

WRAP CONTRACTS AND THEIR INFLUENCE ON THE CONTRACT LAW


ABSTRACT: The basis of the digital economy is electronic commerce (e-commerce), based on contracting which increasingly relies on the use of a digital technology. A contract represents the basis of legal obligation, as well as the foundation of the validity and legitimacy of legal rules, dating back to the theory of the social contract. The functioning of the digital society and digital economy has introduced the process of digitization into the scope of the Contract Law and contracting practice. On the example of wrap contracts, as a kind of online contracts by access (adhesion contracts), the author shows how new practices in contracting affect the traditional obligation law institutes.

Keywords: *contracting, wrap contracts, the Contract Law, digital society, declaration of will.*

1. Introduction

Modern society, defined as digital society, introduces a new reality into market relations through new and different forms of offering goods and services, primarily electronically and with the usage of new terminology in economy and law. Consequently, the contracting processes go through changes, in the broader context of digital economy as the dominant framework of market exchange in the digital society, in form of electronic commerce. One

* LL.D, Associate Professor, The Faculty of Law for Commerce and Judiciary in Novi Sad, The University Business Academy, Republic of Serbia, e-mail: j.stojic.dabetic@gmail.com

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of the novelties is, for example, that the courts appear as creators of standards of fairness that apply to consumers in the case of contracts concluded over the Internet, since courts can respond to the regulatory needs of modern commerce faster than the legislator. This trend indicates that the creation of new regulation in all areas of law affected by the use of digital technology is based on case law, i.e. the principles of precedent law. Furthermore, different forms of online, i.e. electronic trading, introduce new ways and standards of assessing the consent of the buyer, i.e. consumer to the transaction. Payment for goods and services in various crypto currencies is accepted. Thus, today we are witnessing to digital technology changing the basic principles of traditional fields of law, including contract law, and two regulatory processes are taking place in parallel – the revision of traditional principles of contract as well as other fields of law, on the one hand, and the creation of new, innovative normative solutions on the other.

The author's intention in this paper is to engage in an analysis of the normative consequences of the usage of digital technology in contracting, and thus also of the interaction of law and digital technology on the example of a narrow legal issue such as online adhesion contracts or wrap contracts, and in the broader context of digital society, digital economy and the development of electronic commerce. The paper is segmented into three separate central parts, in addition to introduction and conclusion, that complement each other and consequently derive from each other. The first part shows the specific phenomenology of contracting in the digital society, with an emphasis on online adhesion contracts, and serves as a closer background for the analysis that follows in the second and third parts of the paper. The second part of the paper is dedicated exclusively to wrap contracts as a special type of contracts which are concluded precisely with the usage of digital technology and which are one of the forms of electronic contracting that is most commonly used among users of digital technology. The third part of the paper is a normative analysis and examination of the scope of the application of traditional contract law institutes and principles in the context of the implementation of wrap contracts. The concluding part of the paper indicates the potential impacts of the regulation of the use of digital technology in contracting on the redefinition of contract law, in the broader context of the digital economy and digital society.

2. Phenomenology of contracting in the digital society

Contemporary development of economic activity in the form of digital economy shows that contracts in business transactions are concluded with the wide usage of the services of the information society. Electronic commerce implies the conduct of transactions electronically, primarily using the Internet as the dominant business environment for the promotion of goods or services, as well as for the conclusion and execution of contracts (Dukić Mijatović & Mirković, 2022, p. 54). A complete purchasing of goods today can be made via the website, from ordering, through payment and even delivery of the requested goods as digital content (Mirković & Stojšić Dabetić, 2020, p. 60). Merchants who use the Internet or other forms of information society services for their business can establish special electronic, automated representatives who receive orders on their behalf, as special electronic representatives. This form of purchasing appears as the most convenient from the aspect of timeliness and financial benefit, both from the point of view of the buyer and the seller.

