

MIGRATING THE DOMESTIC ASSET PROTECTION TRUST OFFSHORE

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1. **WHAT IS TRUST MIGRATION?** Trust migration, also sometimes referred to as trust redomiciliation, includes the following actions: (1) appointment of a trustee located in another jurisdiction; (2) relocation of assets to another jurisdiction; and (3) change of the trust's governing law to that of another jurisdiction. The trust migration process may include some or all of the above actions, but in short, the objective in migrating a trust is to move the control of its assets and/or the assets themselves away from the trust's original jurisdiction, thereby making it more difficult for creditors to attach trust assets. Where trust provisions and the given (or relative) situations permit, the migration of a trust may be accomplished in many ways, including, but not necessarily limited to, the following:
 - a. Automatic flee clause. A "flee clause" is a provision of a trust agreement automatically requiring the redomiciliation of the trust upon the happening of a described event, such as upon the initiation of a creditor's attack against the settlor or beneficiary of a trust. A flee clause is also sometimes referred to as a "flea clause"^b, "flight clause", "fleet clause", "walking clause", or "Cuba clause"^c. While at first blush having an

automatic flee clause sounds impressive and desirable, several cautions exist, including: (i) the possibility that such a clause will cause the trust to be defined as a “Foreign Trust” for tax purposes and, therefore, subject the trust to more stringent tax reporting rules and regulations;^d (ii) the chance of needing to move an entire trust to another jurisdiction, including unforeseen delays and other difficulties in securing the arrangement; and (iii) the uncertainty of automatic migration: no one can predict, nor ensure, the exact happening of events, or how the clause will actually be interpreted to ensure execution in accordance with the settlor’s intent. In summary, an automatic flee provision may create many more problems than it solves.

- b. Fiduciary-initiated flee clause. Many trusts provide that the trustee or trust protector will have the power to change the situs of the trust and/or to name a foreign successor trustee to assume the role of trustee and, thereby, to redomicile the trust and its assets. To avoid the need of an appointment, some practitioners recommend an active/passive trusteeship strategy.^e Under this approach, the trust is settled with two trustees: (i) an active domestic trustee and (ii) a passive foreign trustee. When trouble is brewing, the active domestic trustee might then informally agree to resign at the request of the passive foreign trustee.

A downside to this strategy is fairly obvious: what if the two trustees cannot agree on when and how the resignation of the active trustee should occur? Such hostility might cost valuable time and money, thereby subjecting the trust to expenses and attacks which are otherwise avoidable. However, the prudent use of a trust protector as a “tie-breaker” in this case could help resolve this issue.

- c. Resettlement clause. To avoid some of the potential pitfalls discussed above, some practitioners recommend the use of a resettlement clause.^f A resettlement clause provides the power to a third party, possibly the

trust protector, to appoint any or all of the trust estate to another trust in any jurisdiction(s), as long as the provisions of the new trust are substantially the same. While such an appointment cannot be carried out instantaneously, it can be accomplished much faster than the alternative methods of migration discussed above, since “neither the existing nor the new trustee has to be involved in extensive agreements, obtain releases, etc. They merely have to satisfy themselves that the power was exercised in accordance with its terms.”^g

- d. Decanting statutes. Where a trust contains flee and resettlement clauses, offshore migration is made much easier. What happens when such clauses are not clearly present in an existing domestic trust? A person might be able to “fake it” by reading between the lines of an instrument (risky for the practitioner), or, better yet, all or some of the trust’s assets could be appointed to another trust through a process known as decanting. Currently, eight states have enacted statutes that endow a trustee with the discretion to decant and distribute principal of a trust to the trustee of a new trust. The eight decanting statute states are Alaska, Delaware, Nevada,^h Florida, New Hampshire, New York, South Dakota and Tennessee. While the terms of the new trust relating to beneficial enjoyment must be identical to the terms of the original trust, when decanting, the new trust may have some provisions which are different from those of the original trust, such as terms that allow for easier migration to or resettling in an off-shore jurisdiction.
- e. Judicial reformation and technical amendment by third parties. In much the same way trust provisions can be enhanced through decanting, as discussed in 1.d. above, other options for clarifying the settlor’s intent to allow for changes in trust domicile and situs of administration include judicial reformation and the making of technical amendments by third parties such as the trust protector. These options may be available based

upon the terms of the trust document, the particular trust laws in the jurisdiction in which a trust is administered, and/or the liberality of the equity under which a particular court operates and allows for such reformations.

