OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN DELIVERED ON 3 DECEMBER 1981

My Lords,

In this case the First Civil Division of the Tribunale, Milan, asks the Court for a preliminary ruling on a question raised as to the interpretation of Article 35 of Council Regulation No 542/69 of 18 March 1969, p. 125, as amended by Article 1 of Council Regulation No 1079/71, OJ 1971, p. 285. Regulation No 542/69 was in force at the relevant time although it has now been replaced by Council Regulation No 222/77 of 13 December 1976, OJ 1977, L 38, p. 1.

That Regulation sets up a Community transit procedure for goods, which is divided into two parts — one for "external Community transit". The former applies, inter alia, to the movement of goods which do not satisfy the conditions laid down in Articles 9 and 10 of the EEC Treaty (Article 1 (2) (a) of Regulation No 542/69) — e.g. where goods have originated outside the Community and have not yet been cleared by customs authorities in the Member State into which they have been imported. That appears to be the situation in the present case.

In respect of goods carried under the procedure for external Community transit, a T 1 declaration has to be made on form T 1 by virtue of Article 12 of Regulation No 542/69. That form is in three parts, and it must be completed and produced at the Customs Office where the Community transit operation begins ("the office of departure"). There it is registered. One copy of the form is kept and the other two are given to the person who has applied to move the goods. He must ensure that those two copies accompany the goods: when they are received by the customs office where the goods must be produced to conclude the Community transit operation ("the office of destination"), that office must record the details of controls, retain one copy and send the other back to the office of departure (see Articles 1, 12, 17, 19 and 26 of the Regulation).

"In order to ensure collection of the duties and other taxes which one of the Member States is authorized to charge in respect of goods passing through its territory in the course of Community transit", a guarantee must normally be provided by the person applying to move the goods. The guarantee must, subject to exceptions which do not arise here, be in the form of one of the specimens annexed to the Regulation and must be given by a person established in the relevant Member State. The guarantor undertakes jointly and severally with the

principal to pay the duties and taxes payable (Articles 27 and 28).

Article 35 of Regulation No 542/69 initially provided as follows:

"The guarantor shall be released from his obligations towards the Member States through which goods were carried in the course of a Community transit operation when the T 1 document has been discharged at the office of departure."

"Discharge" is not defined but it seems to be accepted that it amounts to an official of the office of departure examining the copy of the form T 1 sent to it by the office of destination, being satisfied that the goods have been transferred in accordance with its terms and recording such fact in whatever is thought to be an appropriate way.

By Regulation No 1079/71, a second paragraph was added viz:

"Where the guarantor has not been notified by its office of departure of the non-discharge of the T 1 document, he shall be released from his obligations on expiry of a period of twelve months from the date of registration of the T 1 declaration".

The Tribunale found that the company Alimentari Molteni di Ambrogio Paulo Molteni withdrew from its private bonded warehouse three consignments of frozen beef on 21 November and 21 December 1975 and on 2 January 1976. Forms T 1 were completed and registered in respect of each consignment, the declared destination of each being Switzerland. Each was covered by a guarantee given by Società Italiana Cauzioni Compagnia di Assicurazioni e Riassicurazioni SpA ("SIC") under a policy dated 5 May 1970. Subsequently the customs office in Milan (the office of departure) received from the customs office in Geneva (the office of destination) the third copy of form T 1 which purported to show the stamp of the Geneva office and the arrival of the goods in Switzerland. These three documents were "discharged" respectively on 13 and 30 December 1975 and 21 January 1976. Later enquiries indicated that the entries purporting to have been made in Switzerland were forged and that the meat had not left Italy. Notice was given to SIC on 22 January 1977 of those indications. On 6 September 1977 the customs authorities in Milan claimed payment of the customs duties and interest and costs. SIC accordingly commenced proceedings before the Tribunale in Milan challenging the demand for payment on the basis that, by virtue of Article 35 of Regulation No 542/69, the company was discharged from its liability since more than twelve months had elapsed between the date of discharge of the last of the three T 1 forms and the date when they were notified of the alleged falsification of the documents. The customs authorities contended that SIC could not rely on Article 35 and that the guarantee remained enforceable.

