



# Special Lecture on Trust Law

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Faculty of Law, University of Tokyo

## Theme: Trust of Enterprise Per Se

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## What Trust of Enterprise Per Se Is

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Trust of an enterprise

① Enterprise-type trust

- That which carries out an enterprise utilizing the structure of trust (Prof. Hideki Kanda, *About Legal Principles of Commercial Trust*, Study on Trust Law, vol.22)

② *Trust of enterprise per se*

- That which entrusts an ongoing enterprise per se as is (a trust of positive property and a settlor's acceptance of liabilities).

# Pro and Con of Trust of Enterprise Per Se Under Old Trust Law

- In accordance with the term “property rights” prescribed in Article 1 of the old Trust Law a trust property must be “property rights” (①that which can be valued at money; ②that which is a positive property)



“A trust of an enterprise per se (the right of management of an enterprise) cannot be acknowledged, except the operation of an enterprise on the basis of an entrusted property rights (e.g., land trust) is necessary to implement the objective stipulated in its trust deed. Whether or not such management of an enterprise is approved on a business trustee company is an issue of the supervisory authorities’ judgment.” (Kazuo Shinomiya, *Trust Law, new ed.*, Yuhikaku, 1983, p.133)

# Trustee's Debt-Burden Act Under Old Trust Law

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- It's possible to revert a debt after the setup of a trust (to accept a debt in accordance with Civil Law Act's general principle).
- It's possible for a trustee, in case a debt burden act is approved in the trust deed, to bear a debt as an administrative deed of its trust property.



- In a land trust, it's possible for a trustee to become the concerned party regarding contracts for a borrowing of building construction capital, for a contracted construction work, for design and supervision, for a building lease, a realty administration.



# Features of Trust as Enterprise Execution Body

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- ① Possible to alienate an enterprise per se
- ② Possible of a free and flexible governance by private autonomy
- ③ Beneficiary, being a financier, retains the monitoring/ supervising authority over a trustee who is a direct enterprise executor.
- ④ Beneficiary being a financier secures limited liability.
- ⑤ Isolation of a trustee, being an enterprise executor, from the bankruptcy
- ⑥ Possible to expeditiously implement an organizational change, merger, and partition
- ⑦ Securement of fairness to trust creditors
- ⑧ Enhancement of circulation of beneficiary rights
- ⑨ Trustee being an enterprise executor secures limited liability.
- ⑩ Possible to selectively utilize functions of new types of trust



# Development of Discipline Useful to Trust of Enterprise Per Se

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- ① Acceptance of a settlor's debt at the time of setting up a trust
- ② To transform the prescription on a trustee's duties and a beneficiary's decision-making into a discretionary provision
- ③ Development of rights of beneficiary that cannot be controlled by the regulations on trust deeds
- ④ Abolishment of the trustee's right to claim expenditures against a beneficiary
- ⑤ Securement of independency of property in trust
- ⑥ Development of discipline as to a change, merger, and partition of a trust
- ⑦ Foundation of a bankruptcy system for property in trust
- ⑧ Foundation of a beneficiary-certificate issuance trust
- ⑨ Foundation of a limited liability trust
- ⑩ Foundation of a self-trust



## ① Acceptance of Assignor's Debt at the Time of Setting Up Trust

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- Range of the responsible debt burdens for the trust property includes “a credit against an settlor arisen prior to the trust, having the stipulation on the trust deed to the effect that a debt pertaining to subject credit constitutes the responsible debt burdens for the trust property.” (Article 21, paragraph (1), item (iii) of the new Trust Law)
- To consider an “enterprise” as a bundle of positive properties and negative properties



- ① Acceptance of the trust of positive properties
  - ② For a trustee to accept a settlor's debt and treat it to be borne by the property in trust
- ➡ “Trust of Enterprise Per Se” (the same positive economic effect as that) becomes possible.



## ② Trustee's Duties and Beneficiary's Decision Making

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- ① To transform the prescription on a trustee's duties into a discretionary provision
  - Rationalization of the prescription as to duty of loyalty
  - Relaxation of duty of self-execution
  
- ② Development of prescriptions to improve effectiveness/maneuverability of a beneficiary's exercise of right
  - To transform a beneficiary's decision-making method as to multiple trusts into a discretionary provision





## ③ Rights of Beneficiary that Cannot Be Controlled by Regulations on Trust Deeds

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Right to plead to court, right to preemptory notice in Art. 5, para. (1), right to object in Art. 23, para. (5) or (6), claim for payment in Art. 24, para. (1), right of rescission in Art. 27, para. (1) or (2) (including case used in Art. 75, para. (4)), right of rescission in Art. 31, para. (6) or (7), right to request report in Art. 36, claim for public perusal or duplication in Art. 38, para. (1) or (6), claim for compensation or restitution in integrum in Art. 40, claim for compensation or restitution in integrum in Art. 41, right to request injunction in Art. 44, claim for payment in Art. 45, para. (1), right to request injunction in Art. 59, para. (5), right to request injunction in Art. 60, para. (3) or (5), claim for payment in Art. 61, Para. (1), right to preemptory notice in Art. 62, para. (2), right to relinquish beneficiary right in Art. 99, para. (1), claim to obtain beneficiary right in Art. 103, para. (1) or (2), right to preemptory notice in Art.131, para. (2), right to preemptory notice in Art.138, para. (2), claim for delivery or tender in Art. 187, para. (1), claim for public perusal or duplication in Art. 190, para. (2), claim for Entry or record in Art. 198, para. (1), claim for monetary compensation or payment in Art. 226, para. (1), claim for monetary compensation or payment in Art .228, para. (1), claim for compensation in Art. 254, para. (1)



## ③ Rights of Beneficiary Newly Introduced Under New Trust Law

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- ① Right to preemptory notice on acceptance to a party specified as a trustee (Art. 5, para. (1))
- ② Right of rescission against a trustee's deed in conflict of interests (Art. 31, para. (6), (7))
- ③ Intervention rights in case infringing the ban on a competitive deed (Art. 32, para. (4))
- ④ Claim for disclosure of other beneficiaries' names and such (Art. 39, para. (1))
- ⑤ Right to request injunction against a trustee's deed violating laws or regulations on trust deed (Art. 44, para. (1))
- ⑥ Right to request injunction against a trustee's breach of the duty of impartiality (Art. 44, para. (2))
- ⑦ Claim to obtain beneficiary right (Art. 103, para. (1), (2))
- ⑧ Claim to convene a meeting of beneficiaries and the right to convene (Art. 107, para. (1), (2))
- ⑨ Right to plead the bankruptcy of a trust (Art. 244-4 of Bankruptcy Law)



## ④ Trustee's Recourse to Expenditure Against Beneficiary

### Old Trust Law (Art. 36)

Premise

Beneficiary right is the whole of rights and duties.

