"I Will Pay": Does Confirming an Invoice Mean Accepting the Arbitration Clause Sent with It?

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Swiss Federal Supreme Court Decision 4A_237/2026 of 14 September 2026

Key takeaways

- **An arbitration agreement may, in principle, be concluded through WhatsApp. No signature is required.**
- **An invoice ordinarily requests payment; it does not create or amend contract terms. An arbitration clause appearing for the first time in an invoice or its attachments does not automatically become part of a contract already concluded.**
- **Whether a subsequent statement or message amounts to acceptance of an arbitration clause depends on its context, including the communication channel used. An indication that an invoice will be paid does not necessarily establish consent to an arbitration clause contained in the invoice or its attachments.**

Introduction

Two commercial transactions involving several artworks were agreed through WhatsApp. The invoices followed later as PDF attachments, with arbitration clauses appearing for the first time in the small print and the attached general terms and conditions ("GTC"). Did the buyer agree to arbitration by indicating, after receiving the invoices, that he would pay them?

In decision 4A_237/2026 of 14 September 2026, the Swiss Federal Supreme Court held that no valid arbitration agreement had been concluded and set aside the arbitral award. While WhatsApp can satisfy the form requirement, the parties' communications must show a clear agreement to exclude the jurisdiction of the state courts and, where the contract has already been concluded, to amend it accordingly.

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From WhatsApp deal to arbitration

An art dealer offered a buyer an artwork by Miriam Cahn through WhatsApp. The buyer asked whether he could purchase it, spoke with the art dealer by telephone and subsequently provided his invoice address.

The following day, the art dealer sent a four-page PDF containing the invoice, its "Key Terms" and the GTC via WhatsApp. The "Key Terms", in barely legible small print, ended with a summary of an arbitration clause, while the GTC contained the full arbitration clause. Both provided for arbitration under the Swiss Rules before a sole arbitrator seated in Lucerne. A few hours later, the buyer replied that he would pay within the next hour.

The same evening, the art dealer presented a collection of five further artworks. After receiving the price of CHF 1.5 million the next morning, the buyer replied:

"I will take it all, I will pay until tomorrow"

The art dealer subsequently sent a second invoice with the same "Key Terms" and GTC.

Two days later, the buyer asked again about the price for the artworks. The art dealer replied that he had already sent both invoices. The buyer answered "OK□" and "Bill please", following which the art dealer sent both invoices again. None of the WhatsApp messages referred to the "Key Terms", the GTC or the arbitration clauses. In a later telephone call, the buyer stated that he would pay the second invoice.

When the buyer ultimately refused to pay, the art dealer commenced arbitration. The sole arbitrator upheld her jurisdiction and awarded the art dealer damages plus interest. The buyer challenged the award before the Swiss Federal Supreme Court, arguing that no valid arbitration agreement existed.

Form is not the obstacle, consent is

As both parties were seated or domiciled in Switzerland, the domestic arbitration provisions of the Swiss Code of Civil Procedure ("CPC") applied.

Under Article 358(1) CPC, an arbitration agreement must be made in writing or in another form that allows it to be evidenced by text. The Swiss Federal Supreme Court confirmed that an arbitration agreement may therefore, in principle, be concluded through WhatsApp or another instant-messaging service. A signature is not required, but the declarations of both parties must meet the text-form requirement. An oral or tacit acceptance of a written offer to arbitrate is insufficient.

Article 358(1) CPC is modelled on Article 178(1) of the Swiss Private International Law Act ("PILA"), and the Swiss Federal Supreme Court drew on its case law concerning international arbitration. Its reasoning is therefore also relevant when assessing arbitration agreements under the PILA.

A valid arbitration agreement requires the parties to agree to submit their disputes to arbitration and thereby exclude the jurisdiction of the state courts. If no actual common intention can be established, their communications must be interpreted objectively and in good faith. The Swiss Federal Supreme Court reiterated that such consent should not be assumed lightly, given the significantly limited grounds for challenging an arbitral award. In case of doubt, the arbitration agreement must be interpreted restrictively. An arbitration clause contained in GTC is, in principle, validly incorporated if the contract refers specifically to the clause or at least globally to the GTC.

Adding the arbitration clause would have required contractual amendments

The sole arbitrator had found, and the Swiss Federal Supreme Court proceeded on the basis, that the purchase agreements had already been concluded through the earlier exchanges before the invoices were sent. The arbitration clauses could therefore only have been incorporated through subsequent amendments to the purchase agreements.

The decisive question was whether sending the invoices amounted to an offer to amend the purchase agreements by adding an arbitration clause and, if so, whether the buyer had accepted such an amendment.

No clear agreement to amend the purchase agreements

The Swiss Federal Supreme Court started from the nature of the communication channel: WhatsApp is designed for informal communication, and messages are typically read on a mobile phone. Accordingly, a recipient cannot generally be expected to review a multi-page PDF attachment in every detail.

Against this background, the correspondence lacked a sufficient reference to the GTC or the arbitration clauses. The messages accompanying the invoices referred generally to the invoices and to payment and delivery of the artworks. Nothing indicated that the art dealer intended to introduce a new dispute resolution mechanism into contracts that had already been concluded.

The mere sending of the invoices therefore did not amount to an offer to amend the purchase agreements. The Swiss Federal Supreme Court emphasised that, as a matter of general commercial practice, an invoice is a request for performance, not a document that establishes or amends contractual terms. Viewed objectively, the exchange concerned the practical implementation of the transactions, not an amendment to the purchase agreements.

In any event, the buyer's subsequent messages could not reasonably be understood as acceptance of such an amendment: "I will pay within the next hour" announced that payment would be made to the account specified in the invoice. "OK□", sent two or three days after the invoices during an exchange concerning the artworks and the invoices, did not indicate acceptance of their terms. "Bill please" was, if anything, a request for the invoices to be sent, not an acceptance of their content.

The buyer's later oral indication that he would pay one of the invoices did not change the conclusion. It did not establish consent to arbitration and, in any event, an oral statement did not satisfy the text-form requirement under Article 358 CPC.

The Swiss Federal Supreme Court therefore set aside the award and declared that the sole arbitrator lacked jurisdiction. It ordered the art dealer to bear the costs of the proceedings and compensate the buyer.

Conclusion

The decision highlights the importance of addressing arbitration when the contract is concluded. If an arbitration clause is introduced by one party only afterwards, the communication should clearly identify the proposed amendment and refer at least to the GTC containing the arbitration clause, better still to the clause itself. To be valid and binding, the counterparty's acceptance is necessary and should likewise be documented in a form that can be evidenced by text.

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No legal or tax advice

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