Reasonable Relation and Party Autonomy Under the Uniform Commercial Code

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All states have adopted with minor variations, article one of the Uniform Commercial Code. Section 1-105, the choice of law provision, allows contracting parties considerable latitude in the selection of the law applicable to their transaction.\(^1\) The restriction upon an otherwise unfettered party autonomy is that the choice bear a "reasonable relation" to the transaction.\(^2\) This article examines the scope of the reasonable relation criterion of section 1-105(1) and suggests the direction in which courts should move in applying that criterion.

Courts and commentators have devoted much attention to the analysis of section 1-105.\(^3\) However, no court has enunciated a definitive standard by which the existence of a "reasonable relation" may be determined. Rather, the courts have proceeded on a case-by-case basis, probing the nature and extent of the relationship between the transaction and the parties' choice.

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1. There are certain situations in which specific choice of law rules obtain. Designed chiefly to protect the rights of third parties, the "exceptions" to party autonomy are stated in U.C.C. § 1-105(2) which provides:

   (2) Where one of the following provisions of this Act specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law (including the conflict of laws rules) so specified: Rights of creditors against sold goods. Section 2-402. Applicability of the Article on Bank Deposits and Collections. Section 4-102. Bulk transfers subject to the Article on Bulk Transfers. Section 6-102. Applicability of the Article on Investment Securities. Section 8-106. Perfection provisions of the Article on Secured Transactions. Section 9-103.

   All references are to the 1972 version of the Uniform Commercial Code unless otherwise noted.

2. U.C.C. § 1-105(1) provides:

   Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement this Act [i.e., the Code] applies to transactions bearing an appropriate relation to this state.

The predilection of the courts for a case-by-case analysis, while cautious, renders uncertain the efficacy of the parties' selection. This is ironic, considering that uniformity in the law governing commercial transactions, with the attendant predictability and certainty, was an objective of the Code in general and of its choice of law provision in particular. Eliminating the vagaries of sovereign-minded approaches to choice of law issues was thought to be desirable; the Code drafters, accordingly, chipped away at territorial sovereignty. What emerged was a statutory power, conferred upon the parties to a transaction, to select consensually a governing law.

Despite its ad hoc nature, a common methodology has been employed by the courts in treating issues of party autonomy under section 1-105. The critical inquiry has been whether, and to what extent, there is a geographic nexus between the transaction and the jurisdiction selected by the parties. This geographic nexus has been viewed as a prerequisite to satisfaction of the reasonable relation criterion. The preoccupation with geography is, however, neither mandated by the Code nor called for under conflict of laws principles. It is suggested in this article that an exclusively geographic analysis of

4. See, e.g., Goodrich, Conflicts Niceties and Commercial Necessities, 1952 Wis. L. Rev. 199, 201 [hereinafter cited as Goodrich].

5. See 3 BENDER'S U.C.C. SERV. § 4.07[1], at 4-87 (1968).

6. By consensual selection what is meant is one not tainted with adhesion. It has been observed that the term "agree" is not defined in the Code; however, "agreement" is defined (U.C.C. § 1-203(3)) in terms of legitimate arms' length bargaining. Nordstrom & Ramerman, The Uniform Commercial Code and The Choice of Law, 1969 Duke L.J. 623, 630 [hereinafter cited as Nordstrom & Ramerman]. The necessity of an agreement as so understood underscores the requirement of good faith and renders the selection invalid in circumstances involving overreaching.

It has been suggested by the above commentators that "the term 'agree' would appear to be broad enough to include an implied agreement that the laws of a certain jurisdiction are to control the transaction." Id. at 632. Regardless of how it "would appear," the suggestion should not be pursued. Calling upon the courts to assay whether there is an implied agreement under U.C.C. § 1-105(1) would be burdensome and superfluous. The suggestion does not appear to have been followed by courts or other commentators. Cf. Bunge Corp. v. Biglane, 418 F. Supp. 1159 (S.D. Miss. 1976) (finding no implied agreement as to choice of law). See also 6 BENDER'S U.C.C. SERV. § 1-105, at 1-12.2 (1973), wherein it is noted: "The parties' right to choose the applicable law should be affirmatively stated, and if that is done the limits on that right must also be set out." The proponents of this theory further indicate that the determination of whether an "implied agreement" exists may be effectively handled by enlightened analysis under the "appropriate relation" criterion of U.C.C. § 1-105(1). Nordstrom & Ramerman, supra note 6, at 632-33.
the "reasonable relation" criterion improperly restricts party autonomy under section 1-105.

I. THE EARLY SECTION 1-105

The early version of section 1-105 contained an itemized

7. The text of the early U.C.C. § 1-105 reads as follows:

(1) Article 1 applies to any contract or transaction to which any other Article of this Act applies.

(2) The Articles on Sales (Article 2), Documentary Letters of Credit (Article 5) and Documents of Title (Article 7) apply whenever any contract or transaction within the terms of any one of the Articles is made or occurs after the effective date of this Act and the contract

(a) is made, offered or accepted or the transaction occurs within this state; or
(b) is to be performed or completed wholly or in part within this state; or
(c) relates to or involves goods which are to be or are in fact delivered, shipped or received within this state; or
(d) involves a bill of lading, warehouse receipt or other document of title which is to be or is in fact issued, delivered, sent or received within this state; or
(e) is an application or agreement for a credit made, sent or received within this state, or involves a credit issued in this state or under which drafts are to be present in this state or confirmation or advice of which is sent or received within this state, or involves any negotiation within this state of a draft drawn under a credit.