2. **WHY START WITH A DOMESTIC ASSET PROTECTION TRUST (“DAPT”)?**

As part of an asset protection plan, many settlors, in consultation with their legal advisor, are opting to settle a DAPT, or onshore trust, rather than an offshore trust. A few of the common reasons, right or wrong as they may be, are as follows:

- a. This is not your run-of-the-mill trust...this is a statutory self-settled spendthrift trust! For many years offshore practitioners have been arguing that placing a flee provision in a conventional domestic trust is useless and a waste of time and money. These arguments have been somewhat convincing for several reasons, including the following: (i) it is difficult to determine if and when a domestic trust is vulnerable to creditor attack; (ii) if the migration trigger is pulled too abruptly, the added expenses and restrictions relating to the new offshore trust will kick in too early; and (iii) if the redomiciliation trigger is pulled too deliberately (*i.e.*, too slowly), it may be too late to successfully complete the migration before trust assets are frozenⁱ or attached (see Section 3.a. below for examples of why migration is a time consuming process).

A DAPT, on the other hand, or an onshore trust as it is sometimes called, is a self-settled spendthrift trust created by a special state statute. By definition, a self-settled spendthrift trust is one that is (i) established by the settlor, (ii) for the settlor's own benefit, and (iii) protected from the claims of the settlor's creditors, thereby preventing a creditor from attaching assets of the trust. In other words, a creditor who personally attacks a settlor would first have to defeat the DAPT and overcome the special protection available to it by statutory carve-out. While asset protection

practitioners and academics may argue about the ultimate effectiveness of such protection,^j the DAPT most likely gives its parties a head-start over conventional domestic trusts when it comes to migration.

- b. Less expensive to administer. DAPTs are generally less expensive to administer, both in terms of initial start-up costs and ongoing trustee and administration fees.
- c. Ease of administration. Many clients perceive offshore trusts as being more difficult to deal with. This view may be changing with advances in technology and economic globalization. With that said, many still feel it is overly burdensome and risky to transfer assets outside of the United States. Dealing with overseas communication and differing time zones can be frustrating. In addition, there may be difficulties in receiving distributions from far-off lands because of overseas and multi-time-zone communication, potential tax reporting complexities, and challenges in explaining offshore balance sheet items in business transactions.

While many complexities also exist in dealing with DAPTs, settlors may perceive the administration of onshore trusts to be simpler. In Nevada, for example, settlors of a DAPT may even serve as trustees over their own self-settled spendthrift trusts, as long as they cannot authorize distributions being made back to themselves.^k

- d. Less confidence in foreign governments and persons. Although this perception is also quickly changing with advances in technology and economic globalization, many clients still worry about the stability of foreign governments and economies, the possibility of foreign trustees and custodians absconding with trust assets, and the difficulty of obtaining remedies in such events. Keeping trusts domestic may alleviate such worries.

- e. May not have “enough” to go offshore. At the time of settling, many clients may feel they don’t have enough assets to justify the use of an offshore trust. If the DAPT estate value increases to the point where the levels substantiate an increased asset protection burden or where the danger of loss becomes more imminent, clients can then move offshore. This wait-and-see strategy is further validated by offshore statutes allowing for carry-over limitations periods, such as those found in jurisdictions like the Cook Islands where the law provides that time limits run from the date of the trust’s original settling.^l For clients who want to “test the waters” of asset protection, the DAPT may provide a more comfortable and gradual transition.