Principle

As to expenditures borne for a trust property, the trustee is able to claim payment not only from the trust property but also from the beneficiary.

Exception

Subsection 3 of Sec.36 (right to relinquish beneficiary right)  
Opinion is widely divided on pros and cons of the relinquishment.

### New Trust Law (Art. 48)

Beneficiary right is the whole of rights.

Trustee's claim for compensation of expenditures against the beneficiary was deleted.

Nevertheless, the trustee is able to claim refundment of expenditures in accordance with its agreement with the beneficiary.



# Administrative Method for Duty of Separate Management

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【Art. 34, para. (1), item (ii), and para. (2)】

- ① Property that can be registered/on the record as a trust
  - Registration/entry of a trust (As long as it is acknowledged that, a trustee, when in an economic predicament, is obliged to register/record without delay, an exemption from registration/entry is possible in accordance with the regulations on trust deeds.)
- ② Movable property (excluding money)
  - Custody in a state to allow a distinction in externals (physical separation)
- ③ Money and property other than movable property
  - Method to clarify its calculation (separation by ledger)
- ④ Property prescribed by the ordinance of Ministry of Justice
  - As per the ordinance of Ministry of Justice
- ⑤ With an exception of ①, the exemption is possible as per the regulations on trust deeds. (discretionary provision)

## ⑤ Discipline Indistinguishable Between Trust Property and Intrinsic Property

### 【Old Trust Law】(nonexistent)

- When a property belonging to property and an intrinsic property (or other trust property) becomes unable to be distinguished



- It's unclear whether or not a trust property gets protected at the time of a trustee's bankruptcy.

### 【New Trust Law】 (Art.18)

- Case in the left column
  - i) In proportion to a share in price of each property in those days, a joint ownership of each property— having become indistinguishable— is deemed to belong to subject trust property and an intrinsic property (or other trust property).
  - ii) If a share in price in those days is not certain, a share of a joint ownership gets estimated to be even.



- If a share in price in those days —when properties became indistinguishable—is clear based on a ledger and such, a trust property gets protected from a trustee's bankruptcy in a real right.

## ⑥ Change of Trust

(If "change of trust" is captured as a termination of trust, plus a setup of trust) Is it possible with a consensus of all parties concerned?

Only the change in an administrative method can be pleaded to a court. (Art. 23)

Old Trust Law

Difficult to respond to a change in conditions (difficult to attain a trust's objective)