The Tribunale referred the following question to the Court:

"With regard to Article 35 of Regulation (EEC) No 542/69 of 18 March 1969, as supplemented by Article 1 of Regulation (EEC) No 1079/71 of 25 May 1971, is it always incumbent on the Amministrazione Finanziaria (Finance Administration) to intimate, within twelve months of the date of registration of a T 1 declaration, the non-discharge of that document, in order to preserve the guarantee referred to in those provisions?"

The Italian customs authorities contend that fraud inducing the discharge of the T 1 form vitiates everything which follows. Whether fraud does vitiate the discharge itself, so as to prevent a guarantor relying on the first paragraph of Article 35 is not the question referred by the Tribunale and I do not think it right to comment on that matter. The relevant question is whether fraud which induces the discharge can affect reliance on the second paragraph.

It is argued by the customs authorities that where there has been an examination of the T 1 form and that this has appeared to show on the face of it that the goods had been dealt with in accordance with the declaration, there can be no obligation to give a notice of non-discharge. It is asked how can the authorities give notice of non-discharge when there has been, after a proper examination, a discharge on the basis that the document appears valid. Accordingly it is said that the twelve months period does not begin to run if there is an examination of the document which does not reveal any defect. The customs authorities cannot be expected to conduct detailed enquiries as to the validity of the third copy of the form or otherwise endless delays would occur. Only if the falsification is known and nothing is done to put the guarantor on notice, or if no examination is made at all, can the period of twelve months begin to run.

These arguments in my opinion are misconceived. The second paragraph of Article 35 by clear language exempts the guarantor from liability under the guarantee on the expiry of the period of twelve months from the date of registration of the T 1 declaration (i.e. by the office of departure) *unless* during that period the guarantor is notified by the office of departure that the T 1 form has not been discharged. This is for the protection of the guarantor: it does not involve any enquiry as to fault or carelessness or inactivity on the part of the office of departure. There is no obligation to give a notice of discharge. The question is one of fact — has there been a notice of non-discharge by the office of departure within the period? If there has not, the guarantor can no longer be called upon to pay. These clear words seem to me to carry out simply the objective of the amendment which is set out in the recitals, viz.- to achieve certainty in the law by enabling guarantors to be certain of being released from their obligations on the expiry of a fixed period, namely twelve months from the date of registration of the Community transit declaration.

Such an objective assists in the freedom of movement of goods within the system set up under the Treaty since it enables the guarantee, or funds supporting it, to be extended to other transactions. The period of liability comes to an end whether or not the guarantor has been told that there has been a discharge: liability is only preserved where notice of

non-discharge is given. The argument that enquiries may not reveal fraud, or that enquiries may be complicated and take a long time, does not lead to the contrary result. If the discharge has become suspect, it may be possible to rescind it and to give notice of non-discharge: in any event a remedy may still be available against the principal.

In this case there is no suggestion of fraud on the part of SIC. If on the facts of a particular case it could be shown that the guarantor was fraudulent in inducing the office of departure *not* to give a notice of non-discharge different considerations might arise which would have to be considered on the facts before the Court.

In the circumstances, in my opinion, the question asked by the Tribunale in the present case should be answered on the lines that:

In the absence of fraud by a guarantor which induces customs authorities not to give notice of non-discharge for the purposes of the second paragraph of Article 35 of Regulation No 542/69 of 18 March 1969 as amended by Article 1 of Regulation No 1079/71 of 25 May 1971, the guarantor will be released from his obligations under the guarantee on the expiry of a period of twelve months from the date of registration of the relevant T 1 document, unless the guarantor is notified within that period by the office of departure of the non-discharge of the T 1 documents.