Neutral Citation Number: [2022] EWHC 68 (Comm)

Case No: CL-2019-000119

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Rolls Building, Fetter Lane, London EC4A 1NL

Date: 17/01/2022

Before :

MR JUSTICE ANDREW BAKER

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Between :

NOKSEL ÇELİK BORU SANAYI A.Ş.	**Claimant**
- and -	
(1) BEMACO STEEL LIMITED	**Defendants**
(2) PRIME STEEL S.A.	
(3) EUROTEX INTERNATIONAL LIMITED	
(4) BÜLENT ÜNAL	

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Siddharth Dhar and Mark Belshaw (instructed by **Cripps LLP**) for the **Claimant**
Simon Hattan (instructed by **Eversheds Sutherland (International) LLP**) for the **Defendants**

Hearing dates: 15, 16, 17, 18, 22, 23, 24, 29 November 2021

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Approved Judgment

This is a reserved judgment to which CPR PD 40E has applied.
Copies of this version as handed down may be treated as authentic.

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MR JUSTICE ANDREW BAKER

Mr Justice Andrew Baker :

Introduction

1. The claimant ('Noksel') is a Turkish steel manufacturer. The first and second defendants ('Bemaco', an English company, and 'Prime', a Spanish company) were customers of Noksel for electric resistance welded ('ERW') pipes and profiles. The fourth defendant, Mr Ünal, a director and shareholder of Bemaco and Prime, was and is their directing mind.

2. The company named as third defendant ('Eurotex'), a Samoan company, was another creature of Mr Ünal's. It has not existed since 15 February 2015, when it was removed from the Samoan company register as a result of Mr Ünal's decision not to renew its annual company registration. During its existence, Mr Ünal had done some business with Noksel through Eurotex such that in June 2015, when the parties met at Noksel's offices in Ankara with a view to reconciling account balances, Noksel in its accounting records had Eurotex as a debtor owing it c.US$420,000, unaware that Mr Ünal had caused it to cease to exist.

3. At that time, Noksel also had in its accounting records a long-standing, small balance of c.US$20,000 owed by Bemaco Ltd, another company of Mr Ünal's.

4. The principal contract governing trading relations between the parties was a written contract in Turkish, signed between Noksel, Bemaco and Prime, entitled "ERW SATIŞ PROTOKOLÜ", which translates as 'ERW Sales Protocol'. Clause 14 provided that it was signed and came into effect on 19 December 2005. The ERW Sales Protocol contained no express governing law provision, but it was common ground that it was governed by Turkish law. By Clause 11, it provided for 'London Courts' to have jurisdiction to resolve disputes between the parties.

5. Bemaco and Prime are referred to jointly as 'BEMACO' in the ERW Sales Protocol, and under Turkish law are jointly liable for financial obligations to Noksel arising under it. That is because (the expert witnesses on Turkish law were agreed) Article 7(1) of the Turkish Commercial Code, reversing the general rule of the Turkish law of obligations, provides for joint and several liability by co-contractors under commercial transactions unless some specific mandatory provision of the law or the contract in question provides otherwise, and neither qualification applies here. Where it is appropriate to refer to them jointly or not material to differentiate between them, I shall likewise refer to Bemaco and Prime together using the capitalised form, BEMACO.

6. Pursuant to the ERW Sales Protocol, BEMACO purchased substantial quantities of ERW products from Noksel for the UK and Spanish markets on an open account cash basis so they were not required to pay, shipment by shipment, by letter of credit. As I shall explain below, the ERW Sales Protocol referred to England, but I have no doubt that meant the whole of the UK.

7. The essence of the deal given effect by the ERW Sales Protocol was that:

(i) BEMACO benefitted from open account purchasing terms;

(ii) BEMACO promised to purchase 60,000-80,000 m.t. per annum pursuant to the Protocol;

(iii) there would be mutual exclusivity in relation to the UK and Spain:

(a) by Clause 3, BEMACO promised that any products purchased by them from Noksel would be sold "*only in the markets of England [i.e. the UK] and Spain. In the event that BEMACO wishes to sell the materials in markets other than of England and Spain, it should obtain NOKSEL's prior approval in this regard.*";

(b) by Clause 5:

"*For the ERW products manufactured by NOKSEL sold by BEMACO in the market of Spain and England [i.e. the UK],*

NOSKEL is the exclusive manufacturer for BEMACO. BEMACO is the exclusive seller for NOKSEL.

Therefore, BEMACO shall not purchase products that are within the manufacturing range of NOKSEL from another manufacturer or supplier for these markets without written authorization from NOKSEL.

In the same way, NOKSEL shall not sell these products without written authorization by BEMACO in the aforementioned markets."

8. Although substantial quantities of ERW products were sold pursuant to the ERW Sales Protocol, volumes did not come close to the annual commitment of 60,000-80,000 m.t. and Noksel claims that in those circumstances, and with a manufacturer, HDM Tubes, in which Mr Ünal had an interest having relocated to the UK, the parties agreed at a meeting at the Conrad Hotel, Istanbul, in April 2013, to drop the exclusivity term, so that Noksel became free to sell to other purchasers for the UK and Spanish markets and BEMACO became free to buy from other sellers (including HDM Tubes) for those markets. BEMACO deny that any such agreement was reached and say that under Turkish law any such agreement would have been ineffective to vary the contract. Additional points on Turkish law arise if there was no effective variation.

9. The counterclaim in the action is for damages for breach of Clause 5 of the ERW Sales Protocol from April 2013, to which Noksel's claim that Clause 5 was varied is the primary response. Under rulings I made at a pre-trial review, I refused BEMACO permission to amend to allege breach of Clause 5 prior to April 2013 and the trial upon which this is my judgment was a trial of liability only in respect of the counterclaim thus unamended, with all questions of the extent of breach (what volumes were sold from April 2013, when, in breach of Clause 5) and of what, if any, loss was suffered as a result by Bemaco and/or Prime to be dealt with at a second trial if there is a liability.

10. The parties were not *ad idem* as to the scope of Clause 5 on its terms set out in paragraph 7(iii)(b) above. However, it is plain on the evidence, and accepted by Noksel, that at least some sales were made by it after April 2013 that would have been outlawed by those terms, even on Noksel's case as to their meaning and effect. So if Noksel is wrong on its claim that the contract was varied so as to remove Clause 5, and on its alternative arguments under Turkish law that would have a similar effect, then Noksel will have acted in breach of Clause 5. If that be the position, then it will be appropriate to determine also now the scope of Clause 5, which was argued as part of this trial, so that any second trial as to the extent of breach could take that as a fixed starting point.

11. The claim for damages for breach of Clause 5 is a counterclaim because it was raised only in response to Noksel's pursuit by these proceedings of payment of what it says is the balance due to it under the parties' open account trading pursuant to the ERW Sales Protocol, claimed at US$5,852,178.89, and a balance of US$589,983.06 Noksel says is owed under an agreement reached in 2010 to cancel certain purchase orders that BEMACO could no longer afford to fulfil in return for lump sum compensation of US$1,800,000 payable to Noksel.

12. The principal basis for the main current account balance claim is Noksel's allegation that an overall figure was agreed between the parties either at the June 2015 meeting referred to in paragraph 2 above, in correspondence after that meeting, or in further correspondence in January and/or March 2016, by way effectively of compromise of the differences between their respective starting positions at that meeting under which Noksel was showing aggregate net receivables due to it of c.US$9.8 million whereas Mr Ünal acknowledged net receivables due to Noksel of only c.US$4.8 million. If Noksel is right about that, then it was entitled to the agreed compromise balance on a simple contractual analysis that it was not suggested would be unavailable under Turkish law, and the process of determining what net balance is now due between the parties is therefore one of updating the account from that starting point.

13. Finally, by way of introduction to the claims made in the action, Noksel joined Mr Ünal as fourth defendant to pursue claims against him personally in the alternative, if (contrary to Noksel's case) there was no resolution of the current account balance between the parties at the June 2015 meeting, or in the correspondence following it, upon which Noksel can rely as the starting point for assessing the net balance now due. The claims against Mr Ünal are:

    (i) a claim that by an email he sent on 16 March 2016, read with the documents it attached, Mr Ünal acknowledged that as at 31 December 2015 Eurotex owed US$2,242,224.90 to Noksel, thereby representing that Eurotex existed, and that Mr Ünal had authority to act for it, at that time, and asserting that liability of various kinds on various bases flows from that premise; and

    (ii) a claim that by that email and an email sent the following day, 17 March 2016, again read with the documents attached, Mr Ünal represented that the aggregate debt due to Noksel as at 31 December 2015 was US$7,534,100, and asserting that a liability for damages for

misrepresentation flows from that if (as BEMACO and Mr Ünal now say) the correct figure was only US$5,291.875.10 as at that date.

The ERW Sales Protocol

14. I have already given an overview of the contract. In slightly more detail:

15. Clause 1 stated that the contract set out "*the conditions of the purchase of ERW pipes and profiles produced by NOKSEL, from NOKSEL to BEMACO in order to sell them in the markets of England and Spain.*"

16. Clause 2 provided that "*Materials within the scope of the Agreement are any kind of pipe, square and rectangle profiles produced by NOKSEL by ERW technique*"; Clause 3, quoted in paragraph 7(iii)(a) above, then applied to all such products.

17. Clause 4 contained the purchase commitment by BEMACO, to buy 60,000-80,000 m.t. per annum. It was plainly an obligation and not just an aspiration as Mr Ünal sought to suggest at one point in his oral evidence. Clause 4 went on to make provision for quarterly declarations by BEMACO of its requirements and for the planning of a shipment programme in consequence. The detail does not matter, but it had the effect that BEMACO's order quantities for April-June were supposed to be fixed by the end of February, and so on.

18. Clause 5 provided for mutual exclusivity in the terms set out in paragraph 7(iii)(b) above. The frequent use in international business discourse of 'England' or 'English' when what is meant, strictly, is 'the UK' or 'British', inaccurate though it is (and irksome to many in Scotland, Wales and Northern Ireland), is familiar. Bemaco supplies to the UK, not just to England, and is headquartered in Wales. In the context of the ERW Sales Protocol, a long-term sales and exclusivity arrangement between Noksel and BEMACO relating to export sales by Noksel in Turkey, in my view references to 'England' in a phrase such as "*the markets of England and Spain*" to define the territory in respect of which there was to be mutual exclusivity, with Noksel to be the only manufacturer for goods supplied by BEMACO and BEMACO the only seller of goods manufactured by Noksel, would naturally be taken to refer to the whole of the UK, absent pointers in the contract, of which there are none, that the parties intended to draw a distinction between England and other parts of the UK.

19. The witness evidence in the case, from Mr Ünal as well as from Noksel, was to the effect that in their dealings with each other generally, these parties indeed used 'England' to refer to the UK as a whole, except when, under the pressure of cross-examination on one particular point, Mr Ünal unattractively chose to contradict himself and claim for the first time that England in Clause 5 meant only England and that he would not have regarded supplies to other parts of the UK as covered by the Clause. BEMACO's counterclaim for breach of Clause 5 was also pursued, under a statement of truth signed by Mr Ünal, on the basis that the exclusivity regime extended to the whole of the UK.

20. I have no doubt, and conclude, that 'England' in Clause 5 of the ERW Sales Protocol, properly construed, indeed referred to the whole of the UK.

21. As regards the nature of the exclusivity granted to BEMACO, I regard the contractual language as clear, and it was not contentious between the Turkish law experts that clear contractual language falls to be given effect in this context. The case does not turn on the refined debate in which the experts engaged over whether a clause such as Clause 5 is, other things being equal, to be given a broader or a narrower construction, or as to whether there is an interpretative presumption that indirect sales would not be intended to be prohibited (that is where a manufacturer sells to X (not the distributor with exclusivity) who sells to Y (also not that distributor), X delivering to Y in the territory of exclusivity).

22. On the particular language used by these parties in the ERW Sales Protocol, the focus of the Clause 5 exclusivity regime was ERW products of types manufactured by Noksel coming into the territory (so as to be available to be put to use there) in which BEMACO was to have exclusivity rights (to be "*the exclusive seller for NOKSEL*") and was to owe an exclusivity obligation (that Noksel be "*the exclusive manufacturer for BEMACO*"), i.e. the UK and Spain. The sense of the former, if I express it as a promise by Noksel to mirror the entitlement in BEMACO that was articulated in the contract, is that Noksel promised that when ERW products manufactured by it were delivered in the UK or Spain under a sale contract, BEMACO would be the seller.

23. A certain amount of time and intellectual energy was devoted to whether, or the extent to which, Noksel was in practice aware, or might generally be expected to be aware, of the (intended or actual) final destination of its ERW products it sold. That seemed to me rather to miss the point. On the clear language used, the exclusivity granted was neither more nor less than this, namely a promise by Noksel to bring it about that anyone (apart than BEMACO, obviously) buying Noksel ERW products delivered in the UK or Spain would be buying from BEMACO. How exactly Noksel was to deliver on that promise was its concern and does not define or confine the promise.

24. Noksel having promised in simple terms that BEMACO would be the only seller of Noksel ERW products delivered in the UK and Spain, and having extracted a paired commitment from BEMACO only to buy from Noksel if buying for those markets ERW products of types manufactured by Noksel, BEMACO was surely entitled to expect that Noksel would sell to others only on terms prohibiting the product sold coming to the UK or Spain. Assessing whether a possible buyer other than BEMACO could be trusted to honour such terms, and/or would have the means to answer to Noksel for failing to do so (including as to any liability to BEMACO that Noksel might therefore incur), seems to me an ordinary aspect of counterparty risk assessment for an exporter in Noksel's position in deciding to whom and on what terms it is willing to sell. I add for completeness that neither side suggested that unlawfulness under any applicable competition law might attend any putative construction of Clause 5 such that a presumption towards lawfulness ought to steer the court away from it.

25. Before moving on, I shall confirm how therefore certain sub-categories of case posited by BEMACO's pleading would fall to be treated. For this purpose, the

category is sales by Noksel otherwise than to BEMACO of ERW products manufactured by it, and I take Mr Hattan's formulation of the sub-categories for trial:

(i) "*First, sales by Noksel to companies based in England or Spain and destined for end-users in England or Spain.*"

Assuming this means sales pursuant to which the Noksel ERW products sold will be imported into England (i.e. the UK) or Spain, which I think must be intended by the reference to 'end-users', such sales would be or would result in a breach of Clause 5.

(ii) "*Secondly, sales by Noksel to companies based outside England or Spain in circumstances where Noksel knew at the time it made the sales that the products were destined for end-user customers in England or Spain.*"

This sub-category is not so easy to deal with (see paragraph 23 above). What would matter, for the purpose of Clause 5, would be whether Noksel ERW products were in fact delivered in the UK or Spain under a sale contract where BEMACO was not the seller, rather than where they had been 'destined for' at any prior stage or what knowledge as to that Noksel might have had when selling. I am also not as clear as Mr Hattan might have wished me to be whether he meant by "*sales by Noksel*" and "*the time it made the sales*" the conclusion of contracts to sell or sales effected pursuant thereto.

(iii) "*Thirdly, sales by Noksel to companies based in England or Spain and destined for end users outside England or Spain.*"

A converse observation arises. To the extent that by this Mr Hattan was seeking to test whether Noksel ERW products delivered in (say) Italy pursuant to a sale contract by Noksel to a company based in the UK or Spain, or pursuant to a chain of sale contracts with such a contract at its head, my answer is straightforwardly that such deliveries would *not* be or involve any breach of Clause 5. If, however, though the products to be sold were when Noksel concluded a contract with (say) an English buyer 'destined for' an 'end user outside the UK or Spain', whatever precisely Mr Hattan meant by that, yet they came to be delivered in the UK or Spain under that or some other contract where BEMACO was not the seller, that *would* be or involve a breach of Clause 5 by Noksel.

26. Clause 6 provided that sales would be FOB Izmit, Turkey, at market prices fixed quarterly on 15 February, May, August and November, for the volumes then being declared under Clause 4. Thus, a mid-February market price would apply to order quantities for April-June, a mid-May price would apply to order quantities for July-September, a mid-August price to order quantities for October-December, and a mid-November price to January-March quantities. As I mention below, during the life of the ERW Sales Protocol the parties at times applied uplifts to contract prices so that BEMACO would overpay Noksel, the overpayments serving particular, agreed purposes. To the extent that BEMACO claimed that there was some other, more general arrangement, for contract

prices set under the Protocol to be revised by reference to market price movements between when orders were placed and when the products were shipped, I reject that claim. I was shown no documentary evidence that supported it, and I prefer the evidence of Noksel's witnesses denying its existence to that of Mr Ünal asserting it, to some extent supported by evidence from Mr Eroğlu.

27. Clause 7.2 provided that for sales made for Spain, documents were to be transferred directly and payment would be on an open account basis. Clause 7.1 provided that "*Sales made for England shall be made with sight letter of credit, however if agreed by mutual negotiations certain sales shall be made on the basis of a 120-day term open account, as for the Spain market.*" In the event, the norm became for deliveries under the ERW Sales Protocol to be on the open account basis whether they were for the UK or for Spain. That open account basis, provided for by the remainder of Clause 7, was for interest to be payable at Libor + 2% from the bill of lading date until payment 120 days after the B/L date (or earlier at BEMACO's option), but organised in this way:

    (i) the interest charge for the full 120-day credit period allowed would be calculated, by reference to Libor on the bill of lading date, and added to the base price applicable under Clause 6;

    (ii) the shipment in question would then be invoiced at that uplifted price, inclusive of the financing charge for 120 days;

    (iii) if BEMACO chose to pay before the invoice due date (B/L + 120 days), it would be entitled to a pro rata rebate on the financing charge element built into the invoice price.

28. The ERW Sales Protocol did not make express provision for interest (or for any particular rate of interest) to accrue after B/L + 120 days if BEMACO paid late, or did not pay at all. In my judgment, however, a fair reading of Clause 7 is that Noksel was to be entitled to interest at Libor + 2% from the B/L date until payment and absent agreement for a different rate of 'default' interest, that rate would apply by contract between the parties, the 'default default rate' as it were. I note, which would be sufficient for that conclusion as to the default default rate in any event, that Mr Hattan's skeleton argument for BEMACO accepted an entitlement in Noksel to default interest at Libor + 2%, so the only issue between the parties was whether, either generally or for any particular default interest accrual period(s), a higher rate was agreed instead.

29. Clause 9 recorded the parties' purpose to develop the market for Noksel's products in a mutually beneficial fashion. Noksel promised to make "*the utmost effort to develop its product range with similar products which are needed in the market*"; BEMACO promised to report quarterly to Noksel on developments in the market, the status of competitors and market expectations. The parties agreed to convene at least once a year to evaluate developments.

Witness Evidence

Factual Witnesses

30. Six witnesses of fact gave oral evidence at trial. Mr Hattan also put in a short witness statement from Luis Arias, a Swiss lawyer practising in Geneva as a partner in Arias Avocats Genève. Mr Arias gave limited and uncontroversial evidence about the corporate registration history of Eurotex.

31. The live witnesses at trial called by Noksel were:

    (i) Salim Akkoyunlu, one of the founding shareholders of Noksel and an executive board member until 2016, when he retired, after which he continued to work for Noksel as an 'observer' (which I took to indicate a consultancy) until the end of 2017.

    (ii) Vedat Yalçin, CEO of Noksel since 2009 and an executive board member in 2016-2017, taking Mr Akkoyunlu's place on the board upon his retirement.

    (iii) Onur Canatalay, who has worked for Noksel since April 2011 and is the deputy export manager for Noksel's ERW products. He reported to Mr Eroğlu, introduced below, until the latter left Noksel in February 2016, and took over Mr Eroğlu's responsibility for certain relevant matters from July 2013.

    (iv) Cenk Atik, who has worked for Noksel since May 2009 and is deputy general manager of financial and administrative affairs, with responsibility for accounting, finance, legal, IT and administration.

32. The two live witnesses called by BEMACO were:

    (i) Burak Eroğlu, now employed by Bemaco as a consultant, but mostly, so far as material, employed by Noksel. He was a sales engineer for Noksel from 2002 to 2010 and then export manager from 2010 until his departure in February 2016.

    (ii) Mr Ünal.

33. Messrs Akkoyunlu and Eroğlu gave evidence remotely, from Turkey, in both cases for reasons connected with the Covid-19 pandemic. The other live witnesses gave evidence in person.

34. I found Noksel's witnesses and Mr Eroğlu straightforward, open and so far as I could see honest in their testimony. They had all prepared witness statements that stood as their evidence in chief that, having heard from them, I felt content were records, in language they would use, of their best recollections of the events in question, none of which is recent and some of which date back 15 years or more. The statements appeared to have been prepared properly in accordance with PD57AC. Mr Yalçin was a little discursive in some of his answers, but not so as to become argumentative or unresponsive, and not so as to cause me to have concern that he was doing anything other than trying to

answer questions as best he could and to the best of his honest recollection. In my judgment, that was also the nature of the evidence of the other Noksel witnesses and Mr Eroğlu.

35. By contrast, Mr Ünal's witness statements were poor examples. They were full of unwelcome and inappropriate documentary commentary. On matters that purported to be factual testimony, my judgment, having seen and heard Mr Ünal give evidence and seen the documents in the case, is that his witness statements do not speak with his voice. I do not accept that his witness statements fairly resemble the evidence he was in a position to give and would have given if examined in chief. I do not accept as true the declarations within his statements of truth under PD57AC that he understood his function as a witness of fact and that his statements set out only his personal knowledge and recollection, in his own words.

36. Under cross-examination, Mr Ünal's evidence was shown to be unreliable on a number of significant matters. As regards the most significant single item in dispute on the current account between the parties, BEMACO's claim to have c.US$2.75 million brought into account in their favour arising out of over-invoicing by Noksel in 2006-2007, I concluded that Mr Ünal was giving the court evidence he knew to be untrue; and in relation to some important evidence relied on by Noksel in support of its case that the exclusivity term was varied by agreement in April 2013 (or that it is an abuse of right contrary to Turkish law for BEMACO now to seek to enforce it) I concluded that Mr Ünal was making up what he said as cross-examination went along.