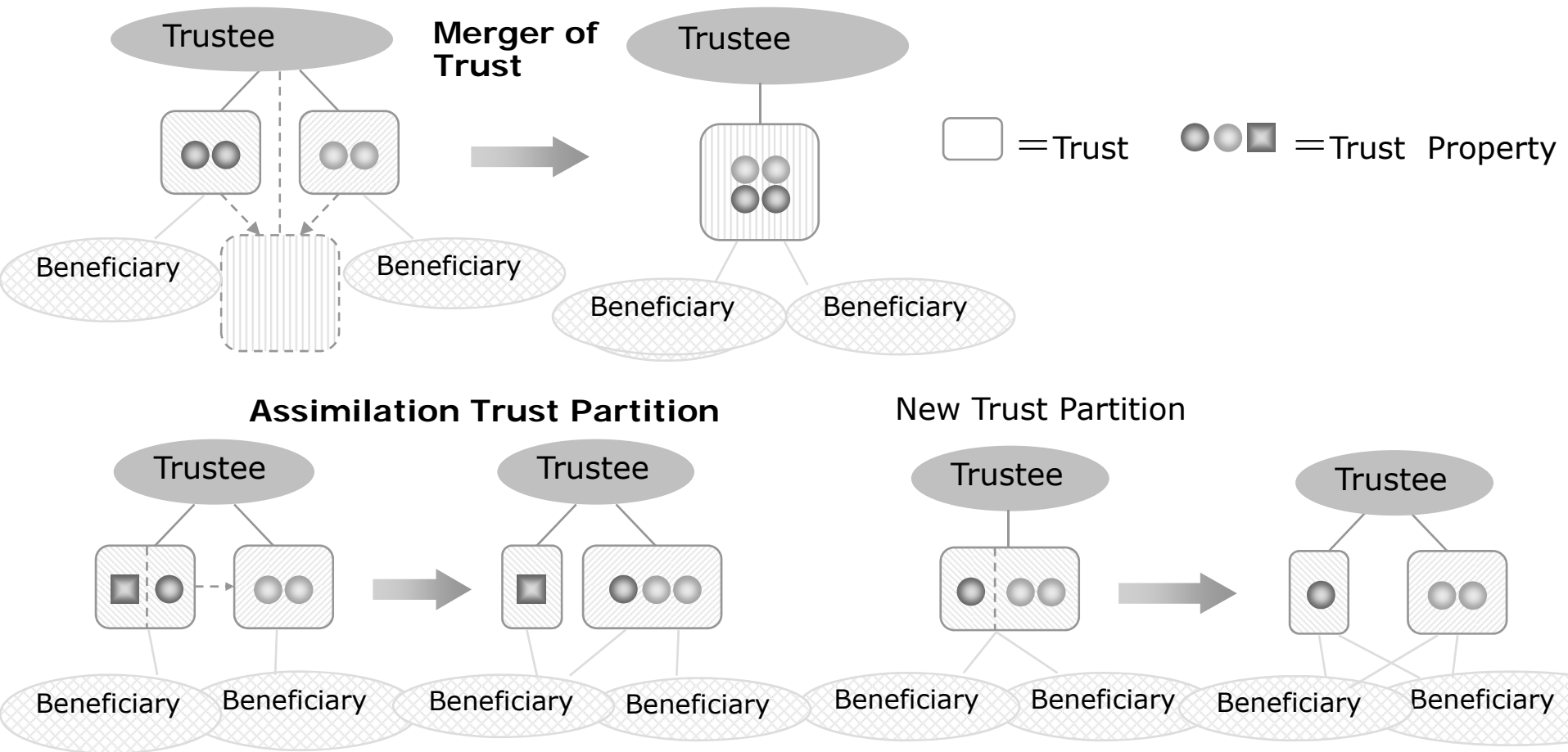
New Trust Law

In principle, a change is possible with a consensus among a settlor, trustee, and beneficiary. (Art. 149, para. (1))

Consensus omissible in a certain case (Art. 149, para. (2), (3))

Possible to plead to a court on a change when an incompatibility with a beneficiary's interests arises due to special conditions (Art.150)

# ⑥ Merger and Partition of Trust (1)





## ⑥ Merger and Partition of Trust (2)

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### 【Merger of Trust】 (Art. 2, para. (10))

- To make the whole of trust property of more than two trusts under the same trustee into the trust property of one new trust

### 【Assimilation Trust Partition】 (Art. 2, para. (11))

- To transfer a part of trust property of a certain trust to a trust property of other trust under the same trustee

### 【New Trust Partition】

- To transfer a part of trust property of a certain trust to a trust property of a new trust under the same trustee





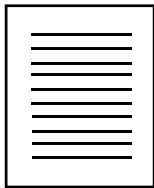
## ⑦ Bankruptcy of Trust Property

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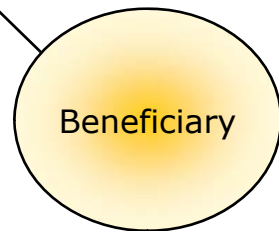
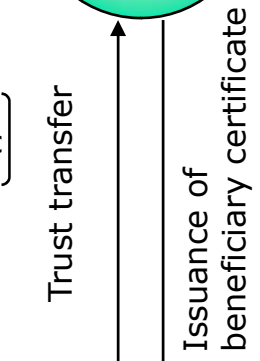
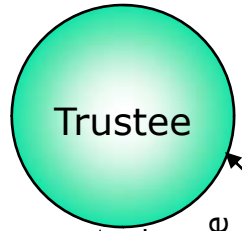
- ① Cause of an inception of bankruptcy proceedings on a trust property (Art. 244-3 of Bankruptcy Law)
  - i) Insolvency (Situation in which a trustee, for failing in solvency with a trust property, is incapable to discharge ordinarily and uninterruptedly as to matters with the time appointed for payment among liabilities assumed by a trust property)
  - ii) Liabilities in excess of assets (Situation in which a trustee is incapable to pay in full liabilities assumed by a trust with a property that belongs to a trust property)
- ② Plea of an inception of bankruptcy proceedings (Art. 244-4 of said law)
  - Creditor of a trust (one who limits its nonexempt property to a trust property), a beneficiary, a trustee, a trust-property administrator, a trust-property corporate administrator, an administrator on a court order to take custody of property

# ⑧ Beneficiary-Certificate Issuance Trust

- Assumption on an occupant's legal possession
- Acquisition of beneficiary certificate in good faith
- To be invalidated with proceedings on a peremptory public notice



Duties on preparing ledge of beneficiary right, placement, public perusal, etc.



Trust transfer

Issuance of beneficiary certificate

Entry/record in the beneficiary-right ledger as requisite for trustee's counteraction

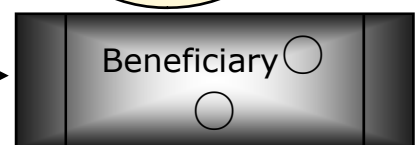


Convertible



Transfer

Issuance being requisite for validity



Blank

Nominative



## ⑧ Special Cases of Rights and Duties in Beneficiary-Certificate Issuance Trust

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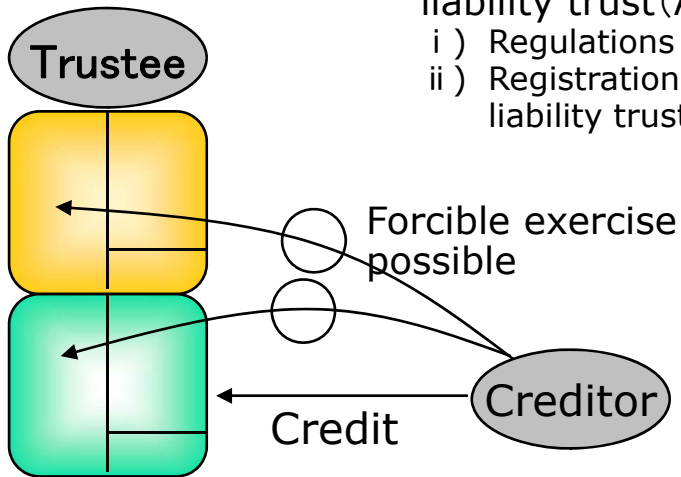
- Abatement of the particular provision for trust deed (Art. 212, para. (1)) in the care duty of good administration (Art. 29, para. (2))
- Abatement of the particular provision (Art. 212, para. (2)) as to the duty on a nomination of the third party/supervisory responsibility in entrusting administrative work for a trust (Art. 35, para. (4))
- Limitation on a part of the beneficiary right that is prohibited to limit (Art. 92), on the basis of the regulations on trust deeds (Art. 213)
- Regarding a decision made by more than two beneficiaries, it is deemed that there is a regulation by a majority vote at a beneficiaries' meeting in trust deeds (Art. 214).
- A beneficiary executes a part of the rights of a consignor in a beneficiary-certificate issuance trust (Art. 215).