(3) The Articles on Commercial Paper (Article 3) and Bank Deposits and Collections (Article 4) apply whenever any contract or transaction within the terms of either of the Articles is made or occurs after the effective date of this Act and the contract

(a) is made, offered or accepted or the transaction occurs within this state; or
(b) is to be performed or completed wholly or in part within this state; or
(c) involves commercial paper which is made, drawn or transferred within this state.

(4) The Article on Investment Securities (Article 8) applies whenever any contract or transaction within its terms is made or occurs after the effective date of this Act and the contract

(a) is made, offered or accepted or occurs within this state; or
(b) is to be performed or completed wholly or in part within this state; or
(c) involves an investment security issued or transferred within this state.

But the validity of a corporate security shall be governed by the law of the jurisdiction of incorporation.

(5) The Articles on Bulk Transfers (Article 6) and Secured Transactions (Article 9) apply whenever any contract or transaction within their terms is made or occurs after the effective date of this Act and falls within the provisions of Section 6-102 or Sections 9-102 and 9-103.
list of geographic contacts, the presence of any one of which would warrant application of the Code. Party autonomy first emerged in the following language:

Whenever a contract, instrument, document, security or transaction bears a reasonable relationship to one or more states in addition to this state the parties may agree that the law of any such other state or nation shall govern their rights and duties. In the absence of an agreement which meets the requirements of this subsection, this Act governs.¹⁰

This structure of the early section 1-105 reflected the intent of the Code drafters to extend the greatest possible scope to party autonomy given the dual constraints of restrictive conflict of laws theories current at the time⁹ and constitutional impediments which then existed to free choice of law by the forum court.¹⁰ Judge Goodrich, the official reporter for the early Code section 1-105 and the author of a treatise on conflict of laws,¹¹ observed that the early Code was not intended to limit the parties' ability to select governing law to the extent to which a forum court could constitutionally apply its own law.¹² Rather, their ability to choose the applicable law

(6) Whenever a contract, instrument, document, security or transaction bears a reasonable relationship to one or more states or nations in addition to this state the parties may agree that the law of any such other state or nation shall govern their rights and duties. In the absence of an agreement which meets the requirements of this subsection, this Act governs.

U.C.C. § 1-105 (1952 version).

8. Id. at (6).

9. These theories stemmed from what has been called the "vested rights" approach to conflicts of laws. This approach asserts basically that a legal right exists only to the extent that it is recognized by the sovereign power of the territory in which it is acquired. The forum court is thus compelled to apply the law of that territory to determine the existence and scope of that right. This theory was fully elucidated in J. Beale, Conflict of Laws (1935) and formed the basis of a number of Supreme Court decisions, e.g., Mutual Life Ins. Co. v. Liebling, 259 U.S. 209 (1922); Slater v. Mexican Nat'l R.R., 194 U.S. 120 (1904). See generally R. Nordstrom, Handbook of the Law of Sales § 15, at 28 n.47 (1970).


12. Goodrich, supra note 4, at 207, notes:
For example, under certain circumstances, transit of goods through a jurisdiction may be a reasonable relationship under Subsection (6) and not under Subsection (2) [which provides that the Code is to apply when the contract is, inter alia, made, offered or accepted within the (enacting) state]. The test of relationship under Subsection (6) is one of degree: do the dealings of the par-
should be at the very least co-extensive with the ability of a
court constitutionally to apply the law of the forum.\footnote{13}

Adoption of the Code by the states was not at all swift and
the Code draftsmen sought to hasten its unifying objective by
legitimating its application whenever the forum state pos-

13. It has been suggested in 3 \textit{Bender's U.C.C. Serv.} \textsection{4.07[1]}, at 4-86 (1968),
that: "It seems reasonable to assume that whatever bases have previously supported
the application of a state's law will certainly be sufficient contact upon which parties
may themselves make a selection." The reference to "bases [which] have previously
supported the application of a state's law" alludes to the constitutional limitations on
a court's ability to apply its own law. This suggests a linkage between the Code's
choice of law provision and the ability of the forum to apply its own law under con-
flict of law principles. Such a linkage may be thought to be founded upon U.C.C. \textsection{1-105}, Comment 3, which states:

Where a transaction has significant contacts with a state which has enacted
the Act and also with other jurisdictions, the question what relation is "appropriate"
is left to judicial decision. In deciding that question, the court is not
strictly bound by precedents established in other contexts. Thus a conflict-of-
laws decision refusing to apply a purely local statute or rule of law to a particu-
lar multistate transaction may not be valid precedent for refusal to apply the
Code in an analogous situation.

But upon closer analysis, the comment can be seen not to support such a linkage at
all. The comment does not concern "reasonable relation"; rather, it is directed to the
term "appropriate relation" which emerges in the court's analysis only in the absence
of a choice of law by the parties to the transaction. Thus, whatever constraints may
limit a court's application of its own law in the absence of the parties' agreement
certainly do not apply where the parties have agreed. Even in the context of "ap-
propriate relation," the comment indicates that a court should not feel constrained to
follow conflict of laws precedents. Thus, any implication that the freedom of parties
to select governing law is restricted to instances in which application of forum law is
permitted should be rejected.
graphic contacts. As a consequence, party autonomy under the Code developed under a geographic-oriented approach.

The collection of geographic contacts, however, has been eliminated from the current version of section 1-105. Thus, party autonomy no longer need be tied to resolution of a geographic inquiry based upon the same factors which determine whether a court has the ability to apply its own law. And, with the general acceptance of the Code, there is less need for forum-protective, sovereign-minded resolution of party autonomy issues to insure the accomplishment of the Code drafters' public policy objectives.

