

# INTERPRETATION OF 'WRITING': COMPARISON BETWEEN PROVISIONS OF THE CISG (ARTICLE 13) AND COUNTERPART PROVISIONS OF THE PECL\*

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## 1 INTRODUCTION

Article 13 CISG and its counterpart in Art. 1:301(6) PECL both provide definitions of similar, albeit not identical terms. While Art. 13 CISG deals with the term 'writing', Art. 1:301(6) PECL addresses 'written' statements. The systematic position of the two provisions in the respective texts makes clear that both are only concerned with formal aspects of the terms 'writing' and 'written'.<sup>1</sup> Article 13 CISG and Art. 1:301(6) PECL neither expressly nor implicitly deal with other questions of interpretation of declarations, statements and communications by the parties<sup>2</sup> (these are subject to Art. 8 CISG and Art. 5:101 PECL *ff*), nor do they address the question if a written declaration was or must have been comprehensible to the recipient (which is to be resolved according to Arts. 8 and 24 CISG).<sup>3</sup>

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1 For Art. 13 CISG, see Schlechtriem, P., *Internationales UN-Kaufrecht* (1996), no. 98. For Art. 1:301(6) PECL, see Note 6 to Art. 1:301.

2 Herber, R. & Czerwenka, B., *Internationales Kaufrecht: Kommentar zu dem Übereinkommen der Vereinten Nationen vom 11. April 1980 über Verträge über den internationalen Warenkauf* (1980) (1991), Art. 13 No. 4; cf Enderlein, F. & Maskow, D., *International Sales Law* (1992), Art. 13 No. 1 [available on-line at <<http://www.cisg.law.pace.edu/cisg/biblio/enderlein.html>>].

3 See Schlechtriem, P., 'Article 24', in *Commentary on the UN Convention on the International Sale of Goods* (Schlechtriem, P., ed., 1998), No. 15 (unintelligible declarations) and No. 16 (foreign languages).

## 2 *REQUIREMENT OF A 'WRITING' OR 'WRITTEN' STATEMENTS IN THE CISG AND THE PECL*

Both Art. 1:301(6) PECL and Art. 13 CISG limit the relevance of their definitions to writing requirements derived from the respective sets of rules ('[i]n these Principles' and [f]or the purposes of this Convention').<sup>4</sup>

Within the PECL, the provisions containing such requirements can be divided into two groups: The first group consists of provisions that require a written statement in order to be applicable (Art. 1:304(1) defining the moment when a period of time set by a party in a written statement begins to run,<sup>5</sup> Art. 2:207(2) addressing late acceptances contained in a writing, Art. 2:210 governing professionals' written confirmations,<sup>6</sup> and Art. 3:208 regulating the effect of the principal's silence to a third party's written confirmation including a request to ratify an act of the agent), while the provisions of the second group govern cases in which the contracting parties have provided for a writing requirement in their contract (Art. 2:105(1) applying to 'merger clauses' and Art. 2:106(1) dealing with 'no oral modifications' clauses in written contracts).

In the CISG, only few provisions specifically deal with declarations in writing: Art. 21(2) CISG which, being identical to Art. 2:207(2) PECL,<sup>7</sup> belongs to the first above mentioned group of provisions and is subject to Art. 13 CISG,<sup>8</sup> and Arts. 12, 96 CISG dealing with form requirements in national laws which may apply due to a declaration of a Contracting State – it is, however, doubtful if Art. 13 CISG covers this case as well.<sup>9</sup> Additionally, the

4 In Oberster Gerichtshof, [Supreme Court, Austria], 2 July 1993, *Juristische Blätter* (1994) 119, at p. 121 the court observed that the definition in Art. 13 CISG applies only 'for the purposes of this Convention' and may therefore not be extended to domestic lease contracts; case presentation also available in English at <<http://cisgw3.law.pace.edu/cases/930702a3.html>>.

