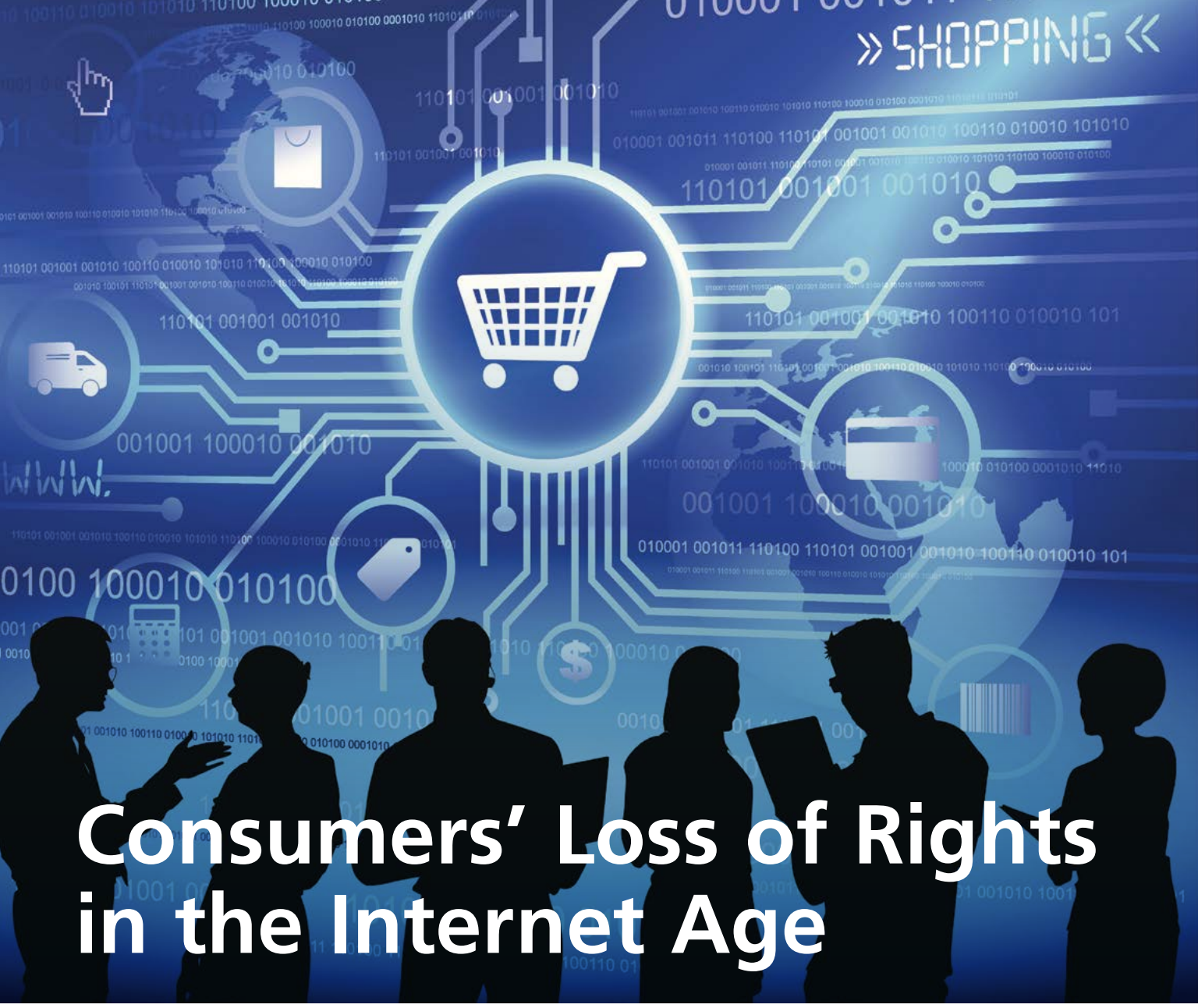

Consumers' Loss of Rights in the Internet Age

By Thomas A. Dickerson and Mark A. Berman

When we first examined the significance of Internet transactions, we believed that the Internet may have made it easier to assert personal jurisdiction over the sellers of goods and services whose primary connection with a local forum was their virtual presence on the consumer's computer screen.[1] One of the more ominous developments[2] for e-commerce consumers, however, involves the increasing enforcement of onerous contractual terms and conditions, such as mandatory arbitration, forum selection and choice-of-law clauses, and liability disclaimers, lurking in the hyperlinks and pop-up boxes.