The metamorphosis of section 1-105 parallels the modern developments in both conflict of laws and constitutional doctrine. With the emergence of modern choice of law approaches, the explicit itemization of old section 1-105 lost its currency. There developed the relatively streamlined current section 1-105. The abandonment of the mechanical and highly technical early section 1-105 represents a matter of greater significance than merely the elimination of cumbersome language. The streamlining suggests, rather, an enhancement of party autonomy and its freedom from earlier constraints which would impose geographic limitations. The removal of the restrictions upon party autonomy is reflected in the selection of the list of geographic contacts. Reasonable relationship under section 1-105 no longer follows closely upon, nor impliedly refers the reader back to, a mechanical list of geographic touchstones which serve to confine the parties' ability to select the governing law.

II. THE OFFICIAL CODE COMMENT AND THE SEEMAN DECISION

What, then, constitutes a "reasonable relation"? The Official Code Comment states:

In general, the test of "reasonable relation" is similar to that laid down by the Supreme Court in Seeman v. Philadelphia Warehouse Co., 274 U.S. 403, 47 S. Ct. 626, 71 L. Ed. 1123 (1927). Ordinarily the law chosen must be that of a jurisdiction where a significant enough portion of the making or

performance of the contract is to occur or occurs.  

More mysteriously, the comment concludes: "But an agreement as to choice of law may sometimes take effect as a shorthand expression of the intent of the parties as to matters governed by their agreement, even though the transaction has no significant contact with the jurisdiction chosen." The comment is unclear as to whether any contact with the jurisdiction chosen is required. To the extent that any such contact is required, the nature of that contact is not defined. Exactly what constitutes a "significant enough portion of the making or performance of the contract" is unclear. Nor does the Seeman case, cited in the comment, offer much elucidation. In that case, an attack was made on the interest rate charged on a commercial loan. Whether the rate was usurious depended upon which law — that of New York or Pennsylvania — was applied to the transaction. The Court stated that the loan would be upheld if valid either at the place of the making of the loan or at the place of payment.

A qualification of these rules . . . is that the parties must act in good faith, and that the form of the transaction must not "disguise its real character." . . . The effect of the qualification is merely to prevent the evasion or avoidance at will of the usury law otherwise applicable, by the parties' entering into the contract or stipulating for its performance at a place which has no normal relation to the transaction and to whose law they would not otherwise be subject.

Thus Seeman, in addition to requiring the good faith of the parties, suggests that a reasonable relation is a "normal" relation. The substitution of "normal" for "reasonable" is not

16. U.C.C. § 1-105, Comment 1.
17. Id.
18. 274 U.S. at 408.
19. Nordstrom & Ramerman, supra note 6, at 628, observe:
When the Comment reference to Seeman is combined with the statutory policy favoring party autonomy, the result is that the parties' choice should be upheld unless the transaction lacks a normal connection with the state whose law was selected. Only when it is shown that the contact did not occur in the normal course of the transaction, but was contrived to validate the parties' choice of governing law, should the relation be held unreasonable; in other cases, the clause should be upheld.

(footnote omitted) (emphasis in original).
particularly helpful.\textsuperscript{20}

The place of the making or performance of a contract, explicitly mentioned in the comment, would satisfy the "reasonable relation" requirement. The place from which goods are shipped "and other similar relationships" have also been characterized as bases clearly supportive of the parties' selection.\textsuperscript{21} Place of incorporation or principal place of business is viewed as a less predictable basis.

Another questionable choice is the state through which goods pass.\textsuperscript{22} It has been suggested that the good faith of the parties might prove determinative in the selection of one of the less predictable bases.\textsuperscript{23} Others have echoed the inference drawn by the comment from the language of Seeman — i.e.,

\textsuperscript{20} It should be remembered that Seeman was first referred to in the Official Comment to the 1952 Code. The vitality of a 1927 decision becomes more suspect as the years pass. Courts and commentators have, nonetheless, sought instruction from Seeman, despite the fact that it was the product of a different era in terms of conflict of laws. In 1958 the Official Comment was changed to its present form with additional language added following the citation to the Seeman case. U.C.C. § 1-105, Comment 4 (1952 version) provided:

4. Subsection (6) allows the parties to use their own law in a situation where there is multiple jurisdictional contact provided that the law chosen is of a jurisdiction where a significant enough portion of the making or performance of the contract is to occur or occurs. In general, the test is similar to that laid down by the Supreme Court in Seeman v. Philadelphia Warehouse Co., 274 U.S. 403, 47 S. Ct. 626, 71 L.Ed. 1123 (1927).

\textsuperscript{21} 3 BENDER'S U.C.C. SERV. § 4.07[1], at 4-86 (1968).

\textsuperscript{22} Judge Goodrich notes that "under certain circumstances, transit of goods through a jurisdiction may be a reasonable relationship under Subsection (6) and not under Subsection (2) [of the 1952 version of the Code]." Goodrich, supra note 4, at 207. Unfortunately, Judge Goodrich does not elaborate on these "circumstances."

U.C.C. § 1-105(2) (1952 version) provided that Articles 2 (sales), 5 (letters of credit) and 7 (documents of title) of the Code would apply whenever any contract or transaction:

(a) was made, offered or accepted or the transaction occurred within the state; or
(b) was to be performed or completed wholly or in part within the state; or
(c) related to or involved goods which were to be or were in fact delivered, shipped or received within the state; or
(d) involved a bill of lading . . . ;
(e) was an application or agreement for a credit made, sent or received within the state . . . .

