is based and specify the nature of those pleas. An abstract statement of the pleas in law does not satisfy the requirements of the Statute or the Rules of Procedure of the Court of Justice.

3. When the Court derives its competence from an arbitration clause contained in a public or private contract it cannot consider a plea in law, such as undue enrichment, with a non-contractual basis.

REPORT FOR THE HEARING
in Case C-330/88 *

I — Facts

1. From March 1980 onwards, Mr Grifoni supplied services on a number of occasions as the successful tenderer for sheet-metal and iron work for the Joint Research Centre (hereinafter referred to as 'the Centre'). The services were supplied on the basis of an outline agreement which had been concluded in advance. They were first supplied following an offer made by Mr Grifoni on 21 November 1979 and then following a subsequent offer of 10 March 1984, which was accepted by the Commission by registered letter of 21 May 1984. The outline agreement included the following clauses:

(a) a clause (clause 16) which provided that, notwithstanding clause 17 of the General Terms and Conditions, Italian law was applicable;

(b) a clause (clause 17) referring to clause 16 of the General Terms and Conditions applicable to contracts concluded by the Commission and conferring exclusive jurisdiction on the Court of Justice to settle disputes relating to the implementation or interpretation of the agreement;

(c) a clause (clause 3) under which Mr Grifoni was to be paid in accordance with the list of prices for construction work in Milan (Elenco Prezzi delle Opere Edili in Milano), published by the Milan Chamber of Commerce, Industry, Crafts and Agriculture;

(d) a clause (clause 2) stipulating that the agreement was to be valid for one year from the date of the first order;

(e) a clause (clause 6) stipulating that if, while the work was under way, it became necessary to have work carried out which was not included in the order, such work must first be authorized in writing by the Directorate of Works following submission by the

* Language of the case: Italian.

undertaking of a detailed and definitive costing. Any work carried out otherwise would be neither recognized nor paid for. The costing was to be prepared as far as possible using the prices in the price list for construction work in Milan; prices not included in that list were to be agreed upon, as stated in clause 3(2);

(f) under clause 3(2), any items not appearing in the list of prices were to be agreed upon, on a case-by-case basis, following submission of a detailed breakdown of the cost;

(g) a clause (clause 7) under which the work was to be entered in the accounts on a cost-reimbursement basis.

2. On the basis of that outline agreement, the Commission placed a number of orders with Mr Grifoni's undertaking each of which were for the performance of various work; those orders, some of which appear in an annex to the defence, pointed out that the amounts to which they referred served only as a guide and that the work would be entered in the accounts 'on a cost-reimbursement basis in accordance with the actual amounts' (point B of the order).

3. Moreover, each order also contained clause G, which was worded in the same way as the abovementioned clause 6 of the outline agreement. It also carried the following warning: 'any work carried out otherwise than as specified above shall not be recognized or paid for'.

4. When relations between Mr Grifoni and the Commission came to an end in May 1987, Mr Grifoni considered that the Commission still owed him at least LIT 450 597 910 for work carried out over the years. He requested payment of the sum which he considered still owing to him, and when the Commission refused he brought the present action.

II — Written procedure and forms of order sought by the parties

5. Mr Grifoni's application was received at the Court Registry on 14 November 1988.

6. The written procedure followed the normal course. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry. It assigned the case to the Fourth Chamber.

7. The applicant claims that the Court should, after dismissing any counter-claim and adopting whatever measures it considered to be most appropriate, declare that the European Atomic Energy Community (EAEC) has failed to fulfil its obligations, order it to reimburse the applicant the sum of LIT 450 597 910, plus interest and a monetary adjustment calculated from the date on which that sum fell due until the date of payment, or whatever other amount the Court may consider appropriate, and to compensate him for any further loss, including the costs of the proceedings.

8. The Commission claims that the Court should:

(i) dismiss the application;

(ii) order the applicant to pay the costs.

III — Pleas in law and arguments of the parties

9. In his application Mr Grifoni claims that, owing to the particular mechanism of payment used by the Commission, he was not reimbursed as agreed, namely on a cost-reimbursement basis.

10. In its defence, the Commission attempts first of all to make sense of the application. In its opinion, the applicant is in effect seeking payment for additional work. It considers two possibilities: either the calculations in the documents which it describes as invoices could contain an error, or the order could have been modified and additional work carried out.

11. With regard to the first possibility, the Commission points out that it is for the applicant to prove the existence of an error. As for the second possibility, the Commission cites the clause which provides that work not included in the order requires the prior written authorization of the Works Directorate, which was never given. The Commission contends that the applicant's claim is therefore unfounded.

A — *The nature of the documents produced (invoices or costings?)*

12. In its defence, the Commission agrees that the work had to be entered in the accounts on a cost-reimbursement basis, a method whereby fixed-price contracts are precluded and only the services actually supplied are paid for, even if they differ from those originally ordered. However, the Commission produces certain written orders and corresponding documents, which it describes as invoices, to show that the work carried out by the applicant was in fact entered in the accounts and paid for in accordance with the agreed method, that is to say on a cost-reimbursement basis. Payment of the invoice brought the legal relationship to an end.