5 See Comment B to Art. 1:304 PECL which refers to the definition in Art. 1:301(6) PECL.

6 See Comment B to Art. 2:210 PECL referring to the definition in Art. 1:301(6) PECL.

7 See Note 2 to Art. 2:207 PECL.

8 Payeras, M.C., 'Artículo 13', in *La Compraventa Internacional de Mercaderías: Comentario de la Convención de Viena*, at p. 158 (Diez-Picazo, L. & de León, P. eds., 1998); Honnold, J.O., *Uniform Law for International Sales*, No. 130 (3rd edn., 1999); Magnus, U., 'Artikel 13', in von Staudingers, J., *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Wiener UN-Kaufrecht (CISG)* (1999), No. 6; Neumayer, K.H., & Ming, C., *Convention de Vienne sur les Contrats de Vente internationale de Marchandises* (1993), Art. 13 No. 2; Witz, W., 'Artikel 13', in *International Einheitliches Kaufrecht: Praktiker-Kommentar und Vertragsgestaltung zum CISG*, No. 1 (Witz, W., Salger, H-C. & Lorenz, M., eds., 2000).

9 It is subject to dispute if the opening phrase of Art. 13 CISG ('For the purposes of this Convention') covers cases where the writing requirement itself is rooted in domestic law and Art. 96 CISG merely allows its application; cf. Enderlein & Maskow, please see fn 2, Art. 13 No. 1; Herber & Czerwenka, please see fn 2, Art. 13 No. 2; Schlechtriem, please see fn 3, Art. 13, No. 4 (arguing that CISG Article

definition in Art. 13 CISG applies to Art. 29(2) CISG<sup>10</sup>. This provision expressly addresses contractual ‘no oral modifications’ clauses and is, according to one author,<sup>11</sup> also applicable to merger clauses.<sup>12</sup>

In practical terms, however, the primary importance of Art. 13 CISG lies in the fact that its definition also applies to any other contractual ‘writing’ requirement stipulated by the parties<sup>13</sup>: apart from the clauses envisaged by Art. 29(2) CISG, the parties may also subject other declarations in conjunction with the contract’s execution to a form requirement, thereby derogating from the rule in Art. 11 CISG. Possible contractual writing requirements, for instance, may concern the notice of non-conformity (Arts. 39(1), 43(1) CISG),<sup>14</sup> the notice fixing an additional time for performance (Art 47(1) CISG), the buyer’s specification of form, measurement or other features of the goods (Art. 65(1) CISG), the declaration of avoidance (Art. 26 CISG), the notice of the intention to declare the contract avoided because of a future fundamental breach of contract by the other party (Art. 72(2) CISG) or the notice of the intention to sell the goods (Art. 88(1), (2) CISG). In these cases, it is necessary to first look to Art. 8 CISG in order to determine the parties’ intent when agreeing on the writing requirement.<sup>15</sup> Whenever it is impossible to ascertain a particular intention, Art. 13 CISG will apply.<sup>16</sup>

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13 should apply); and, on the other hand, Eiselen, S., ‘Electronic Commerce and the UN Convention on Contracts for the International Sale of Goods (CISG) 1980’, 6 *EDI Law Review* (1999), at p. 36, also available on-line at <<http://www.cisg.law.pace.edu/cisg/biblio/eiselen1.html>>; Honnold, please see fn 8, No. 130; Rajski, J., ‘Article 13’, in *Commentary on International Sales Law*, No. 3.1 (Bianca, C.M. & Bonell M.J., eds., 1987) (stating that Art. 13 CISG does not apply). As this dispute concerns the scope of Art. 13 CISG, the PECL cannot insofar serve as an aid to interpretation.

10 Audit, B., *La vente internationale de marchandises: Convention des Nations-Unies du 11 avril 1980 (1990)*, at p. 74; Payeras, C., please see fn 8, at p. 158; Enderlein & Maskow, please see fn 2, Art. 13 No. 1; Honnold, please see fn 8, No. 130; Magnus, please see fn 8, No. 1; Neumayer & Ming, please see fn 8, Art. 13 No. 2; Rajski, please see fn 9, No. 1.1; Schlechtriem, please see fn 9, No. 3.

11 Schlechtriem, please see fn 3, Article 29 No. 6. See also ICC Arbitral Award, March 1998, No. 9117, where the arbitral tribunal remarked that ‘[t]he written modification clause [the significance of which was explained referring to Article 29(2) CISG] has the same effects as the merger clause with regard to any future negotiations, promises and any other extrinsic evidence which otherwise might be adduced for supplementing, altering or contradicting the written contract’. Case presentation available at <<http://cisgw3.law.pace.edu/cases/989117i1.html>>.