It is curious that the place of incorporation or principal place of business, for example, are thought to be a less predictable basis for the parties' selection, as one of these bases would clearly be sufficient to allow a court to assert jurisdiction over a party.

\textsuperscript{23} 3 BENDER'S U.C.C. SERV. § 4.07[1], at 4-86 (1968).
that the place of contracting or performance would clearly be "reasonable." There appears less certainty, however, as to whether (1) the domicile of either party, (2) the place of offer, (3) the place of shipment, (4) the principal place of business of either party or (5) the situs of the goods would provide the requisite reasonable relation.\(^{24}\)

Largely ignored by the commentators is the cryptic passage of the Code comment suggesting the efficacy of an agreement as to choice of law "even though the transaction has no significant contact with the jurisdiction chosen." The passage suggests that an analysis founded on geographic contacts alone is incomplete, and that the failure to locate a geographic contact does not automatically invalidate the parties' choice.

One commentator has attempted to clarify the meaning of "reasonable relation," offering two pre-Code cases as "helpful."\(^{25}\) Actually, the cases serve merely to generate confusion. In *Green v. Northwestern Trust Co.*,\(^{26}\) the court upheld a choice of Montana law despite the fact that notes, which were secured by land in Montana, were made and to be paid in Minnesota. The court sought to buttress its ruling by locating Montana contacts,\(^{27}\) but the case probably rests on the impor-

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26. 128 Minn. 30, 150 N.W. 229 (1914).

27. The action was brought by a stockholder of the Cartersville Irrigated Land Company against that company and Northwestern Trust Company to enjoin Cartersville from paying and Northwestern from receiving interest upon notes made by Cartersville payable to the Rosebud Land & Improvement Company. These notes were secured by a purchase money mortgage in the form of a trust deed made by Cartersville to Northwestern as trustee.

The court pinpointed the Montana contacts:
The transaction here in question was vitally related to Montana. The Rosebud Company was a resident of Montana. So were its officers and stockholders. The plaintiff . . . resided there. The contract of sale was signed there, and was returned there, though originally intended for a different transaction. The land conveyed was there. The mortgage was drafted there. It was for unpaid purchase money and was secured upon lands located there. The notes were negotiable in Montana and nonnegotiable in Minnesota. The Cartersville Company covenanted in the trust deed to pay the taxes and assessments levied in Montana, including irrigation taxes. It had the right by the trust deed to sell portions of the mortgaged lands at not less than specified prices, and upon payment of a certain percentage of the price received was entitled to a release of the mortgage as to the lands sold. It covenanted to keep the buildings,
tance of land. The court apparently viewed the situs contact as paramount.

In Brierly v. Commercial Credit Co.,28 the court held invalid a choice of Delaware law where the contract had been made in Maryland and provided for a loan of money by Commercial Credit Company to a Pennsylvania corporation. Commercial Credit was incorporated in Delaware but had its principal place of business in Maryland. The court felt that Delaware had no normal relation to the transaction. The opinion suggests that mere place of incorporation, without any other contact, is insufficient to provide a basis for the parties' selection. The "help," such as it is, provided by these cases is that when a stipulated law is neither the law of the place of making nor performance, the situs of property integral to the transaction may provide the requisite "reasonable relation," but place of incorporation, without more, may not.29

III. ANALYSIS OF "CONTACTS"

Despite evidence in favor of giving greater latitude to party autonomy,30 the courts have limited their analysis of "reasonable relation" to a search for the presence of certain geographic contacts. The characteristic response of the courts to party autonomy issues is to lump together all the geographic contacts they can find. Certain "contacts" are stressed by the courts and, indeed, a relative ranking or priority of these contacts is suggested. It is clear, though, that the greater the number of contacts the parties can amass the more assured they will be that their choice will be upheld, subject to

fences, ditches and other improvements on the Montana lands in repair. It was contemplated by the November contract that the mortgage should contain, as it did, clauses usual to Montana mortgages. The connection between the transaction here involved and Montana was not artificial.

Id. at __, 150 N.W. at 232.


29. To the extent that the court in Green v. Northwestern Trust Co. sought other Montana "contacts," even this timid appraisal is weakened.

30. There is increasing acceptance of the parties' ability to choose how and where disputes are to be resolved. See, e.g., Fretty & Peroni, Multistate Operations, 1 Corporation L. Rev. 28 (1978). The authors, in discussing the enforceability of forum selection clauses in a contract, note that, in recent federal decisions at least, the courts have proven receptive to and have enforced forum selection provisions. Id. at 28-29 nn. 3&4.
the overarching principle of good faith bargaining.

A. Place of Performance

This geographic contact with the chosen jurisdiction provides the most solid bulwark for the choice of law. There appears to be a consensus among commentators that the place of performance clearly satisfies the reasonable relation criterion. Judge Goodrich, as early as 1952, noted:31 "The law of the place of performance of a contract governs, by well established conflict of laws rules, matters relating to performance. This rule of the Code follows such precedent and presents no constitutional problem."32

A somewhat more difficult issue arises when the jurisdiction chosen is one in which only part of the performance is to occur. Significantly, the Official Code Comment33 does not require that performance of a contract take place entirely within the chosen jurisdiction in order to legitimize the parties' choice. Rather, the comment provides: "Ordinarily the law chosen must be that of a jurisdiction where a significant enough portion of the making or performance of the contract is to occur or occurs."34 While this raises the possibility of semantic quibbles as to significance, it is clear that merely a portion of performance within the chosen jurisdiction may provide a sufficient "contact." The comment reflects the fact that commercial transactions are often incapable of geographic pigeonholing into a separate compartment of performance. Indeed, performance often occurs in more than one jurisdiction.