37. I maintain throughout a healthy level of scepticism as to the likely reliability of what even an entirely honest witness may perceive to be recollection of the events of between 6 and 16 years ago. In Mr Ünal's case, with regret, matters go further and I am unable to conclude that he approached the giving of his evidence to the court, whether in writing or under cross-examination, as an exercise in doing his honest best to say what he believed he could recall. I would not be prepared to accept his word on disputed matters where it is not supported by the documentary evidence, the testimony of one or more of the other witnesses, or both.

Experts – Turkish Law

38. I had the great pleasure of receiving evidence on Turkish law from Professor Dr Sitki Anlam Altay, Professor of Law and Chair of the Department of Commercial Law at Galatasaray University, and Professor Dr H Ercüment Erdem, founder and senior partner of Erdem & Erdem Law Office. Professor Altay was called by Noksel, Professor Erdem by BEMACO and Mr Ünal. The Professors have known each other professionally for 30 years or so. Professor Erdem was for many years Professor Altay's immediate senior in the Faculty at Galatasaray. It was evident that they hold each other in high regard and are well qualified to give expert evidence on pertinent Turkish law principles. They readily agreed with each other where conscientiously they felt they could, and respectfully agreed to disagree with each other on the relatively few points, albeit some potentially important to the case, where conscientiously they felt they could not.

Experts – Accounting

39. There was also expert evidence from forensic accountants, Ian Clemmence, a partner in the Forensic Services practice of PricewaterhouseCoopers LLP, instructed by Noksel, and Luke Steadman, a partner in the disputes and investigations practice of Alvarez & Marshall Disputes and Investigations LLP, instructed by BEMACO and Mr Ünal. There was no contentious issue of accountancy relevant to the points that fall to be decided at this stage, given the scope of this trial (see paragraph 9 above). It was therefore agreed that the accountants' expert reports could be referred to and relied on without the need for either of them to be called to give oral evidence.

The Main Chapters

40. I now turn to consider and make findings as to the main chapters in the story of the trading and accounting position between the parties. I do so in a broad chronological order of origin, that is to say I consider in turn:

    (i) the 2006-2007 overpayment scheme agreed between the parties;

    (ii) the debt of US$1,800,000 agreed in July 2010;

    (iii) the alleged variation of the exclusivity term in April 2013;

    (iv) the account reconciliation exercise at the meeting in Ankara in June 2015 and/or through the correspondence that followed it.

41. That does not mean, however, that the events referred to in each chapter can be confined to those dates or date ranges. Thus, for example, most of the evidence casting a light on how the 2006-2007 overpayment scheme worked, and by inference what it must therefore have been as an agreed scheme, comes from the documented later efforts towards reconciling accounts. Or again, it is common ground that a debt of US$1,800,000 was agreed in July 2010, the issue that arises being how much of it, if any, is still due and owing, and the evidence on that comes largely from 2013. Nonetheless, I find it possible and convenient to deal with each topic fully within its own chapter, rather than setting out a single, chronological narrative in which the separate threads of the different topics might well become lost along the way.

2006-2007 Overpayment Scheme

42. It follows from the pricing term of the ERW Sales Protocol (see paragraph 26 above) that shipments under it would not be sold at the prevailing spot market price at the date of shipment, but at a price set by reference to the market as it stood up to several months earlier. On a falling market, deliveries under the Protocol would tend to be at prices above the spot market at the time of shipment; on a rising market, they would tend to be under that spot market.

43. It was common ground that during 2006-2007, a time of rapidly rising market prices, the parties agreed and implemented a scheme whereby Noksel would invoice and be paid by reference to spot market prices at the time of shipment,

even though the contract price was not varied, and Noksel would thus have an overpayment refund obligation.

44. It was also common ground that this scheme was devised by Noksel because it perceived that if it documented its sales under the ERW Sales Protocol correctly, invoicing at the contract price, it might attract the attention of the EU Commission on a suspicion of anti-competitive 'dumping'. Thus, the 2006-2007 overpayment scheme was for Noksel to pretend to sell at prices higher than the contract prices in fact fixed with BEMACO in order to avoid the possibility of an anti-dumping investigation.

45. No attempt was made before me to justify this dishonest practice, or to claim that it could somehow have avoided liabilities for anti-dumping duties or penalties if the ERW Sales Protocol pricing did expose any of the parties to such liabilities. It is relevant to the current account balance claim because:

    (i) Noksel received overpayments under the 2006-2007 overpayment scheme totalling US$2,747,310.02;

    (ii) BEMACO say that Noksel never reimbursed them and that this US$2.75m odd therefore should be included as a credit in their favour in any calculation of the current account balance between the parties;

    (iii) Noksel says that by agreement the bulk of the aggregate overpayment was reimbursed in two ways:

        (a) by payments by Noksel against invoices issued by Eurotex for 'Algeria Commissions', as a means of pretending to the outside world that this was not a price refund, i.e. as a means of concealing the 2006-2007 overpayment scheme,

        (b) by overpayments by Noksel on sheet metal orders placed by it with Eurotex;

    (iv) Noksel then says that the remaining balance, some US$723,000, cannot now be claimed in view of the agreement it says was reached as to the current account balance at the June 2015 meeting, or through the subsequent correspondence, and that any claim for it now would be time barred anyway.

46. In his written evidence, Mr Ünal claimed ignorance until 2016 of the reason for the 2006-2007 overpayment scheme (paragraph 44 above). He claimed that at the time he understood only that "*Noksel always wanted to record high sale prices*" and said that Mr Yalçin and Mr Akkoyunlu had told him that Noksel wanted to overcharge BEMACO, and as a result to owe them refunds in the amounts overpaid, "*because they needed to balance or shift the profits made between the Noksel plant that manufactured the hollow sections that Bemaco and Prime were buying and the Noksel plant that made spirally welded tubes.*"

47. I do not believe that would have made any sense to, or been accepted by, Mr Ünal as any kind of explanation for being overcharged, as in the event he was,

c.US$2.75 million in aggregate; and I am sure that neither Mr Yalçin nor Mr Akkoyunlu would have given any such explanation. I do not accept the claim that Mr Ünal was ignorant of Noksel's true motivations until 2016.

48. I also do not accept his evidence that his companies did not invoice for the overpayment reimbursements because he was told by Noksel they were being offset against those companies' general indebtedness to Noksel. He was sent after every shipment a spreadsheet originated by Mr Eroğlu and from July 2013 continued by Mr Canatalay ('the Burak Shipment Summary'). The Burak Shipment Summary recorded the overpayments, noting them as 'dummy' receivables by Noksel offset against 'dummy' payables by Noksel for 'Algeria Commission' and sheet metal overpayments invoiced by Eurotex.

49. The Burak Shipment Summary and Mr Ünal's contentment with it at the time these transactions were undertaken is sensibly explicable only on the basis put forward by Noksel. It was drawn up by Noksel, sent to Mr Ünal and never objected to by him, to record the implementation of the 2006-2007 scheme whereby Noksel inflated sales invoices, BEMACO paid the invoiced amount, and the overpayments were recouped through Eurotex, principally by issuing invoices for Algerian commission never earned but also through agreed overcharging (as against contract prices) for sheet metal supplied to Noksel by Eurotex.

50. Mr Ünal was driven to claim, contrary to that documentary record and to the other documentary evidence to which I refer below, that Eurotex was entitled to charge Noksel commission for consultancy services in relation to Algerian government projects in which Noksel was involved. There is not a shred of support for that in the documentary record. It is not credible that Eurotex should have provided consultancy services under contract to Noksel, which was Mr Ünal's claim, yet there be no evidence of any contract, no correspondence evidencing or hinting at the provision of any such services, and no evidence of either a need in Noksel for Eurotex's services in respect of its Algerian business or an ability in Eurotex to provide services to Noksel of any value. My assessment, with regret, was that when giving this evidence Mr Ünal cannot have believed what he was telling the court.

51. Mr Ünal accepted, indeed asserted, that Noksel had variously proposed to treat its 'commission' payments to Eurotex and the uplifted elements of sheet metal purchase invoices from Eurotex as reducing the 2006-2007 overpayment scheme dues, *and* that on his version of events this was a ludicrous proposal because those payments by Noksel were properly due to Eurotex entirely independently of the 2006-2007 scheme and had nothing to do with it. I agree it would have been a ludicrous proposal if Mr Ünal's account of events were true. On that premise, no such proposal could sensibly have been put forward, and I am confident no such proposal would in fact have been put forward by Noksel.

52. That would be reason enough to reject Mr Ünal's evidence on this aspect of the case. As it is, however, and added to the Burak Shipment Schedule, the documentary evidence provides compelling confirmation of the fact that

'Algeria Commission' invoices and Eurotex over-pricing were agreed means of reimbursing the 2006-2007 scheme overpayments.

53. Firstly, on 30 January 2009, in the context of a meeting or proposed meeting between the parties in Barcelona, Mr Eroğlu sent to Anita Lee, cc.Mr Ünal, at Bemaco, an email attaching a spreadsheet setting out the accounting situation between the parties, according to Noksel. It appears to have included a net balance of US$881,645.86 payable by Noksel in respect of over-invoicing. In reply, Ms Lee asked Mr Eroğlu how he got to that figure. On 6 February 2009, Mr Eroğlu provided the following explanation to Ms Lee, cc.Mr Ünal:

> "*We have over invoiced you 2.747.309,65 USD … between 23.03.2006 and 30.06.2007. Additionally there were some demmurage [sic] or other things you claimed on us as a total of 88.479,24 USD between the same dates. …*
>
> *In order to compensate this increase on invoices you have invoiced us for commissions and we have paid 1.175.647,85 USD till 30.06.2007. Moreover some of the coils we have purchased from you was overinvoiced as 538.307,77 USD till the same date. Interests accumulated till 31.03.2007 was 240.187.31 USD.*
>
> *The net of above*
>
> *2.747.309,65 USD + 88.479,24 USD – 1.175.647,85 USD – 538.307,77 USD – 240.187.31 USD = 881.645,96 USD*"

54. There is no evidence that Mr Eroğlu's explanation was challenged in any way, by Ms Lee or Mr Ünal or at all.

55. It will be convenient for what follows to label the elements of this offsetting explanation provided by Mr Eroğlu as follows: A = 2006-2007 overpayments to Noksel; B = other BEMACO claims (e.g. demurrage); C = 'Algeria Commission' amounts; D = sheet metal overpayments by Noksel; E = interest claimed by Noksel. Thus, a net balance was being calculated by Mr Eroğlu as A + B – C – D – E. That means elements C and D, that is sums invoiced by Eurotex as 'Algeria Commission' and sums over-invoiced by Eurotex for sheet metal supplies were being treated as discharging the 2006-2007 scheme overpayments to Noksel. That in turn is explicable only on the basis that those elements, C and D, were unreal on their own terms, i.e. Noksel indeed did *not* owe commission to Eurotex in relation to Algerian business and did *not* owe the uplift element of the sheet metal invoices as part of the agreed price for those supplies.

56. Secondly, Mr Eroğlu sent Mr Ünal by email on 29 April 2010, in preparation for a meeting between them, a spreadsheet he called a *mutabakat tablosunu* (which translates as 'reconciliation table'), prior to which, on 30 March 2010, Mr Eroğlu had first emailed to himself the early 2009 exchange with Ms Lee referred to in the previous paragraph. The spreadsheet showed *inter alia*:

    (i) that the parties' 'Algeria Commission' account was "**CLOSED**", with US$1,479,731.80 having been invoiced and paid, US$249,080.45

having been invoiced but unpaid. The latter (amounts invoiced but unpaid, the account nonetheless being closed) comprised an invoice dated 28 September 2007 for US$137,601.52 and an invoice dated 7 November 2007 for US$111,478.93;

(ii) an interest balance claimed by Noksel but acknowledged to be "*Not approved*" by Mr Ünal of US$721,342.49;

(iii) the same offsetting exercise as Mr Eroğlu had performed in his email to Ms Lee of 6 February 2009, A + B – C – D – E, albeit the figures were different and now gave a net balance of US$631,599.63 in favour of Noksel rather than a balance payable by Noksel;

(iv) in that offsetting sheet, elements A to D inclusive were labelled as "*approved*", only element E, the interest balance of US$721,321.49, was shown as "*not approved*".

57. I note that element C, the 'Algeria Commission' amount, was given as the total amount invoiced, US$1,728,812.25, thus it included the unpaid amount of US$249,080.45.

58. The important point for my present purpose is that there is no evidence of dissent by Mr Ünal or anyone else on behalf of his companies to the treatment in principle of elements C and D, i.e. that they were not, as invoiced, commission fees earned by Eurotex on Noksel's Algerian business or sums due to Eurotex for sheet metal supplied to Noksel, but rather were payables by Noksel agreed and intended as means for discharging their obligation to reimburse the 2006-2007 overpayment scheme uplifts.

59. Thirdly, there is an eight-page note prepared for the meeting between the parties at the Conrad Hotel in Istanbul in April 2013, the first four pages of which were provided to Mr Ünal. This is the meeting at which, Noksel says, the parties agreed to remove the exclusivity terms of the ERW Sales Protocol. At this stage, my focus is on what was said about the accounting position between the parties. The first page of the note opened with an overview of the position, including a table summarising "**Additions to invoices and their provisions**", as follows:

	USD
Values added to invoices (22.03.2006-13.06.2007)	2.747.310,02
Claims & Demurrage	96,086.16
TOTAL	**2.843.396,20**
Algerian commissions invoiced and paid by NOKSEL	1.479.731,80
Additions to Prices in Sheet Metal Contracts (1)	573.348,39
Unissued interest invoices	790.317,01
TOTAL	**2.843.396,20**

(1) [*An explanatory note was given, the detail of which does not matter*]

60. The second page listed the 2006-2007 overpayment scheme uplift amounts totalling US$2,747,310.02. It is precisely those amounts, as thus detailed, that BEMACO now claim were never reimbursed and should be brought into account. The third page gave a breakdown of the claims and demurrage item, which was in every respect the same as that item in the 2010 reconciliation table referred to in paragraph 56 above.

61. The fourth page detailed the 'Algeria Commission' and sheet metal price uplift elements, in the case of the former differentiating between the US$1,479,731.80 invoiced and paid and the US$249,080.45 invoiced but unpaid. It will be noted that in the table replicated above, only the paid element was included. In an overview at the head of the first page, the invoiced but unpaid amount of 'Algeria Commission' was included *as an item in Noksel's favour* within the overall current account balance in its favour as of April 2013 (which was shown as US$7,898,382.15, plus €50,499.53). That is explicable only on the basis that Noksel was treating payment of the unpaid invoices, if made, as not operating to discharge any genuine liability to Eurotex for commission. In fact, taking that to its logical conclusion, it amounts effectively to treating the US$249,080.45 as not really payable by Noksel, consistent with the 2010 spreadsheet treatment of the accounting for 'Algeria Commission' as closed.

62. Mr Ünal did not challenge or express unfamiliarity with this treatment, once again, of elements C and D as going to discharge element A, Noksel's liability to reimburse the 2006-2007 overpayment scheme uplifts. Nor did he dissent from any of the figures given relating to elements A, B, C and D; and nor did he challenge the principle that if Noksel was owed un-invoiced interest, that could further offset element A. There may be a question whether he accepted that there *was* any such interest liability, or if so whether Noksel's calculation of it was correct, but that is a separate point.

63. Fourthly, there are documents generated after a meeting between the parties in Cardiff in December 2013. This meeting also features in the case for other reasons. At this stage, what matters is that in the meeting minutes prepared by Noksel and submitted to Mr Ünal for agreement or comment, on the 2006-2007 overpayment scheme uplifts, *Mr Ünal's position* at the meeting is noted in these terms:

> ***B11.*** *The amount of total receivable of Bemaco from Noksel for the years of 2006-2007 as a result of the operations stated below is USD 723.000;*
>
> | | | |
> |---|---|---|
> | ***a)*** | *Additions to Noksel's sales invoices* | *USD2,747,000* |
> | ***b)*** | *Payments as Algeria Commission* | *USD-1,479,000* |
> | ***c)*** | *Payments made with Sheet Metal Contracts* | *USD-545,000* |
> | | ***Total*** | ***USD 723,000*** |

64. In his responsive comments, Mr Ünal simply agreed: "*Note B11 OK*". I shall return to Noksel's meeting minutes for the December 2013 meeting, and Mr Ünal's response, to consider what, if anything, was agreed thereby as to how

that balance was to be dealt with. What matters for now is that Note B11 in the meeting minutes, and Mr Ünal's response, evidence as plainly as one might want the fact that indeed Noksel's payments as 'Algeria Commission' and as price uplifts on sheet metal supplies by Eurotex had been payments under the 2006-2007 overpayment scheme.

65. Fifthly, on 18 August 2016, Cintia Tomaszek at Bemaco sent an email to Mr Ünal querying how he wished certain invoices to be dealt with in the Bemaco group's accounting records. Ms Tomaszek raised her query by reference to a spreadsheet Mr Ünal had created and sent to her. It plainly shows the offsetting referred to above, except only that it omits element E. So it effects a 2006-2007 overpayment scheme balance calculation as A + B – C – D, showing a balance in favour of BEMACO of US$790,315.98.

66. Thus, the fact that so-called 'Algeria Commission' payments and sheet metal price increases were nothing of the kind, but rather were payments discharging the 2006-2007 overpayment scheme reimbursement obligation owed by Noksel, was Mr Ünal's own record of matters internally. Mr Ünal was evidently discomfited by this document in cross-examination. My assessment was that he knew full well that it gave the game away, he was embarrassed it had been found, and he had no answer to it as proof of Noksel's case on the true nature of elements C and D.

67. Sixthly, by email dated 14 June 2018, in the context of what was by then the dispute between the parties leading ultimately to this Claim, Mr Ünal sent Mr Yalçin a spreadsheet showing price differences on shipments during 2010-2018. That spreadsheet is important for its separate listing of those differences on shipments up to March 2013, totalling US$1,210,016.94, which is part of the story concerning the US$1,800,000 contract cancellation debt referred to in paragraph 11 above. In Mr Ünal's covering email, though, as to the present point, he said that he would "*send the differences made between 2005-2010 subsequently. There is some portion deducted against the paid Algeria commissions, and its balance is also available. Some portion thereof has been apparently deducted from the calculations as interest amount.*" Thus, again, at least as regards element C ('Algeria Commission' amounts), this is Mr Ünal himself squarely recording the nature of the historic arrangement as now contended for by Noksel.

68. A week later, on 12 June 2018, Mr Ünal sent Mr Yalçin, after it would seem from the email there had been a telephone call chasing for the earlier data he had in mind, what Mr Ünal described as "*the accounts between 2005-2013 you asked [for] on the phone. When you examine these, our accounts should be exactly the same, except for the interest invoices you have issued.*" What Mr Ünal in fact attached was his copy of the four-page note (as he had received it) for the April 2013 meeting on which he had ticked against elements A, B, C and D as shown in the table reproduced in paragraph 59 above and put a question mark against element E (the un-invoiced interest of c.US$790,000).

69. Before being able to draw certain threads together, I need to go back to the December 2013 meeting, the US$723,000 balance on the 2006-2007

overpayment scheme, and the unpaid 'Algeria Commission' invoices totalling US$249,080.45.

70. The main part of the meeting minutes drawn up by Noksel following the December 2013 meeting, paragraph 1) running to over 2½ pages, concerned the state of the general account between Noksel and BEMACO. Paragraph 2) made explicit that the balances Noksel was showing for Bemaco Ltd and Eurotex (see paragraphs 2-3 above) would be looked at separately. Paragraph 3) concerned the US$1,800,000 contract cancellation debt referred to in paragraph 11 above, to which I shall turn as the next main topic to address. Paragraphs 4) through 10) dealt with a range of other matters.

71. Paragraph 1) was then structured as a series of explanatory notes, "**B**" notes recording BEMACO's position at the meeting and "**N**" notes recording Noksel's position at the meeting, in respect of what was said to have been an agreement at the meeting "*that the total debit balance (excluding Eurotex and Bemaco Ltd. ...) is USD 6,344,429.49 as of 31.12.2013 ...*", leaving aside one particular invoice issued to Bemaco in June 2013 on which it is unnecessary to dwell. As Noksel's witnesses acknowledged, indeed as Noksel's pleaded case accepts (else there would be at least an alternative case asserting agreement as of 31 December 2013 as a fixed starting point for the current account balance claim), agreement had not in fact been reached at the meeting. In that respect, the meeting minutes were aspirational or, to be less coy, inaccurate. Mr Ünal commented when responding to them by email on 26 December 2013 that "*I read the minutes of meeting that you have sent me, some notes must have been included for them to be an "agreement text" because as you know we couldn't make a full account reconciliation*". I agree with that assessment.

72. I have already quoted Note B11 in full (paragraph 63 above). It was preceded and followed by these Notes:

> ***B10.*** *... The amount of interest as of 31.12.2013 is accepted as USD 1,687,170.75 in the attached calculation table. Bemaco will finalize this interest by taking into account articles B11, B12 and B13 that will be explained below and will record the total of USD 714,170.75 to its accounts as debt.*
>
> *...*
>
> ***B12.*** *The receivable of Bemaco from Noksel due to [a quality claim on cargo ex m.v. 'Westvoorne'] is ... USD 50,000.*
>
> ***B13.*** *The amount of receivable of Bemaco from Noksel due to theoretical/actual weight difference and non-standard wall thickness of materials shipped in the years of 2012 and 2013 by Noksel is USD 200,000.*
>
> *The total of the paragraphs* ***B10-B13;***
>
> | | |
> |---|---|
> | ***B10*** | *USD 1,687,170.75* |
> | ***B11*** | *USD -723,000.00* |
> | ***B12*** | *USD -50,000.00* |

> ***B13*** *USD -200,000.00*
> ***Total*** ***USD 714,170.75*** *will be recorded by Bemaco as interest price.*

73. I should say at this stage, to explain Note B13, that it was common ground that the parties at some stage agreed to make post-delivery price adjustments, not affecting the initial invoicing and payment at contract prices, where the actual weight of steel delivered was outside a 6% tolerance provided by the EN10219 quality standard, which the parties applied to shipments by Noksel as from 2012 (although the standard itself had been issued some years before that). It was also common ground, I think, but in any event I find on the evidence, particularly that of Mr Canatalay who had responsibility for the calculations, that the adjustments to be made only came to be calculated when he took over from Mr Eroğlu the task of tracking all these matters in July 2013. I find that the agreement in principle was for that to be applicable as from 2012, not only as from July 2013. That is why, whether or not agreement was reached on amounts at the December 2013 meeting (as it was not – see below), the subject for discussion was the *quantum* of weight adjustments that were to be applied for 2012-2013 shipments.