12 The term ‘writing’ is also used in Art. 11 CISG. Its exact definition, however, is not necessary for the purposes of this provision as Art. 11 CISG also rejects ‘any other requirement as to form’.

13 Enderlein & Maskow, please see fn 2, Art. 13 No. 1; Magnus, please see fn 8, No. 6; Neumayer & Ming, please see fn 8, Art. 13 No. 2; Rajski, please see fn 9, No. 3.1; Witz, please see fn 8, No. 1.

14 See Landgericht [District Court] Stuttgart, Germany, 13 August 1991, 16 S 40/91, [case presentation also available on-line at <<http://cisgw3.law.pace.edu/cases/910813g1.html>>], where the seller’s standard terms required the buyer’s notice of non-conformity to be given by registered letter (*lettre recommandée*).

15 Herber & Czerwenka, please see fn 2, Art. 13 No. 5; Melis, W., ‘Artikel 13’, in *Kommentar zum UN-Kaufrecht*, No. 6 (Honsell, H., ed., 1997); Neumayer & Ming, please see fn 8, Art. 13 No. 2; Schlechtriem, please see fn 1, No. 98.

16 See Schlechtriem, please see fn 11, no. 7: If one party’s use of the term ‘writing’ was intended to impose stricter requirements than in Article 13 CISG (e.g., he intended it to have the sense it has in his

### 3 USE OF ARTICLE 1:301(6) PECL IN INTERPRETING ARTICLE 13 CISG

Article 13 CISG does not provide an exhaustive definition of the term ‘writing’, but merely states that it ‘includes’ telegram and telex. The provision which was incorporated only at the 1980 Vienna Diplomatic Conference<sup>17</sup> and has no direct predecessor in ULF, ULIS or any of the Convention’s previous drafts thus reflects the technical standards of the year 1980. Since then, a number of other means of communication not explicitly addressed by Article 13 CISG have started to play an important role in international business transactions.<sup>18</sup> This poses the question if, and under which conditions, modern means of communication can be considered to fulfil writing requirements for the purposes of the CISG.

By stating that ‘writing’ *includes* telegram and telex, the wording of Art. 13 CISG makes clear that it does not fix the outer limits of this term.<sup>19</sup> As writing requirements in and arising in connection with contracts of sale are clearly within the scope of the Convention,<sup>20</sup> recourse is thus to be had to the Convention’s general principles addressed by Art. 7(2) CISG.<sup>21</sup> Unfortunately, the fact that the Convention itself does not impose any form requirements (*see* Art. 11 CISG), that the legislative history of Art. 13 CISG is brief and inconclusive, and that the primary role of Art. 13 CISG lies in the interpretation of *contractual* form requirements, make it difficult to derive a general principle on writing requirements from the Convention.<sup>22</sup> The main purposes of a writing requirement under the CISG identified by some commentators – to establish the content of a declaration<sup>23</sup> and to permit the identification of its author<sup>24</sup> – accordingly seem to have been drawn from national legal systems, not the Convention itself.

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own domestic law), that party bears the burden of proving that pursuant to Art. 8 CISG his declaration was intended to derogate from Art. 13 CISG and that the other party accepted it as such.

17 See U.N. Official Records (1981), at p. 74.

18 *Cf.* Eiselen, please see fn 9, at p. 36; Ferrari, F., ‘Einige kurze Anmerkungen zur Anwendbarkeit des UN-Kaufrechts beim Vertragsschluss über das Internet’, *European Legal Forum* (2000/01) 301, at p. 305.

19 Achilles, W.A., *Kommentar zum UN-Kaufrechtsübereinkommen (CISG) (2000)*, Art. 13 No. 1; Enderlein & Maskow, please see fn 2, Art. 13 No. 1; Honnold, please see fn 8, No. 130; Magnus, please see fn 8, No. 5; Neumayer & Ming, please see fn 8, Art. 13 No. 1.

20 Eiselen, please see fn 9, at p. 36. This of course only applies to matters of sales law – as far as writing requirements relating to matters which are often addressed in contracts of sale but are not governed by the CISG are concerned (e.g., arbitration clauses or guarantees of payments and performance), the writing requirement is subject to national law. See Schlechtriem, please see fn 3, Article 11 No. 10.