The Bisquick Revolt

Public pressure from consumers exerted over just a few days this past April forced General Mills to remove from its website language directed at users of its online communities who download items of value, such as coupons, that would have required "all disputes related to the purchase or use of any General Mills product or service to be resolved through binding arbitration." General Foods responded to the pressure with the following press release:

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> We rarely have disputes with consumers – and arbitration would have simply streamlined how complaints are handled. Many companies do the same, and we felt it would be helpful. But consumers didn't like it. So we've reverted back to our prior terms. . . . We stipulate for all purposes that our recent Legal Terms have been terminated, that the arbitration provisions are void, and that they are not, and never have been, of any legal effect. . . . We'll just add that we never imagined this reaction. Similar terms are common in all sorts of consumer contracts, and arbitration clauses don't cause anyone to waive a valid legal claim. They only specify a cost-effective means of resolving such matters.

An Unstoppable Advance?

While the Bisquick Revolt was momentarily encouraging, consumers should be aware that things haven't actually changed. Companies continue to seek to limit exposure and litigation expense, with much success, by requiring consumers to agree to significant terms and conditions, as noted above, included on their websites through hyperlinks and scroll-throughs with consumers clicking their acceptance. From a business perspective, it is understandable why merchants want such contractual limitations. And when included properly in a website, so that a consumer is provided appropriate notice of such proscriptions, they will be upheld by the courts.

What Is Adequate "Notice"?

New York courts, however, are grappling with a fine line. When is a hyperlink or a click through on a website so "temporally and spatially[3] decoupled"[4] from a consumer's decision to purchase a product or service as to provide *inadequate* "inquiry" or constructive notice of such provision? Courts are well aware of their role to appropriately balance the right of businesses to rely upon such contractual limitations, but know that, in many cases, consumers do not read such provisions, even after they acknowledge through a click that they had. Just what is inquiry or constructive notice in today's world of e-commerce, and when should consumers be bound to terms they admit they never cared to review? This is what is at issue.

Going the Distance

Merchants continually push the limits of how much distance they can put between consumers' decisions to purchase and the disclosure of mandatory arbitration, forum selection and choice of law clauses, and liability disclaimers, so that consumers may not consider or focus on the fact that they are waiving their right to, among things, sue in court. E-commerce merchants cannot blithely assume, however, that inclusion of, for instance, a mandatory arbitration clause somewhere on a hyperlinked page or on its website will be deemed part of any contract agreed to by a consumer and afford the merchant its sought-after protections.

Continuing Development of the Law

The Second Circuit aptly characterized the issue in *Schnabel v. Trilegiant Corp.*:[5]

> [I]nasmuch as consumers are regularly and frequently confronted with non-negotiable contract terms, particularly when entering into transactions using the Internet, the presentation of these terms at a place and time that the consumer will associate with the initial purchase or enrollment, or the use of, the goods or services from which the recipient benefits at least indicates to the consumer that he or she is taking such goods or employing such services subject to additional terms and conditions that may one day affect him or her.