The usage of digital technology in the daily business practice of contracting individuals and legal entities has led to a change in the consciousness of individuals regarding contracting. Before the use of digital, or electronic, devices, it was virtually impossible for an individual to be bound by a contract without being aware of it, in the sense that they had not read it or otherwise agreed to it. The dominant form of contract was a written contract, where each contracting party, before signing the contract, took the time to read the contract and be informed of all the legal consequences of its conclusion. This is precisely the contractual phase when lawyers or other legal advisors participate in the conclusion of the contract and provide legal assistance to the parties. With the usage of digital technology in contracting, very often we are not even aware that we have entered into contractual relationship, that we are a contracting party, and thus an obligated party, in relation to another, most often, legal entity. This is a consequence of the management of transactions and business and every other communication predominantly via electronic means (Gutbrod, 2020). For example, every time we buy juice, coffee or other goods from a vending machine into which we insert money or a card in order to pay, we have concluded a sales contract. Also, every time we click on the button “Accept all cookies” or “I agree” to view the content of a website, we, again, become a contracting party, although we did not give monetary compensation, but access to our data instead.

Precisely this type of communication that takes place online between the user and the provider of a digital service is based on different forms of

contractual relations, mainly in the form of online adhesion contracts, which are concluded on a daily basis and often individuals are not even aware that they clicking on icon or other act made them enter into a contractual relationship (Grundmann & Hacker, 2017). The daily practice of concluding contracts on the Internet for most users means easily agreeing to their content, often without even reading and not knowing that they are actually entering into an agreement that expresses the legally relevant agreement of the will of the contracting parties. In this sense, the most common way of concluding a contract on the Internet is not by a signature (not even an electronic one), often it is not an express consent as such drawn up in a verbal sense, but a conclusive action, which represents an act by which one contracting party (the user) enters into a certain contractual relationship under often pre-offered and pre-defined conditions of the information society service provider. Therefore, every action on the Internet where person selects an item or service, or where goods or services are ordered, puts the user in the position of a contracting party, with all the rights and obligations that this status entails in the legal sense. A step further in the arrangement of contractual relations on the Internet are contracts in electronic form, which are usually drawn up beforehand and presented to the user who, by clicking on a specific link or checkbox button for marking, confirms agreement with their content and thus “signs” it.

It has become common practice to use automated software on websites that are used for sales, in which the parameters for receiving orders are pre-set (programmed) and this enables orders to be placed without the seller’s knowledge. In such cases, the sale is made through classic adhesion contracts concluded through the website, where the software acts as an electronic representative of the seller. Contracts where declarations of will are made by electronic means can be characterized as reactive in the sense that they require an additional communicative action from the contracting parties in order to complete the contracting. It can be a click on a certain field on the web page (clickwrap contracts), which means the completion of the contracting process, or by accessing the web page itself (browsewrap contracts). In other words, in the digital context, the offer can be created as open one, that is addressed to any Internet user through open communication channels, e.g. via the website, or it can be limited in the sense that it is sent to a certain number of users in a personalized way via email or even encrypted. Acceptance of the offer is at the same time the moment of concluding the contract, either by clicking on a specific field on the website (with an additional step of confirmation with the next click), by filling out the form on the website or by email.

3. Online adhesion contracts – wrap contracts

Contracts by access or adhesion contracts are contracts that have a predetermined content, to which the other contracting party may or may not agree. These contracts are most often concluded by individuals with banks, mobile operators, utility service providers, etc., as standardized contracts, the content of which is predetermined by one contracting party, which decides on the conditions for concluding the contract and which offers the pre-created contract to the other party or parties for signing. Although they are often criticized, adhesion contracts in practice have significant advantages: lower costs (in the sense that all transactions of the same type are performed in the same way) and less time consuming, the conditions contained in the contracts have passed the “test” of the court and are one of the most suitable instruments for mass transactions. Pre-prepared form contracts speed up the process of negotiation and conclusion of the contract, and are characteristic in situations where a large number of contracts are concluded between the offeror and the various offered contractual parties, bearing in mind that the content of the contract has already been written, and certain changes can possibly be made if there is an agreement of the contracting parties. The most obvious disadvantage of these contracts relates to the position of the other party, that is, the acceding party who did not participate in determining the terms contained in the contract. Most often, a situation occurs where the person entering the contract gives priority to the benefit he receives from the contract, even though he may not fully agree with the terms contained in the contract he is entering.

General terms and conditions of business (Terms of Service) are an integral part of the adhesion contract (which are adopted by the contractual party that drew up the contract), and they can be implemented in the contract itself, or the contract only refers to them. The general terms and conditions, unless something else has been agreed, produce the same legal effect towards the contracting parties as the contract itself, provided that the offered contracting party is familiar with them in the usual manner. General conditions, in a broader sense, represent the conditions under which some companies operate. They are an integral part of the contract, and are usually found on the back of the contract form or under the signed part of the text.