## ⑨ Limited Liability Trust

### 【Common Trust】

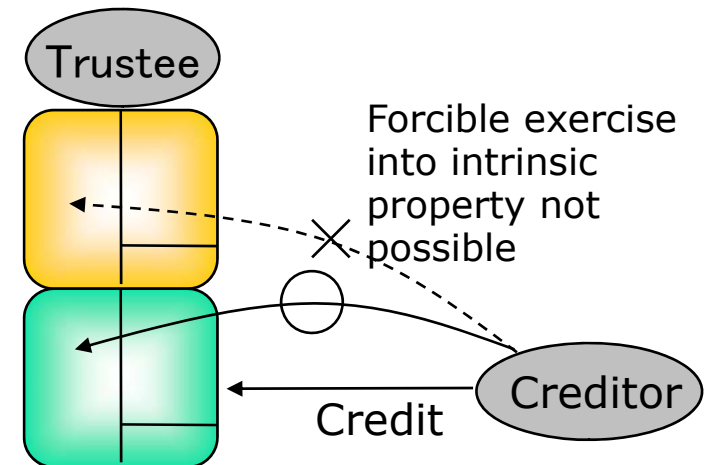
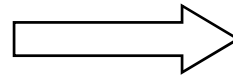
Requisite for validity of limited liability trust(Art. 216)

- i) Regulations on trust deeds
- ii) Registration of limited liability trust



 = Trust (Intrinsic property)

### 【Limited Liability Trust】



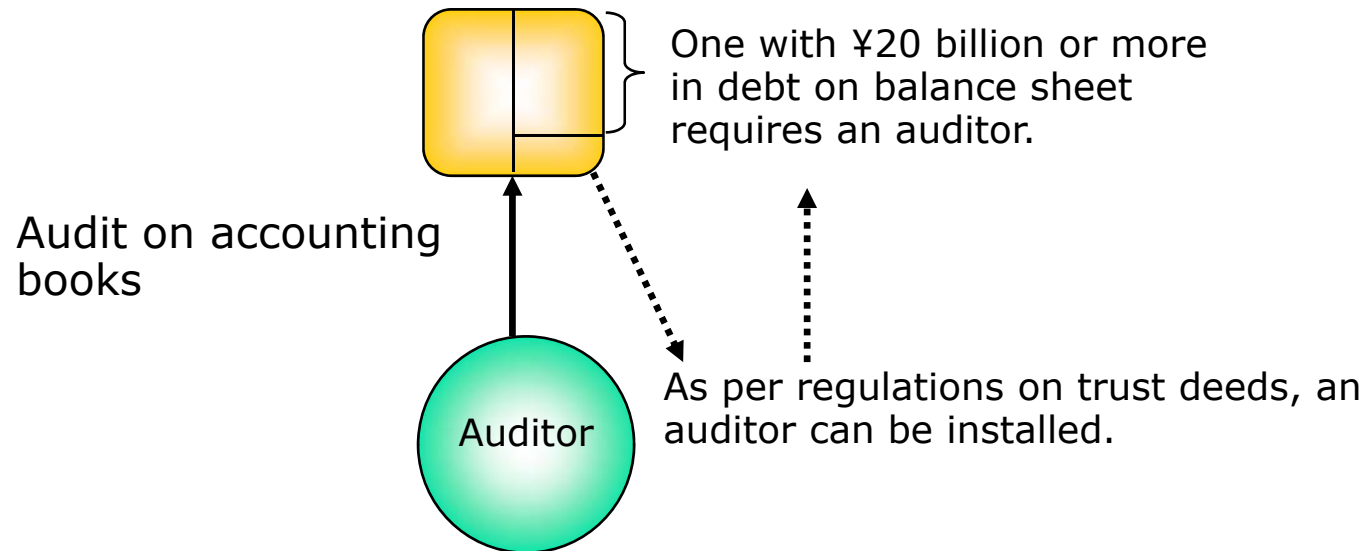
 = Trust (Trust property)

- The title shall use the letters of "limited liability trust" (Art. 218).
- Duty of elucidation to the effect of a "limited liability trust" to the third party (Art. 219)
- Special cases of calculations, etc.(Art. 222-231)
- Registration of a limited liability trust(Art. 232-247)

# ⑧⑨ Beneficiary-Certificate Issuance Trust with Limited Liability

Beneficiary-certificate issuance trust with limited liability  
(Limited liability trust that's a beneficiary-certificate issuance trust)

Art. 248-257



- To bear the care duty of good administration as for exercise of function
- To be responsible for compensation for damage as the responsibility for negligence of duty, and be responsible for indemnity to the third party when there is bad faith or gross negligence



## ⑩ Self-Trust

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① Effectuation of trust (Art. 4, para. (3)) requires:

- i) a notarial deed, a document attested by a notary public, production of an electromagnetic record, or
- ii) a notice on a trust by a deed with an inconvertible date against a party appointed as a beneficiary

② Special case of proceedings on forcible exercise (Art. 23, para. (2))

- Creditor to a settlor is possible to implement forcible exercise, public auction and such against the property belonging to a trust property without proceedings to rescind a fraudulent trust. (Except the case in which one has not been aware that the following would damage the creditor: when one knew about the whole or part of beneficiaries were designated as the beneficiaries, or obtained the beneficiary rights by transfer.)