In New York, the issue first arose more than 10 years ago in a Second Circuit decision issued by then Judge Sonia Sotomayor in *Specht v. Netscape Communications Corp.*[6] In a class action lawsuit, the plaintiffs, Internet users who downloaded free software from the defendants' webpage, claimed that they were not bound to arbitrate their dispute according to the terms included on the defendants' website. In order to resolve "the central question of arbitrability," the court addressed "issues of contract formation in cyberspace."[7] The court noted that, although cyberspace transactions typically lack a physical document containing contract terms, parties can be deemed to have been put on "inquiry notice" of terms that a "reasonably prudent" person would have seen on the website.[8] After document and deposition disclosure had occurred on the issues, the court found that the placement of contractual limitations on an "unexplored portion of [the defendants'] webpage" that had to be scrolled down to, and which was located below the download button and which terms were not set out there, but rather contained in a hyperlink, was not sufficient to bind customers to such terms.[9] The court explained that, when the plaintiffs were prompted to download free software from the site at the click of a button, they could not see a reference to any license terms that they could accept by clicking. Noting that "there is no reason to assume that viewers will scroll down to subsequent screens simply because screens are there," the court concluded that a "reference to the existence of license terms on a submerged[10] screen is not sufficient to place consumers on inquiry or constructive notice of those terms." The plaintiffs, therefore, could not be said to have assented to the defendants' arbitration clause when they clicked to download the site's plug-in program.[11]

In *Hines v. Overstock.com*,[12] a consumer class action, the defendant sought to compel confidential arbitration, pursuant to the defendant's terms and conditions, which provided that "[e]ntering this site will constitute your acceptance of these [t]erms and [c]onditions" and which statement could be found only within such terms and conditions.[13] The website did not prompt the consumer

to review the terms and conditions, and the link to the terms and conditions was not so prominently displayed as to provide reasonable notice.[14] On appeal, the court noted that the defendant had alleged nothing regarding the consumer's "actual or constructive knowledge" of the terms and conditions and, more specifically, whether the consumer had an opportunity to see the terms and conditions "prior" to "accepting" them by "accessing the website."[15]

In *Fteja v. Facebook, Inc.*,[16] the court enforced a forum selection provision[17] where the sign-up page for a Facebook account provided: "By clicking Sign-Up, you are indicating that you have read and agree to the Terms of Service."[18] By clicking on an underlined terms of service hyperlink, users would be sent to a different page, which included a forum selection clause. The court described Facebook's terms of use as "somewhat like a browsewrap agreement[19] in that the terms are only visible via a hyperlink, but also somewhat like a clickwrap agreement[20] in that the user must do something else – click 'Sign Up' – to assent to the hyperlinked terms."[21] Although the website did not contain any mechanism forcing the user to actually examine the terms before assenting, the court found the critical question was whether the terms had been "reasonably communicated" to the user.[22] The court reasoned:

> What is the difference between a hyperlink and a sign on a bin of apples saying "Turn Over for Terms" or a cruise ticket saying "SUBJECT TO CONDITIONS OF CONTRACT ON LAST PAGES IMPORTANT! PLEASE READ CONTRACT – ON LAST PAGES 1, 2, 3"? The mechanics of the internet surely remain unfamiliar, even obtuse to many people. But it is not too much to expect that an internet user whose social networking was so prolific that losing Facebook access allegedly caused him mental anguish would understand that the hyperlinked phrase "Terms of Use" is really a sign that says "Click Here for Terms of Use." So understood, at least for those to whom the internet is in an indispensable part of daily life, clicking the hyperlinked phrase is the twenty-first century equivalent of turning over the cruise ticket. In both cases, the consumer is prompted to examine terms of sale that are located somewhere else. Whether or not the consumer bothers to look is irrelevant. "Failure to read a contract before agreeing to its terms does not relieve a party of its obligations under the contract."[23]

Accordingly, the court found that, under contract law principles, the plaintiff assented to the forum selection clause on Facebook's website.

The defendant in *Zaltz v. JDATE*[24] submitted evidence that the plaintiff was expressly required to click a specific box to accept the terms of service (that included the forum selection clause), which the prospective member "clicked" on to confirm that he or she read and agreed to the terms of service, and which featured a hyperlink to a webpage displaying such contractual limitation.[25] The plaintiff did not need to scroll or change screens in order to be advised of such terms, and the existence of, and need to accept and consent to, such terms, which were readily visible.[26] The court noted that, whereas Facebook's terms of use in *Fteja* were referenced *below* the button a prospective user had to click in order to assent, the defendant's reference to its terms and conditions appeared *above* the button, thereby making it "even more clear that prospective members of JDate.com are aware that by clicking the button to move forward in the registration process, they manifest their assent"[27] to the website's terms. The plaintiff was required to acknowledge her acceptance of the terms each time she submitted credit card information to cover monthly subscription fees for the website. The plaintiff also was "required to take two specific actions to assent to JDate.com's terms: (1) check the box next to the statement 'I confirm that I have read and agreed to the Terms and Conditions of Service' (with a hyperlink to the Terms . . . over those words), and (2) click the 'Accept and Continue' button."[28] Thus, the plaintiff had to twice denote her acceptance of the terms and conditions, which contained the forum selection clause. In such circumstances, the court noted that "[a] reasonably prudent offeree would have noticed the link and reviewed the terms before clicking on the acknowledgement icon[s]."[29]