- f. Twelve and twelve: DAPTs have come a long way. The legitimacy and effectiveness of DAPTs have been strengthened with time and multijurisdictional acceptance. As and more states pass legislation allowing for these types of trusts, they are seen as more mainstream. With Alaska establishing its statute in 1997, DAPTs have now been in existence for *twelve* years with essentially no meaningful negative case history. Moreover, *twelve* states have now adopted a DAPT statute,^m including Alaska, Delaware, Nevada, South Dakota, Wyoming, Tennessee, Utah, Oklahoma, Colorado, Missouri, Rhode Island and New Hampshire (*note*: in Section 1.d. above, six of the eight states listed as decanting jurisdictions are also part of the dozen listed in this Section 2.f.—coincidence? This writer thinks not).

- g. The “D” in DAPT stands for “Domestic”. All onshore DAPTs are established under U.S. state statutes, allowing them enforceability in U.S. courts under the full faith and credit clause of the constitution. While judges may not enjoy applying the laws of another sister state, they hate being bound by non-U.S. law even more.

3. PRE-MIGRATION PLANNING CONSIDERATIONS AND DRAFTING TIPS.

Before settling a DAPT which might someday migrate to an offshore jurisdiction, the trust advisors would be wise to offer pre-migration planning as an option to their settlor clients. Moreover, every DAPT should facilitate some type of redomiciliation strategy. In addition, the drafter should build into the DAPT indenture provisions allowing for efficient and effective migration, should the need arise. When sufficient pre-migration planning has not occurred and when a trust attempts to flee to another jurisdiction without adequate written provisions, such a migration will cost more, take more time, and ultimately may not even be possible. Following are some pre-migration planning considerations and drafting tips.

- a. Trust migration takes time. Anyone interested in settling a DAPT which may later be redomiciled in another jurisdiction needs to understand that the migration process takes time. As one highly respected estate planning professional puts it, a “flee clause” should be called the “molasses clause”.ⁿ Before a DAPT can be redomiciled to a foreign jurisdiction, the deciding parties should consider the following: (i) the jurisdiction(s) most suitable to the parties based on the applicable facts; (ii) by whom, for what reasons, and at what time will the migration clause be triggered; (iii) who will be the trustee in the new jurisdiction, what will be the related terms of engagement, and when will such trustee be engaged; (iv) how will the existing trustee be protected as authority and title transfer to the new trustee in the foreign jurisdiction; and (v) who will be the new custodian of trust assets in the new jurisdiction and how will assets be converted and/or transferred from the existing custodian.
- b. Identify and select potential substitute jurisdiction(s). Many factors should be considered when selecting a potential substitute jurisdiction, including: (i) the strength and flexibility of the governing statutes and laws; (ii) the stability of the political and economic climate; and (iii) the quality and

availability of trustees to serve in such jurisdiction. As it more directly relates to migration of a DAPT, it is important to make sure that the laws in the original jurisdiction permit migration to another (“outbound” redomiciliation). Obviously, it is also important to understand the requirements for migrating to substitute jurisdictions (“inbound” migration). In many cases it might even be prudent to select both a primary and a secondary option. For reference purposes, a chart summarizing the provisions governing migration of trusts in select foreign jurisdictions is as follows:⁹

<u>Jurisdiction</u>	<u>Governing Law</u>	<u>Inbound Migration</u>	<u>Outbound Migration</u>
Anguilla	Anguilla Trusts Ordinance	Allowed if recognized by previous governing law	Allowed if recognized by the new governing law and where the new law recognizes the validity of the respective interests of the beneficiaries
Bahamas	Trusts (Choice of Governing Law) Act	Allowed without limitation	Allowed without limitation
Belize	Trust Act	Allowed without limitation	Allowed without limitation
Bermuda	Companies Act	Allowed without limitation	Allowed without limitation
British Virgin Islands	Trustee Amendment Act	Allowed, however, use of “flee” clause not allowed where: 1) court order disallows; 2) criminal proceedings instituted; 3) investigation begun by BVI Financial Service Commission	Allowed if recognized by the new governing law
Cayman Islands	Cayman Trusts (Foreign Element) Law	Allowed if recognized by previous governing law	Allowed if recognized by the new governing law
Cook Islands	Cook Islands International Trusts Act	Allowed without limitation	Allowed without limitation
Cyprus	International Trusts Law	Allowed if permissible under previous governing law	Allowed if permissible under new governing law
Gibraltar	Trustee Ordinance; and Trusts Ordinance	Allowed	Allowed
Guernsey	Guernsey Trusts Law	Allowed	Allowed