74. In his responsive comments, as noted above, Mr Ünal endorsed Note B11 without more ado. In relation to Note B10, however, he stated that agreement was not reached at the meeting, there were problems with the interest calculation, and he intended to redo it. I note that this was *not* a challenge to the idea that there was an interest charge due, only a complaint that Noksel had not calculated it correctly. The tenor of Mr Ünal's comment was to accept that there was interest due but to maintain that the correct amount still needed to be identified.

75. As regards Note B12, he asserted that BEMACO's loss in relation to the m.v. *Westvoorne* cargo quality issue was at least US$169,000 and said that a compensation figure of US$50,000 had not been discussed. Finally, as regards Note B13, Mr Ünal said that it "*contradicts our prior conversations and the facts. An amount of USD 200,000 was not considered during the meeting. The non-standard and out of norm amounts that have been issued to us are much higher than this number. We will have to discuss this separately.*"

76. In line with those responses, and whatever the underlying rights or wrongs of the parties' different positions as regards interest, the m.v. *Westvoorne* quality issue and the 2012/2013 weight adjustments, I find that no agreement was reached at the December 2013 meeting or in the correspondence following it on how and when the outstanding balance on the 2006-2007 overpayment scheme (US$723,000 payable to BEMACO) was to be discharged. It was however agreed in itself, i.e. it was agreed that BEMACO's 2006-2007 scheme overpayments had otherwise been recouped already, and it was being treated by both sides as one element of the general current account balance in respect of which they were trying to get to an agreed reconciliation, unlike (as I come to below) the US$1,800,000 debt.

77. The invoiced but unpaid 'Algeria Commission' amount, US$249,080.45, is not referred to in the meeting minutes or in Mr Ünal's response. However, as I noted in paragraph 70 above, the meeting minutes recorded (and Mr Ünal's response

on this aspect effectively acknowledged) that a balance Noksel was showing as due from Eurotex needed to be examined further. That balance was in fact US$419,894.20, and the meeting minutes gave the figure. There is no evidence that this would have been apparent to Mr Ünal at the December 2013 meeting, but in fact Noksel's disclosure shows that the final accounting step it took to generate that net Eurotex balance was to credit Eurotex with the invoiced but unpaid 'Algeria Commission' amount, US$249,080.45, as of 1 December 2009.

78. It was thus right, at all events if Noksel's record of what it was owed by Eurotex was otherwise correct, that the note for the April 2013 meeting identified that amount as a credit in Noksel's favour on the current account balance with BEMACO even though it had not paid those last two Eurotex invoices, i.e. had not paid cash against them. Starting as far back as the early 2009 email exchange, but particularly with and after the paper for the April 2013 meeting, Noksel had complicated the treatment of the 2006-2007 overpayment scheme balance by seeking to offset un-invoiced interest it said was due to it. But for that complication, the natural, correct treatment of those Eurotex invoices by Noksel, since it regarded them as having been discharged as of 1 December 2009 by offset against the balance then payable by Eurotex, would have been to show the 2006-2007 overpayment scheme balance further reduced to US$474,000 (US$723,000 LESS US$249,000).

79. Instead, at all events at the April 2013 meeting, Noksel had the US$249,000 as a credit in its favour on the general account, in effect treating it as an over-payment on the 2006-2007 overpayment scheme refund account because of its suggestion that that refund account balance be brought to nil without reference to that US$249,000.

80. That final analysis as regards the US$249,000 is important because Mr Hattan sought to rely on its treatment by Noksel as reducing an otherwise unrelated balance due from Eurotex as showing that to that extent at least, Noksel accepted that Eurotex really had earned commission fees on Noksel's Algerian business. Not so, in my judgment, when the evidence is properly understood.

81. Where does that leave the 2006-2007 overpayment scheme, as the parties met in Ankara in June 2015? In my judgment, the answer is as follows:

    (i) The parties had agreed to the invoicing by Noksel between March 2006 and June 2007 for, and payment in full by BEMACO of, inflated prices on shipments pursuant to the ERW Sales Protocol, to mask the contract price, in the hope of avoiding an anti-dumping investigation by the EU Commission.

    (ii) As part of that scheme, the parties agreed that Noksel would make payments to Eurotex that would be treated as discharging pro tanto its resulting reimbursement obligation. By agreement, those payments were documented, principally, by Eurotex invoicing Noksel for commission payments in respect of Noksel's Algerian business projects although both sides knew full well there was no basis for any such payments.

(iii) The parties also agreed to the over-invoicing of Noksel by Eurotex on certain shipments of sheet metal (steel coils), the uplift element having no basis in the terms on which the sheet metal was being purchased by Noksel but being included solely as a means for Noksel to discharge more of its reimbursement obligation arising on its over-invoicing of BEMACO under the scheme.

(iv) By cash payments in respect of 'Algeria Commission' and sheet price uplifts, Noksel thus reduced the 2006-2007 overpayment scheme balance to US$723,000. The parties agreed and mutually confirmed as much as of December 2013, subject to (vi) below.

(v) Noksel maintained that there was a substantial sum due to it from BEMACO by way of un-invoiced interest, and proposed that the 2006-2007 overpayment scheme balance be offset against it. BEMACO had not objected to offsetting that balance against un-invoiced interest due from them, and seemed to acknowledge that there was an un-invoiced interest charge due from them, but had not agreed Noksel's calculation.

(vi) Meanwhile, no cash payment was made to Eurotex in respect of its last two 'Algeria Commission' invoices, totalling US$249,080.45. Instead, Noksel had written down the balance payable to it by Eurotex that it was carrying in its accounts, by that amount, thus treating itself as having discharged those last two 'Algeria Commission' invoices. But it had (logically correctly) included that amount as a credit in its favour in the general account with BEMACO, if calculated on its proposed basis of offsetting un-invoiced interest to bring the 2006-2007 overpayment scheme balance to nil. If that way of eliminating the 2006-2007 overpayment scheme balance were not agreed, then that balance properly stood at US$474,000, not US$723,000.

The 2010 Cancellation Debt

82. It was common ground on the pleadings, and common cause between the witnesses (leaving Mr Canatalay aside, but only because he was not involved at the time), that in the summer of 2010, the parties agreed to cancel for lump-sum compensation of US$1,800,000 payable by BEMACO certain purchase orders placed at very high contract prices that BEMACO could no longer afford following the financial crisis and market crash of Q4 2008. Mr Ünal insisted, contrary to his pleaded case, that this was a non-binding gentlemen's agreement only. This was, I regret to say, an example of Mr Ünal saying what he felt he had to say, because otherwise there could be no defence to Noksel's claim for any remaining balance of the US$1,800,000 not previously paid by BEMACO, rather than telling things straight.

83. It was likewise common ground and common cause between the witnesses that the intention was for that US$1,800,000 to be paid over time by uplifts applied when invoicing further shipments pursuant to the ERW Sales Protocol.

84. I have mentioned already the spreadsheet created by Noksel but shared with Mr Ünal in which those uplifts up to March 2013 were tracked, totalling

US$1,210,016.94 (paragraph 67 above). That would indicate a balance still due as at March 2013 of US$589,983.06, and that is the balance claimed by Noksel as, so it says, never having been paid.

85. The December 2013 meeting minutes recorded, at paragraph 3), that the parties had agreed at the meeting that the balance of this original debt of US$1,800,000 after payments made by then was US$690,824.66, and that it was to be paid following payment by BEMACO of the general current account balance dealt with by paragraph 1) of the meeting minutes. Mr Ünal's response on paragraph 3) was "*OK. It will be generally applied under the terms we agreed.*"

86. Noksel pleaded that that was a typo in the meeting minutes for US$590,824.66, which is very close to the pleaded balance. BEMACO and Mr Ünal plead in defence that paragraph 3) of the meeting minutes as quoted by Noksel, which means with the alleged typo, identified as such by a footnote, corrected in the text of Noksel's pleading, accurately sets out that content. No defence is pleaded that the balance thus minuted, and seemingly acknowledged by Mr Ünal in response to the meeting minutes, after correction for the supposed typo, which as it happens is extremely close to (but a tiny amount greater than) the pleaded claim, was not *prima facie* due and owing by BEMACO. The only defence pleaded was that whatever balance would otherwise have been due "*must have been, and was, included*" in certain 2015 audit confirmations, to which I shall come much later in this judgment, and that that means Noksel cannot now claim it.

87. No time bar issue arises for Noksel – it was common ground that the basic limitation period under Turkish law is 10 years. The 2015 audit confirmations concerned sums due to Noksel as at 31 December 2015 and were issued by BEMACO by reference to the general current account balance, whereas I find, below, that the parties agreed in December 2013 to treat the outstanding balance of the 2010 cancellation debt of US$1.8 million as separate from that general account and for it to be deferred until long after 31 December 2015.

88. It may be said with some force that the effect of BEMACO's pleading is to admit the (typo-corrected) balance of US$590,824.66, subject only to a defence that therefore fails, and there should be judgment accordingly for the fractionally smaller amount to which Noksel has limited its claim.

89. I am concerned at the artificiality of that, however, unless the upshot is that Noksel has effectively chosen to claim less than it might have. My concern arises because it is plain on the documentary evidence that there is more to this than Noksel has pleaded, and the suggestion that the meeting minutes contained a typo is demonstrably incorrect.

90. For that purpose, it is necessary first to go back to the full eight-page paper prepared for the April 2013 meeting. The final page includes a paragraph on the US$1,800,000 settlement debt. It records that as of mid-April 2013, the total of the price uplifts paid by BEMACO on post-2009 shipments, towards payment of that debt, was US$1,366,589.83, leaving a balance of only US$433,410.07. However, BEMACO was to be offered the option of issuing debit notes for US$257,414.49, which would then go into the general current account between

the parties, thereby increasing the balance remaining on the US$1,800,000 to US$690,824.66, the figure subsequently minuted as agreed at the December 2013 meeting.

91. Moving then to December 2013, Note B6 in the meeting minutes recorded Mr Ünal's position as having been that: "*The amount of overpayment as a result of the price difference added to unit sales price for sales made in 2012 and 2013-until the month of May is USD 514,828.98. Half of this amount will be set off to the debt of USD 1,8M that is tracked separately, the other half will be discounted from the accounting records in accordance with the agreement. For this reason, Prime Steel company will issue an invoice in the amount of USD 257,414.49 to Noksel and will record it as receivable in its accounts.*" Note N6, recording Noksel's position at the meeting on that same point, was to like effect: "*As explained in Article B6, the amount of overpayment as a result of the price difference added to unit sales price for sales made in 2012 and 2013-until the month of May is USD 514,828.98. Half of this amount will be set off to the debt of USD 1,8M that is tracked separately, the other half will be discounted from the accounting records in accordance with the agreement. For this reason, Noksel will take into its accounts the invoice in the amount of USD 257,414.49 issued by Prime Steel and will record as receivable to Prime Steel.*"

92. Mr Ünal's response to the meeting minutes on this point was to confirm it, in these terms: "*Invoice has already been issued and recorded to the accounts for the part in the amount of USD 257,414.49.*"

93. That leads me to the clear conclusion that there was no typo in the December 2013 meeting minutes. There was agreement at the meeting, confirmed by Mr Ünal's response to the meeting minutes Note B6 and paragraph 3), that:

    (i) Prime would and did invoice Noksel for US$257,414.49 in respect of price uplifts in 2012 and January to May 2013 that would otherwise have gone to reduce further the US$1,800,000 debt, whereby to bring that invoiced amount into the general current account between the parties;

    (ii) the remaining balance of the US$1,800,000 payable by BEMACO was therefore US$690,824.66;

    (iii) payment of that balance would be deferred until after the general account balance had been cleared.

94. The upshot is that Noksel has indeed under-claimed, by a fraction over US$100,000, and has by parity of reasoning over-proved its claim, which was for payment in respect of the US$1,800,000 settlement of US$589,983.06 only. It should have judgment in that amount.

95. The second largest item that BEMACO has claimed ought to be brought into the general current account is US$1,210,016.94 LESS US$257,414.49, that is to say the aggregate amount of price uplifts for 2012 through mid-March 2013, less the amount of the Prime invoice referred to in paragraph 93(i) above. That claim misunderstands and misapplies the evidence. As I have found, all of the US$1,210,016.94 (in fact slightly more, US$1,366,589.83 after adding further

price uplifts in April and May 2013) would have gone towards paying off the US$1,800,000 debt but for the agreement reached in December 2013. The effect of that agreement was to transfer US$257,414.49 in the parties' accounting with each other from paying off the US$1,800,000 debt to the general current account from which that debt was otherwise treated as separate.

96. That means there ought to have been a credit of US$257,414.49 in Prime's favour, based on Prime's invoice in that amount, in any general account reconciliation. Whether that was allowed for within the account reconciliation exercise in fact undertaken at and following the June 2015 Ankara meeting, and whether, if not, BEMACO cannot now claim it, are issues for the general account balance claim, by operation of the parties' agreement in December 2013 to locate there that portion of the 2012-2013 price uplifts paid by BEMACO. That now has (and since December 2013 has had) nothing to do with calculating the unpaid balance of the US$1,800,000, or Noksel's entitlement in respect of it.

The Alleged Variation as to Exclusivity

97. On 18 April 2013, following the meeting at the Conrad Hotel, Istanbul, on 13 April 2013, Mr Eroğlu sent Mr Ünal an email stating simply, "*Attached are the minutes of the meeting we held on 13 April 2013 and the decisions taken*". It is worth setting out those minutes in full. They comprised a single page only, with a list of attendees over the page (they having been, for Noksel, Messrs Akkoyunlu, Yalçin and Eroğlu, and for Bemaco, Prime and Eurotex, Mr Ünal):

> **NOKSEL ÇELIK BORU SAN A.Ş.-BEMACO STEEL LTD**
>
> **13.04.2013 MINUTES OF MEETING**
>
> 1.) On 29 April 2013, Cenk Atik, Burak Eroğlu and Bülent Ünal will convene in London and will make an account settlement for the firms Bemaco Steel Ltd., Prime Steel SA and Eurotex.
>
> 2.) For 2013, flat 5% interest will be applied to overdue debts and interest rate to be applied for overdue debts will be reagreed on, in line with market developments, at the end of each year hereafter.
>
> 3.) The invoice issued for 2012, which was calculated at Libor+6% will be recalculated as flat 6%, the surplus will be deducted from the interest invoice to be calculated for the first 6 months of 2013.
>
> 4.) There will be two types of payment hereinafter:
>
> a. CAD: The issued invoices will directly be sent to the bank and the payment will be made at sight.
>
> b. CAG: The issued invoices will be sent to the firm Bemaco and the payment will definitely be made within 60 days.
>
> Regardless of the type of payment method, no interest will be applied within 60 days as of the date of the invoice, however interest will be calculated and deducted from the interest amount for early payments.

5.) Payment guarantee concerning old debts is provided by Bülent Ünal for the minimum amounts stated below. A minimum total amount of 1,300,000.00 USD for the year 2013 with the following minimum amounts indicated below will be made:

300,000.00 USD not later than 15.05.2013
500,000.00 USD not later than 01.09.2013
500,000.00 USD not later than 01.11.2013

However, in order to prevent the write-off problem occurring during the auditor inspection, the total debt will be reduced below 5,000,000 USD under any circumstance until 30.07.2013.

6.) Balance sheets and statements of revenues and expenditures of Bemaco Ltd and Prime Steel SA will be sent to NOKSEL.

7.) NOKSEL is free to make sales to other firms in England, Ireland, Spain. However, sales to Bemaco will continue.

8.) For the year 2013, a total of 12 shipments with vessels of 2.000 tons to England has been foreseen. Importance will be placed on container loading in order to reduce the stocks of both NOKSEL and Bemaco.

98. The combination of the covering email and paragraph 7.) of the minutes could not be clearer. Mr Eroğlu was recording that it had been agreed at the meeting that Noksel would no longer be bound by the exclusivity term within the ERW Sales Protocol.

99. In his written evidence, Mr Eroğlu stated that he had been instructed by Mr Akkoyunlu "*to send minutes of what he had wanted agreed*" and that though the email describes what he sent as "*minutes of the meeting and decisions taken, the minutes produced did not reflect what was in fact resolved but were rather a "wish list" of what Noksel wanted to agree.*" He also suggested as he recalls matters now, Mr Ünal neither agreed nor disagreed with the proposal at the meeting to drop the exclusivity element of the Protocol. It became apparent through cross-examination, however, that:

(i) what Mr Eroğlu meant by speaking of a document like this as a 'wish list' was that there was a hope its content would be confirmed or acknowledged as accurate, but that it would represent nonetheless what he believed had been agreed or decided at the meeting and would not be a mere proposal for a post-meeting agreement, and

(ii) what he set out on this occasion did in fact represent, as he sent it, what he believed at the time had been agreed and decided at the meeting.

100. Mr Akkoyunlu and Mr Yalçin's evidence was that they recalled clearly the agreement being reached. The context was that the ERW Sales Protocol was generating sales far below the promised 60,000-80,000 m.t. per annum. Mr Ünal accepted in cross-examination that he had no solution and had offered no solution for that shortcoming. Seeing the difficulty that gave his case that he

would never have agreed to the removal of his exclusivity, Mr Ünal proffered the new thought that he had not seen the volume commitment as an obligation. I do not think that was truthful evidence.

101. The volume commitment plainly was a contractual obligation, and was at the heart of the ERW Sales Protocol every bit as much as, and as an essential *quid pro quo* for, the exclusivity given to BEMACO. I regarded as credible and plausible that when faced with his admitted inability to come close to the promised volumes, the parties concluded that Noksel should not be confined to selling for the UK and Spain through Mr Ünal. The continuation of the ERW Sales Protocol, and in particular Noksel's willingness to trade on an open account basis under it, was still commercially attractive for BEMACO, which would not have been in a position to trade even the volumes it was managing to trade with Noksel if required to finance every shipment by a letter of credit.

102. I reject the argument, pressed by Mr Hattan in submissions and by Mr Ünal when giving evidence, that it is unthinkable Mr Ünal might agree to drop his exclusivity, or that it would have been (or that he would have seen it as being) commercial suicide so to agree. Indeed, a remarkable feature of the case is that though BEMACO claim that Noksel's sales since April 2013 in breach of Clause 5 of the ERW Sales Protocol (if it had not been dropped by agreement) caused it a loss of profit of US$20 million or more, there is no evidence that in the 5½ years or so after April 2013, while the parties were still trading with each other, BEMACO ever perceived an adverse impact on their sales, their ability to find and make sales, or the volumes they were able to and did in fact sell.

103. Mr Ünal never objected to the minutes sent by Mr Eroğlu. I agree with Mr Dhar that it is not credible to suppose Mr Eroğlu could have got the wrong end of the stick on something as important as that for the parties' contractual relationship, and yet Mr Ünal did not protest at all, let alone promptly, vigorously, and in writing, as I think he would have done if he thought the minutes inaccurate in this respect. Mr Ünal's written evidence, maintained in cross-examination, was that he had told Mr Eroğlu over the 'phone that he did not agree with the minutes and that Mr Eroğlu said he had been instructed by Mr Akkoyunlu to send them and "*acknowledged that nothing had been agreed*". I do not accept that evidence. I consider it an afterthought, forced on Mr Ünal by the implausibility of the case he was advancing and contradicted in substance by Mr Eroğlu's evidence that he does not recall any such conversation. I think it unlikely that Mr Eroğlu would forget something as significant as that and very unlikely that it might have been said and yet no email be generated evidencing it, even if only internally so that Mr Eroğlu had warned others at Noksel that there might be a problem.

104. Mr Hattan fairly acknowledged the potential force of Mr Eroğlu's minutes as evidence in this case, given the normal expectation that contemporaneous records of that kind are likely to be accurate (and are generally much more likely to be reliable than witness testimony collected only years later). He submitted that I should be cautious about treating them as presumptively likely to be accurate in the normal way, but I did not find the points he made persuasive:

(i) Firstly, he submitted that paragraph 5.) of the minutes inaccurately recorded Mr Ünal as having promised to put up guarantees following the meeting for certain future payments, yet that was not the recollection of any witness. But it is not clear to me that paragraph 5.) does so record. Its tenor, even before allowing for any possibility of nuance or loss of nuance in the process of translation, could well be only that at the meeting Mr Ünal expressed firm reassurance that he would cause the current account balance owed by BEMACO to come down by at least the amounts and on the timescale stated; and the gist of Mr Akkoyunlu's evidence and that of Yalçin's evidence, with whom this was explored, was indeed that that was what was said at the meeting.

(ii) Secondly, Mr Hattan emphasised that the December 2013 meeting minutes, to which I have referred above, purported to record agreement reached at that meeting on a number of matters that it is clear were not in fact agreed. There was, he submitted, a 'house style' of over-egging meeting minutes in that way. To the extent that wider submission relied on Mr Eroğlu's evidence that Noksel drafted minutes as 'wish lists', I have already made my finding on that, namely that Mr Eroğlu did not mean by that a habit of claiming agreement had been reached when that was not honestly understood to have been the case. As regards the example of the December 2013 meeting minutes in particular, what is significant to my mind is that (a) it was transparent to Mr Ünal that on that occasion, Mr Eroğlu had indeed overstepped the mark if all they were intended to be was an accurate record of what had been discussed and (if at all) agreed at the meeting, (b) Mr Ünal therefore responded, and responded promptly in writing, as he did, making both material points, i.e. both that various things had not in fact been discussed and/or agreed as stated in the meeting minutes *and* that the minutes were obviously (to him) intended more as a draft text for a possible post-meeting agreement. That response is telling as to how Mr Ünal would have reacted if the April 2013 minutes had not been a fair and faithful record of matters discussed and decisions reached by the parties at the meeting. It also evidences that, contrary to Mr Hattan's submission, the December 2013 minutes were unusual in Mr Ünal's experience of dealing with Noksel in not being such a record.

