

N.Y.U.C.C. § 2-207: Existence of Agreement to Arbitrate May Be Implied from Evidence of Prior Course of Dealing or Trade Usage

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ied in the statute.¹⁶¹ Since government statistics are specifically accessible under FOIL,¹⁶² common-law policy arguments will no longer support nondisclosure of any material which the statute requires to be disclosed. In short, the common-law public interest privilege has been subordinated to FOIL. It appears, therefore, that *Doolan* will encourage strict compliance with FOIL's directive for disclosure of statistical data.

Maureen A. Glass

UNIFORM COMMERCIAL CODE

N.Y.U.C.C. § 2-207: Existence of agreement to arbitrate may be implied from evidence of prior course of dealing or trade usage

Section 2-207 of the Uniform Commercial Code (Code) provides in part that additional terms contained in a written confirmation will become part of a contract between merchants unless, among other things, the additional terms materially alter the contract.¹⁶³ Previously, in New York, it had been held that an arbitration clause contained in an acceptance or confirmation is a material variance of the terms of a prior offer or agreement and thus not part of the contract in the absence of express agreement thereto by the parties.¹⁶⁴ Recently, in *Schubtex, Inc. v. Allen Sny-*

¹⁶¹ 48 N.Y.2d at 347, 398 N.E.2d at 537, 422 N.Y.S.2d at 931. The Court stated: "The public policy concerning governmental disclosure is fixed by the Freedom of Information Law; the common-law interest privilege cannot protect from disclosure materials which that law requires to be disclosed." *Id.*

¹⁶² See N.Y. PUB. OFF. LAW § 87(g)(i) (McKinney Supp. 1979-1980).

¹⁶³ N.Y.U.C.C. § 2-207 & Official Comment 2 (McKinney 1964).

¹⁶⁴ *Marlene Indus. Corp. v. Carnac Textiles, Inc.*, 45 N.Y.2d 327, 333, 380 N.E.2d 239, 242, 408 N.Y.S.2d 410, 413 (1978). The decision in *Marlene* resolved a split that previously had existed in New York as to whether an arbitration clause contained in an acceptance constituted a material alteration of a contract. Although there was some lower court precedent foreshadowing the Court of Appeals' holding in *Marlene*, see, e.g., *Doughboy Indus. Inc. v. Pantasote Co.*, 17 App. Div. 2d 216, 223, 233 N.Y.S.2d 488, 495-96 (1st Dep't 1962), neither the Code nor the comments of its draftsmen suggested that an arbitration clause is a material alteration within the meaning of § 2-207. See N.Y.U.C.C. § 2-207 & Official Comments 3-4 (McKinney 1964). Moreover, other New York courts had indicated that they might take judicial notice that arbitration is a common practice in the textile industry, see, e.g., *Lehigh Valley Indus., Inc. v. Armtex, Inc.*, 53 App. Div. 2d 582, 582, 384 N.Y.S.2d 837, 838 (1st Dep't 1976) (mem.); *Loudon Mfg., Inc. v. American & Efrid Mills, Inc.*, 46 App. Div. 2d 637, 638, 360 N.Y.S.2d 250, 251 (1st Dep't 1974) (per curiam), and at least one court concluded that in such industries an arbitration provision is not a material alteration within the meaning of § 2-207(2)(b) of the Code. See *Gaynor-Stafford Indus., Inc. v. Mafco Textured Fibers*, 52 App. Div. 2d 481, 485, 384 N.Y.S.2d 788, 791 (1st Dep't 1976).

In addition, prior to *Marlene*, some New York courts had attempted to validate arbitra-

der, Inc.,¹⁶⁵ the Court of Appeals reaffirmed this principle, holding that the mere receipt and retention of a written confirmation containing an arbitration clause was insufficient evidence of assent to arbitration, notwithstanding that a similar form had been used in prior transactions between the parties.¹⁶⁶ The Court asserted in dictum, however, that under the proper circumstances, assent to an arbitration provision could be implied in Code transactions from evidence of trade usage or a prior course of dealing.¹⁶⁷