Isle of Man	Trustee Act; Variation of Trusts Act; Recognition of Trusts Act; Trusts Act; and Trustee Act	Thought to be allowed as long as trust instrument provides, due to absence of laws either authorizing or restricting	Thought to be allowed as long as trust instrument provides, due to absence of laws either authorizing or restricting
Jersey	Trusts (Jersey) Law	Allowed if valid under previous governing law	Allowed without limitation
Labuan	Labuan Offshore Trusts Act	Allowed, however, possibly subject to appropriate legal capacity under governing law in previous jurisdiction	Allowed
Liechtenstein	Liechtenstein Civil Code, <i>note</i> : Liechtenstein is among the only civil law jurisdictions to have adopted a common-law-type trust	Allowed without limitation	Allowed without limitation
Malta	Trusts Act	Allowed where formalities required for the settlement of a Maltese trust are met	Allowed without limitation
Nevis	Nevis International Exempt Trust Ordinance	Allowed, provided no part of the previous law will operate to render the trust or its functions void, invalid or unlawful under Nevis law	Allowed, provided new jurisdiction is protected from provisions of Nevis law which would otherwise operate to render the trust or its functions void, invalid or unlawful
Niue	Niue Trusts Act	Allowed where no provision of the prior law can operate so as to invalidate the trust under Niue law	Allowed where no provision of the Niue law can operate so as to invalidate the trust under the new law
St. Lucia	St. Lucia International Trusts Act	Allowed without limitation, regardless of whether recognized by laws of prior jurisdiction	Allowed without limitation
Turks and Caicos	TCI Trusts Ordinance	Allowed, provided trust was properly constituted under laws of original jurisdiction.	Allowed without limitation

- c. Legal Counsel. Parties should be aware of who will represent them in a potential redomiciliation transaction, as well as who will serve as legal counsel to the new offshore trustee. Understanding these options beforehand may save valuable time if a move is ever made.

- d. Custodianship. The parties to the trust should be aware of options as to who might serve as custodian in the backup jurisdiction. It might even be prudent to have accounts set up and pre-seeded so as to anticipate the administrative requirements of the potential custodian and to help future physical transfers occur more smoothly. The trustee should be aware of the timeframe required for terminating the original custodial relationship(s) and understand the mechanics of transferring the assets to the new custodian.
- e. Protect the original trustee. Since the original trustee may have to defend an action pursued in the original jurisdiction (even after the DAPT has migrated offshore), such trustee may need money to defend herself and the trust arrangement, and possibly even be compensated. Protecting such trustee with guaranteed fees, releases and indemnities may help assist the Trustee in transferring the assets to the new trustee more expeditiously in the face of a potential danger. Increasing the speed at which assets are released may make all the difference in getting assets offshore before they can be frozen. Sample indemnity language is found at the following endnote.^P
- f. Trustee selection. As was mentioned above in Section 3.b., before selecting a potential substitute jurisdiction, settlors must know what their options are regarding who will serve as trustee of the redomiciled trust. This may be one of the most important factors in selecting a jurisdiction. Having an able, stable, trustworthy offshore trustee may be more important than even having a trust domiciled in a jurisdiction having statutory advantages. It should be noted that many offshore jurisdictions require that at least one trustee reside in the jurisdiction of choice. The settlor might consider naming multiple co-trustees rather than a sole trustee. The obvious benefit to naming co-trustees is that there will be less chance of a trustee absconding with trust assets. A major downside

of having multiple trustees is that there are then more targets for plaintiffs to attack. Obtaining jurisdiction over just one of the co-trustees may be all it takes for a creditor to gain access to trust assets. On the other hand, with just one offshore trustee, it would be more difficult to attack the trust and the migration of assets would be handled much more quickly, inexpensively and efficiently.