(iii) Thirdly, Mr Hattan relied on Noksel's willingness to maintain false accounting records, given what was involved in the 2006-2007 overpayment scheme and the fact that the US$1,800,000 debt was not reflected properly in Noksel's books. I agree that those two matters had that effect or implication, i.e. that Noksel's accounting records were not accurate (and in the case of the 2006-2007 overpayment scheme, dishonestly so). But I do not agree that that has anything material to say on whether Noksel would commit the implausible error (deliberately or otherwise) of claiming by way of (purported) meeting minute that the parties had agreed at the April 2013 meeting to drop Clause 5 exclusivity, a key feature of the ERW Sales Protocol, let alone explain why, if that had not been agreed, Mr Ünal failed to react to the meeting minute stating that they had.

105. It is also clear, although the direct evidence of this did not go beyond one or two examples, that Noksel was open with BEMACO, when on occasion it was relevant to their correspondence, that it was selling products covered by the ERW Sales Protocol to others for the UK. That Noksel made no secret of doing so, and that no complaint was made by BEMACO about it, reinforces the likelihood that Mr Eroğlu's minute of the April 2013 is accurate on the exclusivity point.

106. The clearest example comes from October 2015, but relates to a shipment in late 2013. It was a shipment to Dudley Iron and Steel in Northern Ireland ('Dudley') of ERW products within the scope of the ERW Sales Protocol. Dudley was an important Bemaco customer. I have no doubt Dudley was a customer sales to whom by Noksel would have been identified instantly by Mr Ünal as, to his mind, a breach of Clause 5 if extant. The shipment had been on the m.v. *Parsival*, which Bemaco had chartered for a shipment to it from Noksel but on which Mr Ünal had agreed to allow Noksel to ship also the 7.5m length hollow ERW tubes it was selling to Dudley as there was room for both parcels of cargo.

107. On 12 October 2015, Mr Ünal emailed Mr Canatalay to remind him that he was going to send "*the packing list of the products that you sent to Barretts [Dudley being in the Barretts group] in the vessel Parsival*". Mr Canatalay replied within minutes with a one-line response, "*It is in the attachment*", attaching a spreadsheet, 'barrett_packing_list.xlsx'. It is a single-sheet spreadsheet giving packing list details for two parcels of cargo, one above the other on the screen. To illustrate, the upper packing list appears thus when the spreadsheet is opened:

PACKING LIST

DUDLEY IRON AND STEEL
UNIT 36, BALLINCRAIG WAY,
GREENBANK INDUSRIAL ESTATE , NEWRY
NORTHERN IRELAND BT 34 2QX,UK

DATE #########
NO 736447-A

Size	Wall thickness	Unit weight	Length	Pieces per bundle	Bundle Weight	Number of bundle	Total weight	Total actual weight	Total Length	Standard
(mmxmm)	(mm)	(kg/m)	(m)		(kg)		(kg)	(kg)	(m)	
88.9	3.00	6.350	7.500	19	904.88	11	9,953.68	9,336	1,567.50	EN 10219-2
88.9	4.00	8.370	7.500	19	1,192.73	9	10,734.57	10,112	1,282.50	EN 10219-2
114.3	3.50	9.560	7.500	19	1,362.30	9	12,260.70	11,732	1,282.50	EN 10219-2
114.3	5.00	13.480	7.500	10	1,011.00	12	12,132.00	11,327	900.00	EN 10219-2
114.3	6.00	16.020	7.500	10	1,201.50	8	9,612.00	9,696	600.00	EN 10219-2
139.7	5.00	16.610	7.500	10	1,245.75	12	14,949.00	13,882	900.00	EN 10219-2
139.7	6.00	19.780	7.500	10	1,483.50	9	13,351.50	13,124	675.00	EN 10219-2
GRAND TOTAL						70	82,993.45	79,209	7,207.50	

108. As will be familiar to anyone who has worked with spreadsheets, the '#########' for 'DATE' appears only because the relevant column is a bit too narrow in the default view when the spreadsheet is opened to display the entry, which by widening the column slightly is revealed to be '06/11/2013'. Subject to that point affecting one cell, the entire contents of that packing list are visible on opening the spreadsheet. Nothing is obscured or unclear, or hidden off the right-hand edge of the screen (it is nothing like a wide enough table to encounter that issue).

109. It was apparent to me on opening that spreadsheet, having been introduced to the commercial subject matter of the case, that it showed shipments to Dudley in Northern Ireland of products falling within the ERW Sales Protocol. The product dimensions stated would have communicated that instantly to Mr Ünal and the reference to the quality standard EN10219 would have put the point beyond doubt if he might otherwise have entertained any.

110. Mr Ünal gave written evidence about this packing list in his fifth witness statement just a week before trial. The timing of that statement was not Mr Ünal's responsibility, as it was triggered by a related document that had only recently turned up in late disclosure from Noksel. The content of Mr Ünal's written evidence and cross-examination upon it was however deeply unsatisfactory, and that was his responsibility. The written evidence was as follows (paragraphs 9-11 of Mr Ünal's fifth witness statement):

> "*9. Around the time the ship was due to sail, I received a call from the shippers, Mel Sea LLC, to inform me that, in addition to our goods, [Noksel] had added some other goods to be shipped by MV Parsival. … I therefore called Mr Canatalay on the telephone and asked him what these additional goods were. Mr Canatalay told me that they were some conduction pipes for Barrett. This did not surprise or concern me as Barrett, who was one of [BEMACO's] customers for hollow sections, which was involved in supplying conduction pipes in the US. … [BEMACO] did not deal in conduction pipes and had consented to their sale by [Noksel] to Boreasteel in April 2013 and also did not object to the sale of conduction pipes to Barrett.*
>
> *10. In order that we could identify the goods for Barrett, I asked Mr Canatalay to send me the packing list for the shipment by my e mail dated 12 October 2015 so that when the goods arrived we could ask the port to separate the goods for Barrett from [BEMACO's] goods. Mr Canatalay duly replied on the same day attaching the packing list. The packing list is to Dudley Iron and Steel, one of Barrett's companies in Northern Ireland. The packing list did not reveal the goods to be hollow sections. This is because the packing list shows the goods only have one size and so are circular … . Conduction pipes are always circular sections; in contrast, hollow sections are normally square or rectangular (although they can be circular). Mr Canatalay told me that the goods were conduction pipes – if he had told me they were hollow sections, I would have objected as that was contrary to the exclusivity agreement.*

> *11. … this is the only example Mr Canatalay has pointed to where he claims [BEMACO] were aware of [Noksel] putting on hollow sections for other customers onto a vessel chartered by [BEMACO]. As explained above, I approached Mr Canatalay about this and he misled me as to the nature of the shipment; further the shipment was to Northern Ireland. … There are no other examples because [BEMACO] never agreed to remove the exclusivity agreement in the ERW Contract, as [Noksel] knew, which probably explains why Mr Canatalay did not tell me the truth about the shipment to the Barrett company on MV Parsival.*"

111. The first problem with the above account is that on 29 November 2013, i.e. at about the time of the shipment, Mr Canatalay sent Suky Ghosal at Bemaco the Mill Test Certificates for the m.v. *Parsival* cargo, one of which was for the Dudley parcel. It identified Dudley, in Northern Ireland, as the customer, and specified the product as circular ERW "*steel hollow sections with EN10219-2 standard quality S235JRH*". The idea that Mr Canatalay might at the same time have been telling Mr Ünal, untruthfully, something completely different about the Barrett/Dudley parcel is fanciful.

112. The second problem with the account in Mr Ünal's fifth witness statement is that almost nothing in paragraph 10 is credible:

(i) Mr Ünal's email to Mr Canatalay nearly two years after the shipment cannot have had and did not have anything to do with separating the goods out for their different consignees at destination.

(ii) The packing list did reveal to an individual knowledgeable in this trade like Mr Ünal, and did so at a glance, that the Dudley parcel comprised (circular) hollow sections of precisely the type that (a) Noksel sold to BEMACO pursuant to the ERW Sales Protocol (indeed materially similar to some of the hollow sections for Bemaco in this m.v. *Parsival* shipment) and (b) Bemaco sold to Dudley. Compelled to accept as much in cross-examination, Mr Ünal changed his evidence, now claiming, contrary to the clear tenor of his witness statement signed just two weeks previously, that he had not looked at the packing list at the time, or when so recently preparing that witness statement, and, contrary to the truth, that it was only the reference to the EN10219 standard in the packing list that identified the goods as hollow sections within the scope of the ERW Sales Protocol and that that reference was not immediately obvious in the document because it was on the 'far right' of the spreadsheet.

(iii) Under the pressure of the same difficulty about his account, namely the claim that it had not been obvious that Noksel was supplying EN10219 hollow sections to Dudley, Mr Ünal changed his evidence that if he had realised that he would have objected because such a sale would have been contrary to Clause 5. Now, contrary to his written evidence (and not just this most recent evidence either), Mr Ünal claimed that he would not have regarded a direct sale by Noksel to one of his important UK customers as within the scope of Clause 5 because the ERW Sales Protocol said 'England' rather than 'the UK'.

113. I do not believe Mr Ünal took proper personal responsibility for the content of paragraphs 9 to 11 of his fifth witness statement. It notes accurately that on 12 October 2015, by email, Mr Ünal asked Mr Canatalay for the packing list for the 'Barrett' cargo *per* m.v. *Parsival* two years previously, and it was promptly provided, but that required no witness evidence. Apart from that, in my judgment no material part of paragraphs 9 to 11 of Mr Ünal's fifth witness statement was true. If Mr Ünal had considered at all seriously the content of those paragraphs before signing the statement, in my judgment he could not honestly have claimed to believe them to be true. I infer against him, and conclude, that he *did* look at the packing list Mr Canatalay sent at the time and he must have appreciated from it, and so I find he *did* so appreciate, at a glance, that it showed Noksel selling and shipping to Dudley in Northern Ireland circular hollow sections, EN10219 standard, that were, in Mr Ünal's understanding, within the scope of the ERW Sales Protocol and that would have been, in Mr Ünal's understanding, a breach of Clause 5 if it still applied. Mr Ünal thought nothing of it, in my judgment, because, in his understanding, Clause 5 no longer applied, having been dropped from the ERW Sales Protocol by agreement reached at the April 2013 meeting.

114. The next question that arises is whether the parties' oral agreement at that meeting, evidenced in writing by the April 2013 meeting minute but not effected by it (so not an agreement made in writing), has contractual force under Turkish law. From the expert evidence, the following is clear.

115. Firstly, where by law a contract must take a certain form to be enforceable, a material amendment to that contract likewise must take the prescribed form. In that proposition, 'material amendment' is my shorthand for an amendment that is more than a supplementary, subsidiary provision that does not contradict the agreement text. Article 13 of the Turkish Code of Obligations so provides: "*Where the law requires that a contract be done in written form, the written form is also mandatory to the amendment of the contract. However, any supplementary subsidiary provisions, which do not contradict the agreement text, are excluded from this requirement. This requirement shall also apply to the validity requirements other than the written form requirements.*"

116. Secondly, where a contract is required to be made in writing, generally that requires signatures (although a modern approach is taken to what constitutes a signature). Articles 14 and 15 of the Turkish Code of Obligations so provide:

> "*Article 14. Signatures of persons undertaking an obligation are required to be present on agreements stipulated to be made in writing. Unless otherwise provided under the Law, any signed letter, or telegram the originals of which have been signed by those undertaking an obligation; texts, on the condition that they are verified, which are sent through fax or similar means or via secure electronic signature which can be kept, are deemed to be in written form.*
>
> *Article 15. Signature is required to be affixed by hand of the person undertaking an obligation. Secure electronic signature shall also lead to any and all legal consequences of a signature affixed by hand. Affixing the signature by any means other than hand shall be deemed sufficient only in circumstances*

deemed acceptable under custom, especially in the case of the signing of securities that are issued in large numbers."

117. In that regard, Article 16 provides for fingerprints or other hand-made marks or seals to count as signatures in the case of persons unable to provide a signature.

118. Thirdly, there is no mandatory rule of Turkish law prescribing any formal validity requirements for a contract such as the ERW Sales Protocol, *viz.* a commercial contract providing for the sale and purchase of steel for export markets with associated exclusivity terms.

119. Fourthly, in the absence of any mandatory rule of Turkish law as to formalities "*The way a contract can be amended is dictated, in the first instance, by the terms of the contract to be amended. The ERW Sales Protocol is silent on how its clauses are to be amended.*" (to quote from Professor Erdem's main report). Strictly, the first sentence just quoted is expert evidence of Turkish law, the second is a comment on the facts, albeit an accurate one.

120. Fifthly, again quoting Professor Erdem's formulation of their effect:

    (i) by Article 17(1) of the Turkish Code of Obligations, "*... where the parties agree to make a contract subject to formal requirements not prescribed by law, the parties are not bound by the contract if the agreed form is not satisfied*"; and

    (ii) by Article 17(2) of that Code, "*... where the parties stipulate written form without elaborating further, the provisions governing the written form as required by law (Art. 13(1) of the TCO) apply to the satisfaction of that requirement.*"

    (Article 17 is in these terms: "*[(1)] If any agreement, the form of which has not been stipulated under the law, is agreed to be made in a certain form by the parties, any agreement which has not been made in the pre-determined form shall not be binding on the parties. [(2)] If the written form has been agreed without any specification, the provisions on the legal written form shall apply.*")

121. So far, so good. The experts parted company, however, at Professor Erdem's next sentence, which was that "*In the absence of any specific contractual provision, the general rule is that any provisions of the contract can only be varied by complying with the same form requirements that are followed while drafting and executing the contract*". It required no cross-examination to see that:

    (i) if Professor Erdem was advancing that as a corollary of any of the statutory rules summarised above, it was a *non sequitur*, sliding from a statutory rule for cases where the parties had stipulated for a certain formality requirement to a rule for cases where they happened to use a certain formality though not required by law to do so nor stipulating *inter se* that it was required;

(ii) the proposition advanced does not sit at all easily with the fourth rule stated above – if, absent a statutory requirement as to form, the way a contract may be effectually amended is dictated by the terms of the contract to be amended, a contract containing no term stipulating any formal requirement for its amendment might be thought naturally to be a contract that had stipulated no formal amendment requirements; and

(iii) as Professor Erdem accepted in cross-examination, the effect of the further rule he stated was that under Turkish law every contract that happened to have been made in writing (or by some other particular means) could only be amended in writing (or by adopting again those same means), unless it provided otherwise, and yet there is no decision in the Turkish courts to that effect and it is not a rule propounded in the writings of any recognised Turkish law scholar. (Professor Altay gave an explanation in his oral evidence, with which Professor Erdem agreed, of the hierarchy of legal texts in Turkish law, under which the writings of scholars are treated as of persuasive value equally with the decisions of the Turkish Court of Cassation other than unification decisions.)

122. Professor Altay explained, and Professor Erdem agreed, that amongst learned scholars who have written on the point, the unanimous view is that there is no such rule, but rather the rule is as I posited by way of contrast in paragraph 121(ii) above – a contract not required by law to conform to any requirements of form and not stipulating for any may be amended without any. Professor Erdem cited in support of his view two Cassation decisions. It seemed from one or two of his answers that he may have had in mind additional expressions of view in Cassation judgments, but as I say he cited only two and I refused on grounds of procedural fairness an application by Mr Hattan, made without prior warning on the morning when Professor Altay was to be called, to rely upon two additional Cassation decisions he wished to say went to this point. In short, though it might not have been unfair to spring the additional authorities on Professor Altay like that, given his expertise in the field, it would have been unfair on Noksel to have them sprung on Professor Altay like that.

123. To be fair in those circumstances to Professor Erdem as expert witness but also to Noksel as litigant, I would not express as such a criticism of Professor Erdem that he could not or did not identify support for his view beyond the two decisions he cited, but I should and do evaluate his view on the basis that if he might have chosen to cite further or other material, it would not have provided better support for his view than the decisions he did choose to cite.

124. The two decisions cited by Professor Erdem were from 2019. The earlier of the two, E.2018/4892 K.2019/153 of 15 January 2019, ruled that where a construction agreement in return for a share in the land was required by statute to be drawn up and issued at and before a deed officer or notary public, a variation to such a contract had to satisfy those same formalities. Neither that decision nor anything said in the judgment of the Court of Cassation, with great respect to Professor Erdem, had anything whatever to do with the proposition at hand.

125. The later decision, E.2018/5368 K.2019/2170 of 8 May 2019, concerned a claim by an assignee of receivables under a contract that contained an express prohibition on assignment without the written consent of the debtor. The claim failed because of that prohibition, there having been no written consent to the assignment. The judgment is extremely concise, but within the Court of Cassation's brief reasoning there is an observation in passing that there had been neither amendment of the assignment prohibition nor acceptance (by the debtor, presumably) of the assignment, and in that observation the Court expressed itself of the view that "*any written agreement is required to be amended in writing*". Professor Erdem accepted that there was no indication from the record of the case that anyone had suggested there might have been an amendment. The question whether an amendment would have required any particular formality simply did not arise.

126. I regard that as flimsy support for Professor Erdem's view and I prefer Professor Altay's opinion that a contract that is not required by law or by some stipulation between the parties to be made in writing, and that does not provide that any formality must be followed for it to be amended, may be amended without formality. The ERW Sales Protocol was such a contract. It could be, and given my findings on the facts therefore it was, amended at the April 2013 meeting, such that, as recorded by paragraph 7.) of the meeting minute, Noksel was free thereafter to sell to other buyers for the UK and Spanish markets, although sales to BEMACO would also continue (otherwise on the terms of the ERW Sales Protocol).

127. That means BEMACO's counterclaim fails *in limine*, and it is not necessary to deal with alternative ways in which Noksel sought to argue that after the April 2013 meeting it was not bound by Clause 5 or BEMACO could not enforce Clause 5 against it.

128. For completeness, I would add that it is understandable, given the way the releasing of Noksel from Clause 5 came to be agreed at the meeting, that in drawing up the meeting minutes Mr Eroğlu focused on that main conclusion, *viz.* that Noksel was free to sell to other buyers. The effect of the discussion at the meeting, as I have found it to have been, was equally that BEMACO was free thereafter to buy from other manufacturers *and* that their commitment to purchase 60,000 to 80,000 m.t. annually was also removed. The failure of the meeting minute to record those additional elements of, or consequences of, the removal of exclusivity, does not mean they were not effective, as agreed at the meeting. The latter element is perhaps implicit in paragraph 8.) of the meeting minute in any event.

The Ankara Meeting – and Beyond

129. In this section, all times referred to are local time in Turkey (GMT+3).

Fixed Points

130. I start with some fixed points that are beyond dispute on the evidence.

131. The parties met over at least two consecutive days in late June 2015, and 25 June 2015 (a Thursday) was one of those days.

132. Mr Ünal attended alone representing BEMACO and (purportedly) Eurotex (although in fact Eurotex had ceased to exist four months before). He arrived in Turkey for the meeting on 24 June 2015. As of 15 June 2015 (as confirmed by an email that day from Mr Eroğlu to Mr Ünal), the plan was to meet on 23-24 June, and Mr Ünal had told Noksel that he was coming via Dusseldorf and Italy. As of 23 June 2015 (as confirmed by an email that morning from Mr Ünal to Ms Tomaszek), the meeting was set to commence the following day.

133. Messrs Eroğlu, Atik and Canatalay attended on behalf of Noksel throughout. Messrs Akkoyunlu and Yalçin joined for only part of the extended meeting.

134. A spreadsheet (the 'Ankara Workbook') was created by Mr Canatalay during the meeting. In Mr Canatalay's final version of it, which he sent to Mr Ünal by email at 4.30 pm on 26 June 2015, after the meeting, the Ankara Workbook had 11 sheets. That email said simply, "*Please find attached the document covering the accounts of Noksel-Bemaco*". One of the 11 sheets in the final version of the Ankara Workbook was labelled 'Sheet 2'. The metadata show that the Ankara Workbook was created by Mr Canatalay at 3.58 pm on 24 June 2015 and that, as sent to Mr Ünal on 26 June 2015, it was last modified by Mr Canatalay at 2.19 pm that day.

135. The Ankara Workbook *without 'Sheet 2'*, last modified by Mr Canatalay at 6.00 pm on 25 June 2015, was sent by him to Mr Ünal by an email with no covering message, just "*report*" for 'Subject', at 6.01 pm on 25 June 2015.

136. The separate sheets of the Ankara Workbook were as follows (identifying the tabs from left to right as they appear on a screen):

    (i) 'Sheet 1', a sheet that on 25 June 2015 had about 350 line items, only one of which was retained on 26 June 2015. In descriptions of (it must be) the full version of 'Sheet 1' as it was on 25 June 2015 that I have no reason not to accept: Mr Atik said it was "*an experiment*" with no conclusive outcome; Mr Canatalay said it was an exercise to try to identify records that were in the accounts of one side but not those of the other side, likewise saying it had no final outcome.

    (ii) 'BemacoNoksel', a sheet imported into the Ankara Workbook from copy accounting records that Mr Ünal brought with him to the meeting on a memory stick (flash drive), said by him to be what Bemaco then had in its accounting records as credit and debit items between itself and Noksel, spanning the whole trading relationship from June 2005, some 300 or so line items. It showed a total net balance due from Bemaco of US$4,647,405.97.

    (iii) 'bemaco_Steel', a sheet imported directly from Noksel's accounting records by Mr Canatalay, in front of Mr Ünal during the meeting, of what Noksel then had in those records as credit and debit items between itself

and Bemaco, some 600 or so line items giving a total net balance due from Bemaco of US$7,659,717.55.

(iv) 'PRIME_STEEL', the equivalent for Prime of 'bemaco_Steel', with 370 or so line items giving a total net balance due from Prime of US$1,650,692.62 plus €62,497.68.

(v) 'PrimeNoksel', the equivalent for Prime of 'BemacoNoksel', with 260 or so line items giving a total net balance due from Prime of only US$42,039.55 plus €44,713.46.

(vi) 'Diff', a list of line items derived from those prior sheets to assist the parties in identifying where the differences between the records were. Mr Atik described it in evidence I accept as "*a test run; it was an attempt to find out the reciprocal differences. It does not have a conclusive meaning.*"

(vii) 'PrimeSteel Check', which opened with line items for (a) the Prime-Noksel net balance *per* Mr Ünal, here stated as US$65,385.65 plus €44,713.46 and (b) the Prime-Noksel net balance *per* Noksel's records, matching 'PRIME_STEEL'. It then listed line items identified from what Mr Ünal had said were Prime's accounting records that were not in Noksel's records, followed by line items in the latter but not the former. For each of those, the comments of each side were entered in separate columns by Mr Canatalay, line item by line item, as the line items were reviewed and discussed during the meeting.