③ Special case of a corporate business transfer (Art. 266, para. (2))

- To be influenced by the applications of prescriptions regarding the corporate business transfer under company law and other stipulations



## ⑩ Regulations of Trust Business Act on Self-Trust

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- ① In case the number of beneficiaries is 50 or more
- ② In case the number of real beneficiaries, with interference of investment vehicles, is 50 or more
- ③ In case the total number of beneficiaries, having repeated self-trust of the same contents, is 50 or more
  - Self-trust that many parties acquire the beneficiary right of ⇒ subject of the registration under Prime Minister's supervision (part of Trust Business Act applicable)
- ④ In case the number of beneficiary rights is 50 or more



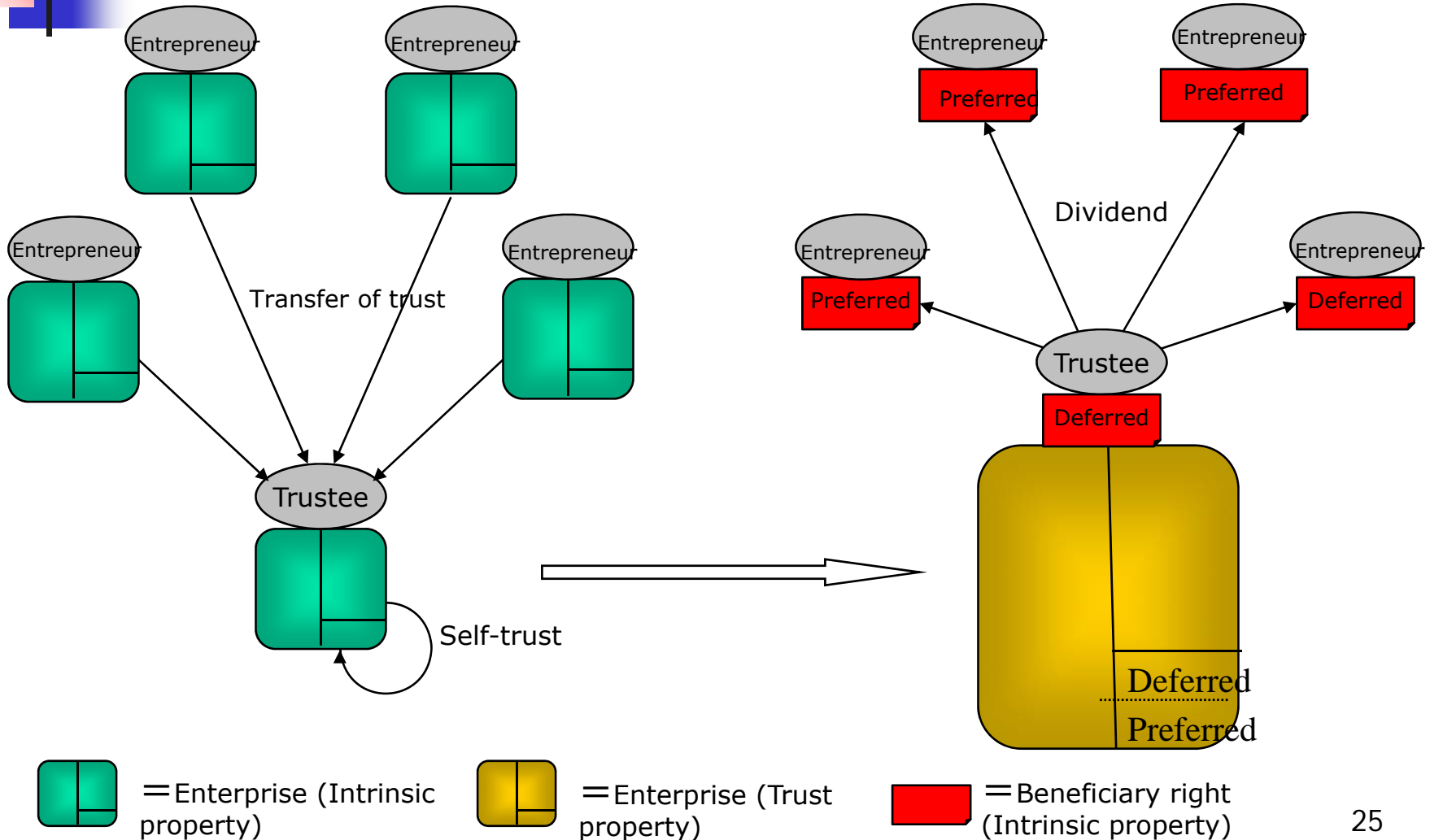
## Utilization of Trust of Enterprise Per Se Under New Trust Law

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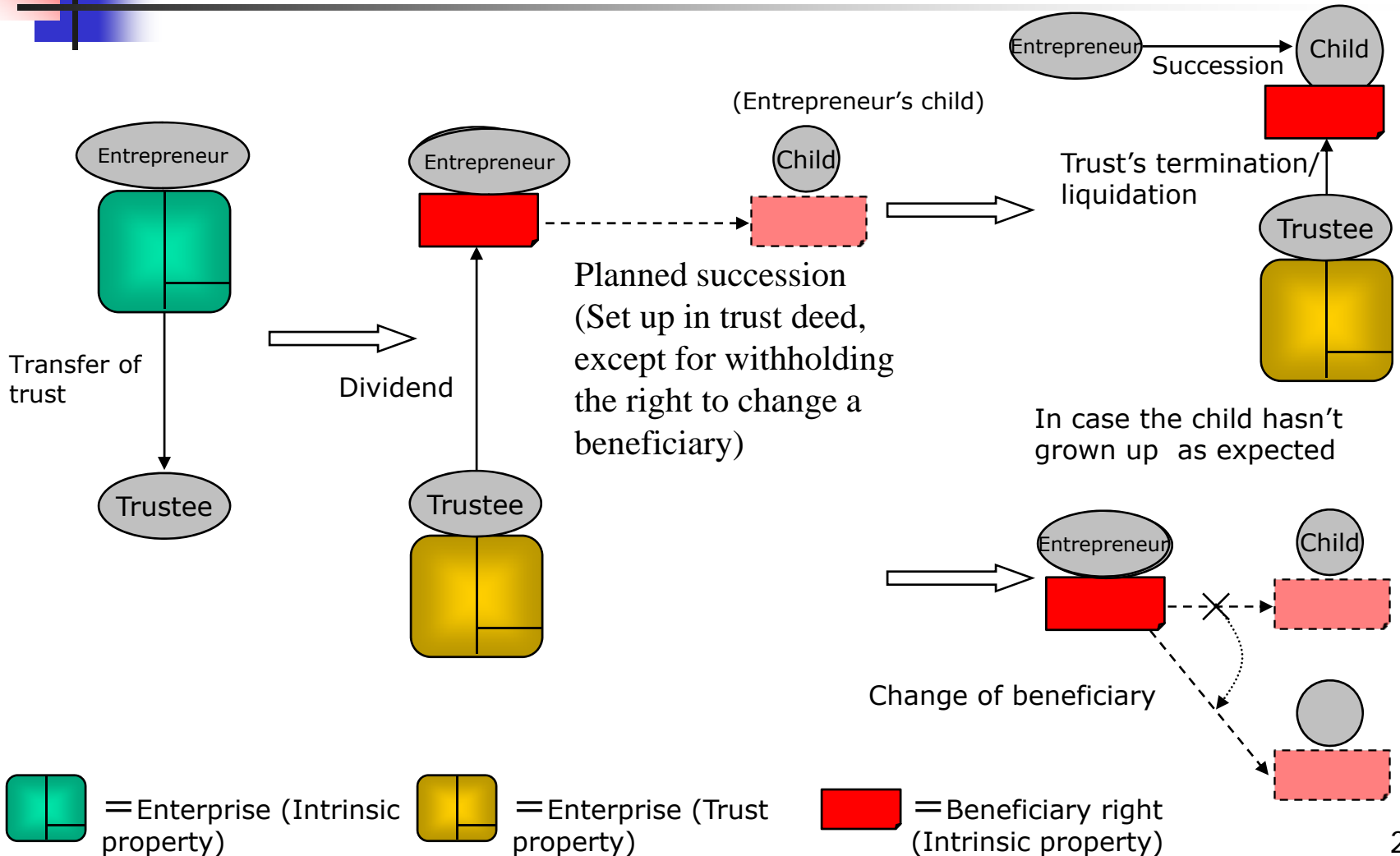
- ① Enterprise consolidation
- ② Enterprise succession of personal business
- ③ Affiliation/consolidation of businesses among corporations
- ④ Reconstruction of corporations
- ⑤ Fund-raising (securitization of the whole enterprise)
- ⑥ Fund-raising (trust of profitable unit)