- g. Trust protector. Using a trust protector to make some decisions rather than a trustee may be wise. Trust protectors may have less of a fiduciary duty to beneficiaries than do trustees because of the nature of their service. Because they may have less legal risk, they may be able to act more quickly in certain situations. Although the author recommends great caution in using automatic migration clauses, if the drafter of a DAPT still desires to include such a provision, the agreement should also probably give the protector the power to cancel any such migrations. This will protect against those downsides discussed in section 1.a. above.
- h. Anti-duress clause. An anti-duress clause obligates a foreign trustee to ignore a domestic co-trustee, settlor, protector, or other party if that person is acting under court pressure. This refusal to deal with domestic parties will allow such parties to argue that performance is impossible. (*Caution*: Such a situation might tend to anger judges and increase the court's sympathy toward the plaintiff.) An example of an anti-duress clause is found at the following endnote.⁹
- i. Incapacity language. It is important to determine in advance which law or trust provisions will determine the incapacity of the settlor, trustees and beneficiaries. For example, it is a requirement under Anguillan law that its laws specifically determine the incapacity of a settlor.^r
- j. Solvency issues and the "Jones clause". In the normal settling of an offshore trust, the settlor must sufficiently prove by affidavit or otherwise

that he or she is solvent at the time of trust formation. This is to avoid a transfer which could later be set aside by a court upon finding that the settling constituted a fraudulent transfer. Because the DAPT is separate and distinct from the vulnerable estate of the settlor, when migrating the trust to a new jurisdiction or in resettling in a new domicile, it is the DAPT's solvency that is at issue. Some trustees, however, may require a solvency analysis of the settlor as well before accepting the trust estate, depending upon whether limitations periods are to run anew or relate back to the original trust formation, as they do in the Cook Islands.⁵

If the trustee is worried about a trust's or settlor's state of solvency or current obligations at the time of redomiciliation, the trustee may require that the trust have a "Jones clause" added. This would either be accomplished through a resettlement of the trust, decanting, or technical amendment by a third party, as discussed in Sections 1.c., 1.d., and 1.e. above. A Jones clause is a provision which allows trustee to pay specific existing claims against the settlor, despite the otherwise defensive character of a trust.[†] This is sometimes also referred to as a "contingent payment clause."^u "The intent of the typical Jones clause is to permit payment from the trust for money judgments obtained by specified creditors or claims in existence at the time of the trust settlement, provided the judgment is final and no further appeals are available."^v

- k. Perpetuity period. Be specific as to what perpetuities rule will be followed: that of the original jurisdiction or that of the new trust domicile. Pre-migration planning can be helpful to make sure that provisions of the original DAPT will seamlessly switch to a new perpetuities rule upon migration, if required by the new jurisdiction. This is yet another reason why it may be important to pre-select a substitute jurisdiction from the outset.

- b. Changes to beneficial interests – Whether the laws of the new jurisdiction might change or affect the nature and extent of beneficial interests under the trust.
- c. Application of laws over assets not situated in the Jurisdiction – Where assets of a trust are not located within the trust situs, obviously such assets may be vulnerable to claims in that jurisdiction.
- d. Incapacity. If not clearly provided for in the trust instrument, which law or provisions would determine the incapacity of the settlor, trustees and beneficiaries?
- e. Jurisdictional advantage. Even though uncertainties exist, there are still great advantages obtained in relocating assets to a foreign jurisdiction. When a competent trustee from a favorable foreign jurisdiction accepts a redomiciled trust and its assets it is very difficult for domestic creditors to attach such assets.

