Terms of shrink-wrap agreements

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Courts may refuse shrink-wrap agreement, if notice to the purchaser was only given after the formation of the contract or if the purchaser was not given the opportunity to read it as was in the case of Specht v Netscape Communications Corporation, 306 F 3d 17, 2nd Circuit CA, 2002. In that case, the Court rendered the term unenforceable because it appeared only at the bottom of the web page after the download button, depriving the customer the opportunity to read it first. This is not true however, in the present case because Dell not only advertised the terms on its website but also enclosed a written copy of it with the delivery of the computer to the customer.

Generally, the courts will find for arbitration if it clearly appears that an agreement thereto was reached between the parties and even if there are doubts such as in the case of NCR Corp v Korala Associates, Ltd 512 F 3d 807 (2008) but may decide against it, even if there was agreement, if it is obviously one-sided such as in the case of Circuit City Stores Inc v Adams 279 F 3d 889 (2002) (cited Miller & Jentz 2009 52, 53). The present case, however, is distinguished from similar cases where the court held shrink-wrap agreements and arbitration clauses valid by its absence of an express disclaimer informing the customer of the specific method by which to express his or her rejection of the terms, usually a return of the product as was in the case of ProCD, Inc v Zeidenberg 908 F Supp 640 (1996). The implication of this is that DeFontes has no notice that a rejection of the terms should be expressed by returning the product and therefore, as to her, the arbitration term is not binding. She, therefore, has good chances of dismissing Dell’s application for arbitration.