In *Starkey v. GAP Adventures, Inc.*,[30] a *pro se* New York resident purchased a tour package and received a confirmation email, confirmation invoice and service voucher. None contained any forum selection and choice of law clauses. The email confirmation, however, stated that the plaintiff "must read, understand and agree to the following terms and conditions" and then provided a "link that [plaintiff] could click on to review the 'Terms and Conditions.'"[31] The confirmation invoice and the service voucher contained a link that directed the plaintiff to the terms and conditions and included the language: "Confirmation of your reservation means that you have already read, agreed to and understood the terms and conditions, however, you can access them through the below link if you need to refer to them for any reason."[32] The traveler chose not to click on the hyperlink, but, assuming she had and, further assuming that she read the first 31 paragraphs, she may have read paragraph 32, titled "Applicable Law," which stated that "the Terms and Conditions and Conditions of Carriage including all matters arising from it are subject to Ontario and Canadian Law and the exclusive jurisdiction of the Ontario and Canadian Courts."[33] The traveler asserted that the tour company should have set forth its terms and conditions, including the forum selection clause, up front "in the body of the three relevant communications."[34] The court, however, dismissed the case, holding that a "hyperlink" is a "reasonable form of communicating" the terms and conditions of a contract.[35]

In *Starke v. Gilt Groupe, Inc.*,[36] in a putative consumer class action, the court framed the issue as

> whether [the plaintiff] is bound by the written terms of a transaction [which included a mandatory arbitration clause] which he did not see or read,[37] although he was aware that there were terms which governed his purchase, that he would be taken as having agreed to them by making the purchase, and that he could read [sic] them by one or two clicks[38] of the mouse.[39]

The court concluded that, when the plaintiff clicked "Shop Now," he was "informed that by doing so, and giving his email address, 'you agree to the Terms of Membership for all Gilt Groupe sites,'" and "[r]egardless of whether he actually read the contract's terms, [the plaintiff] was directed exactly where to click in order to review those terms, and his decision to click the 'Shop Now' button represents his assent to them."[40]

When the plaintiff clicked "Shop Now," he was "informed that by doing so, and by giving his email address, 'you agree to the Terms of Membership for all Gilt Groupe sites.'"

The cases discussed above, essentially set out in chronological order, show merchants' continued development of their consumer websites over time in their attempt to ensure that their mandatory arbitration clauses are sustained by the courts. It appears that courts are now at a crossroads regarding Internet consumers. Some consumers are naïve, while others are Internet and social-media savvy, but each end up claiming not to have read a company's terms and conditions, yet otherwise acknowledge to the contrary, through their clicks on merchants' websites. These same consumers then assert, when a dispute arises, that they should not be bound to multi-page terms and conditions that they "misspoke" about having read, and which agreement may never have been printed out.