When comes to defining an online adhesion contract, as a special form of adhesion contract, it can be defined as a contract that regulates the mutual relationship between the user and the Internet service provider (Internet service provider – ISP). Every type of usage of Internet, that is, visit to a certain website

implies consent to the terms of use of that page, which are precisely contained in the online adhesion contracts that are commonly called wrap contracts. In practice, a large number of users are not aware of the existence of such conditions, nor that they are contained in the legal form of the contract and that their actions in relation to them corresponds to the conclusion of a contract and the acquisition of the status of a contracting party, that is, that they entered into a contractual relationship by undertaking a certain act. The problem with adhesion contracts in general is that the contracting party, the accessing party, is often not aware that has entered into a contractual relationship at all, which is more pronounced in the case of wrap contracts that are concluded online. Today, in modern business surroundings, this type of contract is so common at the daily level of an individual's interaction that individuals do not even notice that they have entered into a contract, especially if they conclude this contract online.¹

In practice, wrap contracts are the ones that enable access to the website with prior acceptance of the Terms of Service (ToS). In this type of contract, the expression of will in the online context determines the relationship with the ISP, and the ISP gives notice of the contract and the consequences of the user's behavior. Nevertheless, despite this, the main problem with this type of contract is that the users most often do not know that they have entered into a contractual relationship and are not aware of the consequences of their declaration of will, or that they have given a valid declaration of will. In the context of the contractual relationship between the user and the online service provider (provider or platform), wrap contracts are the only effective practice that benefits both parties. The most common issues contained in the terms of these contracts relate to software licensing, terms of use of the website, choice of competent court, i.e. possible arbitration clause and applicable law, copyright, issues of data security, privacy and return of goods. "Take it or leave it" clauses play a significant role in the creation of wrap contracts, the conditions of which are determined and published by the ISP, and in the online context this is the only way to formulate a contract. These clauses are often very brief, more detailed content is usually available via links, and users are often unaware of the extent of the content of the contract they have entered into. Common content that users may become familiar with through the terms of use are terms of sale, software licensing, choice of court, arbitration

¹ In the case of adhesion contracts that are concluded offline, there is usually a third party, an expert, who can point out all the consequences of the contract to the weaker party, that is, the party that approaches. In the online context of concluding such contracts, the aforementioned practice is simply absent and the accessing party is usually left to its own assessment of the situation, and consequently is often unaware that it has entered into a contractual relationship.

clauses, copyright, security, choice of rights, etc. In any case, there must be reasonable notice of the existence of the terms of use, which in the event of a dispute is assessed in relation to its placing in the website, font size and type, terms and words used, presentation, form and functionality, web design, color, hyperlinking, user experience – therefore according to the assessment of subjective and objective factors.

Online adhesion contracts are in practice, but also in theory, referred to as *wrap contracts*. The term *wrap* corresponds to the way in which the accessing party, that is, the user, expresses the will to commit, that is to access them (Klasiček, 2021, p. 174). Wrap contracts are defined as non-negotiable digital contracts, and belong to the category of contracts by access or adhesion contracts (Kim, 2020). There are three basic types of wrap contracts – shrinkwraps, clickwraps and browsewraps, including various hybrid forms of these contracts that appear in practice (click-browse wrap hybrids, scroll wraps, sign-in wraps, multiwraps: shrink-clickwrap hybrid or shrink-click-browse wrap hybrids).

Shrinkwrap contracts are contracts that are an integral part of the packaging or the purchased product itself – usually software. The user, i.e. the party accessing the contract, becomes familiar with the contract by opening the plastic or other type of packaging, i.e. the wrapper. This is the only type of wrap contract that has a written, i.e. printed form, and it is considered that the party entered into the contract by opening the packaging, that is, by removing the packaging, which means that the moment of opening the packaging represents the moment of concluding the contract (Radovanović, 2008, p. 679). Consent is expressed by opening the packaging, and in practice this means that the user first gives his consent and then familiarizes himself with the content and conditions of the contract. And this is the biggest drawback of this type of contract, and the contract usually stipulates a certain time limit for the user to return the software and withdraw from the contract, although not as a general rule.