(viii) 'BemacoCheck', which opened with line items showing the net balances due from Bemaco (a) *per* 'BemacoNoksel', (b) *per* 'bemaco_Steel', then identified differences with added comments, as in 'PrimeSteel Check'.

(ix) 'Sheet 2', to which I return below.

(x) 'bemaco ltd', the equivalent of 'bemaco_Steel' for Bemaco Ltd with 70 or so line items and a net balance shown as due from Bemaco Ltd of US$20,493.37.

(xi) 'eurotex', the equivalent for Eurotex with 200 or so line items, the last of which being the 1 December 2009 item offsetting the final 'Algeria Commission' invoices totalling US$249,080.45 leaving a net balance due from Eurotex of US$419,894.20.

137. The content of Sheet 2 was as follows, save that (a) I have reduced the gap between the Bemaco / Noksel columns on the left and the Prime / Noksel columns on the right to fit them all across the page, and (b) I have added green shading to three entries that is not in the original so that I do not have to set Sheet 2 out again for a point that comes later:

	Bemaco	Noksel		Prime	Noksel
	4,647,406	7,659,718		115,464.00	1,720,688.00
	4,876				27,547
	27,547				
	57,087			46,628	
		-5,500			-41,632
		-24,407			-27,437
	34,534			-60,377	
	-19,463				-60,377
	53,051	-112,328			-401,521
		-7,232			-169,799
	1,324				-121,586
	38,159				-66,347
	1,000				-87,164
	6,607				-71,386
		-1,853			-18,975
		-170,563			-20,856
	29,630	-138,021			-15,293
	45,917				-39,412
	93,830	-327,917			-79,959
		-407,075			-30,528
		-99,416			-32,505
		-62,822			-146,985
	7,655			150,000	
		-27,456		45,917	
		-125,693		297,632.16	316,474.18

		- 73,377			
		- 85,267			18,842.01
		- 140,262			
		- 108,000			
	715,617				
	534,693	534,693			
Bemaco	6,279,470	6,277,222			
PrimeSteel	300,000	300,000			
Eurotex	419,894.20	419,894.20			
	6,999,364	6,997,116			

138. The opening row, under the headings, sets out the rival figures at the start of the meeting for the overall net balances, taken from 'BemacoCheck' and 'PrimeSteel Check' but in the case of the latter after converting the € balances into US$ so as to report on each side a single aggregate net balance in US$.

Mr Ünal's Account

139. Mr Ünal first provided evidence for these proceedings by a lengthy statement signed and served in May 2020 in opposition to Noksel's application to join him as a defendant to pursue claims against him personally. It gave a largely false account about the creation of the Ankara Workbook, claiming that it was created only after the June 2015 meeting, by Mr Atik (not by Mr Canatalay), and that it was first sent to him (again, by Mr Atik not by Mr Canatalay) on 10 August 2015. He said that, as he received it then, he understood 'Sheet 2' to be "*[Noksel]'s proposals to resolve the differences (which were not accepted) but effectively amount[ed] to a proposal that the parties split the difference and agree the debt is $7 million …*". In his second witness statement dated 3 June 2021, which was his first trial witness statement (although it adopted the May 2020 statement, so that was also treated as part of his evidence in chief), Mr Ünal reiterated this false account about the Ankara Workbook and added, but on the false premise that the proposal to fix the current account at US$7 million came to him only by Mr Atik's email of 10 August 2015, that he "*never had any intention of agreeing to this proposal because I did not consider it was a good deal*".

140. I shall deal further with the exchange of emails with Mr Atik in August below, in its chronological place. Save that Mr Atik did send the Ankara Workbook to Mr Ünal in the course of that exchange, no part of Mr Ünal's first account just summarised is correct. There are two possible explanations, either of which shows Mr Ünal to be an unreliable witness concerning the June meeting. The first possibility is that until being shown in October 2021, shortly before trial, the emails sending the Ankara Workbook to him in June, Mr Ünal had forgotten that the Ankara Workbook had been created during the meeting, indeed was the primary working tool used at the meeting, and had been sent to him twice, once before 'Sheet 2' had been created, then again with 'Sheet 2', essentially contemporaneously with the meeting. The second possibility is that in giving his first account in May 2020, Mr Ünal was not trying to tell the truth as best he could as a matter of recollection, rather he was trying to fit a story to (some of) the documents (not very successfully, as it happens) in the hope it might result in a finding in his favour as to what happened at the June meeting.

141. In a fourth witness statement dated 28 October 2021 (about two weeks before trial), Mr Ünal changed his account very substantially, having been referred to the documentary evidence showing the Ankara Workbook being emailed to him on 25 and 26 June 2015. Now, he claimed to recall receiving the Ankara Workbook on both of those dates, but said that:

    (i) The copy sent on 25 June 2015 contained no 'Sheet 2' "*because there was no agreement that the parties would settle their differences at $7 million and no proposal for them to do so.*"

    (ii) The copy sent on 26 June 2015 "*contained – for the first time – the Sheet 2 document. This was [Noksel's] proposal to resolve the accounting differences between us and I do not recall looking at it in any detail, if at all, at the time. It was sent after the meeting with [Noksel] had finished and the first time I knew about the proposal contained in Sheet 2 was when I considered the e mail from Mr Canatalay dated 26 June 2015.*"

142. During cross-examination, Mr Ünal's account changed again on that final element. He now said that a proposal to settle accounting differences at an aggregate net balance of US$7 million in Noksel's favour *was* made *at the meeting* (not only afterwards by the sending of 'Sheet 2'), albeit he insisted that he had not agreed.

143. This inconsistency in Mr Ünal's evidence about the Ankara Workbook and the US$7 million proposal not only causes me to treat Mr Ünal's evidence about the June meeting as unreliable. More specifically, it means his claim that he never had any intention of agreeing the proposal is not credible. It would have been a difficult claim to accept even on Mr Ünal's original, false, account as to how and when the proposal was made to him, since his correspondence with Mr Atik (dealt with below) is not consistent with the idea that he never had any intention of agreeing. It is an impossible claim to accept, however, in the true circumstance, conceded by Mr Ünal only at trial, that the proposal was in fact made to him *at the meeting*. It is not credible that Mr Ünal could have had no intention whatever of agreeing, as he claimed, yet said nothing of the sort and

even Mr Eroğlu, now Mr Ünal's witness, remembered Mr Ünal being positive about the proposal when it was made at the meeting (see below).

Meeting Schedule / Sheet 2

144. The fixed points set out above mean that the meeting must have occurred within Wednesday-Friday 24-26 June 2015. Mr Ünal's evidence was that he met Noksel on all three days, but that nothing of relevance occurred on the Friday. From those who were on Noksel's side at the time:

(i) Mr Atik's evidence was that Mr Ünal came to Noksel's offices for two days, and that Messrs Akkoyunlu and Yalçin "*also joined later*", i.e. "*towards the end of the meeting*".

(ii) Mr Canatalay's evidence was that this account reconciliation meeting "*took place over two days on our Ankara office's terrace floor*", and he was adamant in cross-examination that he was referring there to 25-26 June, not 24-25 June. He described the process of review and negotiation, working through the records using the Ankara Workbook, and spoke of calling in Messrs Akkoyunlu and Yalçin to arrive at and agree a final reconciliation with Mr Ünal "*after we finished talking about the records*" (placing that, as did Mr Atik, towards the end of the meeting schedule, on the second day of substantive discussions).

(iii) Mr Eroğlu said nothing in his evidence about when exactly the meeting took place, or over how many days.

(iv) Mr Akkoyunlu's evidence was that he remembered that Mr Ünal met Messrs Atik, Eroğlu and Canatalay on the terrace in Noksel's office and there came a point when he and Mr Yalçin were asked to join the meeting in order to reach a final reconciliation. He did not say when exactly, or over how many days as a whole, the meeting occurred.

(v) Mr Yalçin's evidence was that he did not remember the date of the meeting, but having been reminded of an email dated 14 July 2015 from Mr Atik, to which Mr Yalçin was copied, he dated the meeting to 25 June 2015, but also said that the meeting "*lasted for two days and I became involved at the end of the second day to finalise the agreement*", being called in with Mr Akkoyunlu by one of the Noksel team for that purpose. Mr Yalçin said that at the point when he and Mr Akkoyunlu were called in, "*The meeting was about to be concluded, and [Mr Ünal] was about to leave. There were just a few points left, to reach the final decisions and reach reconciliation.*"

145. As I noted above, Mr Ünal's evidence about the June 2015 meeting changed very substantially shortly before trial. In his first statement in May 2020, Mr Ünal claimed to have flown to Turkey on 24 June 2015 and to have flown home on 2 July 2015, "*and so the meetings took place over several days in Ankara during that period*". His fourth statement, shortly before trial, gave a very different account, upon which he elaborated in oral evidence, in which he did not travel by air at all, but undertook a lengthy trip to Turkey by land and sea,

arriving in Istanbul (by sea) at about 8 or 9 am on 24 June 2021 so as to reach Noksel's office in Ankara (by road) by mid-afternoon that day.

146. In this belated, revised account, Mr Ünal said that not much progress was made on 24 June, that "*the substance of the meeting really took place on 25 June 2015*", and that:

(i) "*… at the end of the meeting on 25 June 2015, Mr Yalcin and Mr Akkoyunlu joined myself, Mr Atik and Mr Canatalay and discussed whether we could find a way to agree the accounting differences between us and resolve matters. I explained that I was waiting for [Noksel] to come back to me on the invoices in the Bemaco and Prime check documents which they said they needed to check. There were other invoices from the Bemaco Companies on the Bemaco Check and Prime Check documents which [Noksel] had no comment against and I understood they were accepted. However, nothing was agreed on 25 June 2015 and there was no celebrations [sic.] at the end of the meeting. I did go out to dinner that evening with all five of those attending on behalf of [Noksel] … but we did not progress matters further.*"

(ii) "*I did return to [Noksel's] offices on the morning of 26 June 2015 and met with Mr Atik, Mr Eroğlu and Mr Canatalay, but this was in reality just to have a coffee and say goodbye as a courtesy. However, I do recall that on that morning of 26 June 2015, I wrote out in chalk on a blackboard at [Noksel's] offices, all the invoices from the Bemaco Companies which I understood [Noksel] had accepted.*"

(iii) Mr Ünal left Noksel's offices around 12 noon on 26 June, to be driven back to Istanbul, where he had dinner that evening with his sister and then stayed with her until leaving Turkey on 2 July 2015. Thus, on Mr Ünal's account, the 26 June copy of the Ankara Workbook, with 'Sheet 2', was sent to him while he was on the road to Istanbul.

147. Both parts of Mr Ünal's evidence about 26 June (paragraph 146(ii) above) cannot be true. There would have been no recap exercise on a blackboard as Mr Ünal described if he had called in just as a farewell courtesy, the business discussions between the parties having ended the previous day. In fact, it is clear by comparing the versions of the Ankara Workbook sent to Mr Ünal on 25 and 26 June that all the narrative content in 'PrimeSteel Check' was only entered on 26 June, likewise some of the final content of 'Bemaco Check'. That means, contrary to Mr Ünal's account, the substantive line item review conducted with Mr Ünal was not concluded on 25 June but continued into 26 June.

148. The way in which the two iterations of the Ankara Workbook were sent to Mr Ünal on 25 June (paragraph 135 above) and 26 June (paragraph 134 above) is not readily explicable unless what was being sent was already familiar to Mr Ünal from the meeting. Furthermore, on 26 June there was no explanation of, nor even an attempt to draw attention to, 'Sheet 2'. It is credible that, if received by him 'cold', Mr Ünal might have guessed that it illustrated a means by which Noksel and the Bemaco group could achieve in their respective accounts an overall net current account balance of (almost exactly) US$7 million payable to

Noksel, in aggregate across Bemaco, Prime, and Eurotex. But it is highly implausible that Mr Canatalay would have failed to draw attention to and explain 'Sheet 2' when sending it to Mr Ünal, if he (Canatalay) thought it would be new to Mr Ünal; and having seen and heard from Mr Canatalay as a witness, I am confident he would not have behaved in that improbable fashion.

149. Mr Canatalay's evidence, which I accept, is that he created 'Sheet 2' during the meeting, while his laptop was still connected to a projector so that the Ankara Workbook was displayed on a large screen, as it had been as he entered up the parties' comments to create the narrative content of the 'BemacoCheck' and 'PrimeSteel Check' sheets. As regards 'Sheet 2', then, Mr Canatalay entered the individual line items as Messrs Ünal and Eroğlu went through the 'BemacoCheck' and 'PrimeSteel Check' sheets and agreed on how much, if any, of the difference amounts were to be recognised on one side or the other towards a final reconciliation. I accept that evidence as the evidence of an honest witness on a matter likely to have been memorable that fits the documentary record well.

150. Recalling when the Ankara Workbook was first created on 25 June (see again paragraph 135 above), the evidence of all the witnesses that substantive discussions at the June meeting occupied more than one day, and what can be seen from a comparison of the 25 June and 26 June versions of the Workbook (paragraph 147 above), in my view the probability is, and I find, as follows.

151. On 24 June, by the time Mr Ünal got to Noksel and the meeting could get underway, there would have been little time to do more than retrieve the data and set up the Ankara Workbook in readiness for the detailed review that was needed of the difference items identified in the respective accounting records.

152. 25 June was therefore the first, and main, day of discussions, line item by line item, by the end of which the 'BemacoCheck' and 'PrimeSteel Check' sheets had been created for a line item review of the differences between the accounting records, towards (all going well) agreement upon a final reconciliation. By the end of that day, that line item review had been substantially completed for 'BemacoCheck', although some further work on that was done the next day. Sending the Ankara Workbook to Mr Ünal as it then stood at the end of 25 June, as Mr Canatalay did, served to record where the parties had reached, from which substantive discussions could be picked up the following morning.

153. 26 June was the second day of substantive discussions, albeit (I agree with Mr Ünal) the third day in total. 'BemacoCheck' was finalised, the line item review work for 'PrimeSteel Check' was done, and then 'Sheet 2' was created, as described by Mr Canatalay (paragraph 149 above). To the extent that Noksel's witnesses spoke of two days of meeting, and of Messrs Akkoyunlu and Yalçin joining only for the latter part of discussions, on the second day, they were recalling the substantive discussions on 25-26 June 2015, not substantive discussions on 24-25 June 2015.

154. Those would be my findings even if, as he claimed, Mr Ünal left Noksel at about 12 noon on 26 June 2015, but with nothing to corroborate that specific claim, I

am not prepared to treat it as reliable. I regard it as more probable than not, and find, that discussions *did* extend into the early afternoon of 26 June. I do not think it plausible that Mr Canatalay waited for over four hours after Mr Ünal's departure before sending the final version of the Ankara Workbook (with 'Sheet 2'), and the metadata showing Mr Canatalay's last revision to have been at 2.19 pm that day suggest the meeting continued until about then, as does Mr Akkoyunlu's evidence that he recalled attending the last part of the meeting, being there for over two hours, until the end of the meeting, which was in the afternoon, perhaps around 2 pm. (In one cross-examination answer, Mr Canatalay said the meeting ended "*in the evening on the 26th*", but he corrected himself to the afternoon after giving his more specific recollection that "*the final revisions to [the Ankara Workbook] was made there at the table with the presence of [Mr Ünal] and I sent to [him] the final version of that file on the same day at around 4.30*."

155. Mr Ünal's belatedly claimed recollections that Messrs Akkoyunlu and Yalçin joined the meeting late on 25 June, not on 26 June, and that he did no more on 26 June than call in for a coffee and to say goodbye as a courtesy, are not reliable. In my judgment, Mr Ünal's revised account was an attempt to reconstruct from the documents, having been referred to the emails sending the Ankara Workbook on 25 and 26 June 2015, an account that fitted the case he was advancing that no account reconciliation had been agreed at the June meeting, for the purpose of which he had sought to claim that (a) 'Sheet 2' was not created in his presence, and (b) no proposal to settle the account at US$7 million had been made during the meeting.

US$7m Proposal

156. Noksel's witnesses gave consistent evidence, in writing and orally, that during that final part of the June meeting, after Messrs Akkoyunlu and Yalçin joined (they being the relevant decision-makers for Noksel), the parties agreed to set the current account balance at US$7 million payable to Noksel, by BEMACO (simplifying the accounting so that there were no longer separate balances claimed against Bemaco Ltd and Eurotex as well), and that 'Sheet 2' reflected the deal thus reached. Indeed, Messrs Yalçin, Atik and Canatalay all said (and I accept) that they recall the meeting closing with celebratory drinks (Messrs Yalçin and Canatalay mentioned also hugs) to mark the successful culmination of the project to get to an agreement on the current account balance that had been ongoing since at least the April 2013 meeting in Istanbul.

157. Mr Ünal was consistent in denying having agreed the proposal, but as I have noted his evidence shifted substantially as to when the proposal was made. On his first account, in May 2020, the proposal was made only in writing, in August 2015, about six weeks after the June meeting. On his second account, in October 2021, the proposal was still made only in writing, and after the June meeting, but immediately after, by the 26 June email sending the Ankara Workbook with 'Sheet 2'. On his third account, during cross-examination, the proposal was put to him orally, at the June meeting.

158. Mr Eroğlu's written evidence was that he recalled the proposal that the parties agree the debt owed to Noksel at US$7 million being made at the June meeting,

he said by Mr Atik. In cross-examination on that, it was clear to me that he had some recollection of 'Sheet 2' in the Ankara Workbook and, specifically, that he recognised it as having been put together during the June meeting and recalled that the US$7 million proposal was made at the meeting by reference to it. His written evidence as to Mr Ünal's response was that, "*Mr Ünal seemed interested in the idea but did not as I understand it, in fact agree to this proposal*". In cross-examination, he explained what he meant by that as follows: "*So what I mean here is, as far as I remember, in the meeting Mr Ünal seemed interested in the idea but as you may know, we have some other conversations after this meeting. So altogether not about this meeting but altogether afterwards what we have spoken, I understand he didn't agree this proposal.*"

159. Thus, as Mr Eroğlu went on to confirm in terms in further answers, his understanding that Mr Ünal did not agree came not from anything said at the June meeting – at which Mr Ünal was, in Mr Eroğlu's words, "*interested in the proposal*" – but was an understanding he formed from things said by Mr Ünal later that indicated to Mr Eroğlu that Mr Ünal had not really agreed with it. He clarified that Mr Ünal never said to him in terms that he did not agree the US$7 million balance: "*It is not a direct quote. I cannot say that we have this conversation but the emails, the other conversations, I remember exactly, cherry picking, he said cherry picking about the meeting notes. I understood that he did not agree to 7 million.*"

160. Asked finally "*in terms of what happened at the meeting itself …, isn't the reality that Mr Ünal was not only interested in the $7 million proposal but also agreed to that proposal at the Ankara meeting?*", Mr Eroğlu said, "*No. I didn't say. I couldn't say.*"; and then, asked as follow-up, "*Is that your actual recollection based on events at the meeting or is that based on the conversations that you had subsequently*", he said, "*Subsequently. Not only the conversations but the emails we have received from his side.*" My assessment is that Mr Eroğlu was unwilling to say in terms that Mr Ünal agreed the US$7 million proposal at the meeting, because his recollection of exactly what he had said is not clear enough for him to be happy to contradict so directly what he knew to be one of Mr Ünal's most important contentions. However, his appreciation of what happened at the meeting is clouded by the impression he formed from Mr Ünal later appearing to him to be unhappy with the US$7 million figure, giving him an impression that Mr Ünal had not really agreed with it. Importantly, though, Mr Eroğlu recalls Mr Ünal being positive at the meeting about the proposal to fix on that figure, even if (as I conclude) he does not remember exactly what was said.

161. I have no doubt that the final part of the June meeting, after Mr Akkoyunlu and Mr Yalçin joined with a view to bringing discussions to a conclusion, included the making of a proposal to settle the accounting differences between the parties by fixing the current account balance at US$7 million in favour of Noksel as at 4 June 2015, payable by BEMACO. The last element, locating the agreed balance all in BEMACO (and therefore setting Bemaco Ltd's and Eurotex's balances at nil, whatever they might otherwise correctly have been), as Mr Atik said in his evidence (which I accept), was raised at the meeting as a convenient simplification of the overall account. If agreed (as Mr Atik said it was), it would

be effective as a matter of contract to make BEMACO the only debtors of Noksel and Noksel would have no need to be concerned as to how, internally within the Bemaco group, that change would be dealt with or accounted for. In particular, that aspect of the proposal did not require or involve any notion that BEMACO had a joint or several liability, pursuant to the ERW Sales Protocol or otherwise, for debts of Bemaco Ltd or Eurotex.

162. The issue, then, is whether, as Noksel says, that proposal was accepted by Mr Ünal, bringing the June meeting to a successful conclusion, or whether, as the defendants say, the proposal was not accepted so that the June meeting ended inconclusively.

163. On that issue, I prefer and accept the evidence of Noksel's witnesses, which was not contradicted (in my view, on balance, it was rather supported) by the evidence of Mr Eroğlu, and I reject the contrary evidence of Mr Ünal. The account given by the Noksel witnesses was a consistent account by truthful witnesses of an essential matter likely to have been memorable, namely that the June meeting ended successfully with an agreement to fix the current account balance at US$7 million, payable by BEMACO. As the Noksel witnesses explained, that involved at the end an element of 'let's call it US$7 million and be done'.

164. That account is supported by the Ankara Workbook, in particular 'Sheet 2', and (by way of adverse inference) by Mr Ünal's desperate, inconsistent but unsuccessful attempts to claim that 'Sheet 2' was not a working document at the meeting. It is further supported, strongly, by the correspondence between the parties following the June meeting, to which I now turn.