In *Khoa Nguyen v. Barnes & Noble*,[41] applying New York law in affirming a district court's denial of a motion to compel arbitration, the court stated that

> where, as here, there is no evidence that the website user had actual knowledge of the agreement, the validity of the browsewrap agreement turns on whether the website puts a reasonably prudent user on inquiry notice of the terms of the contract. Whether a user has inquiry notice of a browsewrap agreement, in turn, depends on the design and content of the website and the agreement's webpage.[42]

Barnes & Noble argued that the location of the "Terms of Use" hyperlink in the bottom left-hand corner of every page on its website, and its close proximity to the buttons a user must click on to complete a purchase, "is enough to place a reasonably prudent user on constructive notice."[43] The court held that "the proximity or conspicuousness of the hyperlink alone is not enough to give rise to constructive notice, and Barnes & Noble directs us to no case law that supports this proposition."[44] In sum, applying New York law, the court cogently held:

> In light of the lack of controlling authority on point, and in keeping with courts' traditional reluctance to enforce browsewrap agreements against individual consumers, we therefore hold that where a website makes its terms of use available via a conspicuous hyperlink on every page of the website but otherwise provides no notice to users nor prompts them to take any affirmative action to demonstrate assent, even close proximity of the hyperlink to relevant buttons users must click on – without more – is insufficient to give rise to constructive notice. While failure to read a contract before agreeing to its terms does not relieve a party of its obligations under the contract, the onus must be on website owners to put users on notice of the terms to which they wish to bind consumers. Given the breadth of the range of technological savvy of online purchasers, consumers cannot be expected to ferret out hyperlinks to terms and conditions to which they have no reason to suspect they will be bound.[45]

Need for Legislation

What may be needed is legislation mandating that merchants, *prior* to a consumer confirming his or her purchase, prominently display on their websites, in clear language and large font,[46] that the consumer, by such purchase, has waived the right to proceed in court and that all disputes will be resolved through arbitration. Given existing New York law concerning "inquiry" and "constructive" notice as it has developed based on paper agreements, which concepts now have been extended to e-commerce agreements, only legislation can appropriately protect consumers, who claim to have read and understood the terms and conditions of an Internet purchase, but who, in reality, through well-known casual unwillingness, simply click "I confirm," and do not scroll through pages and pages of terms and conditions to learn the merchants' contractual limitations, including mandatory arbitration, forum selection and choice of law clauses as well as liability disclaimers. ■

1. *See* Thomas A. Dickerson, Cheryl E. Chambers & Jeffrey A. Cohen, *Personal Jurisdiction and the Marketing of Goods and Services on the Internet*, 41 Hofstra L. Rev. 31 (2010). See also *Paterno v. Laser Spine Inst.*, 112 A.D.3d 973 (2d Dep't 2013), which addresses the assertion of personal jurisdiction over foreign companies in the Internet age.

2. Equally distressing is Facebook's apparent manipulation of user emotions as discussed in the *New York Times* Op-Ed piece, Jaron Lanier, *Should*

Facebook Manipulate Users?, http://www.nytimes.com/2014/07/01/opinion/jaron-lanier-on-lack-of-transparency-in-facebook-study.html? (6/30/2014) ("A study recently published by researchers at Facebook and Cornell suggests that social networks can manipulate the emotions of their users by tweaking what is allowed into a user's news feed. The study, published in the Proceedings of the National Academy of Sciences, changed the news feeds delivered to almost 700,000 people for a week without getting their consent to be studied. Some got feeds with more sad news, others received more happy news. . . . The researchers claim that they have proved that 'emotional states can be transferred to others via emotional contagion, leading people to experience the same emotions without their awareness.'").

3. *See People v. Nat'l Home Prot., Inc.*, 2009 N.Y. Misc. LEXIS 3667, 2009 NY Slip Op 32880(U), at *7 (Sup. Ct. N.Y. Co. Dec. 8, 2009).

> National cannot rely, as a defense, on the T&C. First, the link which appears at the bottom of the homepage and directs the consumer to seven (7) pages of densely worded, fine-print, single spaced terms and conditions *are too far removed from the main portions of the web page* and are insufficient to alter consumers' net impressions that the HWP covers existing systems and appliances which break down due to normal wear and tear. Fine-print disclosures and disclaimers that are placed in portions of an advertisement that are less likely to be read or remembered are inadequate to disclaim or modify a claim that is made in the main body or text of the advertising (emphasis added).

4. *Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 127 (2d Cir. 2012).

5. *Id.*

6. 306 F.3d 17 (2d Cir. 2002). *See also* Kaustuv M. Das, Note *Forum Selection Clauses in Consumer Clickwrap and Browsewrap Agreements and the "Reasonably Communicated" Test*, 77 Wash. L. Rev. 481 (2002).