Clickwrap (click-accept, click-to-sign) contracts imply that the accessing party declares its consent directly, and it is assumed that the accessing party is aware of entering into a contractual relationship. The user declares himself by clicking on the field related to the statement “I agree”, “I disagree”, “OK” or similar. It is especially important to point out in connection with this type of contract that the user cannot continue using the website or other content if he does not agree to the terms of use. And it can be said that in digital circumstances this is one form of the most direct expression of consent, even though it does not have its own physical form (Matić, 2008, p. 790). In the case of this type of contract, the contract itself contains terms that define the

way the user interacts with the digital service. In this case, users are presented with all terms of the contract in advance.

In practice, the clickwrap contract is displayed to the user as a separate screen that prevents the user from continuing to view or use the content unless it is confirmed by clicking or otherwise that the user has familiarized himself with the terms of use presented within the screen. This type of contract doesn't ever have a physical form, unlike a shrinkwrap contract, but the user is given the opportunity to familiarize himself with all the terms of use before giving his consent. In practice, clickwrap contracts have been subject to criticism because users were often unaware that they were agreeing to the terms by clicking, since very few users actually read the entire text contained within the screen (Benoliel & Becher, 2019). On the other hand, the websites themselves and other platforms strive to create content that keeps the attention of users and often avoids explicit emphasis on legal consequences. For this reason, users are often unaware that they are entering into a legally binding relationship and that a legal obligation has arisen for them after clicking. If it can be proven that the user made a click, the contract is considered valid, regardless of whether the user has actually read the conditions to which he agreed, whether he understood them and whether he is aware of entering into a legally binding relationship. The only argument with which the user can defend himself in the case of a proven click is by claiming that the terms of use are not in accordance with public order and the principles of good business, or in accordance with general contractual rules.

Browsewrap contracts are a type of adhesion contract where the user is least aware that he has entered into a contract at all. These agreements are "hidden" behind a hyperlink located on a website or other platform. Most often, there is a notice on the page itself that by visiting the page or downloading content from it, the user agrees to the terms of use on a contractual basis. In practice, this is a situation that the user is aware of to a very small extent, especially if he enters into a contractual relationship just by navigating the website. These agreements apply to access or use of content on the website or in connection with a product downloaded from the website. The user can familiarize himself with all the conditions and content of the contract only after clicking on the hyperlink. If the internet provider provides adequate notification to the user that by moving around the page or downloading content from the page, he creates a contractual relationship, that is, consent to the terms of use, then the browsewrap contract has legal force and is enforceable.

When using wrap contracts in practice, especially in relation to contracts that regulate the relationship between users and websites or other digital

platforms in connection with the use of content – clickwrap and browsewrap contracts, problems arise in connection with the manifestation of consent. Business practice has indicated the need to redefine traditional contractual standards related to the expression and content of consent, as well as the standards of responsibility of the contracting parties. The terms of use of the website may be available via browsewrap, in the sense that the user can access them by clicking on the hyperlink, but is under no obligation to do so, although further use of the page, i.e. access to the page, requires acceptance of the terms of use. If special conditions of the use of website are relevant, they must be sufficiently visible to the ordinary careful user. Otherwise, they are not applicable. Regardless of the existence of sufficiently visible notice of the applicability of the terms of use, it is necessary to prove the existence of an affirmative action that unequivocally proves individual consent to the contract (Kim, 2021). Jurisprudence clearly pointed out that the mere fact of using the website cannot be considered as consent to the terms of use. In the event that consent cannot be proven, the courts are not inclined to rule in favor of the existence of a contract, i.e. acceptance of the terms of use. In case that user's attention has not been clearly drawn to the material conditions, i.e. in a way that would be understandable to an objectively prudent user, the conditions of use could not be applied in the specific case. The terms of use of the website are not binding for the user if a reasonably visible notice wasn't available or visible to the user, to which the user has given unequivocal consent. If there is no requirement for affirmative consent, such as checking the box, and the user was not warned of the conditions either by a different font, letter size or other mechanism, users cannot be considered bound by the terms of use (Daiza, 2018, p. 215). The website by its design must provide a reasonably visible notice that a specific action undertaken by user while on the page will result in entering into a contractual relationship. Even when purchase is conducted through the website, it must be clearly emphasized that the purchase entails consent to the terms of use, and possibly the choice of applicable law or competent court, limitation of the seller's liability, etc. Also, it must be clearly indicated that installing, accessing or using certain software, e.g. if it is not necessary to accept the general conditions for downloading games, the general conditions cannot be considered as binding. The site administrator must prove that the notification about the conditions of use, i.e. the consequences of using the website, is really visible, also in the case where the continued use of the website implies an expression of will, that is, that the site administrator interprets and accepts the continued use as consent. The notice on the terms of use is analyzed from the perspective of the site