In *Schubtex*, the petitioner, Schubtex, Inc. (Schubtex), placed an oral order for the purchase of certain fabrics with the respondent, Allen Snyder, Inc. (Snyder).¹⁶⁸ As it had done in prior dealings with Schubtex, Snyder mailed to the buyer a written confirmation of order on a form which contained an arbitration clause.¹⁶⁹ Schubtex retained the unsigned confirmation without disputing

tion provisions to which the parties did not expressly agree by relying on the failure of a party to object to an arbitration provision in his adversary's form, as required under the Code. N.Y.U.C.C. § 2-201 (McKinney 1964); see, e.g., *S. Kornblum Metals Co. v. Intsel Corp.*, 47 App. Div. 2d 523, 362 N.Y.S.2d 568 (2d Dep't 1975), *aff'd*, 38 N.Y.2d 376, 342 N.E.2d 591, 379 N.Y.S.2d 826 (1976); *Loudon Mfg., Inc. v. American & Ebird Mills, Inc.*, 46 App. Div. 2d 637, 360 N.Y.S.2d 250 (1st Dep't 1974) (per curiam); *Klockner, Inc. v. C. Iton & Co.*, 17 UCC REP. SERV. 915 (Sup. Ct. N.Y. County 1975); see Kirt, *Usage of Trade and Course of Dealing: Subversion of the UCC Theory*, 1977 U. ILL. L.F. 811, 857. As the *Martene* Court noted, however, § 2-210 is only relevant for statute of frauds purposes and cannot be utilized to incorporate additional terms into a contract. 45 N.Y.2d at 331, 380 N.E.2d at 240, 408 N.Y.S.2d at 411; see Duesenberg, *General Provisions, Sales, Bulk Transfers and Documents of Title*, 30 Bus. Law. 847, 853 (1975).

¹⁶⁵ 49 N.Y.2d 1, 399 N.E.2d 1154, 424 N.Y.S.2d 133 (1979), *rev'g*, 63 App. Div. 2d 868, 405 N.Y.S.2d 622 (1st Dep't 1978) (mem.).

¹⁶⁶ 49 N.Y.2d at 6-7, 399 N.E.2d at 1156, 424 N.Y.S.2d at 135.

¹⁶⁷ *Id.* at 6, 399 N.E.2d at 1156, 424 N.Y.S.2d at 135. The Code, in § 1-205, defines a course of dealing and a usage of trade and sets forth their applicability to commercial transactions as follows:

- (1) A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.
- (2) A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question
- (3) A course of dealing between parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of the agreement.

N.Y.U.C.C. § 1-205 (McKinney 1964); see *id.* § 2-202.

¹⁶⁸ 49 N.Y.2d at 7, 399 N.E.2d at 1157, 424 N.Y.S.2d at 136 (Gabrielli, J., concurring).

¹⁶⁹ *Id.* (Gabrielli, J., concurring). The confirmation of order form which Snyder, a converter of yarn, sent to Schubtex, a jobber, contained a statement on its face providing that the "contract is subject to the terms on the . . . reverse side hereof, including the provisions for arbitration . . ." *Id.* at 4, 399 N.E.2d at 1155, 424 N.Y.S.2d at 134.

the validity of the arbitration clause until, after an alleged breach of contract, Snyder attempted to compel arbitration.¹⁷⁰ In the subsequent action instituted by Schubtex to stay the arbitration proceedings, the trial court held that Schubtex was bound by the agreement to arbitrate since it was "fully aware of the arbitration clause" as a result of the parties' prior transactions.¹⁷¹ The Appellate Division, First Department, affirmed the lower court's judgment without opinion.¹⁷²

On appeal, the Court of Appeals reversed, holding that the evidence adduced at trial was insufficient as a matter of law to permit a finding that the parties had agreed to arbitrate future disputes arising from their contract of sale.¹⁷³ Judge Jasen, writing for the majority,¹⁷⁴ initially noted that a litigant should not be forced into arbitration in the absence of an express agreement to arbitrate.¹⁷⁵ Although the Court asserted that evidence of a prior course of dealing between the parties is relevant in determining whether a written arbitration provision had been incorporated by the parties in their oral agreement, it concluded that a course of dealing sufficient to infer an agreement to arbitrate did not exist by virtue of the prior transactions in which Schubtex merely re-

¹⁷⁰ See *id.* at 7, 399 N.E.2d at 1157, 424 N.Y.S.2d at 136 (Gabrielli, J., concurring). Schubtex applied to the court, pursuant to CPLR 7511, for a stay of arbitration on the ground that a valid agreement to arbitrate had not been made. *Id.* (Gabrielli, J., concurring); see CPLR 7511 (1962).