7. *Id.* at 20.

8. *Id.* at 31, 32.

9. *Id.* at 32.

10. In *Jerez v. JD Closeouts, LLC.*, 36 Misc. 3d 161 (Dist. Ct., Nassau Co. 2012), defendant's website contained the "Terms of Sale" on its "About Us" page and the "Terms of Sale" had a "hyper-link" that directed the viewer to the terms of all sales, including disclosures, return policy and legal policy. The page titled "Sale Terms" stated that "[i]n the event that an irresolvable situation arises, any litigation will take place in Broward County, in the State of Florida." Plaintiff, a commercial customer, contended that the "forum selection" provision found on defendants' website "is not part of the contract between the parties" and asserted that he had "never seen this language before, and . . . never saw it" when he agreed to purchase tube socks from defendants. *Id.* at 165. Defendants presented no evidence that the "terms of sale" listed on their website were ever communicated to plaintiff in connection with the transaction. The court held that the forum selection clause was not "reasonably communicated" to plaintiff by requiring a "click-through" acceptance of "hyperlinked" terms and conditions. *Id.* at 169. Instead, the "terms were 'buried' and 'submerged' on a webpage that could only be found by 'clicking' on an inconspicuous link on the company's 'About Us' page." *Id.* at 169–70. The court noted that:

> [w]ithout minimizing the importance of the provision to defendant's business, too little was done to ensure that the provision became part of the parties' contract. Especially in cases where the terms of an e-commerce transaction are negotiated, in the first instance, by e-mail, a seller must make an affirmative effort to "reasonably communicate" the essential terms of sale to the buyer. *If it wishes to make those terms part of the bargain, it can easily do so by providing notice to the buyer that the terms can be found at a given website address.* Defendants did not do so. Nor did they structure their website in a manner that placed the terms of sale directly up front, in a conspicuous place, for all to see.

Id. at 170 (emphasis added).

11. 306 F.3d at 32.

12. 668 F. Supp. 2d 363 (S.D.N.Y. 2009).

13. *Id.* at 367.

14. *Id.*

15. 380 Fed. Appx. 22, 24 (2d Cir. 2010).

16. 841 F. Supp. 2d 829 (S.D.N.Y. 2012).

17. *See Fleet Capital Leasing/Global Vendor Fin. v. Angiuli Motors, Inc.*, 15 A.D.3d 535, 536 (2d Dep't 2005): "Contractual forum selection clauses are prima facie valid and enforceable unless [they are] shown by the challenging party to be unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or it is shown that a trial in the selected forum would be so gravely difficult that the challenging party would, for all practical purposes, be deprived of its day in court." (quoting *Premium Risk Grp. v. Legion Ins. Co.*, 294 AD2d 345, 346 (2002)). The court added: "The agreement stated clearly above the signature line that the terms on the reverse side were part of the contract, and those terms stated clearly that the courts of Los Angeles County were to have exclusive jurisdiction. Thus, Angiuli is bound by the subject forum selection clause."

18. 841 F. Supp. 2d at 835.

19. In a browsewrap agreement, "'website terms and conditions of use are posted on the website typically as a hyperlink at the bottom of the screen.'" *Fteja*, 841 F. Supp. 2d at 836 (quoting *Hines*, 668 F. Supp. 2d at 366). A browsewrap agreement "usually involves a disclaimer that by visiting the website – something that the user has already done – the user agrees to the Terms of Use not listed on the site itself but available only by clicking a hyperlink." *Id.* at 837.

20. A clickwrap agreement, by contrast, requires a user to take more affirmative action: the user "clicks" on a "I agree" box to standard form terms, after being presented with a list of the terms and conditions of use. *Id.*

21. *Id.* at 838.

22. *Id.*

23. *Id.* at 839 (citation omitted).

24. 952 F. Supp. 2d 439 (E.D.N.Y. 2013).

25. *Id.* at 448 n.5.

26. *Id.* at 453.