The courts have recognized that a state in which part performance takes place possesses the requisite reasonable relation. For example, County Asphalt, Inc. v. Lewis Welding & Engineering Corp.,35 involved an action by a buyer against a seller for alleged breach of contracts providing for the purchase and installation of asphalt plants and automatic

32. Id. [Author's footnote]. See also Restatement (Second) of Conflict of Laws § 187, Comment f (1971).
33. U.C.C. § 1-105, Comment 1.
34. Id.
batch control systems. The parties had agreed that Ohio law should govern validity, interpretation and performance of the contracts. The court concluded:

[While most of the performance of the contracts was to occur in New York, significant events were to occur in Ohio. Certain parts for the equipment sold by defendant were to have been fabricated or shipped from defendant's plant located in Ohio.]

It appears quite reasonable for the defendant to have required that its performance be regulated by the legal system with which it was presumably most familiar, in light of the probability of a substantial part of its performance's [sic] occurring in Ohio.36

The court in Mell v. Goodbody & Co.37 upheld a choice of New York law, finding that brokerage arrangements between the parties bore a reasonable relation to New York. Under Illinois law the interest charge on the margin accounts was usurious; New York law permitted the interest rate. Determining that a "significant enough portion" of the performance occurred in New York, the court listed the contacts:

Defendant's primary place of business is in New York; it is there that the major portion of the securities under the contracts were purchased and sold on the major exchanges. Plaintiff's collateral was kept in New York; defendant's central records of all its margin accounts were kept in New York; bills on margin accounts were made in New York; and it was in New York that defendant made its principal borrowings to cover its margin accounts. All of this is not to say that there were not also very substantial relationships with Illinois in these brokerage agreements. Yet the numerous and significant contacts with New York clearly satisfy the "reasonable relationship" test applicable in this choice of law situation.38

One recent case suggests that the strength of the place of performance "contact" may prove an obstacle to the valida-

36. Id. at 1303.
38. Id. at 812-13, 295 N.E.2d at 99-100. It is significant that the Illinois court did not feel compelled to interpose a public policy argument based upon the state's usury law and the good faith requirement enunciated in the Seeman decision. See note 19 and accompanying text, supra.
tion the parties' choice in some instances. In *I.S. Joseph Company, Inc. v. Toufic Aris & Fils*, a New York court considered the validity of a contractual provision which provided that disputes under an agreement would be arbitrated in New York and under its laws. The appellant suggested that the laws of Louisiana should govern the matter in controversy, as Louisiana was the place of performance. The court treated the argument seriously. The contention was finally rejected because the court concluded that (1) the issue concerned that portion of the contract calling for arbitration (rather than the portion calling for performance), (2) "[a]n agreement that all differences arising under a contract shall be submitted to arbitration relates to the law of remedies, and the law that governs remedies is the law of the forum" and, finally, (3) the parties' selection under Code section 1-105(1) would be honored. The court may have gone to such lengths to uphold the choice of New York law precisely because of the strength of the place of performance "contact." The court was clearly concerned with the lack of New York contacts, and in a rather conclusory fashion stated that "at least as to the provision for arbitration, the transaction bears a reasonable relation to New York."

**B. Place of Contracting**

The early version of section 1-105 provided that the Code would apply to a contract made, offered or accepted within the state. The objective was to enlarge the notion of the place of contracting in order to afford a more expansive basis for application of the Code. Judge Goodrich, in fact, recognized that the place of the offer may not even fall within the ambit of the place of contracting; however, the drafters were interested in furthering the influence of the Code and providing a stimulus to its enactment and, accordingly, sought to legitimate application of the Code upon a large number of con-

40. *Id.* at 665, 388 N.Y.S.2d at 3 (quoting Meacham v. Jamestown, F. & C. R.R. Co., 211 N.Y. 346, 352, 105 N.E. 653, 655 (1914) (Cardozo, J., concurring)).
41. *Id.* at 665, 388 N.Y.S.2d at 3.
42. U.C.C. § 1-105(2)(a) (1952 version).
43. Goodrich, *supra* note 4, at 204.
Judge Goodrich concluded in 1952 that any one of the contacts that triggered application of the Code — e.g., the making, offering or acceptance of the contract within the state — would also confer upon the parties’ choice the requisite reasonable relationship. The Official Code Comment, as noted above, would validate the parties’ choice if a “significant enough portion of the making” of the contract occurs within the chosen jurisdiction.

The application of this principle can be illustrated by *Tennessee Carolina Transportation, Inc. v. Strict Corp.*, in which the court considered an action for breach of implied warranties. The contract provided that it was to be governed by and interpreted according to the laws of Pennsylvania. The North Carolina court gave effect to the parties’ choice, based upon the fact that the contract was negotiated and accepted in Pennsylvania. But the forum did not readily cede application of its own law and, curiously, offered an alternate ground for its decision, noting: “It is settled law in North Carolina that matters bearing upon the execution, interpretation, and validity of a contract are determined by the law of the place where it was made.”