¹⁷¹ 49 N.Y.2d at 8, 399 N.E.2d at 1157, 424 N.Y.S.2d at 136 (Gabrielli, J., concurring). The lower court vacated a temporary stay of arbitration, which had been granted pending the outcome of the court proceeding, after it determined that the arbitration agreement was validly adopted, accepted, and undertaken by Schubtex "'with full knowledge of the obligations which it entailed.'" *Id.* at 5, 399 N.E.2d at 1155, 424 N.Y.S.2d at 134.

¹⁷² 63 App. Div. 2d 868, 405 N.Y.S.2d 622 (1st Dep't 1978) (mem.).

¹⁷³ 49 N.Y.2d at 5, 399 N.E.2d at 1155, 424 N.Y.S.2d at 135. Although noting that its limited appellate jurisdiction would not ordinarily permit the review of issues of fact which have been resolved by appellate division affirmance, see CPLR 5501(b) (1978), the Court distinguished situations in which, as here, the evidence in the record was insufficient to support the findings made by the lower courts. See, e.g., *Estate of Canale v. Binghamton Amusement Co.*, 37 N.Y.2d 875, 877, 340 N.E.2d 729, 729, 378 N.Y.S.2d 362, 362 (1975) (mem.); see 49 N.Y.2d at 5, 399 N.E.2d at 1155, 424 N.Y.S.2d at 134. See also H. COHEN & A. KARGER, *POWERS OF THE NEW YORK COURT OF APPEALS* § 108, at 453-55 (rev. ed. 1952); Scheinkman, *The Civil Jurisdiction of the New York Court of Appeals: The Rule and Role of Finality*, 54 ST. JOHN'S L. REV. 443 (1980).

¹⁷⁴ Joining Judge Jasen in the majority opinion were Judges Jones, Fuchsberg and Meyer. Judge Gabrielli, concurring in result, filed a separate opinion in which Chief Judge Cooke and Judge Wachtler concurred.

¹⁷⁵ See 49 N.Y.2d at 5, 399 N.E.2d at 1156, 424 N.Y.S.2d at 135; note 164 and accompanying text *supra*.

tained, without objection, a confirmation of order form containing an arbitration clause.¹⁷⁶ Judge Jasen suggested, however, that an express agreement might be implied from prior dealings or trade custom where there existed other evidence affirmatively establishing such agreement.¹⁷⁷

In a separate opinion, Judge Gabrielli concurred in the result reached by the Court but took issue with the suggestion that "a court may impose an agreement to arbitrate upon the parties to a contract, despite the absence of any express agreement, solely on the basis of past dealings or a trade custom."¹⁷⁸ While evidence of a trade usage or a course of dealing may normally be used to supplement the express terms of a Code transaction,¹⁷⁹ Judge Gabrielli argued, the Court of Appeals had never applied this rule to arbitration agreements because of "overriding policy considerations."¹⁸⁰ Indeed, the concurring judge concluded, while such evi-

¹⁷⁶ 49 N.Y.2d at 6-7, 399 N.E.2d at 1156, 424 N.Y.S.2d at 135. The *Schubtex* majority reasoned that "inasmuch as the mere retention by the buyer of the form containing the arbitration clause failed to create such an agreement in the first instance, repeated use of the same ineffective form should not be held to have done so in subsequent transactions." *Id.*

¹⁷⁷ See *id.* at 6, 399 N.E.2d at 1156, 424 N.Y.S.2d at 135. Judge Jasen cited two New York cases, *Acadia Co. v. Edlitz*, 7 N.Y.2d 348, 349, 165 N.E.2d 411, 411, 197 N.Y.S.2d 457, 458 (1960) (per curiam); *Helen Whiting, Inc. v. Trojan Textile Corp.*, 307 N.Y. 360, 367, 121 N.E.2d 367, 370 (1954), as examples of decisions in which the court had utilized evidence of trade usage or of a course of dealing to incorporate arbitration provisions into commercial contracts. The majority emphasized, however, that "a determination that a written provision for arbitration has, in fact, been incorporated in the oral agreement of the parties in consequence of either trade usage or a prior course of dealings must be supported by evidence in the record," a requirement not met on the facts of this case. 49 N.Y.2d at 6, 399 N.E.2d at 1156, 424 N.Y.S.2d at 135.