27. *Id.* at 453–54.

28. *Id.* at 454.

29. *Id.*

30. 2014 WL1271233 (S.D.N.Y. Mar. 27, 2014).

31. *Id.* at *2.

32. *Id.*

33. *Id.*

34. *Id.* at *6.

35. *Id.*

36. 2014 WL1652225, (S.D.N.Y Apr. 24, 2014).

37. "The rule of law to be applied to these facts is simple and clear. '[A] party will not be excused from his failure to read and understand the contents of a release.'" A party who signs a document without any valid excuse for having failed to read it is "conclusively bound" by its terms." *Sofio v. Hughes*, 162 A.D.2d 518, 519–21 (2d Dep't 1990) ("Upon our review of the record, we find that Mr. Sofio both understands and speaks English sufficiently to warrant the inference that had he read the document, he would have understood it. His misapprehension concerning the scope of the release is thus attributable solely to his negligent failure to read it.") (citations omitted). *See Martino v. Kaschak*, 208 A.D.2d 698, 698–99 (2d Dep't 1994) ("Contrary to the plaintiffs' contentions, the plaintiff Carmine Martino's unsubstantiated claim that he executed the release in question without reading it because a secretary in the office of his recently discharged attorney had told him that the document was merely a receipt indicating that his legal files had been returned to him is insufficient to excuse his alleged failure to read the document. The release clearly and unambiguously released the defendant Robert J. Kaschak, as well as the plaintiffs' recently discharged attorney, from "all actions, causes of action, suits . . . claims, and demands whatsoever" that the plaintiffs might have had against them, and it is undisputed that the plaintiffs' new attorney was provided with a copy of the release prior to its execution.").

38. *See Brands, Inc. v Garden Ridge, L.P.*, 105 A.D.3d 1011 (2d Dep't 2013) (forum selection clause properly contained in defendant's terms and conditions where it was incorporated by reference into the parties' agreements).

39. *Starkey*, 2014 WL1271233 at *5.

40. *Id.* at *9.

41. 2014 U.S. App. LEXIS 15868 (9th Cir. Aug. 18, 2014).

42. *Id.* at *12 (citations omitted).

43. *Id.* at *14.

44. *Id.* at *15.

45. *Id.* at *17–18 (citation omitted).

46. *Filippazzo v. Garden State Brickface Co.*, 120 A.D.2d 663, 665–66 (2d Dep't 1986) (citations omitted).

> With respect to the petitioners' argument that the agreement to arbitrate is unenforceable because it is set forth in "small print," while it does not appear that the print is unusually small, neither party has offered any evidence on this issue. CPLR 4544 ("Contracts in small print") provides: "The portion of any printed contract or agreement involving a consumer transaction or a lease for space to be occupied for residential purposes where the print is not clear and legible or is less than eight points in depth or five and one-half points in depth for upper case type may not be received in evidence in any trial, hearing or proceeding on behalf of the party who printed or prepared such contract or agreement, or who caused said agreement or contract to be printed or prepared. As used in the immediately preceding sentence, the term 'consumer transaction' means a transaction wherein the money, property or service which is the subject of the transaction is primarily for personal, family or household purposes" (emphasis supplied).

Although this statute speaks in terms of the admissibility in evidence of such a contract, the underlying purpose of this "consumer" legislation is to prevent draftsmen of small, illegibly printed clauses from enforcing them (McLaughlin, Practice Commentary, McKinney's Cons Laws of NY, Book 7B, CPLR 4544 [1986 Supp Pamph], p 422). The few cases construing this statute interpret it as rendering a contract's provisions "unenforceable" if printed in "small print." Provisions of a contract appearing in small print "should not be enforced by the party who caused the agreement to be printed" (memorandum of Assemblyman Edward H. Lehner, 1975 NY Legis Ann, at 40). Although, technically, the respondent is not offering this provision in evidence, it is seeking to enforce the arbitration agreement by cross motion. It is a statutory requirement that an agreement to arbitrate be in writing (CPLR 7501), and it appears that this writing may not be enforceable pursuant to CPLR 4544.