Negation Theory of Principle of Indemnity as Mandatory Provision in Indemnity Insurance

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It is one of the basic controversy problems in insurance law that whether mandatory provision which means insured is prohibited to gain the profit by the insurance exists or not? The accepted theory in Japan which imitates traditional theory of Germany has been considered that all legal relations in indemnity insurance is governed by the principle of indemnity as mandatory provision.

However, judicial precedent and accepted theory of Germany of recent years denies the traditional theory, and it considers that principle of indemnity as mandatory provision does not exist.

This dissertation takes opportunity which law situation in Germany is changed of reexamining principle of indemnity. In conclusion it denies principle of indemnity as mandatory provision, and restructures interpretation of individual regulations of Commercial Code which is based on principle of indemnity as mandatory provision.

The point of my opinion is as follows. It is not possible to think the principle of indemnity to be mandatory provision. The principle of indemnity in indemnity insurance is not a limitation of public policy, because insurable value which is criterion of indemnity is to be variable. To the full extent of liberty of contract, party of contract estimates the insurable value freely.

Legal meaning of principle of indemnity is more limited. On the basis of intention of party, principle of indemnity only decides the amount of the insurance money that should pay. Therefore, principle of indemnity is not a problem of public policy inevitably.

Theory of gradual nullity concerning§631Commercial Code is based on this standpoint.

I reached the following conclusion in consideration of argument concerning over insurance in which it aims at gain of unlawfulness.Essentials of public policy concerning principle of indemnity is not to prohibit a mere profit but to prohibit illegal profit related to subjective element, for example fraud.