21 Payeras, C., please see fn 8, at p. 159; Eiselen, please see fn 9, at pp. 29, 36.

22 Herber, R., ‘Article 7’, in *Commentary on the UN Convention on the International Sale of Goods*, No. 36 (Schlechtriem, P., ed., 1998), on the contrary, considers the principle that declarations may be made without observing requirements as to form to be a general principle of the Convention in accordance with Art. 7(2) CISG; accord Schlechtriem, please see fn 1, No. 49.

23 Rajska, please see fn 9, No. 2.2; see also Peter Schlechtriem, ‘Artikel 13’, in *Kommentar zum Einheitlichen UN-Kaufrecht*, No. 2 (Schlechtriem, P., ed., 3rd edn., 2000).

24 Payeras, C., please see fn 8, at p. 159; Magnus, please see fn 8, No. 4; Rajska, please see fn 9, No. 2.2.

In this situation, it is preferable to look to Art. 1:301(6) PECL as an aid for interpretation: this provision was drafted fifteen years after its counterpart in Art. 13 CISG and therefore specifically takes into account the various modern means of communication that have been developed since. By drawing on a wide range of legal materials from within and outside Europe (including the CISG itself),<sup>25</sup> the drafters of Art. 1:301(6) PECL have come up with a convincing solution in line with the trend in modern international trade legislation.

#### **4 MODERN MEANS OF COMMUNICATION UNDER THE CISG AND THE PECL**

No differences exist between the two instruments with respect to declarations made by telegram and telex which are explicitly covered by both Art. 13 CISG and Article 1:301(6) PECL. Also, neither of the two provisions deals with form requirements demanding a signature, a document signed by both parties or an electronic signature:<sup>26</sup> contractual stipulations of this kind<sup>27</sup> are subject to the general rule on interpretation in Art. 8 CISG.

##### **4.1 TELEFAX**

The first new means of communication introduced to the business community after the Convention's adoption in 1980 was the telefax (teletype). It is explicitly mentioned in Art. 1:301(6) PECL and also in other international instruments containing provisions which have been modelled on Art. 13 CISG.<sup>28</sup>

Telefaxes are generally considered to be covered by the term ‘writing’ in Art. 13 CISG.<sup>29</sup> Some commentators, however, favour a restriction to faxes which have been printed out as opposed to a fax which is transferred from computer to computer and only appears on the

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25 See Note 6 to Art. 1:301 stating that Article 13 CISG is ‘narrower’.

26 Schlechtriem, please see fn 23, No. 2.

27 The Convention itself does not require a signature in its Arts. 21(2) and 29(2), please see Honnold fn 8, No. 130. Such requirements can, however, frequently be found in contractual clauses; see U.S. District Court S.D.N.Y., 22 September 1994, 92 Civ. 3655 (JFK) – *Graves Import Company Ltd. & Italian Trading Company v. Chilewich International Corp.*, where the contract stipulated that ‘[n]o amendments and additions to the present Contract shall be valid unless the same are in writing and signed by duly authorized representatives of both parties’. Case presentation available on-line, at <<http://cisgw3.law.pace.edu/cases/940922u1.html>>.

28 E.g., Uniform Act Relating to General Commercial Law of the Organization for the Harmonization of Business Law in Africa (OHADA) Article 209, see Schroeter, U.G., ‘Das einheitliche Kaufrecht der afrikanischen OHADA-Staaten im Vergleich zum UN-Kaufrecht, Recht in Afrika’ (2001) 163, at p. 167; available on-line at <<http://cisgw3.law.pace.edu/cisg/biblio/schroeter.html>>.