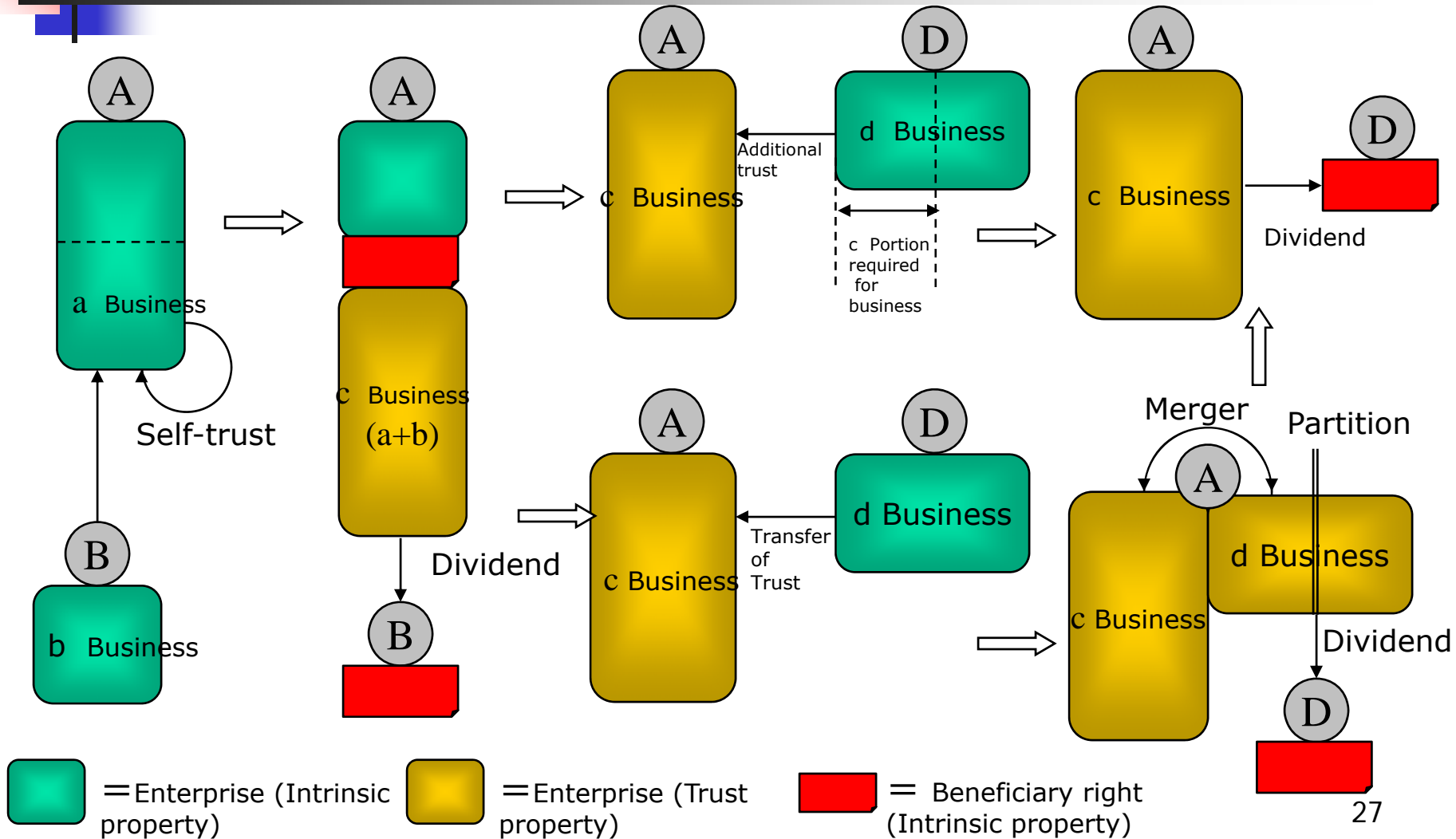
# ① Utilization for Purpose of Enterprise Consolidation