165. I have stated my general conclusion upon that correspondence now, before turning to the detail, because there is a lot of detail to go through and I do not want the wood to be missed for the trees as I do. The theme is constant: the parties corresponded and acted in a way that is not sensibly explicable except that it was appreciated on both sides that the June meeting had concluded with the striking of a deal at US$7 million (due from BEMACO to Noksel), so that what came next was but implementation of a concluded deal; conversely, the parties did not correspond or act as they would have done if the June meeting, like the April 2013 and December 2013 meetings, had ended inconclusively without a final, agreed resolution of the current account balance due to Noksel.

166. I do not accept a submission by Mr Hattan that there could be or was no effective agreement setting the current account balance at US$7 million without, in addition, agreement on how precisely that would be implemented as a matter of internal accounting on each side and/or cross-invoicing between the parties. The fact that Mr Atik engaged at some length with Mr Ünal on how they would each implement the agreement does not mean that the agreement was incomplete.

167. In any event, 'Sheet 2' as created, in effect jointly, by the parties at the June meeting contained a sufficient, detailed work-up of how they could get to US$7 million in each side's books. For reasons that did not emerge clearly enough from the evidence for me to make a specific finding, Messrs Atik and Ünal did not simply turn that specific work-up into an accounting reality by invoices or

credit/debit notes to match it, but that does not render the deal as reached at the meeting uncertain or ineffective.

Subsequent Correspondence

168. As I have mentioned a number of times already, the first communication after the June meeting was Mr Canatalay's email to Mr Ünal on 26 June 2021 attaching the Ankara Workbook in final form, including 'Sheet 2', with the simple covering message, "*Please find attached the document covering the accounts of Noksel-Bemaco*". That seems to me a natural communication if Mr Canatalay was providing for Mr Ünal's records a copy of the agreed final position reached at the meeting. Of course, he might have put the point beyond doubt by more explicit language (e.g. by adding "*as finally agreed today*" or similar); but in simply sending to Mr Ünal a copy of what the parties had just been looking at, I think it understandable that it did not occur to Mr Canatalay to spell that out. I do not regard Mr Canatalay's email as a natural communication following an inconclusive meeting at which a final account reconciliation proposal had been made but not accepted.

169. Furthermore, for the meeting to have ended inconclusively would have meant it was, ultimately, a failure, its whole purpose having been finally to resolve the issue of the current account balance. It is not realistic to suppose that in such circumstances neither side sought for it to be continued or reconvened, or (as appears to have been the case) gave any thought at all to doing so, though Mr Ünal was due to remain in Turkey for at least another three working days even if (and I could not say whether this was the position) he could not have extended his scheduled visit further if need be.

14 July 2015

170. On 14 July 2015, at 3.02 pm, Mr Atik sent the email to which I referred in paragraph 144(v) above, to Messrs Ünal, Eroğlu and Canatalay, cc.Messrs Akkoyunlu and Yalçin, with email subject "*Noksel-Bemaco Minutes of Meeting*". The email recorded that the parties had agreed at the June meeting *inter alia* that:

> "*1. The total balance of debts of Bemaco Steel, Bemaco Ltd, Prime Steel and Eurotex has been determined at USD 7 million. This amount does not cover the latest invoice of 04.06.2015 no. 917510 in the amount of USD 1,279,019.97.*
>
> *2. The parties will coordinate their respective accounting records by way of reciprocal invoicing in order to reflect the total balance of USD 7 m. For this operation, Cenk Atik and Bülent Ünal will exchange the necessary documentation.*
>
> *3. The agreed USD 7 million balance contains the balance debt of USD 1,820,578 (with the exception of invoice No. 817510) of Bemaco Steel company from 2015 operations. ...*"

171. Mr Atik's email closed with an invitation to Mr Ünal to confirm what was set out about the meeting, i.e. (as I read it) he was invited to confirm the accuracy of Mr Atik's summary.

172. At 3.26 pm, Mr Atik sent a separate email, to Messrs Ünal and Eroğlu, with email subject "*re Account reconciliation*". The email attached a spreadsheet the content of which was the following simple table:

NOKSEL - BEMACO GRUBU HESAP MUTABAKATI

1	**NOKSEL DEFTERLERINDE BEMACO GRUBUNUN BAKIYELERI***		**BEMACO LTD**	**BEMACO STEEL**	**EUROTEX**	**PRIME STEEL**	**TOTAL**
		USD	20,493.37	7,659,717.55	419,894.20	1,650,690.62	**9,750,795.74**
		EUR	0.00	0.00	0.00	62,497.68	**62,497.68**

**Bemaco Steel firmasına en son kesilen 4.6.2015 Tarihli 817510 Nolu 1.279.019,97 USD bedelli fatura (MV Geervliet) dahil değildir.*

2	**PRIME STEEL EUR BAKIYESI USD'YE ÇEVRİLECEK PARITE 1.10**		**BEMACO LTD**	**BEMACO STEEL**	**EUROTEX**	**PRIME STEEL**	**TOTAL**
		USD	20,493.37	7,659,717.55	419,894.20	1,719,438.07	**9,819,543.19**

3	**BEMACO LTD VE EUROTEX BAKIYELERI PRIME STEEL'A DEVREDİLECEK**		**BEMACO LTD**	**BEMACO STEEL**	**EUROTEX**	**PRIME STEEL**	**TOTAL**
		USD	0.00	7,659,717.55	0.00	2,159,825.64	**9,819,543.19**

4	**BEMACO STEEL VE PRIME STEEL'DEN FATURALAR ALINARAK HESABA GİRİLECEK**		**BEMACO LTD**	**BEMACO STEEL**	**EUROTEX**	**PRIME STEEL**	**TOTAL**
		USD	0.00	7,659,717.55	0.00	2,159,825.64	**9,819,543.19**
		FATURA**		-659,717.55		-2,159,825.64	**-2,819,543.19**
		TOTAL		**7,000,000.00**		**0.00**	**7,000,000.00**

** Bemaco ve Prime Steel firmalarının keseceği faturalar 01.07.2015 tarihli olacak. Fatura açıklamalarında 2013'den buyana vessel by vessel "Weight Adjustment" açıklaması
yazılacak.

173. As Mr Atik's covering email explained, the first main row set out the account balances as recorded in Noksel's books, the second main row set out those same account balances after converting the small € balance recorded against Prime to US$, the third row transferred the Bemaco Ltd and Eurotex balances to Prime, and the fourth row assumed that in the invoicing operation "*to reach the agreed USD 7 million*" (as Mr Atik put it), Mr Ünal would invoice from Prime so as to reduce its final balance to nil, with the balance being invoiced from Bemaco so as to leave it with (all of) the final US$7 million balance.

174. The email said of that last step that: "*In section 4, the total invoice amount to be received from you to reach the agreed USD 7 million is USD 2,819,543.19. I don't know how much can be invoiced from Bemaco and how much from Prime Steel. However, in the attached table I assumed that the invoice in the amount of USD 2,159,825.64 to reset the current account of Prime Steel is issued from Prime. This part may change depending on your situation.*

IMPORTANT: In this invoicing operation, the invoices you will issue will only be recorded by us; and the invoices we will issue will only be recorded by you. Only this way, a solution can be reached.

We would like the invoices that you will issue to be dated 1.7.2015 and we would like to conclude the operation by issuance of one invoice from each of Bemaco and Prime. …

Of course, these are to be done just to bring Noksel's account books to USD 7 million. On the other hand the situation on your side should be different, you have more than one company. Therefore we expect from you to notify us about to which company, at which price and with which details you would like the invoices."

175. At 4.09 pm, Mr Ünal replied to Mr Atik's first email setting out minutes of matters agreed at the June meeting (paragraph 170 above). Mr Ünal's email was in these terms:

"*Although the below-summarized notes [i.e. Mr Atik's minutes] cover what we have discussed, there are still some accounts that both we and you need to go through. For example one of them is Eurotex account. We have requested the bank to send us the statements, and Cintia will try to go through them and perform the account reconciliation. Another issue is: the amounts of interest calculations in line with the latest form and firms. Unfortunately; it is not possible in accounting terms to close all accounts with a single balance as there is not a single firm at issue.*

If you like, you'll finalize the interest calculations, and I'll finalize Eurotex's, then we can meet in the last week of July and finalize them together. Is it OK for you?"

176. That did not provide the simple confirmation Mr Atik had requested that Mr Ünal agreed Mr Atik's minutes. At the same time, if it was not true that at the

meeting the parties had agreed to fix the current account balance at US$7 million, leaving Messrs Atik and Ünal to implement that through cross-invoicing (which was the central element of Mr Atik's summary), it is very surprising that Mr Ünal did not say so. In cross-examination, Mr Ünal said he *should* have done so, since there had been no agreement. In my judgment, as illustrated by how Mr Ünal responded with prompt and specific challenges when Noksel overstated following the December 2013 meeting what had been agreed (see paragraph 71 above), the true and pertinent proposition is that Mr Ünal *would* have done so if there had been no agreement.

177. At 4.32 pm, Mr Ünal replied to Mr Atik's second email, with attached table, saying just that he would review and revert by the following Monday (20 July 2015).

178. At 7.00 pm, Mr Atik responded to Mr Ünal's reply on the meeting minutes (paragraph 175 above), stating that "*Both of the parties convened in the highest level in our last meeting, and reached a mutual agreement clearly. It was agreed that it would be worked on and determined a total balance amount of 7 Million USD excluding the last vessel. This amount covers many issues up until now including interests and claims, and no agreement was reached on any further works, examinations, etc. on the same. In this sense, there is not any account that we'll go through again; the issues of interests and claims are already covered in this agreed amount. The new calculation, to be made on the basis of the new interest rate, will start as of July 1, 2015.*"

179. The reference by Mr Atik to "*the new interest rate*" was to interest at Libor + 3.5%, his meeting summary having recorded agreement at the meeting to apply that rate to the current account balance of US$7 million from 1 July 2015.

180. Mr Ünal replied at 7.18 pm, saying that "*All matters, we agreed in principle, were noted down; but as far as I remember, there were some items that you said "we'll review them". Furthermore; the interest amounts need to be separated by firm in some way so that I can divide them between the firms; otherwise, it would be impossible to recognize them. We also need to be accountable to the auditors here. I talked with Burak. He said he would talk to you, and that it could be divided on a percentage basis, only. The amount is highly considerable; so I cannot record it under a single firm's account. You're more familiar with, and experienced on accounting matters. I hope you have understood my point.*"

181. Mr Ünal's concern to identify for interest calculations and invoicing how much of any current account balance was to be attributed to Bemaco and how much to Prime was not explored in any real detail at trial. Mr Atik's reply the following morning treated it as an internal matter for Mr Ünal / the Bemaco group of no concern to Noksel, and in circumstances where the liability under the ERW Sales Protocol was joint and several, that seems to me to have been a correct approach.

15 July 2015

182. That reply from Mr Atik, by email at 9.38 am on 15 July 2015, was in these terms:

> "*Of course; I understand your point. ... you'll determine what will be the amount of interest invoices to be issued to which firm. But, you need to pay regard to a cap while determining it, which is to ensure that the total of Bemaco + Prime accounts will amount to 7 mio USD excluding the last vessel. When you request such invoices and take them under your records, separate balances will be created for Bemaco and Prime; e.g. 1M USD for Prime and 6M USD for Bemaco (excluding the last vessel). Then, you'll issue your invoices to us in order to ensure that our accounts show the same balance amount (please see: the attached example). By the way, we're not reviewing the claim files under the scope of the agreement; because, they have been all accepted and an agreement was reached on a certain amount.*"

183. Mr Atik attached a revised version of the table he had sent the previous afternoon (paragraph 172 above), in which the only change was that at step 4 the table envisaged Bemaco invoicing US$1 million more and Prime invoicing US$1m less than in the first version of the table, so the final US$7 million balance was shown as split across Bemaco (US$6 million) and Prime (US$1 million) rather than all lying against Bemaco.

184. Mr Ünal replied promptly, at 9.55 am, in these terms: "*We're rearranging our accounting records with the interests which have been accrued, as recommended by you. I think I'll be able to send them to you after returning from the festival holiday [a reference to the Eid al-Fitr which was on 17-18 July that year].*" Mr Atik replied at 11.14 am, with a simple "*Thank you; Eid Mubarak to you.*"

185. I regard it as inconceivable that Messrs Atik and Ünal might have had those exchanges, in those terms, if they did not both believe that the June meeting had concluded with agreement to fix the current account balance at US$7 million, payable by Bemaco and Prime to Noksel, as minuted by Mr Atik and illustrated by his spreadsheet tables.

25/29 July 2015

186. By an email to Messrs Atik and Eroğlu on 25 July 2015, with email subject "*Interest*", Mr Ünal said that he was "*trying to finalise the accounts with Cintia and the auditors*". To that end, he asked for "*the total interest amount, as requested by you until July 1, 2015*", so he could divide the remaining amount between his companies "*upon deducting the Algeria commissions of USD 790,000, in line with the calculation by Burak*". This, he said, was "*the last remaining item. I'll send you the balances by companies next week.*"

187. There had never been a calculation that 'Algeria commission' payments of US$790,000 were due. The reference to an amount of US$790,000 calculated by Mr Eroğlu must have been a reference to the balance in that amount calculated by him in the context of the 2006-2007 overpayment scheme (see

paragraph 59 above). That was calculated by Mr Eroğlu as the balance due under that scheme from Noksel as at April 2013, against which Noksel proposed to offset un-invoiced interest.

188. The proper reading of this email of Mr Ünal's, therefore, I think, is that he was looking to identify, for Ms Tomaszek and auditors, the total interest amount accrued up to 1 July 2015 said by Noksel to be outstanding for the purpose of the invoicing exercise that was to follow the June 2015 meeting, in respect of which he had been asked to indicate how he wanted that invoicing to be split between Bemaco and Prime, and that he had in mind to calculate that amount by deducting the US$790,000 referred to in Mr Eroğlu's April 2013 exercise from the total interest said by Noksel to have accrued up to 1 July 2015. That is to say, he was proposing to treat that US$790,000 as having been offset against the 2006-2007 overpayment scheme balance, as proposed by Mr Eroğlu in 2013. In using that amount calculated in April 2013, though, he was overlooking that the overpayment scheme calculations moved on in December 2013 such that the balance *prima facie* due from Noksel and available to be offset against interest claimed by Noksel was agreed to be US$723,000 rather than US$790,000 (see paragraph 81 above).

189. I was not shown any reply from Noksel to that 25 July email.

190. A few days later, however, on 29 July 2015, Mr Atik sent a second reply to the email from Mr Ünal of 15 July 2015 referred to in paragraph 184 above, politely chasing "*whether there is any development regarding the invoices*". In light of the exchanges on 14/15 July 2015, there were two outstanding issues regarding invoicing: (a) a need for invoices from Mr Ünal (split as he might wish between Bemaco and Prime) for Noksel to accept into its accounts to bring its record of the current account balance down from US$9.8 million to the agreed US$7 million (as Mr Atik had repeatedly labelled it); (b) a need for Mr Ünal to identify how he wanted Noksel to split across Bemaco and Prime interest invoices that would be part of bringing their record of the current account balance up to US$7 million between them.

August-October 2015

191. Mr Ünal replied by email on 3 August 2015 saying that "*Everyone has returned from the holiday. I'll gather them up, and send to you this week.*"

192. On 10 August 2015, Mr Ünal initiated a fresh email thread, with email subject "*Missing Invoices*", and a message in these terms: "*Please find the invoices you requested as an attachment, what else do you need, please let me know.*"

193. The attachment was a .pdf with 15 invoices addressed by Bemaco to Noksel, one dated 30 June 2015, one dated 12 May 2014, the rest dated 20 July 2015, totalling a little under US$1.4 million. In the exchange on 14/15 July, Mr Atik had explained that invoices totalling just over US$2.8 million were expected.

194. Mr Atik replied promptly that afternoon, noting that the invoices sent fell short of what was required, reminding Mr Ünal that "*we were trying to reduce [the balance] to 7 million USD; therefore, you need to send us a further invoice*

(whether of Bemaco or Prime) amounting to 1.431.979,21 USD in total. Please find the details under the table below". Mr Atik also reminded Mr Ünal that he would need to enter payables to Noksel into his records to bring them up to US$7 million in aggregate and asked again for Mr Ünal's proposed split of interest invoices between Bemaco and Prime. He also suggested (for the first time, unless something had been said about this on the telephone at some stage) that Noksel was waiting to see a letter issued by Prime ordering the Bemaco Ltd and Eurotex balances to be transferred to Prime before Noksel would "*perform the action #3 under the table below*".

195. The "*table below*" referred to in Mr Atik's reply was a further version of the table first sent on 14 July 2015 (paragraph 172 above). This time, at step 4, it showed Bemaco as having invoiced the total of the 15 invoices that had just been sent by Mr Ünal and Prime as having invoiced nil, leaving a balance of a little over US$8.4 million, with a comment label against that box under Mr Atik's name saying that it was supposed to be US$7 million. Mr Atik's email also attached his two initiating emails sent on 14 July 2015 (paragraphs 170 and 172 above).

196. Mr Ünal replied within a few minutes, as follows:

"*I e-mailed you and asked for the calculation for allocation between the companies that we have made on the black board, if you remember, but I could not get a response. Here we cannot enter everything in the way we prefer, accordingly, I will also ask for an invoice from you. We are talking to the auditor to enter these invoices (interest), we will find a formula because the amount is large. But in the end, the hard part is over, but it may take some time to complete. Could you please send me how much is the total interest after the discount?*"

197. Mr Ünal's evidence was that his reference there to making a calculation on a blackboard was to the morning of 26 June 2015, at Noksel's offices, as referred to above; and I envisage that his reference to an unanswered request was to his email of 25 July 2015. Of more significance now, however, is that Mr Ünal did not dissent at all from Mr Atik's reiterated description and explanation of what they were supposed to be doing, *viz.* sorting out the cross-invoicing to implement an agreement reached at the June meeting to set the current account balance at US$7 million. Indeed, and to the contrary, Mr Ünal put it that "*the hard part is over*", which in context could only mean that the current account balance had indeed been agreed, as Mr Atik had repeatedly said, although it might still "*take some time to complete*", which in context could only refer to the process of implementing what had been agreed.

198. If, as has been the defendants' forensic position, there was never anything more than an unaccepted proposal by Noksel to set the current account balance at US$7 million, it is wholly unrealistic to suppose that Mr Ünal would have expressed himself in that way.

199. Mr Atik replied promptly, attaching a further copy of the Ankara Workbook as sent to Mr Ünal by Mr Canatalay on 26 June 2015, but in which Mr Atik had amended 'Sheet 2' to highlight the cells that I shaded green in paragraph 137

above, and to add against those highlighted cells a comment box identifying them as the interest amounts within the 'Sheet 2' reconciliation. This then is the email by which, in his initial account given in May 2020, reiterated in his second statement in June 2021, Mr Ünal said he was first provided with the Ankara Workbook and the proposal to set the current account balance at US$7 million was first made.

200. Mr Atik's email was in these terms:

"*I have marked it [i.e., it must be, the interest amount Mr Ünal had requested] in the attached excel. The total interest for Bemaco is USD 1,250,310 and for Prime USD 150,000.*

Are you going to send an additional invoice worth USD 1,431,979.21 to lower our credit balance? (It is not important for us whether you include these invoices in your records)" (original emphasis).

201. Mr Ünal again replied within a matter of a few minutes, saying: "*I gave everything to Cintia and the Auditor. I don't know how these kinds of processes are carried out in Turkey, but we need to take everything under record here, otherwise how could we make the account reconciliation at the end of the year? I'll send them the invoices, which I believe are not available under your records; we'll come to an agreement in some way. Many invoices of ours don't already appear to be available under your records.*" In this respect agreeing with a submission by Mr Dhar, in my judgment Mr Ünal thus expressed a degree of reticence about issuing invoices that would not be recorded in his companies' accounts, but did not qualify his immediately prior acknowledgment that what at this stage the parties were looking to agree was how to implement the extant agreement to set the current account balance at US$7 million. His reference to account reconciliation at year end was plainly, in context, to the auditing of his companies' accounts, not a suggestion that the parties had not agreed to fix the current account balance at US$7 million; and his reference to coming to an agreement in some way was, in context, about finalising an implementation method.

202. By further email to Mr Atik on 13 August 2015, sent as a fresh reply to Mr Atik's email attaching the Ankara Workbook, Mr Ünal said, "*I didn't forget it but I'm currently going through our accounts based on our talk yesterday. I have just understood what you are trying to do; I'll try to find an appropriate solution.*" Again, it is not plausible to suppose, as the defendants assert, that Mr Ünal expressed himself in that way without appreciating and accepting that at the June meeting agreement had been reached to set the current account balance at US$7 million and that what was under discussion was only the mechanics to implement that agreement.

203. Also on 13 August 2015, Mr Atik drew attention to the fact that one of the 15 invoices recently sent by Mr Ünal was dated 2014 and asked for that to be corrected to 2015.

204. Later that month:

(i) On 24 August, Mr Ünal sent bills of exchange to Noksel by DHL, and notified Mr Atik by email that he was doing so, as payment security for US$3.75 million of the balance due to Noksel. Mr Atik's minute of what had been agreed at the June meeting recorded agreement that the current account balance of US$7 million would comprise US$1.8 million in respect of business in 2015 (up to but not including the then very recent *Geervliet* shipment, which was treated as new business post-dating the account reconciliation exercise), and therefore US$5.2 million in respect of pre-2015 business, and that bills of exchange would be provided as payment security for that US$5.2 million.

(ii) In his email confirming that the bills of exchange were on their way via DHL, Mr Ünal added that "*only the Eurotex part is giving us a headache, and I am trying to solve it out.*" Although Mr Ünal never told Noksel this, no doubt the reason why he faced difficulty internally over documenting the Eurotex part of what had been agreed, since it involved recognising what had been a balance owed by Eurotex as part of the balance owed by BEMACO, was that Eurotex no longer existed. Be that as it may, and agreeing with Mr Dhar's characterisation of this correspondence, Mr Ünal was thus once again participating in an implementation of an extant agreement fixing the current account balance at US$7 million, and reassuring Noksel that he would find a way to do so that worked for whatever his intra-group issues might be.