¹⁷⁸ 49 N.Y.2d at 7, 399 N.E.2d at 1156, 424 N.Y.S.2d at 135-36 (Gabrielli, J., concurring); see notes 163-64 and accompanying text *supra*.

¹⁷⁹ 49 N.Y.2d at 9, 399 N.E.2d at 1158, 424 N.Y.S.2d at 137 (Gabrielli, J., concurring). Judge Gabrielli cited § 2-202(a) of the Code which provides that terms in a written agreement may be explained or supplemented "by course of dealing or usage of trade . . ." 49 N.Y.2d at 9, 399 N.E.2d at 1158, 424 N.Y.S.2d at 137 (Gabrielli, J., concurring); see N.Y.U.C.C. § 2-202(a) (McKinney 1964).

¹⁸⁰ See 49 N.Y.2d at 9, 11, 399 N.E.2d at 1158, 1159, 424 N.Y.S.2d at 137, 138 (Gabrielli, J., concurring). Judge Gabrielli noted that as compared to other contract terms, a greater "threshold of clarity" is required to validate arbitration provisions. *Id.* at 9, 399 N.E.2d at 1158, 424 N.Y.S.2d at 137 (Gabrielli, J., concurring) (citing *Doughboy Indus. Inc. v. Pantasote Co.*, 17 App. Div. 2d 216, 233 N.Y.S.2d 488 (1st Dep't 1962)).

In addition, Judge Gabrielli distinguished the cases which the majority cited to support its contention that trade usage and course of dealing previously had been applied by the Court to incorporate arbitration agreements into a contract, *Acadia Co. v. Edlitz*, 7 N.Y.2d 348, 165 N.E.2d 411, 197 N.Y.S.2d 457 (1960) (per curiam), and *Helen Whiting, Inc. v. Trojan Textile Corp.*, 307 N.Y. 360, 121 N.E.2d 367 (1954). 49 N.Y.2d at 11, 399 N.E.2d at 1159,

dence may have relevance in determining whether, in the face of conflicting testimony, an express agreement to arbitrate was reached, it alone is insufficient to establish the existence of such an agreement.¹⁸¹

It is submitted that Judge Gabrielli's objection to the dicta espoused by the *Schubtex* majority, premised on his perception that the Court no longer would require express agreements to arbitrate as a precondition to imposing such an obligation on the parties to a commercial transaction, was unfounded.¹⁸² Rather than dispensing with the necessity of showing that the parties to a contract agreed to the use of the arbitral method of dispute settlement before incorporating an arbitration clause into their agreement, the *Schubtex* majority was merely examining the nature and quality of evidence that was required to make such a showing where the arbitration provision was not signed by all parties to the transaction.¹⁸³ The majority, while recognizing that non-objection to an arbitration provision alone could not satisfy the "expressly assented to" requirement of section 2-207 of the Code,¹⁸⁴ nevertheless posited

424 N.Y.S.2d at 138 (Gabrielli, J., concurring); see note 177 *supra*. The concurring Judge argued that *Acadia* merely held that an oral extension to a contract containing an agreed upon arbitration clause extends the arbitration clause even in the absence of another express agreement to it. *Id.*; see *Acadia Co. v. Edlitz*, 7 N.Y.2d 348, 349, 165 N.E.2d 411, 411, 197 N.Y.S.2d 457, 458 (1960) (per curiam). Judge Gabrielli further contended that *Helen Whiting* "held only that a written arbitration agreement need not be signed if there exists sufficient proof that the parties actually agreed to submit their disputes to arbitration." 49 N.Y.2d at 11, 399 N.E.2d at 1159, 424 N.Y.S.2d at 138 (Gabrielli, J., concurring); see *Helen Whiting, Inc. v. Trojan Textile Corp.*, 307 N.Y. 360, 367-68, 121 N.E.2d 367, 371 (1954).

¹⁸¹ See 49 N.Y.2d at 11, 399 N.E.2d at 1159, 424 N.Y.S.2d at 138 (Gabrielli, J., concurring).

¹⁸² *Id.* at 9, 399 N.E.2d at 1158, 424 N.Y.S.2d at 137 (Gabrielli, J., concurring).