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^b A “flea clause” helps the trust to “jump” around from jurisdiction to jurisdiction like a flea (the insect) jumps around from animal to animal.

^c The “Cuba clause” generally refers to a flee provision requiring migration of the trust in the event of foreign invasion or widespread confiscation or nationalization of property by the government.

^d See IRC §7701(a)(30)(E) which defines a Foreign Trust by exclusion, being any trust other than one qualifying as a U.S. person. A trust is a U.S. person if (1) a court within the U.S. is able to exercise primary supervision over the administration of the trust (the “Court Test”), and (2) one or more U.S.

fiduciaries have the authority to control all substantial decisions of the trust (the “Control Test”). Reg. §301.7701-7(a)(1). Neither the Court Test nor the Control Test is met where provisions of a trust agreement would cause the trust to automatically migrate from the U.S. to another jurisdiction in the event a U.S. court attempts to “assert jurisdiction or otherwise supervise the administration of the trust directly or indirectly”. An exception comes into play where there is a foreign invasion or widespread confiscation or nationalization of property in the U.S. Reg. §301.7701-7(c)(4)(ii). See also, Eber, Alan R., Asset Protection Strategies & Forms, stating, “If Treasury wanted to say ‘any migration’ it could have. Instead, the Regulations use the phrases ‘automatically migrate’ and ‘automatic migration provision’ and ‘would cause the trust to migrate.’ I believe that this technique works as long as the clause is drafted so that the action (which is always discretionary with the trustee [or trust protector], not mandated) can only be taken, after the right to take the action arises and the discretionary right arises. Thus, the action is not automatic; it is always ‘discretionary; with the trustee [or trust protector]”. See also, Abbin, Byrle M., Income Taxation of Fiduciaries and Beneficiaries, § 2202, 2008.

^e See Schoenblum, Jeffrey A., Multistate and Multinational Estate Planning, Volume 2, § 18.20 (L), 1999.

^f See, for example, Bove, Alexander A., Jr., Drafting Offshore Trusts, Trusts & Estates, pp. 44-48, July 2004.

^g *Id* at 47.

^h Nevada is the most recent state to enact a trust decanting statute. See, Nevada SB 287, Sec. 37, 2009.

ⁱ A common remedy sought by creditors is the Mareva injunction, also known as a freezing order, in which a plaintiff seeks to freeze the assets of a defendant so the defendant cannot transfer his or her assets to another place outside of the court’s jurisdiction so as to undermine a later judgment. It is named for Mareva Compania Naviera SA v International Bulkcarriers SA, 2 Lloyd’s Rep 509, 1975.

^j For examples of arguments both for and against the DAPT being effective, see, Charles D. Fox IV, Domestic Asset Protection Trusts (2008); Richard W. Nenno, Planning With Domestic Asset Protection Trusts: Part I, 40 REAL PROP. PROB. & TR. J. 263 (2005); Richard W. Nenno, Planning With Domestic Asset Protection Trusts: Part II, 40 REAL PROP. PROB. & TR. J. 477 (2005); Michael A. Passananti, Domestic Asset Protection Trusts: The Risks and Roadblocks Which May Hinder Their Effectiveness (2006); and Richard G. Bacon & John A. Terrill, Domestic Asset Protection Trusts Work-Should They? 26 TAX MGMT. ESTATES GIFTS & TRUSTS J. 123, 137(2001).

^k Nevada SB 287, Sec. 58, 2009.

^l Cook Islands International Trusts Act, Sec. 13K(5).

^m David G. Shaftel, Comparison of the Twelve Domestic Asset Protection Statutes, 34 ACTEC JOURNAL 293 (2009). While Colorado has passed a statute, it is somewhat unclear as to whether it qualifies as a DAPT statute. *Id.* at 294. Compare In Re Baum, 22 F.3d 1014, 1017 (10th Cir. 1994), with In the Matter of Cohen, 8 P.3d 429 (Colo. 1999).

ⁿ See *Supra* note f, at 46.