(iii) On 25 August 2015, Mr Ünal suggested that he was "*trying to convince the auditors to transfer the Eurotex account to that of Prime. However, it creates a tax problem. We will sent [sic.] a separate bill [of exchange] once we handle this issue.*" Why a tax issue over reallocating the Eurotex balance of US$420,000 within the Bemaco group meant that Mr Ünal had sent bills of exchange US$1.45 million short of what had been agreed was not explained. Nor was the supposed tax problem. On the face of things, there should not have been an issue so long as, within the Bemaco group, Eurotex retained responsibility for what had been its balance even if, as against Noksel, there was an agreed simplification of accounts taking Eurotex's balance into an agreed aggregate balance owed by BEMACO. The reality, I infer, was that there was only a problem, if at all, because (unknown to Noksel) Eurotex no longer existed.

205. On 3 September 2015, Mr Atik chased for the further invoices he had called for on 10 August, asking, "*Will we be able to solve the matter of missing invoices in August '15 period? We'll perform the period closing processes in ten days*." In response on that date, Mr Ünal sent Mr Atik a list of Bemaco and Prime items totalling US$1.14 million, indicating that he had asked Ms Tomaszek for invoices for those items and asking Mr Atik "*Is this enough …?*". In reply the following day, Mr Atik pointed out (correctly) that Mr Ünal's list included just over US$400,000 already invoiced in July as part of this exercise and noted that after stripping out that duplication, Mr Ünal's list totalled only US$692,000 whereas he had asked to be invoiced for US$1.431 million.

206. Further invoices (all in Bemaco's name) were then sent by Mr Ünal to Mr Atik early on 4 September 2015, with a request that Mr Atik check them and let Mr Ünal know how much was still missing. Why Mr Ünal was unable to do that simple arithmetic for himself was not explained, but in any event Mr Atik patiently responded that morning confirming that the new invoices added up to US$644,775.80 leaving this invoicing exercise still US$787,203.41 short. He also asked for the new invoices to be re-dated to August 2015 so that Noksel could take them into its systems, and for a currency error in one of them (references to GBP instead of USD) to be corrected. That was a Friday (4 September 2015), and Mr Ünal replied, "*OK I will do all this weekend and send*".

207. On Sunday 6 September 2015, Mr Ünal sent an email to Mr Atik, cc.Ms Tomaszek. The email said, "*Please find attached signed copies of the invoices you have requested to finalise the reconciliation. Please advise if these are now acceptable.*" The single .pdf attachment contained two invoices dated 20 August 2015 addressed by Bemaco to Noksel totalling the US$1.431 million Mr Atik had called for:

    (i) Invoice WD101001 for US$1,210,016.93, created from the list of price uplift items tracked by Noksel up to March 2013 in connection with the 2010 cancellation debt (see paragraph 84 above), except that most of the line items were erroneously stated as € rather than US$ (the line item amounts were correct, only the currency stated was wrong)

    (ii) Invoice WD101002 for US$223,028.74 in respect of material supplied being below standard for galvanising (US$167,651.05), missing tonnage *per* m.v. *Kelt* (US$45,916.93), and three more minor claim items making up the required total.

208. The peculiarity that, as part of this exercise on the general current account balance, Mr Ünal was thus invoicing for price uplift items that had in fact been dealt with separately two years before was not challenged by Mr Atik. He did though point out, by email dated 7 September 2015, the currency error in that invoice, WD101001, asking Mr Ünal to amend and re-send it, which he did that day.

209. On 8 September 2015, Mr Atik reported internally by email, forwarding a copy of his 14 July 2015 email with minutes of what was agreed at the June meeting and stating that within the framework of "*the reconciliation made with Bemaco and explained below [a reference to the 14 July email]*", so far as Noksel's books were concerned, (a) the accounts of Bemaco Ltd and Eurotex had been closed and transferred to Prime, (b) Bemaco invoices for US$2,820,609.65 received in July and August had been taken in, and (c) as a result, the total BEMACO balance had been set at US$6,998,933.54.

210. The following day, 9 September 2015, Mr Atik emailed Mr Ünal with a table setting out the "*final state of the accounts*", showing a balance as of that date of US$8,711,606.14, comprising:

    (i) US$6,998,933.54, stated as having been 'Agreed';

LESS

(ii) payments received on 10 July 2015 and 24 July 2015, totalling US$649,975.00 and US$435,973.83 respectively;

PLUS

(iii) US$1,279,019.97 and US$1,519,601.46 for what were by then two post-settlement shipments (see paragraph 215 below for what I mean by that label).

211. That aggregate balance was shown in the table as being US$6,551,780.50 for Bemaco and US$2,159,825.64 for Prime, the latter being Prime's share of the agreed US$7 million balance as at 4 June 2015 given that Mr Ünal had chosen to issue implementation invoices only from Bemaco.

212. Mr Atik asked Mr Ünal to confirm that Bemaco's and Prime's accounts now matched his table. Mr Ünal replied the same day, as follows: "*I'm still trying to figure out the Eurotex matter with the Auditors. I'll send you the status which appears currently on our side. Once they reply, we'll try to perform the transfer, as necessary.*" Thus, Mr Ünal conveyed that his companies' accounts did not yet reflect Mr Atik's 'final state of the accounts' table, because he had not yet resolved internally what he needed to do to put the Eurotex balance (some US$420,000 only out of the now US$8.7 million total) onto Prime's books. There was no suggestion that what Mr Atik's table showed was not agreed, or that the "*status which appears currently on our side*" (which Mr Ünal did not in fact send across at that time) would show any discrepancy as against Mr Atik's table beyond the location of the Eurotex balance. Once again, Mr Ünal said nothing of the true reason for any issue he might have been having over how to document what had been agreed in relation to Eurotex, *viz* that it no longer existed.

213. On 1 October 2015, after a payment by Bemaco of US$652,656.99, Mr Atik re-stated his table in an email to Mr Ünal, to show "*The situation with the SAP [sale and purchase] accounts … upon your last payment.*" The balance, reduced by that payment, was US$8,058,949.15. Foreshadowing the audit confirmation correspondence to which I shall turn shortly, Mr Atik noted that because of BEMACO, KPMG had issued a qualified 2014 audit opinion on Noksel and might ask for something in writing from Mr Ünal in relation to the account reconciliation. He closed by asking, "*How is the process going on your side? Did we manage to have the identical balance?*" I note in passing that Mr Atik had not yet started to include interest accruing from 1 July 2015 in his statements of the updated account position.

214. Mr Ünal replied the same day, saying that it would not be a problem for KPMG to contact BEMACO and that "*Cintia is trying to match with you the balances of each of the companies separately, we too may want an interest invoice from you.*" Yet again, Mr Ünal gave no hint, in my judgment because it would not have been true, that there had not been an agreement in Ankara in June 2015 to fix the account balance at US$7 million; and he conveyed that (a) whatever process it was he needed to complete internally to get his records to match

Noksel's was not yet concluded, and (b) the only action potentially required from Noksel for the completion of that process would be the issuing of an interest invoice.

Conclusion

215. The evidence establishes to my satisfaction that, as Noksel has claimed, the parties concluded at the June meeting in Ankara on 24-26 June 2015 a firm agreement that the current account balance between them would be fixed at US$7 million, payable by BEMACO to Noksel, as at 4 June 2015, for that purpose running the account up to but not including the then most recent shipment *per* m.v. *Geervliet*, the subject of invoice no.817510 dated 4 June 2015. I refer to that *Geervliet* shipment and subsequent shipments collectively as 'post-settlement shipments' to identify them as the shipments Noksel's entitlements to be paid for which were treated as post-dating, so as not to be part of, the settlement of the current account balance as at 4 June 2015 at the June meeting.

216. There was no discussion of, and therefore no alteration of, the deal struck in December 2013 in respect of the balance due from BEMACO to Noksel in respect of the 2010 cancellation debt, namely US$690,824.66 (but under-claimed herein by Noksel at only US$589,983.06), which was that it would be cleared by BEMACO after the general current account balance (thus finally fixed by the June meeting) had been paid.

217. As 'Sheet 2' in the Ankara Workbook reflects, the agreement to settle all differences on the current account balance at US$7 million payable by BEMACO to Noksel was precisely that, i.e. an agreement to settle all such differences. Absent any claim to set that agreement aside, for example a misrepresentation claim, and no such claim has been made, the agreement takes over from whatever might otherwise have been the rights or wrongs of:

    (i) Noksel's claims for payment from BEMACO in respect of past business (other than the 2010 cancellation debt, agreed in December 2013 to be kept separate), up to the account reconciliation date generally, and up to 30 June 2015 in respect of interest, a term of the agreement having been that Noksel's prior interest claims were taken into the US$7 million balance with interest to run on that balance only from 1 July 2015;

    (ii) BEMACO's claims against Noksel in respect of their trading up to the account reconciliation date pursuant to the ERW Sales Protocol, including any claim for a balance otherwise still payable in respect of the 2006-2007 overpayment scheme, any such balance having been agreed in December 2013 to be part of the general current account between the parties under the Protocol and not a separate matter;

    (iii) Noksel's claim that there were balances owing to it by Bemaco Ltd and Eurotex, one term of the agreement having been that any such claim would be treated as covered by the setting of the account between BEMACO and Noksel at US$7 million as at 4 June 2015.

218. Exactly in the manner of Mr Atik's table sent to Mr Ünal on 9 September 2015 (paragraph 210 above), unless the agreement to state the account at US$7 million as at 4 June 2015 was superseded by an equivalent agreement for a later accounting date, any calculation now of the state of the account between BEMACO and Noksel must sensibly open with a balance in Noksel's favour of US$7 million, on which (or on any outstanding portion of which after any payments were made) interest at Libor + 3.5% has run as agreed from 1 July 2015, and then take in subsequent items, whether in Noksel's favour (such as payments due for post-settlement shipments, or for interest) or in BEMACO's favour (such as payments made, or valid weight or quality claims arising on post-settlement shipments).

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219. Noksel claims that there *was* agreement subsequently, stating the account between the parties as at 31 December 2015 rather than as at 4 June 2015, to which the logic of what I have just said would then apply. Indeed, its primary pleaded claim is founded upon that contention, which is logical since, as I just noted, any such agreement would supersede any June 2015 agreement. I have taken matters chronologically, however, since it is not realistic to assess the effect of the parties' correspondence in January 2016 and/or their audit confirmation exchanges in March 2016, upon which the claim of an agreement fixing the account balance at the end of 2015 depends, without reference to the Ankara meeting in June 2015 and the correspondence in July-October 2015 following it, being the background to and context for those communications early the following year.

220. Those communications started with an email from Mr Atik on 4 January 2016, to Mr Ünal, with best wishes for the new year and "*the account statement as of 31/12/2015 in the attachment*". The attachment was a spreadsheet including a table like those sent by Mr Atik in September and October 2015, with added entries for three further payments by Bemaco, three Bemaco invoices accepted by Noksel that, as Mr Atik put it in his covering message, "*came after the settlement*" (a reference, obviously, to the June 2015 agreement), and the price invoiced for a third post-settlement shipment. The result was an account balance calculated and stated by Mr Atik of US$7,534,099.99 as at 31 December 2015, excluding interest accrued since 1 July 2015.

221. For that interest, the spreadsheet gave calculations showing US$118,680.72 accrued since 1 July 2015 on the historic debt (US$68,110.62 attributed to Bemaco's aged debt, US$50,570.10 to Prime's) and US$30,246.60 (attributed to Bemaco) accrued on the post-settlement shipments, so a total interest charge as at 31 December 2015 of US$148,927.32. Mr Atik's covering message explained the basis of those calculations, namely Libor + 3.5% from 1 July 2015 on the historic debt and Libor + 3.5% from 60 days on the post-settlement invoices. Mr Atik asked Mr Ünal to confirm that Noksel could invoice for those interest amounts (which, obviously, carried with it a request that Mr Ünal check the accuracy of the calculations).

222. On 13 January 2016, Mr Atik chased for a response and Mr Ünal replied as follows: "*Of course, I believe that your calculation is accurate. In any case, it*

will be the same this year. We can arrange the allocations between the companies subsequently as the accounting departments, if you wish so. I have written to you just to inform you. If it facilitates your actions, it's OK for me."

223. Mr Atik replied, still on 13 January 2016, reiterating the basis upon which he had calculated interest and spelling out that he was doing all this "*to prevent any problem, like the ones we had in account reconciliation up until now, from arising again, and not to open such issues retrospectively. If this is OK for you, I'll issue and send the invoices tomorrow.*" In reply, again still on 13 January, Mr Ünal confirmed that "*The total amount of interests [sic.] is OK; but we have not assigned Eurotex's account to anyone yet. Therefore, you can issue it 50%-50% for Prime and Bemaco for now, then we can handle it between us as Bemaco-Prime-Eurotex.*" Mr Atik responded with, "*OK I'll issue 50-50*" and duly did so, sending two interest invoices by email (with originals via DHL) on 14 January 2015, one addressed to Bemaco and one addressed to Prime, each for US$74,463.66

224. The plain effect of that exchange is an agreement that the account balance as at 31 December 2015 was US$7,534,099.99, plus interest of US$148,927.32, for a total balance as at that date of US$7,683,027.31, payable by BEMACO to Noksel.

225. Probably even taking that exchange on its own, but without doubt when read with the familiarity the parties would have had at the time, and I now have, with what had been agreed at the June meeting and how that had been recorded and acted upon in the correspondence later in 2015:

    (i) Mr Ünal's comment that "*we have not assigned Eurotex's account to anyone yet*", as explanation for why he was agreeing the total interest charge but might revisit how the proportions in which Mr Atik had attributed it as between Bemaco and Prime, reads as a reference to internal arrangements on Mr Ünal's side only, it being accepted that the full agreed balance was now BEMACO's responsibility as against Noksel and not in any part Eurotex's liability;

    (ii) the sense of "*we can handle it [that aspect] between us as Bemaco-Prime-Eurotex*" is "*we on this side*", "*my team and I*", or the like;

    (iii) Mr Ünal was thus saying that Mr Atik had the account balance and the year-end interest upon it stated correctly, but while he (Mr Ünal) was still sorting out how (internally) he dealt with allocating what had been the Eurotex balance to BEMACO, Noksel was asked to issue invoices for that year-end interest split 50:50 between Bemaco and Prime (rather than in any different proportions between them).

226. On the agreed interest calculations (agreed, that is, subject to any adjustment of the Bemaco:Prime allocation), Mr Atik had an interest charge for Prime of US$50,570.10, some 34% of the agreed total. That was on a principal balance for Prime of US$2,159,825.62, all of which was historic debt and which included the ex-Eurotex balance of US$419,894.20. If all of that ex-Eurotex balance were reallocated to Bemaco, by my calculation Prime's interest charge

would reduce to US$40,738.71 of the agreed total (US$148,927.31), a share of c.27%. A more sophisticated approach than Mr Ünal adopted might have been to invoice the interest 70:30 rather than 50:50 pending his final decision internally on whether some or all of the ex-Eurotex balance would in fact be reallocated to Bemaco. But this aspect makes no substantive difference since as against Noksel, Bemaco and Prime had and have joint and several liability on the account.

227. I agree with Mr Dhar's submission that "*when considered objectively and taken as a whole, … by this stage [more precisely, by this January 2016 exchange] there was … an agreement between the parties as to the [current account balance] as at the end of 2015 – an agreement from which the Bemaco Companies are now not permitted to resile.*" It was a clear, firm and unequivocal agreement as to the state of the running account between Noksel and BEMACO as at that date. It was founded upon and proceeded from the prior agreement as to the balance of the account as at 4 June 2015, so that what was new was confirmation that Mr Atik had accurately updated that agreement to the end of the year by reference to subsequent transactions falling to be brought into account, and the accrual of interest.

228. It follows, applying the logic of paragraph 218 above, that any calculation now of the state of the account between BEMACO and Noksel must sensibly open with a balance in Noksel's favour of US$7,683,027.31 as at 31 December 2015, and then take in subsequent items, whether in Noksel's favour (such as payments due for subsequent shipments, or interest) or in BEMACO's favour (such as payments made, or valid weight or quality claims arising on or after 1 January 2016).

2015 Audit Confirmations

229. On 2 February 2016, Mr Atik emailed Mr Ünal again in relation to the state of the account. He attached two spreadsheets. His short covering message described them as "*the account files for 2015 and 2016*" and explained that each dealt separately with aged debt and in-year transactions. The spreadsheet for 2015 was a version of the spreadsheet sent a month before (paragraph 220 above), in which the final account summary table had been amended by adding entries for the 2015 year-end interest as invoiced 50:50 between Bemaco and Prime. It thus showed the year-end BEMACO balance that I have just found was confirmed and agreed by Mr Ünal on 13 January 2016, namely US$7,683,027.31.

230. The spreadsheet for 2016 brought that balance up to date, to take account of a further shipment in January 2016 and a further payment by Bemaco, giving a revised overall balance on the account as at 2 February 2016 of just under US$8.4 million. That spreadsheet included interest calculations for the first weeks of 2016, calculating 2016 interest of c.US$23,000 as at 2 February 2016. That interest, accrued (according to Mr Atik's calculations) but not yet invoiced, was not included in the account summary table.

231. The following day, 3 February 2016, KPMG Turkey contacted Bemaco and Prime, with Mr Ünal as one of the parties copied into the email for Bemaco.

KPMG's email said that they were auditing Noksel's financial statements and had attached an account balance confirmation form for completion and return by which Bemaco and Prime respectively would confirm to KPMG the balance due from them to Noksel, or due to them from Noksel as the case might be, as at 31 December 2015. The attached form included a request and authorisation page signed by Mr Atik and one other under Noksel's company stamp asking for the account balance confirmation form to be completed and returned directly to KPMG.

232. On 21 February 2016, Mr Ünal sent Mr Atik a fresh reply to Mr Atik's email of 4 January (paragraph 220 above). Referring to the 2015 year-end interest amounts, Mr Ünal now said he thought there was an error, in that "*it should have been 68 K for Bemaco, but at the end you wrote 98 K. We will make a notification on that basis, to KPMG … .*" Mr Ünal was wrong about that. Mr Atik's 4 January email and attached spreadsheet was perfectly clear on the separate interest charges that Mr Atik had calculated as having accrued against Bemaco, totalling c.US$98,000; and Mr Ünal had of course agreed Mr Atik's figures. Mr Atik pointed out the error in a reply email the following morning, 22 February 2016, reconfirming that therefore US$98,000 was correct for Bemaco's year-end interest, to which Mr Ünal replied within minutes, saying "*OK, now I understand, but of course these were made 50%-50% later on*", an accurate reference to the arrangement he initiated that the 2015 year-end interest, in the agreed total amount of US$148,927.32, would be invoiced 50:50 between Bemaco and Prime.

233. After the erroneous comment about the interest figures, Mr Ünal's email of 21 February continued as follows:

"*On our side, after the corrections made subsequent to the reconciliation, the following balance appears (taking into consideration the invoices which have been issued):*

Bemaco USD -2,681,555.65

Prime USD -3,195,567.61

Eurotex USD -1,019,894.20

We are waiting for auditor approval in order to distribute the Eurotex account to Bemaco or Prime but this has not been possible so far. We need to find another way."

234. No explanation was given for why, the only issue identified being that the Bemaco group had not yet accounted internally for the transfer of the ex-Eurotex balance of c.US$420,000 to BEMACO, those (internal) accounts showed (if they did) a balance due from Eurotex of over US$1 million. Yet again, if there was any difficulty for Mr Ünal there with his auditors, its true cause, I envisage, was that Eurotex had ceased to exist a year previously. Leaving that aside, the total balance Mr Ünal thus claimed to be showing in his books and records was US$6,897,017.46, some US$786,009.85 less than the

2015 year-end balance calculated by Mr Atik and agreed by Mr Ünal a month before. Mr Ünal's email provided no explanation for that.

235. On 25 February 2016, Mr Atik sent Mr Ünal an email like his email of 2 February (paragraph 229 above), again attaching two spreadsheets, the 2015 spreadsheet as before and an updated version of the 2016 spreadsheet. Taking account of further payments made by Bemaco, the final account summary in the latter now showed an overall balance of US$7,683,077.31. That again excluded accrued but un-invoiced 2016 interest, which the interest calculations in the spreadsheet put at US$49,000. Mr Atik reiterated in the covering email that he was calculating interest "*According to what has been mutually agreed; the balances arising from the current transactions will be paid in B/L+60 days, and the invoices for price difference and weight tolerance difference will be deducted from the aged debt. No price difference has been made on the said vessels [i.e. the post-settlement shipments], and the weight tolerance difference (except for the last vessel) has been invoiced and deducted from the aged debt by you.*"

236. Mr Ünal replied, saying nothing in response to Mr Atik's message or attached spreadsheets but asking Mr Atik to reply to his prior email, i.e. the email of 21 February. Mr Atik responded by sending the following, as a reply to that email, namely: "*I think you are referring to this e-mail. I calculated the total amount of interests as USD 148.927,32, and invoiced it to the two companies 50/50.*" In reply to that, Mr Ünal proposed a call with Mr Atik the following morning, 26 February 2016. Mr Atik agreed, saying he would be available.

237. It seems that Mr Ünal in fact talked on 26 February to Mr Yalçin rather than to Mr Atik. Mr Yalçin told Mr Atik of that call, leading Mr Atik to email Mr Ünal as follows:

> "*I learned that you talked with [Mr Yalçin]; I'm sending you this e-mail with respect to the things he shared with me. I'll call you shortly after.*
>
> *The amount of 5,2 M USD, included in the amount of 7M USD as agreed during the meeting held on June 25, arises from the aged debt. The part of 1,8 M USD is related to your transactions in 2015, and it was stated that such amount would be paid by the end of July 2015 … . Therefore, the debt which has been carried forward from previous years amounts to 5.2 M USD. The balance except for this arises from the current transactions. I'm following up the monies, received from you, on such basis by closing them vessel by vessel.*"

238. Mr Ünal replied saying that he had tried to explain to Mr Yalçin that "*THE INVOICES FOR DIFFERENCES, ISSUED IN THE SAME PERIOD, WERE NOT TAKEN INTO CONSIDERATION AT ALL. I'LL EXPLAIN IT TO YOU DURING OUR CALL.*" This appears to be the start of what would eventually become this litigation, in which, contrary to the facts as I have found them, Mr Ünal has claimed that no account-settling agreement was reached at the meeting in Ankara in June 2015, and that the US$2.75m-odd from the 2006-2007 overpayment scheme, and most of the US$1.2m-odd in post-2009 overpayments to March 2013 after the order cancellations in 2010, were not properly accounted for by Noksel.