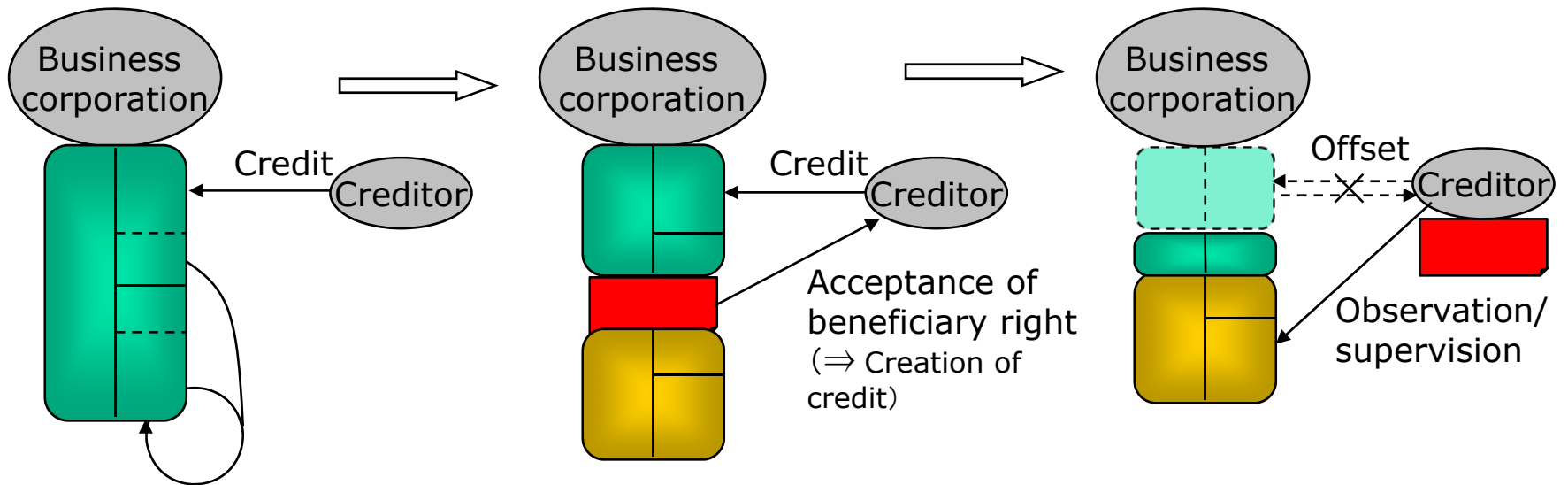
## ② Utilization for Purpose of Enterprise Succession of Personal Business



# ③ Utilization for Affiliation/Consolidation of Businesses Among Corporations



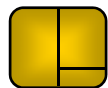
# ④ Usage for Reconstruction of Corporations (Trust Similar to DES)



Self-trust



= Enterprise (Intrinsic property)

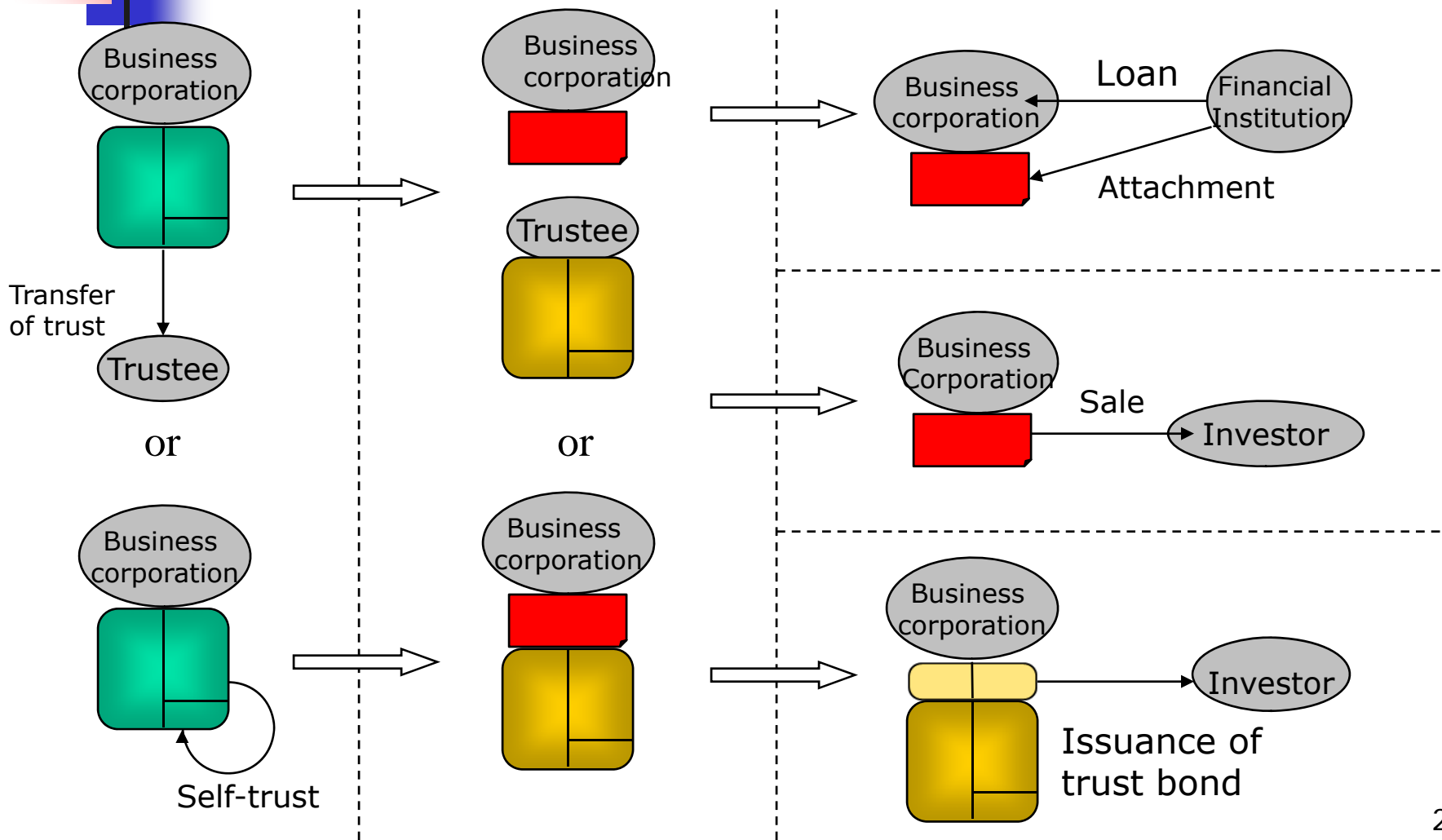


= Enterprise (Trust property)