29 Audit, please see fn 10, at p. 73; Eiselen, please see fn 9, at p. 29; Herber & Czerwenka, please see fn 2, Art. 13 No. 4; Heuzé, V., *La vente internationale de marchandises* (1992), No. 205; Honnold, please see fn 8, No. 130; Magnus, please see fn 8, No. 5; Neumayer & Ming, please see fn 8, Art. 13 No. 1.

recipient's screen or is only retrievable,<sup>30</sup> while one author wants to apply Art. 13 CISG to declarations which have been transmitted 'by fax only', but not to those sent 'by fax and post'.<sup>31</sup> In the light of Art. 1:301(6) PECL, it is not necessary that the telefax has been printed out by the recipient, as long as he had the *option* to obtain a 'readable record' of the statement. This condition is certainly fulfilled if the fax is stored on the recipient's computer system, but also if the fax message merely appears on the recipient's screen and he chooses not to print it out.<sup>32</sup> Accordingly, it is submitted that only telefaxes transferred from computer to computer that merely appear on the recipient's screen *without* the option of producing a print-out or saving it as an electronic file cannot be considered to be in 'writing' in the sense employed by Art. 13 CISG.<sup>33</sup> All other telefaxes constitute a 'writing' for the purposes of the Convention.

#### 4.2 *ELECTRONIC DATA INTERCHANGE (EDI)*

Where Electronic Data Interchange, defined as 'the electronic interchange of machine processable structured data, which has been formatted according to agreed standards and which can be transmitted directly between different computer systems with the aid of telecommunication interfaces',<sup>34</sup> is used in connection with a contract of sale, the parties usually have concluded an interchange agreement<sup>35</sup> prior to their first declaration by way of EDI. Such an agreement will often allow courts or arbitrators to determine if the parties had the intent to treat statements made through EDI as a 'writing' in the sense employed in their sales contract.<sup>36</sup>

Whenever these indications are insufficient or inconclusive, Art. 13 CISG provides the relevant guidelines. A number of commentators have argued that this provision has to be

30 Achilles, please see fn 19, Art. 13 No. 1; Schlechtriem, please see fn 23, No. 2; Witz, please see fn 8, No. 2 (requiring that the fax is 'directly' printed out by the recipient).

31 Melis, please see fn 15, No. 4. This distinction, it is submitted, is hardly convincing.

32 The recipient's situation is comparable to that of a person receiving a (paper-based) letter: The declaration contained therein is beyond doubt 'in writing', even if the recipient subsequently destroys the letter.

33 This interpretation also conforms to the definition contained in a recent UNCITRAL text: The Convention on the Assignment of Receivables in International Trade (2001), Art. 5(c) defines 'writing' as 'any form of information that is accessible so as to be usable for subsequent reference'.

34 Eiselen, please see fn 9, at p. 23.

35 Eiselen, please see fn 9, at pp. 37ff. On standard interchange agreements, see Boss, A.H., 'Electronic Commerce and the Symbiotic Relationship Between International and Domestic Law Reform', 72 *Tulane Law Review* (1998) 1931, at pp. 1949ff.

36 Eiselen, please see fn 9, at p. 27: '[i]f an Interchange Agreement specifically prescribes the methods of communications [...], that should be heeded'. An interchange agreement may also be taken into account if the sales contract incorporating the form requirement was concluded prior to the interchange agreement, as under Art. 8(3) CISG due consideration is to be given to 'all circumstances of the case including [...] any subsequent conduct of the parties' when determining their intent.

read to include EDI.<sup>37</sup> This interpretation seems to be in line with Art. 1:301(6) PECL, which makes no explicit mention of EDI, but covers any ‘means of communication capable of providing a readable record of the statement on both sides’<sup>38</sup>. Accordingly, an EDI message suffices where writing is required for the purposes of the Convention.

### 4.3 ELECTRONIC MAIL (E-MAIL)

Under Art. 1:301(6) PECL, the term ‘written’ statement explicitly includes declarations made by electronic mail. The main difference between e-mail and Electronic Data Interchange lies in the fact that within the latter system a number of different technical standards for data messages are used which, as they are not necessarily compatible with each other, thus usually require a prior agreement between sender and recipient (the interchange agreement), while the former uses ‘open’ data connections and computer networks.<sup>39</sup> In cases where e-mails have been used, it will therefore not be possible to rely on interchange agreements in order to interpret contractual writing requirements. As electronic mail is a means of communication capable of providing a readable electronic record of the messages sent (by storing the messages in the mailing systems of the sender and the recipient), it fulfils the standards of Art. 13 CISG.<sup>40</sup> This rule applies to any e-mail and does neither require the message to be converted into paper-based form<sup>41</sup>, nor is it restricted to e-mails authenticated by an electronic signature.<sup>42</sup>