¹⁸³ *Id.* at 5-6, 399 N.E.2d at 1156, 424 N.Y.S.2d at 135. Both the majority and the concurrence stated that an express agreement to arbitrate is required before parties will be denied the right to resolve their disputes in a judicial forum. See *id.* at 5-6, 399 N.E.2d at 1156, 424 N.Y.S.2d at 135; *id.* at 9, 399 N.E.2d at 1158, 424 N.Y.S.2d at 137 (Gabrielli, J., concurring). Commenting on the nature of the proof which might suffice, the majority suggested merely that only *in conjunction with* evidence affirmatively indicating the existence of an express agreement could prior dealings or trade custom establish the existence of an express agreement to arbitrate. *Id.* at 6, 399 N.E.2d at 1156, 424 N.Y.S.2d at 135. See generally note 177 and accompanying text *supra*. The concurring opinion, however, ignored this caveat placed on the utility of prior dealings or trade custom, purporting instead to take issue with the suggestion that such evidence *alone* could establish the existence of an express agreement. See 49 N.Y.2d at 7, 399 N.E.2d at 1156, 424 N.Y.S.2d at 135-36 (Gabrielli, J., concurring).

¹⁸⁴ 49 N.Y.2d at 5-6, 399 N.E.2d at 1155-56, 424 N.Y.S.2d at 135 (discussing *Marlene Indus. Corp. v. Carnac Textiles, Inc.*, 45 N.Y.2d 327, 334, 380 N.E.2d 239, 242, 408 N.Y.S.2d 410, 413-14 (1978)).

that such a failure to object, considered in light of prior dealings or trade usage evidencing the existence of an agreement to arbitrate, might be sufficient to establish that an arbitration clause was intended by the parties to be part of the agreement.¹⁸⁵

Although the judiciary should exercise caution in finding agreements to arbitrate from prior dealings or trade usage, it is submitted that the *Schubtex* majority's assertion is unobjectionable to the underlying public policy designed to insure that parties are not compelled to resort to arbitration without their conscious consent and knowledge of the scope of the agreement.¹⁸⁶ Moreover,

¹⁸⁵ Several pre-*Schubtex* courts have indicated their approval of the principle espoused by the *Schubtex* majority. See, e.g., *Helen Whiting, Inc. v. Trojan Textile Corp.*, 307 N.Y. 360, 367, 121 N.E.2d 367, 370 (1954); *Arthur Philip Export Corp. v. Leathertone, Inc.*, 275 App. Div. 102, 105, 87 N.Y.S.2d 665, 668 (1st Dep't 1949); *Klockner, Inc. v. C. Itoh & Co.*, 17 UCC REP. SERV. 915, 916 (Sup. Ct. N.Y. County 1975); 8 WK&M ¶ 7501.28. But see *Albrecht Chem. Co. v. Anderson Trading Corp.*, 298 N.Y. 437, 441, 84 N.E.2d 625, 627 (1949); note 180 *supra*.

At least one commentator has proposed that the Code's liberal approach to incorporation of additional terms through reliance on trade usage and course of dealings, see N.Y.U.C.C. § 1-201(3) (McKinney 1964), should be applied to the CPLR provisions concerning arbitration due to the fact that the Code was enacted subsequently to the CPLR, and the Code contains a supremacy clause. See Collins, *Arbitration and the Uniform Commercial Code*, 41 N.Y.U.L. REV. 736, 741 & n.25 (1966). The CPLR, including the provisions concerning arbitration, was passed on April 4, 1962, see ch. 308 & §§ 7501-7514, [1962] N.Y. Laws 593, 857-64, and two weeks later, during the same term, the Uniform Commercial Code was passed. See *id.* ch. 553, at 1687. Although § 10-103 of the Code provides that "[i]f any other provision of law is inconsistent with this Act, this Act shall govern unless this Act or such inconsistent provision of law specifically provides otherwise," it appears unlikely that the legislature intended to supercede the more stringent requirements for arbitration provisions under the CPLR. Support for this proposition can be derived from a legislative treatise on the construction of New York statutes which provides:

Should the Legislature intend to repeal an act passed during the same session, it is reasonable to suppose that such intent would not be left to implication and that plain language to that effect would have been used. The presumption is strong that the Legislature would not repeal an act which is fresh in their minds, without making an express reference to it, and the general rule that repeals by implication are not favored applies with peculiar force as between two statutes passed at the same session of the Legislature.