### C. Situs of Property or Goods

Physical presence within a jurisdiction has traditionally been accorded great significance in choice of law issues. It is ironic, then, that the Code commentators have viewed this “contact,” standing alone, as a weaker basis for the parties’ choice of law. The courts have, however, suggested that situs is important, even if it does not by itself establish a “reasonable relation.” The pre-Code *Green* court, for example, emphasized situs as a crucial “contact” in its decision. In *Old Colony Trust Company v. Penrod Industries Corp.*, the

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44. Assuming there were no constitutional impediments. See text accompanying and note 10 supra.
45. Goodrich, supra note 4, at 207.
47. Id. at _, 192 S.E.2d at 704.
48. See note 22 supra.
49. See note 26 and accompanying text, supra.
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court upheld a stipulation to Massachusetts law under section 1-105(1) "since the location of both Old Colony and the stock certificates in Massachusetts provide[d] a 'reasonable relation' to the State of Massachusetts." Situs cannot be ignored, at least as long as the courts continue to approach the resolution of section 1-105(1) problems as a geographic exercise.

D. Principal Place of Business

Code commentators express some doubt as to whether the principal place of business contact provides the requisite reasonable relation. The Old Colony and Mell courts adverted, in their analyses, to the principal place of business, but both courts did so in the process of compiling a number of contacts upon which to rest their decisions.

E. Place of Incorporation

This appears to be treated as a very weak "contact." For example, the court in Brierly, which antedates the Code, suggested that mere place of incorporation, without more, would not provide a sufficient basis for the parties' choice. Other opinions have not articulated the significance of this individual contact because it so often coincides with the presence of others. As such, it is merely listed in the court's lumping of contacts.

F. Place From or Through Which Goods Are Shipped

Since the courts have exhibited a marked tendency to trace the geographic path of the transaction in considering the

51. Id. at 711 (emphasis supplied) (footnote omitted).
52. Cf. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(a) (1971) and the comments thereto which clearly indicate that principal place of business confers the requisite substantial relationship for the selection of governing law by the parties. The view of the Code commentators is odd considering that a "substantial relationship" under the Restatement necessarily implies a reasonable basis for the parties' selection.
53. See also Bache & Co. v. International Controls Corp., 339 F. Supp. 341 (S.D.N.Y. 1972), aff'd, 469 F. 2d 696 (2d Cir. 1972) (wherein the court, while not precisely considering a choice of law by the parties, does go to great lengths to catalog relevant contacts, including principal place of business).
parties' choice of law, it is hardly curious that this contact has been accorded significance. Whether the significance is warranted is debatable. One commentator suggests that the place from which goods are shipped provides as solid a foundation for the selection of governing law as does the place of making or performing the contract, and Judge Goodrich suggested in 1952 that "transit of goods through a jurisdiction may [provide] a reasonable relationship." The latter suggestion does not appear to have been taken up by the courts. To regard mere transit through the chosen jurisdiction as constituting a "reasonable relation" strains the credibility of the geographic analysis. The path of transit may vary depending upon the transportation medium selected and other factors which may be beyond the control or contemplation of the parties. To consider seriously the path of transit serves to highlight the arbitrariness of the geographic analysis.

G. Choice of Unrelated Jurisdiction

It bears reiteration that the language of the Official Code Comment, providing that the parties' choice of the law of a jurisdiction having no significant contact with the transaction may nonetheless take effect as a manifestation of their intent, has been largely ignored. The language is obviously out of step with a judicial attitude which requires a restrictive geographic analysis.

IV. THE RESTATEMENT—CONFLICT OF LAWS

The Restatement (Second) of Conflict of Laws accords a measure of autonomy to contracting parties. However, their selection will not be given effect if the "chosen state has no substantial relationship to the parties or the transaction and

56. Goodrich, supra note 4, at 207.
57. See text following note 24 supra. The suggestion of the Code comment is echoed in Restatement (Second) of Conflict of Laws § 187, Comment f (1971), which supports the validity, at least under some circumstances, of a selection of the law of a jurisdiction with no substantial relationship to the parties or the transaction.
58. Restatement (Second) of Conflict of Laws § 187(2)(a) (1971). See also Annot., 63 A.L.R.3d 341, 347-48 (1975). The Restatement (Second) of Conflict of Laws was approved for publication by the American Law Institute in 1969. It superseded the original Restatement which was published in 1934.
there is no other reasonable basis for the choice of the parties.\textsuperscript{59} The reporter's note following the section adverts to section 1-105\textsuperscript{60} but does not distinguish between "reasonable" and "substantial" relation. The Restatement commentators do suggest, however, a divergence between the Code and the Restatement.

When the state of the chosen law has some substantial relationship to the parties or the contract, the parties will be held to have had a reasonable basis for their choice. This will be the case, for example, when this state is that where performance by one of the parties is to take place or where one of the parties is domiciled or has his principal place of business. The same will also be the case when this state is the place of contracting except, perhaps, in the unusual situation where this place is wholly fortuitous and bears no real relation either to the contract or to the parties. These situations are mentioned only for purposes of example. \textit{There are undoubtedly still other situations} where the state of the chosen law will have a sufficiently close relationship to the parties and the contract to make the parties' choice reasonable.\textsuperscript{61}

Apparently, then, the Restatement commentators do not share the reluctance of some Code commentators to state, for example, that either domicile or principal place of business may provide a reasonable basis for the parties' choice of law.