### 4.4 INTERNET AND WORLD WIDE WEB

The terms ‘Internet’ and ‘World Wide Web’ are often used interchangeably,<sup>43</sup> although they are not synonymous: The *Internet* is a massive networking infrastructure connecting millions of computers globally, forming a network in which any computer can communicate with any other computer as long as they are both connected to the Internet. As far as communications via the Internet are concerned that merely use the Internet as a network of data connections through which electronic messages are transmitted between the mailing

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37 *Ibid.*, at p. 36; Honnold, please see fn 8, No. 130; Magnus, please see fn 8, No. 5.

38 It is the present author’s position that a readable record in electronic format suffices for the purposes of Art. 13 CISG; see *supra*, 4 a) (on telefaxes transmitted from computer to computer); *cf* Witz, please see fn 8, No. 2.

39 The most important network system for the transmission of e-mails is the Internet; see the text *infra*, at 4 d) for a brief description.

40 Eiselen, please see fn 9, at p. 36; Magnus, please see fn 8, No. 5; Posch, W., ‘Article 13’, in *Praxiskommentar zum ABGB samt Nebengesetzen*, no. 3 (Schwimann, M., ed., 2nd edn., 1997); *cf* Witz, please see fn 8, No. 2.

41 Magnus, please see fn 8, No. 5; *cf* Achilles, please see fn 19, Art. 13 No. 1; Schlechtriem, please see fn 1, No. 68.

42 Magnus, please see fn 8, No. 5; *cf* Schlechtriem, please see fn 23, No. 2.

43 *Cf.* e.g. Schlechtriem, please see fn 23, No. 2.

systems of the sender and of the recipient, the situation under Art. 13 CISG is identical to the one discussed above.

The *World Wide Web*, on the contrary, is a way of accessing information over the medium of the Internet. It is thus an information-sharing model that is built on top of the Internet and which is often used for purposes of electronic commerce. As the World Wide Web ('the web') is in a number of ways different from e-mail,<sup>44</sup> declarations made over the web require special attention under Art. 13 CISG: Frequently, companies' web sites on the web are organized in a way that allows statements to be made to the company by using a 'form' provided on the web site. The web user types his message into the form and dispatches it by clicking on the relevant 'button'. As far as contracts of sale are concerned, this means of communication could, for example, be used to give notices of non-conformity according to Art. 39(1) CISG to sellers providing the abovementioned option on their web site.

A declaration made through a web site form does, however, not fulfil the writing requirement as defined in Art. 1:301(6) PECL, as it does not provide a readable record of the statement on *both* sides – once the declaration is dispatched, an electronic record remains on the recipient's side only, but *not* on the side of the sender (contrary to the use of e-mail, the sender's mailing system is not involved). When accepting that the prerequisite of a record existing on both sides serves as a compensation for the lack of a paper-based documentation of the statement,<sup>45</sup> declarations over the World Wide Web of the kind described above cannot be considered to fulfil the requirements of Art 13 CISG.

## 5 CONCLUSION

As Art. 13 CISG does not explicitly deal with the modern means of communication that have been introduced after 1980 and are nowadays frequently used in connection with the conclusion and performance of international sales contracts, the more recently adopted Art. 1:301(6) PECL, which has an identical purpose and is based on the same philosophy, provides a useful aid in its interpretation. By looking to its PECL counterpart when applying Art. 13 CISG to electronic communications, courts and arbitrators can keep the CISG from becoming a piece of petrified law<sup>46</sup> and, at the same time, allow the Convention to take its place as a part of the emerging global legal framework for electronic commerce.<sup>47</sup>

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44 The main technical difference is that the World Wide Web and e-mail rely on different protocols to transmit data over the Internet: The web uses the HTTP protocol; e-mail uses the SMTP protocol.

45 It has to be kept in mind that the traditional paper-based form of communication qualifying as a 'writing' in the sense employed by Art. 13 CISG – the letter – does, once received by the recipient, only provide a record of the statement on one side (the recipient's), but not on the side of the sender.

46 Eiselen, please see fn 9, at p. 21.

47 Boss, please see fn 35, at p. 1979.