^o Some of the information in this chart was developed using information from Osborne and Schurig’s Asset Protection: Domestic and International Law and Tactics, Part II, Thomson Reuters, 2009. Other parts were derived directly from the international statutes themselves.

^p Sample Indemnity language: An outgoing Trustee shall forthwith upon its resignation or removal be entitled to receive an indemnity and release in a form satisfactory to the outgoing Trustee from continuing or new Trustees and where required by the outgoing Trustee, from any or all Beneficiaries, together with security therefore where the Trustee has exposure to taxes or like charges, together with payment of all remuneration and fees owing to the outgoing Trustee, including those relating to the termination of the outgoing Trustee's appointment. Where the assets of the Trust Fund are insufficient to provide complete indemnification for the Trustee or former Trustee or where for any other reason the Trustee or former Trustee is not fully indemnified then the Settlor hereby agrees to personally indemnify the Trustee or former Trustee and to give such indemnity to the satisfaction of the Trustee or former Trustee.

^q Sample "Event of Duress clause": "On the happening of an Event of Duress, a Trustee not domiciled in the country where the Settlor is domiciled shall have the power to remove the Trustee or Trustees from office who reside or are domiciled in the country where the Settlor is domiciled. No powers, authorities, benefits or discretions granted to a Trustee so removed shall survive the removal. A Trustee removed from office under this clause shall be divested of title to any assets belonging to the Trust Fund effective immediately on the removal, with such assets being vested in the remaining Trustee. Removal pursuant to this power shall be effective immediately the notice of the Trustee's or Trustees' removal is received by that Trustee or Trustees, or by the Trust Consultant. In such an event a Trustee exercising this power (which may only be exercised by the remaining Trustee or by their unanimous action if there shall be more than one such Trustee) shall have the sole power and authority to designate the successor or successors to the Trustee or Trustees so removed, or to otherwise determine in its or their sole and absolute discretion that there shall, for the time being or for any time, not be a successor or successors in office to the Trustee or Trustees so removed. The determination of the Trustee exercising this power as to whether or not an Event of Duress has occurred shall be conclusive and binding on the Beneficiaries of this Trust. As used in this instrument, "Event of Duress" means the receipt or attempted service of any communication by a court administrative tribunal or similar governmental or quasi-governmental agency in any jurisdiction, other than the jurisdiction of the Governing Law, under which any person seeks relief or remedy for himself or any person by means of:

- (1) the assertion of a claim adverse to the Trustee over any property held in the Trust Fund;
- (2) the request for an order or instruction to the Trustee or custodian of any property in the Trust Fund in contravention to the provisions of this Agreement including the provisions allowing the Trustee to exercise any discretion; or
- (3) any request for information concerning the origin, receipt, management, administration, investment, distribution, or encumbrance of property held in the Trust Fund with a view to the assertion of a claim against or the establishment of a receivership or other like arrangement over the property of the Trust Fund that is in any way materially adverse to the exercise of the powers of management, administration, investment and distribution of the Trustee under the provisions of this Agreement;
- (4) the mandatory replacement of the Trustee or the placing of limitations on the powers of the Trustee other than in accordance with the terms of this Trust Agreement;
- (5) the threat of or actual suspension or abrogation in whole or in part of this Trust, or any contract with a party involved in the Trust;

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- (6) the threat of or the actual compulsion of the Trustee to sell, transfer or otherwise dispose of Trust Fund assets in a manner inconsistent with the terms and provisions of this Agreement.”

Important word of caution: Using the above language alone will perhaps cause the trust to fail the Control Test discussed in endnote d hereinabove. To avoid this, the trust agreement might give the U.S. protector the right to veto or negate the foreign trustee within a reasonable period of time. As such, all substantial decisions would then be made in the U.S. and the trust would not be taxed as a Foreign Trust.

^r Anguilla Trusts Ordinance, 1994 § 62(1).

^s See *Supra* note l.

^t *Supra* note f, at 47.

^u *Id.*

^v *Id.*