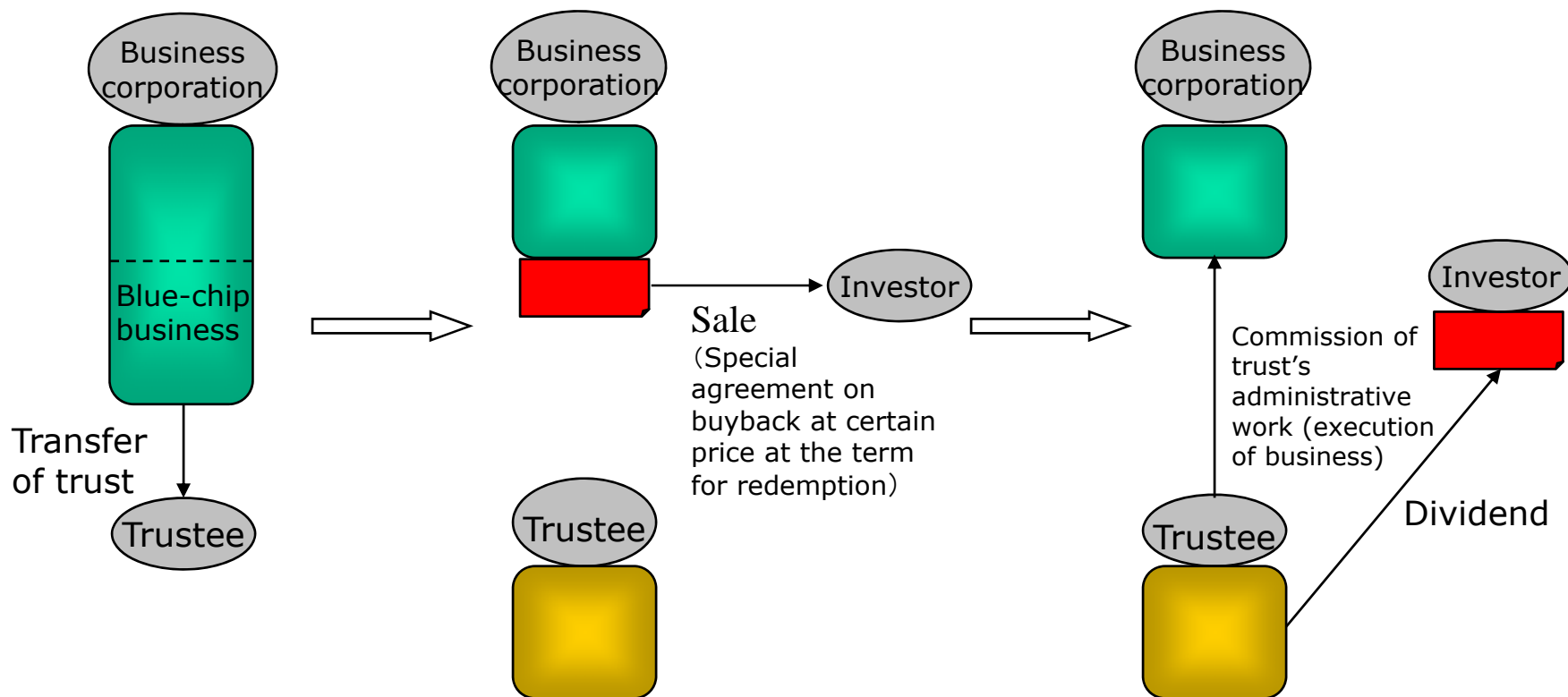


= Beneficiary right (Intrinsic property)

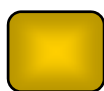
# ⑤ Utilization for Fund-Raising (Trust Similar to Whole Business Securitization)



# ⑥ Utilization for Fund-Raising (Trust of Highly Profitable Unit)



= Enterprise (Intrinsic property)



= Enterprise (Trust property)



= Beneficiary right (Intrinsic property)



## ⑥ Merit of Trust of Highly Profitable Unit

○ Fund-raising for a company with a collectively low enterprise value

- Due to a low rating of the company, a fund-raising is impossible or its cost is high.

- Without assets for collateral, fund-raising means is limited.



○ In case some blue-chip business unit is entrusted

- As a rating is specialized in the entrusted business, a fund-raising with a favorable term is possible.

- A variety of fund-raising means is available such as a transfer of beneficiary right, a loan by setting up security right on beneficiary right, an issue of trust bond.

## ⑥ Trust of Highly Profitable Unit (Trust Similar to Tracking Stock)

○ Unit-performance-linked tracking stock

- Danger that the performance of a specified business gets manipulated through conflict-of-interest dealings
- Issue of a business corporation's bankruptcy accompanying other unit's worsening results



○ In case entrusting each unit by separating an individual business unit

- Severe sanction against a case of the breach of the duty of loyalty
- Isolation of a business corporation from bankruptcy by the separate management





# Legal Issues as to Trust of Enterprise Per Se

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- ① Issue of the proceedings for an acceptance of liabilities
  - A creditor's separate agreement is necessary with respect to the proceedings for a trustee's acceptance of a settlor's liabilities (acceptance of liabilities without recourse) at the time of setting up a trust. → Subordinated to corporate split-up
- ② Issue of the employment of workers
  - To require an individual worker's agreement ↔ Protection of workers
- ③ Issue of the duty of loyalty
  - As the whole of the business per se becomes the subject of the trust, conflicting interests occurs between businesses in the intrinsic property.