N.Y. STAT. § 393, at 561 (McKinney 1971) (footnotes omitted).

¹⁸⁶ The courts will not lightly impute to the parties in a commercial transaction the forfeiture of their right to litigate disputes in the courts, absent an unequivocal expression of such intent because it entails a surrender of procedural and substantive judicial safeguards. See *id.*; SIEGEL § 588, at 835 (1978); Collins, *supra* note 185, at 738. Indeed, despite the present legislative policy preference for arbitration due to its effect of mitigating the courts' expenditure of time and resources, see *Weinrott v. Carp*, 32 N.Y.2d 190, 199, 298 N.E.2d 42, 47, 344 N.Y.S.2d 848, 856 (1973), the courts warn that the clear consent of the parties to arbitrate must remain "unextended and unenlarged either by judicial construction or implication." *Harrison F. Blades, Inc. v. Jarman Memorial Hosp. Bldg. Fund, Inc.*, 109 Ill. App. 2d 224, 226, 248 N.E.2d 289, 290 (1969); see *Riverdale Fabrics Corp. v. Tillinghast-*

by permitting evidence of trade custom and past dealings, future courts will be able to more consistently effectuate the intent and expectation of the parties and construe their agreements in accordance with commercial realities.¹⁸⁷

James M. Ebetino

N.Y.U.C.C. § 4-302: Agreement between depositary and payor banks varying midnight deadline rule binding on payee

Section 4-302 of the Uniform Commercial Code (Code) imposes a duty upon a payor bank in possession of a demand item¹⁸⁸ to either settle the item or send notice of its dishonor before the midnight deadline.¹⁸⁹ Recognizing the need for commercial flexibility, the Code permits variation of this provision by agreement of all interested parties to the transaction, provided the agreement does not discharge the bank from its obligations of good faith and ordinary care.¹⁹⁰ It is unclear, however, to what extent a depositary

Stiles Co., 306 N.Y. 288, 289, 118 N.E.2d 104, 105 (1954).

¹⁸⁷ Speaking to the status of arbitration clauses after the enactment of the Code, one commentator observed:

[I]f the higher threshold for enforceability of arbitration clauses has survived the enactment of the Uniform Commercial Code, the Code's liberalization of contract formation rules may actually increase the risk that a party may find itself bound to a contract lacking . . . a term that he assumed, by virtue of trade, custom or practice, to be a part of his deal.

Collins, *supra* note 185, at 740.

¹⁸⁸ The Code defines an "item" as "any instrument for the payment of money even though it is not negotiable," but not including money or documentary drafts. N.Y.U.C.C. §§ 4-104(1)(g), 4-302 (McKinney 1964).

¹⁸⁹ N.Y.U.C.C. § 4-302(a) (McKinney 1964). Section 4-302(a) provides that "a payor bank . . . is accountable for the amount of a demand item . . . if the bank . . . does not pay or return the item or send notice of dishonor until after its midnight deadline." *Id.* A bank's midnight deadline is deemed to be "midnight on its next banking day following the banking day on which it receives the relevant item or notice or from which the time for taking action commences to run, whichever is later." *Id.* § 4-104(1)(h).

¹⁹⁰ *Id.* § 4-103(1). Federal Reserve regulations, clearinghouse rules and similar enactments have the effect of agreements under § 4-103(1), whether or not all interested parties have specifically assented to their applicability. *Id.* § 4-103(2); see H. BAILEY, BRADY ON BANK CHECKS 14-15 (5th ed. 1979). The article 4 provision relating to agreements between parties to a transaction differs somewhat from the general Code provision. Under § 1-201(3), the provisions of the Code may be varied "except that the obligations of good faith, diligence, reasonableness and care . . . may not be disclaimed by agreement." Because § 4-103(1) expressly limits agreements only by the standards of good faith and ordinary care, it has been suggested that "in the area of bank collections, the bank may contract out of duties of diligence and reasonableness to the extent that such duties are not comprehended in the concept of 'ordinary care.'" Leary, *Check Handling Under Article Four of the Uniform Commercial Code*, 49 MARQ. L. REV. 331, 342 (1965). See generally J. WHITE & R.