13. The note headed 'Balance of Account', produced by the applicant, which shows a credit in his favour, is inexplicable because, according to the Commission, the applicant cannot claim payment a second time for work already paid for, in accordance with the cost reimbursement method of accounting, on presentation of invoices bearing the words 'Final account of work'.

14. In his reply, Mr Grifoni claims that the Commission merely produced documents which it wrongly describes as 'invoices', but which, according to him, are 'costings' of the work carried out. According to the applicant, those costings cannot in any way effect full discharge. He points out that the invoices duly drawn up following payment are not to be found among the documents before the Court.

B — *The mechanism used for the orders and payment*

15. In his reply, Mr Grifoni maintains that in dealings between his undertaking and the Commission the formal requirements laid down for mere accounting purposes were always dispensed with. According to Mr Grifoni, the services provided by his undertaking to the Centre were agreed upon orally; it was simply in order to enable the competent services to make the corresponding payments that the orders and costings were drawn up on each occasion at a later date, without too much attention being paid to what had actually been agreed and carried out. The applicant claims that the fact that the accounts took account of work not specified in the order does not mean that his undertaking could not have carried out any work other than that entered in the accounts, but rather that it carried out that work regardless of the content of the order relating to it.

16. In that regard, the Commission contends, in its rejoinder, that Mr Grifoni's assertions are baseless. In support of that contention it cites Article 32 of the Financial Regulation (Official Journal 1977 L 356, p. 1), under which orders may not be placed unless a firm commitment of expenditure has been made in favour of the person to whom the order is addressed. The Commission adds, giving examples, that the manner in which Article 32 of the Financial Regulation functions is extremely simple and rapid. It also recalls Article 6 of the agreement between the Commission and Mr Grifoni's undertaking, according to which any changes or additional work require a detailed written estimate and may not be carried out unless approved by the competent official of the Centre's 'Infrastructure' Division. The Commission emphasizes that if Mr Grifoni's additional claims had been justified, payment would have been made under a simplified procedure (intended for authorization and additional commitment), but, as Mr Grifoni's undertaking displayed a certain tendency to ignore the abovementioned requirement, a warning letter had been sent to him by the head of the Centre's 'Infrastructure' Division.

17. In his reply, Mr Grifoni described in detail the mechanism which he claims was used in his dealings with the Commission to evade the formalities prescribed for payment: the costings were always drawn up solely on the basis of the amounts committed (according to the applicant, all the costings are invariably a few lire less than the amount of the corresponding orders) and did not take account of the work actually carried out on each occasion or thus of the work to be paid for. According to the applicant, the Commission would provide Mr Grifoni's undertaking with the figures for the various costings relating to the project. The undertaking would copy those figures on to its own headed note-paper and then forward them to the Commission for payment. According to the applicant, an inevitable consequence of that mechanism was that it was possible for his undertaking to be paid not for the work actually carried out but exclusively the amount committed by virtue of the order. Mr Grifoni points out that, since the value of the work carried out by his undertaking nearly always proved to be greater than the amount committed by virtue of the corresponding order, the Commission ended up owing the undertaking an ever-increasing amount.

18. Mr Grifoni also describes the methods by which the Commission paid for any

additional work carried out (costings drawn up for a greater amount, additional orders for work already carried out). With regard to the application of clause G, which appears in the orders and which stipulates that prior written authorization is necessary from the Directorate of Works before work not included in the order can be carried out, the applicant claims that the work at issue is not 'additional work' and that that clause is not applicable because it was nullified by the conduct of the parties, conduct which in the present case the weaker party was forced to accept.

19. Mr Grifoni maintains that he realized immediately what the situation was but that the Commission forced him to accept it, firstly, by guaranteeing that he would be paid the greater amounts by means of bogus orders and, secondly, by threatening that if he did not accept, no more orders would be placed with him in the future. Account must be taken of the fact that the Commission created a legitimate expectation on Mr Grifoni's part.

20. Mr Grifoni points out that the orders placed by the Commission bore no relationship to the work actually ordered and carried out or to the actual dates on which it was carried out, and he claims that the Commission is responsible for the discrepancy between the orders and the actual performance of the work. According to Mr Grifoni, it was the Commission that did not comply with the formalities. He explains that situation in detail, using examples drawn from the documents produced in an annex to his reply, and he highlights three points:

(a) the existence at the Commission of a simplified procedure called, he claims, 'direct action', which is used for orders of less that LIT 7 300 000, and which is implemented by issuing the 'order voucher' provided for that purpose;

(b) the fact that by using orders — contracts/outline agreements — it is not possible to commit sums greater than LIT 75 to 80 million;

(c) the fact that, in the context of an order, what is called the new price — which is applicable in the present case — that is to say the price of work not included in the list of the Milan Chamber of Commerce — must not exceed 50% of the value of the order.

