

Symeonides on Issue by Issue Analysis and Dépeçage

Dean Symeon C. Symeonides (Willamette University – College of Law) has posted Issue-by-Issue Analysis and Dépeçage in Choice of Law: Cause and Effect on SSRN.

This Article discusses two interrelated features of modern American choice-of-law approaches: (1) issue-by-issue analysis, and (2) dépeçage.

Issue-by-issue analysis stands for the proposition that, in choosing the law to be applied to a multistate case, a court should focus on the particular issue(s) for which the laws of the involved states would produce a different outcome, rather than on the case as a whole. Logic suggests and experience confirms that this mode of analysis is more likely to produce individualized, nuanced, and thus rational resolutions of conflicts problems than the traditional mode of wholesale choices.

Dépeçage is the potential and occasional result of issue-by-issue analysis. It occurs when the court applies the laws of different states to different issues in the same cause of action. Although this phenomenon appears anomalous to the uninitiated, in reality it is not as problematic as it appears. For example, although the majority of American courts routinely use issue-by-issue analysis, this use produces surprisingly few instances of actual dépeçage, and, in most of those cases, dépeçage is innocuous. In the remaining few cases, dépeçage can be problematic, but courts employing modern approaches have all the flexibility to avoid it — and they do.

The Article concludes that the low — and easily avoidable — risk of an occasionally problematic dépeçage is not a good reason to eschew issue-by-issue analysis in light of the clear and considerable advantages of this analysis in producing apt choice-of-law solutions.

The article is forthcoming in the *University of Toledo Law Review*.