The Restatement suggests that it is not necessary that the parties' choice of law be anchored upon any geographic connection with the transaction. This is suggested in at least two ways. First, the Restatement would validate choices based upon contacts not given great weight in conventional geographic analysis under the Code. It is observed that the requisite substantial relationship may exist with respect to either the parties or the transaction. Thus, contacts of the parties having nothing to do with the transaction, such as principal place of business or domicile, may support the choice of law.\textsuperscript{62}

\begin{itemize}
  \item \textsuperscript{59} \textit{Restatement (Second) of Conflict of Laws} § 187(2)(a) (1971).
  \item \textsuperscript{60} \textit{Restatement (Second) of Conflict of Laws} § 187(2), Reporter's Note (1971).
  \item \textsuperscript{61} \textit{Restatement (Second) of Conflict of Laws} § 187, Comment f (1971) (emphasis added).
  \item \textsuperscript{62} The parties' selection is validated under the Restatement if it possesses the
This is further than the courts have been willing to go under section 1-105 and suggests that the geographic "path" of the transaction does not necessarily exhaust the jurisdictions possessing the requisite substantial relationship. Indeed, it is noted that a reasonable basis for the parties' choice will save the selection of an otherwise nonsubstantially related jurisdiction. "Reasonable," at least under the Restatement, certainly comprehends something more than mere geographic connection.

Second, and more important, the Restatement commentators expressly recognize the ability of the parties to select a jurisdiction not at all substantially related, at least in the geographic sense. The commentators state:

The parties to a multistate contract may have a reasonable basis for choosing a state with which the contract has no substantial relationship. For example, when contracting in countries whose legal systems are strange to them as well as relatively immature, the parties should be able to choose a law on the ground that they know it well and that it is sufficiently developed.

The full import of the Restatement comments, the Official Code Comment, as well as the views of Judge Goodrich, should at long last be taken seriously: the ability of parties to a transaction to choose governing law should not be confined to notions of significant geographic contact nor should courts continue to resolve issues of party autonomy merely by undertaking a geographic analysis.

The various examples given by the Restatement commentators — e.g., place of performance, domicile or principal place of business — are not meant to suggest that a geographic connection is necessary in order to find a substantial

63. See text accompanying notes 51-3 supra.
64. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187, Comment f (1971) (emphasis added).
relationship. As the Restatement comments demonstrate, the enumeration of geographic contacts is not intended to be exhaustive.\textsuperscript{65} Nor is some form of geographic contact essential.\textsuperscript{66} Rather, geographic “contacts” serve merely as ordinary or typical indicators of a substantial relationship. There is no reason to interpret the “reasonable relation” language of the Code more restrictively. To the contrary, the Code comments suggest the validity of a nongeographically based choice of law just as do the comments to the Restatement.\textsuperscript{67}

Nevertheless, the courts, and many of the commentators,\textsuperscript{68} appear wedded to the myopic geographic analysis of “reasonable relation.” Such an analysis unduly restricts the operation of section 1-105(1). The emphasis upon, and ranking of, various geographic contacts according to how conclusively they establish a “reasonable relation” have resulted in an utter failure by the courts even to consider the significance of nongeographic means of demonstrating a “reasonable relation.”

V. A Different Approach

“Reasonable relation” under section 1-105(1) ordinarily may be demonstrated by geographic contacts, but the absence of any such contacts should not dispose of the inquiry. The major consideration should be the presence of good faith, arms’ length bargaining. As long as the choice represents a selection arrived at in good faith, it should satisfy the dictates of section 1-105(1). A construction of “reasonable relation” that demands greater scrutiny of the good faith of the parties and entails a lesser emphasis on geography is consonant with the Code, the modern developments in conflict of laws theory and the development of party autonomy in general. Such a construction would obviate the geographic acrobatics of decisions such as \textit{I.S. Joseph Company, Inc. v. Toufic Aris & Fils}.\textsuperscript{69} If the forum court is concerned that the parties are at-

\begin{itemize}
  \item \textsuperscript{65} Id.
  \item \textsuperscript{66} Id.
  \item \textsuperscript{67} U.C.C. § 1-105, Comment 1 (last sentence).
  \item \textsuperscript{68} Cf. Tuchler,\textit{ Boundaries to Party Autonomy in the Uniform Commercial Code: A Radical View}, 11 St. Louis U.L.J. 180 (1967). Much of what Professor Tuchler wrote in 1967, it is submitted, should no longer be viewed as “radical” today.
  \item \textsuperscript{69} 54 App. Div. 2d 665, 388 N.Y.S.2d 1 (1976).
\end{itemize}
tempting to circumvent fundamental public policy, this concern should be addressed directly, as reflecting upon the parties' good faith rather than lurking as a subterranean current in a geographic analysis.

The following hypothetical case illustrates the application of the suggested approach to party autonomy. Suppose a Wisconsin manufacturer contracts for the sale of goods to a Florida buyer, with shipment to be made by train. Suppose further, that the seller has manufacturing plants in Oklahoma and Texas, in addition to Wisconsin. The buyer has its principal place of business in Miami but is incorporated in Delaware. The contract executed by the parties contains a stipulation that New York law will govern its validity, construction and enforcement. In a subsequent action for breach of the contract, Wisconsin or Florida would undoubtedly be found to possess a reasonable relation to the transaction if the typical geographic approach of the courts were employed. The question is whether a court in either state would uphold the stipulation to New York law. Application of the typical approach would not bode well for the stipulation. The court would probably attempt to ferret out New York contacts — perhaps prior associations with the state, New York counsel or corporate parentage — but these tangential geographic connections may not be found sufficient to uphold the stipulation.