user, and is the responsibility of the site administrator, i.e. the creator of the contract. Terms of use and other notices that entail the emergence of legal obligations must be such that they attract the attention of a reasonable user, that is, a normally prudent user of the website. When contracts are created by using websites, in the event of a dispute, it is necessary to determine whether the design and content of the website interface allow access to the terms of use, i.e. notice of the consequences of use, and whether the terms of use are formulated and presented in a clear and visible manner. In the event of a dispute, the court analyzes the visual presentation of the terms of use, and on this basis determines the responsibility of the website. When creating web pages that offer services or sell software, users should at the same time be provided with easy access to the content of the page and be informed in an appropriate manner about the consequences of using the page in terms of legal obligations. Also, the terms of use are subject to change, and if one wants to successfully refer to them, the website must prove that the user was familiar with them, that is, that he was aware of the changes made in a timely manner.

The responsibility of the contractual parties is first of all appreciated from the perspective of the website user who, by visiting the website and using the content of the website, knowingly or unknowingly enters into a contractual relationship. The visibility of the text itself, which either contains the terms of use or refers to them, is evaluated, as well as the process during which the terms of use are presented to the user. In the practice of USA courts, the courts have most often analyzed successive screenshots called “webflows” or “flows” in order to understand the path by which the user gets acquainted with the terms of use and to assess whether the process of entering the website itself warns the user that a contract has been concluded by making certain actions on the page itself (Kim, 2020, p. 1692). The practice of courts in the USA puts the burden of proof on the contractual party that made the contract to prove its quality, i.e. the suitability of webflow at the moment when it claims that the user agreed to the terms of use, as well as to prove that the user actually visited the page during that period.

4. Specific questions relating to online wrap contracts

The phenomenology and specifics of wrap contracts that arise in the digital environment have been previously exposed. At this point, it is advisable to give a general overview of the traditional contract law rules that refer to wrap contracts, and at the same time point out the specifics that exist in this sense in the context of wrap contracts, as online adhesion contracts. Wrap contracts are

contracts where one party pre-determines the elements and conditions of the contract through a general and permanent offer, and the other party only accesses such an offer without the possibility of any negotiation. The conclusion of these contracts is not preceded by negotiation as a separate phase of the contracting cycle. They are an expression of restrictions on the freedom of contract that relate to the content of the contract, but they are, in addition, one of the most commonly applicable types of contract in legal transactions (Hart, 2014, p. 107). The generality of the offer in this type of contract implies that the offer is addressed to an unspecified and unlimited number of persons and that each person can accept the offer in its entirety. After acceptance, the content of the offer becomes the content of the contract. The constancy of the offer implies that the party, that is, the offeror constantly repeats it, which means that the offer results from the regular and permanent activity of the offering party.

The conditions under which this type of contract is concluded are called “general conditions” or “terms of use” and for the contract to be valid it is essential that the general conditions at the time of conclusion of the contract were or had to be known to the party accessing them. In the case of these contracts, the inequality of the parties, primarily economic, is obvious, but this characteristic does not enter into the legal features of the wrap contract, that is, it is not a legally relevant fact, but only explains them from an economic aspect. Wrap contracts are also referred to as formulary agreements, but they are not formal agreements, with the obligation to publish the general terms and conditions in a legally prescribed manner so that the other party can adequately familiarize with them. The party that draws up the contract usually includes general conditions into it, either through a formulary contract or by referring to them, with the obligation that those general conditions are previously published in a usual way that allows the other party to become familiar with them in a timely and complete manner. The generally accepted rules of contract law concerning these contracts include, among other things, the duty of the court to interpret them, in the event of a dispute, in favor of the party accessing them. Therefore, the party that claims that it was not aware of the general conditions at the time of concluding the contract must also prove it. The general conditions must be in accordance with good business practices, and this first of all implies that the party who accesses them must not be placed in a difficult and unfair position, and if they prove to be null and void, the entire contract will be nullified.