21. In its rejoinder the Commission contends that the abovementioned assertions made by the applicant are false. It points out that the applicant relies on non-existent or distorted procedures, particularly with regard to 'direct agreement' orders, which he incorrectly refers to as 'direct action' orders. The Commission states that its financial regulation provides that work of a value of less than ECU 5 000 (approximately LIT 7 500 000) may be carried out without an invitation to tender and an order may be placed 'by direct agreement'. Direct agreement means, according to the Commission, that negotiations take place with a single supplier and the orderer is under an obligation to conclude agreements at reasonable prices.

22. The Commission explains that in practice what happens is as follows: an undertaking is asked to make an offer; if the offer is less than ECU 5 000 and the price is reasonable, the order is placed; if the offer is greater than ECU 5 000, it cannot be accepted and an invitation to tender procedure is initiated. In the case referred to by Mr Grifoni, the offer made was in fact LIT 10 600 000, which could not be accepted under the direct agreement procedure. Consequently, Mr Grifoni's undertaking lowered its price in order to avoid an invitation to tender and made a new offer of LIT 7 300 000, thereby winning the order. For the rest, the claim that the remaining LIT 3 300 000 was to be paid by another means is, according to the Commission, pure invention.

23. Moreover, the Commission contends that the facts belie the applicants claim that he was in debt because he was obliged to carry out in advance the work for which the Commission paid late. In any event, the fact that the costings are practically identical to the amounts of the various orders does not prove that there was a discrepancy between the amounts committed and the work actually carried out and paid for. According to the Commission, the correspondence is due to the fact that the orders were drawn up on the basis of a price agreement, that is to say on the basis of the unit prices offered by the undertaking in response to an invitation to tender.

C — *The measures of inquiry*

24. In his reply, Mr Grifoni argues that the outcome of the case hinges on the veracity or otherwise of the defendant's statements. In order to verify those statements, he produces a voluminous set of documents which, in his opinion, proves:

(a) the existence of work which was ordered orally and was carried out having no regard at all to the written orders and for which the written orders were drawn up when the work had already been completed;

(b) the lack of agreement between what was formally ordered and what was in fact agreed and supplied as a consequence of the agreements actually concluded;

(c) the fact that the costings which were the basis for payment of the work carried out by the applicant are entirely without foundation.

25. Mr Grifoni adds that the foregoing can also be proved by verifying what materials were used and by an inspection of the site. He accordingly requests the Court to prescribe measures of inquiry. He considers that it is for the defendant to prove, by adducing specific evidence, that the work which Mr Grifoni claims to have performed without having received payment was not performed or was incorrectly evaluated. Furthermore, he asks the Court to check the work actually carried out by his undertaking and to calculate the amounts owing to him on account thereof using all the measures of inquiry provided for in Article 45(2) of the Rules of Procedure. He submits to the Court a list of witnesses who can corroborate his claims and emphasizes that special importance must be attached to the personal appearance of the parties and to the commissioning of an expert's report permitting the following to be established:

(a) the work actually carried out by Mr Grifoni's undertaking;

(b) the amounts owed to him for performance of that work;

(c) the amounts paid to him;

(d) the amounts still owed to Mr Grifoni by the defendant.

26. The Commission contends that the applicant's request relating to the acceptance of measures of inquiry must be rejected in its entirety. The examination of witnesses gives no concrete result while the expert's report which may be ordered is either unnecessary or not permissible in so far as its subject-matter does not fall within the competence of the expert. The Commission maintains that proof that the additional work was carried out must be adduced not by an expert but by Mr Grifoni's undertaking. Moreover, in order to establish any amounts which are still owing to the applicant, there is absolutely no need for an expert or an auditor's report since the criteria for fixing prices are to be found in the contract.

27. The Commission considers, furthermore, that the testimony of witnesses is not permissible since the applicant does not specify the evidence on which the witness should be examined. Such evidence is prohibited under Article 2722 of the Italian Civil Code and the specific contractual clause cited according to which any change made to the contract must be the subject of a written agreement.

D — *The existence of a new claim*

28. In the claims made by the applicant in the reply, he seeks a sum different from the one originally sought in the application. He states that in the application he omitted to make a specific assessment of the amount due for work supplied as part of the performance of other orders, by way of assistance in the installation of gutters, canopies and roofs and the demolition of roofs, the amounts due for those items having been left blank. He points out that it was only after he had received particulars from the Milan Chamber of Commerce that he was finally in a position, at the reply stage, to assess those items. He maintains that, for the rest, the sums still owed to his undertaking relate to work which has still never been paid for or to work which for which the amount paid was less than the amount actually due according to the outline agreement concluded between the parties. Consequently, he estimates the total amount owed to him by the Commission to be LIT 993 494 064.

29. In its rejoinder, the Commission contends that the applicant has, by his reply, changed his earlier claims. It considers that change to be a new plea in law prohibited by Article 42(2) of the Rules of Procedure.

30. With regard to the conclusions reached by the applicant, the Commission states that approximately 80% of the sum which he

seeks comes under the heading 'miscellaneous', which means in practice that it cannot be analysed in detail.

31. The Commission concludes that the application for an order requiring the payment of LIT 993 494 064 is out of time and therefore inadmissible and it requests the Court to reject all the other claims made in the original application.

C. N. Kakouris
Judge-Rapporteur