Under the approach suggested here the court would honor the stipulation without engaging in painstaking efforts to compile a host of sometimes contrived geographic contacts. The court could readily conclude that the stipulation to New York law was reasonable in relation to the transaction irrespective of the presence, or absence, of geographic contacts. Such a conclusion would do no violence to the Code nor to conflict of laws principles. The stipulation could be upheld based upon the parties' familiarity with New York law, its fuller development in dealing with issues of the type presented by the particular contract or perhaps the parties' preference for a particular substantive doctrine established under New York law. Unless the selection offends a fundamental public policy of the forum state or constitutes a wilful evasion that smacks of bad faith or overreaching, the court would have no cause to interfere with the choice of the parties.
The approach suggested here can be illustrated further by comparing it with two recent decisions. The results reached under the contrasting approaches may differ sharply. In the first case, *Fuller Company v. Compagnie Des Bauxites De Guinee*,\(^7\) the court considered the effect of a contractual stipulation providing that "[t]he Contract shall in all respects be construed, operate and be interpreted in accordance with the law of the State of New York, U.S.A."\(^7\) Concluding that New York bore no reasonable relation to the transaction, the court refused to uphold the parties' choice of law. The court's analysis was typical: the geographic "contacts" were compiled. Fuller, the seller, was a Pennsylvania corporation and Compagnie des Bauxites de Guinee (CBG), the buyer, was incorporated in Delaware. Equipment sold under the contract was to be manufactured in the United States and shipped F.O.B. Philadelphia for use at CBG's bauxite plant in the Republic of Guinea. A Belgian consulting engineer was retained by CBG in connection with the sale. Based upon these contacts, the court noted: "The record in this case discloses no connection of New York to the making or performance of this contract other than the retention by CBG of New York counsel. Therefore, Pennsylvania appears to be the only state bearing a reasonable relationship to this transaction."\(^7\) Accordingly, Pennsylvania law was applied.

The court's geographic analysis need not, however, have disposed of the inquiry into the parties' choice of law. Under the approach suggested here, the choice of New York law would be upheld as eminently reasonable. This essentially international commercial transaction would have been greatly facilitated by the application of a body of law with which the international business community is familiar. Further, the transaction was negotiated by representatives of sophisticated corporations, strengthening the inference that the choice of law was not the product of overreaching. The choice did not appear to conflict with any strong public policy of Pennsylvania, nor did it represent an attempt to evade otherwise applicable law. Accordingly, there is no evidence reflecting an

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71. Id. at 946 n.14.
72. Id. at 946 (emphasis in original).
absence of good faith; there is no hint of adhesion or unconscionable conduct. Rather than repudiate the free selection of the parties as did the court, the suggested approach would reject the court's view that "reasonable relation" requires some tangible, geographic "contact" and uphold the selection.

In the second case, Duplan Corp. v. W.B. Davis Hosiery Mills, Inc.,\footnote{73. 442 F. Supp. 86 (S.D.N.Y. 1977).} the parties' choice of New York law was disposed of in a footnote in which the court concluded that "because New York had no relationship to the transaction underlying this case, that choice of law provision was ineffective."\footnote{74. Id. at 88 n.1.} The court apparently perceived the Code criterion as requiring a geographic relationship to the transaction. Again, in typical fashion, the contacts were listed: Duplan, the seller, was a Delaware corporation and had its principal place of business in North Carolina; W.B. Davis, the buyer, was an Alabama corporation and had a factory outlet in North Carolina; the purchase orders were processed by Duplan in its North Carolina office; three of six orders involved shipments to W.B. Davis' North Carolina outlet. With these contacts as a backdrop, the court observed that: "New York's only connection with these transactions, aside from the fact that Duplan has a New York office, is that each written confirmation contained an arbitration clause provided that arbitration was to take place in that state."\footnote{75. Id. at 88.} None of the orders, the court noted, was received or processed in New York. The court also added: "Finally it is reasonable to conclude that petitioner [Duplan], whose principal place of business was in North Carolina, would have expected the law of North Carolina to govern when the contract was made."\footnote{76. Id. at 88-9.}

There are indications in this case that the court did not take a favorable view of Duplan's insertion of the choice of law clause in the written confirmations of each purchase order.\footnote{77. Id. at 88.} The court may have been concerned\footnote{78. Whether the Duplan court felt that an element of bad faith bargaining was present was not stated in the opinion.} that the placement of a choice of law clause in an easily overlooked written
confirmation form indicated bad faith and sharp dealing. The suggested approach would represent a considerable improvement upon the *Duplan* court's analysis because it would bring the issue of the parties' good faith to the surface rather than smothering it beneath a formalistic inquiry into perhaps irrelevant geographic contacts. The same result may be reached under either approach, but the suggested approach addresses directly the pivotal issue of good faith and achieves a just resolution without the need to engage in machinations involving the manipulation of mechanical concepts which may obfuscate the real issues.

VI. CONCLUSION

It is suggested that the courts move beyond the confining geographic approach to issues concerning party autonomy under section 1-105(1). Party autonomy under the Code, it is submitted, can be effectively monitored through an analysis that does not turn exclusively on geographic contact with the chosen jurisdiction. Judges need not be geographers or cartographers. The consequence of assuming such roles is the undue restriction of party autonomy under the Code. This suggestion is not at all radical; it finds ample support in the Code and the *Restatement*. It is not suggested that geographic factors be entirely ignored. What is indicated by the Code and *Restatement* is that the geographic approach is not exhaustive of the inquiry. Geographic contacts may be viewed as ordinary or typical indicators of a "reasonable relation" but should not be employed to circumscribe party autonomy in choice of law.