Presented legal outline of wrap contracts makes them particularly suitable for contracting in a digital business environment, and also for daily regulation of the use of certain forms of digital technology and information society services. The context of the wrap contract complicates the issue of

expressing consent because the existence of adequate notification by the digital service provider as well as the expression of the user's consent must be determined in particular. For example, when talking about the declaration of will of the contracting parties in the context of wrap contracts concluded online, the most explicit declaration of will exists in the case of a clickwrap contract, and the least in the case of a browsewrap contract. Shrinkwrap contracts are characterized by at least a direct declaration of will, that is, it is contained in the act of removing the packaging. Regardless of the form of the wrap contract, the notice on the terms of use must be presented to the user as clearly as possible, as well as the consequences of his actions on the website or in another digital context. A notice that is considered legally adequate can be directly exposed or be presented in a form that allows a reasonably careful, that is, a conscientious user to become familiar with it and be aware of its existence and consequences. In judicial practice, this means the way this notice is presented, what is the position of the notice, the size and font used in the text, the choice of words, the presentation on the page, the design of the page, hyper linking and generally the general impression of the user experience are taken into account. It is the obligation of the digital service provider to fulfill these conditions in relation to the assessment of the conscientious user. Also, at the same time, the digital service provider must clearly present the user with the consequences of his expression of consent in this context, again according to the standards of a conscientious user.

5. Conclusion

The law governing electronic contracts is constantly and rapidly changing and being redefined. Standards related to notices and expressions of consent still apply, but are applied in a different way compared to electronic contracts, especially the so-called wrap contracts. The legal validity of the notice of consequences is evaluated in relation to the perspective of the users of the page and the way in which their creator decided to present them. Instead of asking the question why the user did not read the terms of use, the question is increasingly asked why the provider did not present the terms in a sufficiently visible way – website owners must make the terms they want to oblige their users sufficiently visible. In the event of a dispute, the creator of the page must show how he made the terms of use available and that the user was actually on the website when the terms were presented.

There are perceptions that traditional contractual principles are flexible enough to apply in the digital environment. Institutes of traditional contract

law, such as changed circumstances, conduct in accordance with the principle of conscientiousness and honesty and obligations of consideration towards the contractor are flexible enough to be interpreted according to each specific situation. However, it is impossible to apply the algorithmic code to open legal standards such as bona fides or force majeure, good business practice, protection of the weaker party, that is, some conditions cannot be evaluated by the algorithm for the purposes of application. The standards of “due diligence” and “declaration of consent” remain the same in their content and effect, but the manner of application of those standards depends on the circumstances of the specific case. Courts have begun to take into account and appreciate the appearance of the website and how the creator of the page decides to present the terms of use of the page – the burden of proof is transferred to the creator of the page.

Rapid development of the digital economy requires the creation of a coherent and global legal framework, especially in relation to guarantees of legal protection when using digital technology. The goal of legal regulation is to achieve a balance between minimizing the risk of digitalization and legitimizing new assets, especially in digital form, in terms of digital content and digital services, i.e. digital assets. From the standpoint of states, as well as at supranational levels, primarily under the auspices of international organizations, efforts are being made to develop strategies that adapt law to the usage of digital technology. And this is the direction established today between law and digital technology – law has to adapt to the new reality of using digital technology, as we have seen being done in the context of contract law nowadays.

Stojšić Dabetić Jelena

Pravni fakultet za privredu i pravosuđe u Novom Sadu, Univerzitet Privredna akademija u Novom Sadu, Srbija

WRAP UGOVORI I NJIHOV UTICAJ NA UGOVORNO PRAVO

REZIME: Osnov digitalne ekonomije jeste elektronska trgovina (e-trgovina), čiji je osnov ugovaranje, koje se u sve većoj meri oslanja na upotrebu digitalne tehnologije. Ugovor je osnov pravnog obavezivanja, osnov važenja i legitimiteta pravnih pravila, počevši od teorija društvenog

ugovora. Funkcionisanje digitalnog društva i digitalne ekonomije uvelo je proces digitalizacije u ugovorno pravo i praksu ugovaranja. Na primeru wrap ugovora, kao svojevrstih onlajn ugovora po pristupu (adhezionih ugovora), autorka prikazuje kako nove prakse u ugovaranju utiču na tradicionalne obligacionopravne institute.

Ključne reči: ugovaranje, wrap ugovori, ugovorno pravo, digitalno društvo, izjava volje.

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