribed by Section 1(3) of the 1989 Law of Property (Miscellaneous Provisions) Act.

In addition to specific provisions requiring certain types of contracts to follow a particular form, the prevailing trend in both major legal systems is to narrow the scope of mandatory formal requirements and to promote flexibility to accommodate electronic transactions, international contracts, and the increasing pace of commercial transactions. For example, Article 2:101(2) of the Principles of European Contract Law provides that “A contract need’s not be concluded or evidenced in writing, nor is it subject to any other requirement as to form. The contract may be proved by any means, including witnesses”.³⁹ Similarly, the UNIDROIT Principles of International Commercial Contracts provide that a contract is valid regardless of its form, unless the parties agree otherwise or expressly provide otherwise by law.⁴⁰

Based on the foregoing analysis, it can be affirmed that notarization and authentication are not regarded as independent forms of civil transactions under foreign legal systems but rather as mandatory legal procedures intended to ensure the formal validity of written instruments in certain specific types of transactions. Non-compliance with notarization or authentication requirements, as prescribed by law in France and Germany, may lead to serious legal consequences, including the invalidity of the transaction. Conversely, under English law, the absence of notarization or authentication does not affect the validity of a contract, unless there is a specific requirement for a written form or a signature.

Additionally, the doctrine of part performance, originating from case law within the common law system,⁴¹ was developed as an equitable mechanism to mitigate the harsh consequences of regulations requiring written form, particularly those stemming from the 1677 Statute of Frauds.⁴² Under this statute, certain types of contracts, such as land transfer contracts, are enforceable only if evidenced in writing and signed by the obligated party to perform.

38 Basyarudin, B. (2024). The evolution and significance of notarial law in modern legal systems. *Law and Business*, 4(1), p. 39-44. doi: 10.2478/law-2024-0002

39 Article 2:101(2) of the Principles on European Contract Law.

40 Article 1.11 of the 2016 UNIDROIT Principles of International Commercial Contracts.

41 Frankel, S. (2011). The uncertain doctrine of part performance. *Victoria University Wellington Law Review*, 42(1), 37-48, p. 37. doi: <https://doi.org/10.26686/vuwlr.v42i1.5403>

42 Statute of Frauds (n 30).

In practice, however, many transactions were entered into orally, with one party substantially performing their obligations. Strictly applying the writing requirement in such cases would be unfair, especially where the other party seeks to exploit the lack of formal compliance to deny liability. In such cases, courts applied the doctrine of part performance to allow the party who had partially performed to protect their rights, even if the contract did not meet the formal requirements. Under this doctrine, if clear acts were demonstrating the execution of the contract and the other party had benefited or acquiesced, the court could compel the continued performance of the remaining parts of the transaction. However, since the enactment of Section 2 of the 1989 Law of Property Act (Miscellaneous Provisions), this doctrine is no longer recognised. Specifically, Section 2(8) of the Act abolished the application of the part performance doctrine in land-related transactions, reaffirming that written form is an absolute legal requirement and cannot be substituted by acts of performance. This demonstrates a shift in the United Kingdom from equitable principles towards principles of certainty and transparency in real property transactions.

The doctrine of substantial performance allows a contracting party to claim payment if they have fulfilled the majority of their contractual obligations, despite minor defects or omissions.⁴³ Courts assess whether the performed portion achieves the primary purpose of the contract and whether the deficiencies have caused significant harm to the other party. In the case of *Hoenig v. Isaacs* [1952],⁴⁴ the defendant contracted the claimant to carry out interior decoration work for 750 pounds. Upon completion, the claimant identified several minor defects and refused to pay the remaining balance. The court held that the work had been substantially performed and that the defects were not serious enough to justify non-payment. As a result, the defendant was required to pay the full amount, deducting the cost of remedying the defects. In another case, *Bolton v. Mahadeva* [1972],⁴⁵ the defendant installed a heating system for the claimant for 560 pounds. The system was inefficient and required repairs costing £174. The court ruled that the defendant had not substantially performed their obligations due to the seriousness of the defects and therefore was not entitled to payment. More recently, in *RTS Flexible Systems Ltd v. Molkerei Alois Müller GmbH & Co KG* [2010],⁴⁶ the UK Supreme Court emphasised that the assessment of substantial performance depends on the specific circumstances of each case. The court must consider whether the contractual non-compliance would cause unfairness to the other party.

43 Beck, A. (1975). The doctrine of substantial performance: conditions and conditions precedent. *The Modern Law Review*, 38(04), p. 413. <https://www.jstor.org/stable/1093999>

44 *Hoenig v Isaacs* [1952] EWCA Civ 6; [1952] 2 All ER 176.

45 *Bolton v Mahadeva* [1972] 2 All ER 1322; [1972] 1 WLR 1009.

46 *RTS Flexible Systems Ltd v Molkerei Alois Müller* [2010] UKSC 14.

4. Recommendations for the amendment of legal provisions

Based on the aforementioned analysis, the authors propose the following amendments to Article 129 of the 2015 Civil Code.

Firstly, the title of such article should be revised to “Civil transactions invalid due to non-compliance with form requirements and notarization, authentication procedures.” While the original title, “Invalidity of civil transactions due to non-compliance with form,” offers a concise summary, it risks being interpreted as applying only to the basic distinction between oral and written agreements. By expanding the heading to include “notarization, authentication procedures,” this approach prevents ambiguity in judicial interpretation, signaling that “form” is not merely a matter of party autonomy, but a comprehensive category that includes strict adherence to the procedural steps required by public authorities for high-risk transactions, such as real estate transfers or the pledging of assets”.

Secondly, this article should be redesigned as follows:

“A civil transaction that violates the legally required conditions on form or notarization, authentication procedures shall be invalid, except in the following cases:

1. A civil transaction that has been established but does not comply with the mandatory written form, where one or both parties have fulfilled at least two-thirds of the fundamental obligations of the transaction. In this case, the court shall, at the request of one or both parties, issue a decision recognizing the validity of such transactions.

2. A civil transaction is required by law to be made in writing, but the written form does not comply with the statutory requirements, and one or both parties have performed at least two-thirds of their fundamental obligations in the transaction. In this case, the court shall, at the request of one or both parties, issue a decision recognizing the validity of such transaction.

3. A civil transaction has been made in writing but violates mandatory requirements on notarization or authentication procedure, and one or both parties have performed at least two-thirds of their fundamental obligations in the transaction. In this case the court shall, at the request of one or both parties, issue a decision recognizing the validity of such transaction and the parties are not required to carry out notarization or authentication procedures.

4. A fundamental obligation is an obligation that fulfills the purpose of the entitled party in the transaction”. ●

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Author Contribution

All authors contributed to the study conception and design. All authors read and approved the final manuscript.

Declarations

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