239. Although I have been critical of a number of particular parts of Mr Ünal's evidence, and have found him to be generally unreliable as a witness, I do not conclude that his litigation stance has been an essentially dishonest one. It was apparent to me that he had poor recollection of a lot of the detail in a complex transaction and accounting history, and that he was prone to misunderstanding what the documents show, looking back at them. I think ultimately he was in earnest, albeit quite wrong-headed, in taking to trial a case that Noksel had massively over-stated the account balance due to it from BEMACO, and had persuaded himself that the account balance had not been fixed by agreement at and after the June meeting in Ankara.

240. On 16 March 2016, Mr Ünal sent an email to Mr Atik attaching "*the confirmations for the auditors*", adding that "*We can show it only in this way as of 31.12.2015. I'll send it as is if it is deemed acceptable by you.*" I do not accept Mr Ünal's evidence, contradicted by Mr Atik whose evidence I prefer, that there was any telephone conversation prior to this email in which Ünal explained what he would be sending. What he attached were:

(i) An audit confirmation in the requested form for Prime, signed by Mr Ünal as authorised signatory, acknowledging a balance due to Noksel of US$2,544,450.05 as at 31 December 2015. That is US$310,160.75 *more* than the balance attributed to Prime in the year-end statement of the account agreed between Messrs Atik and Ünal in January 2016.

(ii) An equivalent confirmation for Bemaco, also signed by Mr Ünal, for US$2,747,425.05. That is US$2,701,312.96 *less* than the balance attributed to Bemaco in the year-end statement of the account agreed in January 2016.

(iii) An unsigned (i.e. draft) audit confirmation form for Eurotex that, if signed (although Mr Ünal's covering email was proposing that it be sent as is, i.e. unsigned), would have acknowledged a balance due to Noksel of US$2,242,224.90, whereas Eurotex was not included at all in the year-end position agreed in January 2016.

241. The total of the figures in the audit confirmations for Bemaco and Prime and the draft audit confirmation for Eurotex was US$7,534,100, which equalled the overall account balance agreed in January 2016, if the year-end interest amount were excluded even though it had also been agreed (and invoiced).

242. Mr Atik replied on the same day, saying that:

"*As of 31.12.2015, Bemaco appears as USD 5.448.738,01 and Prime appears as USD 2.234.289.30 [*]. As this is a matter indicated as "Qualification" under the report last year, they [i.e. KPMG] follow it up closely with a pressure on us.*

Could you please send us a document showing such balances? Otherwise, it would cause trouble for us."

* Those are the year-end totals agreed with Mr Ünal in January, including the agreed 2015 interest as invoiced 50:50, as accurately shown in the spreadsheet for 2015 sent by Mr Atik in early and late February 2016.

243. Mr Ünal replied the following morning, saying that "*Our accounts give the figures as the ones I sent you yesterday, as of 31.12.2015, but I'm sending you the balance confirmations, available as attached hereto, without prejudice because our figures are not identical with yours. I hope this will not create any problem for you.*" He attached signed audit confirmations for Bemaco and Prime (only), giving the figures Mr Atik had requested him to give.

244. The uninitiated might perhaps have read Mr Ünal as saying by that *inter alia* that in March 2016 Eurotex was keeping accounts that showed a 2015 year-end balance in favour of Noksel of US$2.24 million. That could not have been true, however, since Eurotex had not existed for over a year, and in any event its relevant original balance, the agreement to take which into the Noksel-BEMACO account Mr Ünal had said was giving him internal accounting issues, was only c.US$420,000. Even without being aware of the first of those points (Eurotex's non-existence), in my judgment Noksel could not reasonably have concluded that Mr Ünal was claiming to have a Eurotex-Noksel balance in his accounts of US$2.24 million; and Mr Atik fairly acknowledged in cross-examination that he did not think for a moment that there was a Eurotex-Noksel balance of US$2.24 million anywhere (although he was a little argumentative over the interpretation of Mr Ünal's messages). I think Mr Ünal intended to convey no more than this, and in any event this is sensibly how what he said should have been read, namely that the Bemaco group's books showed (only) 2015 year-end balances in favour of Noksel of US$2.54 million (Prime) and US$2.75 million (Bemaco).

245. Mr Dhar submitted that the qualification expressed by Mr Ünal to Mr Atik over the final audit confirmations he had signed and would submit to KPMG (presumably without any qualification) was limited to the fact that they totalled US$7,683,027.31 whereas the figures in the first audit confirmations he had signed and the unsigned draft for Eurotex totalled US$7,534,100. I do not accept that submission. What Mr Ünal conveyed by this exchange (given paragraph 244 above in relation to Eurotex) was that:

    (i) His companies' accounting records showed 2015 year-end balances in favour of Noksel for Prime and Bemaco respectively of US$2.54 million and US$2.75 million (more precisely, in the amounts I stated in paragraph 240(i) and 240(ii) above).

    (ii) He had signed, and would submit to KPMG, audit confirmations for Bemaco and Prime matching Noksel's year-end figures, as requested by Mr Atik, "*without prejudice*" to (i) above.

246. Thus, there was here an agreement by Mr Ünal to submit those final audit confirmations, representing to KPMG that Prime and Bemaco owed Noksel as at 31 December 2015 US$2.23 million and US$5.45 million respectively, without prejudice to the fact (as asserted by him to Mr Atik) that Prime's and Bemaco's accounts showed quite different 2015 year-end balances in favour of Noksel, of US$2.54 million and US$2.75 million respectively. That begs the question of the effect in law, if any, of that fact, and (it may be) a question whether any such effect is capable of being preserved by the articulation of that kind of qualification. But whatever the answers might be to those questions,

they have reference to the difference between the US$7.68 million (US$2.23 million for Prime, US$5.45 million for Bemaco) confirmed to KPMG and the US$5.29 million (US$2.54 million for Prime, US$2.75 million for Bemaco) that Mr Ünal said was in the Bemaco group accounts.

247. In the event, those questions do not need to lengthen this judgment very much. Through Messrs Atik and Ünal, in January 2016 the parties had in fact agreed the 2015 year-end account as calculated and stated by Mr Atik. On the one hand, it was rightly not suggested that Mr Ünal's qualification expressed to Noksel two months later as regards the audit confirmations he would provide for KPMG could undo that agreement or enable BEMACO to escape from its consequences, their relevant case having been instead that there was no such agreement. On the other hand, if notwithstanding the qualification he put upon it, Mr Ünal's agreement to submit the final audit confirmations to KPMG was an agreement that the year-end balance was US$7.68 million, or an acknowledgment of debt in that amount upon which Noksel could rely, that would not give Noksel any entitlement it does not have as a result of the agreement of the account as stated in January 2016. The (further) agreement or acknowledgment in March, if that is what it was, agreed or acknowledged the same year-end balance amount, allocated in the same way as between Bemaco and Prime, as had been stated and agreed in January 2016.

248. Finally, before turning more generally to the dispositive consequences of my findings, my conclusions on the basic claim that there was an agreed statement of the account as at 31 December 2015, and on the purport of Mr Ünal's messages in March 2016, mean that the claims against Mr Ünal personally fall away and can be dismissed. Firstly, and generally, those claims were advanced only in the alternative if, contrary to Noksel's primary case, the parties did not agree at the June 2015 meeting, or in the correspondence following it, to fix the current account balance at US$7 million. But Noksel's primary case that there was such an agreement has succeeded. Secondly, recalling my initial summary of the claims against Mr Ünal (paragraph 13 above):

    (i) The claim that by his email of 16 March 2016, read with the documents attached, Mr Ünal acknowledged that as at 31 December 2015 Eurotex owed US$2,242,224.90 to Noksel, would have failed *in limine*. There was no such acknowledgment.

    (ii) The claim that by his emails of 16 and 17 March 2016, read together with the documents attached, Mr Ünal represented to Noksel that the aggregate debt as at 31 December 2015 was US$7,534,100 is difficult, but in any event a consequential liability was asserted only if the true figure was only US$5,291.875.10. I have held that the true figure was (agreed in January 2016 to be) US$7,534.100, plus interest accrued by the end of 2015, for a final total of US$7,683,027.31.

Consequences

249. The conclusion that the parties agreed the account at US$7,683,027.31 as at 31 December 2015 (inclusive of interest) does not mean that Noksel now has a claim for that amount (plus further interest accruing since 1 January 2016). The

parties continued to trade until well into 2018, generating sums payable to Noksel for further shipments, and potentially generating valid claims by BEMACO for quality issues or weight adjustments, and payments were made to Noksel, so that the account must be brought up to date in the way Mr Atik began seeking to do in February 2016.

250. Noksel's pleaded claim is that:

(i) When the account is updated correctly in that way, starting from US$7,534,100 as at 31 December 2015, the account balance had reduced by the end to US$5,852,178.89 (although that may not be up to date for interest), getting from the former to the latter through 111 line items in Schedule 1 to its Particulars of Claim ('Noksel Schedule 1'), which include both principal and interest amounts.

(ii) Further interest should be awarded on that balance, until judgment, at Libor + 2%, or such other rate as the court might determine.

251. I do not understand the parties to be expecting me to audit Noksel Schedule 1 as part of this judgment so as to determine the final balance of the account, nor do I feel equipped to do so without their further assistance.

252. However, they will wish to have a determination now of BEMACO's positive case that Noksel Schedule 1 overstates the account in favour of Noksel because it fails to include the items listed by BEMACO in Schedules 1 to 4 to their Defence ('BEMACO Schedules 1 to 4'). I should mention in passing that as to those items BEMACO pleaded a case under Turkish law to the effect that various invoices it submitted relating to them were not timely disputed and so were deemed accepted by Noksel. However, the Turkish law experts were agreed that the doctrine thus invoked by BEMACO created only a rebuttable presumption and this is not a case in which the incidence of the burden of proof will matter. The parties will also want the court's determination now of the basis upon which, by contract, interest was supposed to accrue.

253. My hope will be, and I think the parties' expectation was, that if at least the matters just indicated are determined by this judgment, then the true balance of account, including contractual interest, brought up to date to the present, should be capable of agreement. Failing that, I would expect the parties to be able to assist the court by agreeing a list of points that require determination and a concise formulation of the rival positions on those points, to inform what can then be some case management on my part to settle directions as to how they might most efficiently be resolved.

<u>BEMACO Schedule 1</u>

254. BEMACO Schedule 1 is alleged by BEMACO to set out adjustments that need to be made to the 2015 audit confirmation figures. According to Mr Ünal when agreeing to submit those audit confirmation figures, BEMACO's accounts as regards the 2015 year-end balance then differed from Noksel's figures for the year-end balance by US$2,391,152.21. The total claimed under BEMACO Schedule 1 is substantially greater, however, at US$3,792,570.13. Thus,

BEMACO's case was that the true account balance as at 31 December 2015 was US$3,890,457.18, only just over half the balance calculated by Noksel.

255. BEMACO Schedule 1 contains 9 items. Items 2, 4, 5, 7, 8 and 9 go together. They amount between them to the US$2.75 million odd paid by BEMACO in aggregate pursuant to the 2006/2007 overpayment scheme. As I found when dealing with that part of the trading history, all but US$723,000 of that total was duly repaid by Noksel, and that remaining amount was an element of the general current account between the parties, recognised as such in the account reconciliation discussions in April and December 2013. The parties having, as I have held, settled the current account position as at 4 June 2015, it is too late for BEMACO now to contend that it should be credited to them.

256. Since the principle of offsetting that remaining amount against accrued but un-invoiced interest was agreed, the question on this point, in any discussion of the current account balance, should have been whether in calculating interest due to it, Noksel had indeed netted off that amount, whereby to credit BEMACO with it. But the current account difference was resolved by the June meeting agreement to fix it at US$7 million as at 4 June 2015, and no basis for reopening that agreement has been advanced.

257. The contention that Items 2, 4, 5, 7, 8 and 9 in BEMACO Schedule 1, or any of them or any part of them, ought to be brought into the account fails.

258. Item 6 in BEMACO Schedule 1 is for US$952,602.45, for which it is said BEMACO raised an invoice dated 26 January 2017. This is a curious item (see paragraphs 95-96 above). The amount claimed is derived from amounts that originally related to the US$1.8 million 2010 cancellation debt, *viz.*:

(i) the US$1,210,016.94 that, up to March 2013, BEMACO had built up in post-2009 price uplifts towards discharging that debt;

LESS

(ii) the US$257,414.49 that, by agreement in December 2013, was taken into the general current account from those price uplifts (which had by then reached US$1,366,589.83), so that the balance of that debt left unpaid (and deferred for payment until after the current account had been cleared) increased from US$433,410.07 to US$690,824.66.

259. The contention that Item 6 in BEMACO Schedule 1 ought to be brought into account therefore fails. It relates to an aggregate amount built up by way of price uplifts that it was agreed between the parties stood apart from the general current account. It was offset against the 2010 cancellation debt in December 2013 so as to be discharged in full, and there was no basis for BEMACO to be raising any invoice in respect of it thereafter.

260. Item 1 in BEMACO Schedule 1 is a weight adjustment claim relating to product delivered in 2009. Claims of that kind were part of the general current account between the parties. This particular claim of that kind therefore cannot now be claimed in the face of the settlement of that account as at 4 June 2015 in the

June meeting in Ankara and/or the agreement of that account as at 31 December 2015 as calculated and stated by Mr Atik.

261. Item 3 in BEMACO Schedule 1 is a product quality claim for US$57,508.53 in respect of which Bemaco raised an invoice dated 15 March 2016. The claim related to product delivered by the m.v. *Rheinfells* under a bill of lading dated 19 November 2015. The shipment thus pre-dated the 2015 year end; however the product claim, which appears to me to be adequately documented and was explained by evidence from Mr Ünal that makes sense of and by reference to the documentary record, and was not challenged, arose in early 2016 when the bundles of square sections in question were effectively written off and sold as scrap because of a quality issue relating to galvanisation. It appears to me, therefore, that BEMACO are wrong to have pleaded that this should have been part of any statement of the 2015 year-end account; but rather it is a good claim that should be taken into account in Bemaco's favour as of the date of its invoice when the agreed 2015 year-end account balance is brought up to date for the purpose of calculating the judgment sum to be awarded to Noksel.

BEMACO Schedule 2

262. BEMACO Schedule 2 itemises claims that, if valid, all post-date the 2015 year end and so would fall to be taken into account in bringing the agreed 2015 year-end balance up to date, like Item 3 in BEMACO Schedule 1. The 6 items in BEMACO Schedule 2 total US$401,826.29.

263. All of the BEMACO Schedule 2 items are, in my view, adequately vouched by the documents provided to support them and additional explanations given by Mr Ünal in unchallenged evidence that, as with Item 3 in BEMACO Schedule 1, appears plausible and consistent with the documents provided. Subject to a point of principle taken by Noksel in relation to Items 3 to 6, I conclude that they are all valid claims that should be brought into the account. They are claims in respect of the following:

    (i) Item 1: rusty product *per* m.v. *Pommern* (B/L 14 January 2016), sold for scrap causing loss of US$36,817.39. Mr Ünal explained that this concerned just over 88 m.t. from this shipment, sold as scrap at his end. The rest of the shipment was also rusty and was returned to Noksel, resulting in a claim of over US$310,000 that Noksel acknowledges and has included in Noksel Schedule 1. I accept Mr Ünal's explanation, and agree with the submission made upon it that there is no logic to Noksel's acceptance of the bulk claim but denial of the smaller claim that arose first when some of the faulty product was sold for scrap before the full scale of the problem was realised.

    (ii) Item 2: a small claim for US$4,299.44, comprising a weight adjustment claim that is adequately, if minimally, vouched, and a correction requested by BEMACO because though the agreed price was US$680 per m.t., the transaction was by mistake then documented and performed by reference to a price of €680 per m.t. Mr Dhar complains that this is to rely on pre-order negotiations to interfere with the terms of an order

as placed. Indeed it is, but that is of course how the law functions in cases of mistake.

(iii) Items 3 and 4: claims for price and weight adjustments totalling US$203,444.55 arising out of shipments *per* m.v. *Aberdeen* and m.v. *Voornedijk*, which were agreed between Mr Ünal and Mr Canatalay at the time, in respect of transactions where Noksel sold the product to a third party (Condor) for simultaneous on-sale by it to Bemaco. The agreement of the price and weight adjustment allowances included agreement that they would be paid directly, not via Condor, because of the particular circumstances in which, and limited purpose for which, Condor was involved, by agreement.

(iv) Item 5: a claim for incorrect product (tubes of the wrong length) in a shipment *per* m.v. *Tango*, causing Prime a loss of US65,067.60 on a transaction where, as with Items 3 and 4, the parties had agreed to a sale to Condor and simultaneous on-sale by it, in this case to Prime rather than Bemaco.

(v) Item 6: a claim for a weight adjustment rebate in respect of the m.v. *Tango* cargo, calculated by Mr Ünal at US$92,197.31 using the method customarily used between the parties, but which on this occasion Noksel did not agree.

264. The point of principle taken by Noksel in respect of Items 3 to 6 is that since by agreement Noksel sold to Condor and Condor on-sold to Bemaco or Prime, those claims (whether or not otherwise valid, as I have concluded that they are) do not form part of any account between Noksel and BEMACO, but would be claims to be made (if at all) by BEMACO against Condor and/or by Condor against Noksel. That would be correct if there were no more to this aspect of the case than a simple chain of contracts, Noksel selling to Condor, Condor selling to Bemaco or Prime. However, that is not the whole story.

265. The shipments giving rise to Items 3 to 6 were in the summer and autumn of 2018, by when there had been a change of ownership at Noksel and Mr Ünal was concerned that the change of ownership might interrupt the flow of payments when Bemaco or Prime sought to pay Noksel for product supplied. The reasons for that concern (and whether they meant it was a well-founded concern) were not explored in any depth at trial, but do not matter. What matters is that it was clearly agreed and understood that any resulting price adjustment or product claims would still be a matter to be dealt with directly between Noksel and BEMACO. Condor, though buying and re-selling and not acting only as agent for BEMACO, was being used simply as a means to ensure that payments *to Noksel* did not come *from Bemaco and Prime*. Hence Mr Canatalay's ready agreement for the m.v. *Aberdeen* and m.v. *Voornedijk* that the agreed price and weight adjustment rebates would be due *from Noksel* directly *to Bemaco*.

266. As regards the m.v. *Tango* claims, I agree with Mr Hattan's submission that what appears to have happened is that Noksel stopped cooperating with the implementation of that element of the agreed scheme for involving Condor, as

the parties' relationship deteriorated more generally. At one level, it may be said that is Mr Ünal's fault primarily, since the more general deterioration was spawned by his unfounded denials now the subject of my primary findings in the case that a very large balance remained outstanding in Noksel's favour. However, that does not justify Noksel's refusal to apply to the m.v. *Tango* the established and agreed approach for dealing with claims arising out of shipments via Condor.

267. My conclusion is that all of the items in BEMACO Schedule 2 should be brought into account when bringing the agreed 2015 year-end starting point up to date between the parties.

BEMACO Schedules 3 and 4

268. By these Schedules, BEMACO raise a substantial number of items for inclusion in any assessment of the current account between the parties, all but one of which (if valid) were or should have been part of the account as at 4 June 2015. BEMACO's claim to bring those items into account, with that one exception, therefore fails on the ground that whatever would otherwise have been their merits or demerits, the parties in fact agreed to settle the current account balance at US$7 million as at 4 June 2015 and that cannot now be reopened.

269. The one exception, numbered as Item 75 in BEMACO Schedule 4, was one of the three post-settlement claims accepted by Noksel and taken into the 2015 year-end calculations by Mr Atik in January 2016 (see paragraph 220 above). So of course it does not fall to be taken into account a second time as part of updating the agreed 2015 year-end starting point so as to bring the current account between the parties up to date to the present from the opening position of their agreement of those 2015 year-end figures.

270. The contention that the Items in BEMACO Schedules 3 and 4, or any of them or any part of them, ought to be brought into the account that needs to be taken now therefore fails.

Overall

271. Leaving aside any point arising on the way in which Noksel calculated interest amounts that are included in Noksel Schedule 1, the conclusion from the above is that by reference to the positive case advanced by BEMACO, Noksel Schedule 1 overstates the current account balance by a principal sum of US$459,334.82, no more.

Interest

272. It was agreed at trial that I should not attempt to check Noksel's calculations of interest or undertake any interest calculations of my own, at least at this stage. Rather, I was asked to determine and set out the basis upon which Noksel is and has been properly entitled by contract to claim interest, leaving the parties, with the assistance of the expert accountants if required, to undertake (and hopefully agree) any necessary checking or fresh calculations.

273. Noksel has two different types of contractual interest claim:

(i) First, it is entitled to interest on the amount remaining from time to time outstanding of the agreed US$7 million balance of account as at 4 June 2015, from 1 January 2016. The original entitlement ran from 1 July 2015, but the amount accruing to 31 December 2015 was agreed and included within what will now be the opening balance in any final calculation of the account, namely a balance of US$7,683,027.31 as at that date.

(ii) Second, it is entitled to interest pursuant to the ERW Sales Protocol, the original scheme of which was for interest to be payable at Libor + 2% from the B/L date but where the interest charge for the agreed credit period of 120 days at that rate was to be built into the invoiced sale price, so that: (a) there would only be a (separate) interest charge if payment was made later than 120 days after the B/L date; and (b) if payment was made prior to 120 days after the B/L date, there would be an interest rebate due from Noksel.

274. Before turning to the points I can decide now, I should say that it is not clear to me whether element (a) of the ERW Sales Protocol on interest was adhered to in practice, and I can see how there might be argument as to the legal consequences if it was not. If the examples of transaction documentation I have looked at in the case are typical, sales pursuant to the ERW Sales Protocol seem to have been invoiced at 'round figure' prices per m.t., without reference to any built-in uplift for interest, whereas with interest element (a) in the contract one might have expected to find either less round-looking unit prices, because the interest charge for the agreed credit period had been built in, or round-looking basic prices, plus, within the invoice, an explicit reference to and/or calculation of the up-front credit charge for that period (repayable pro rata in the case of early payment).

275. On a related note, a question I do not think the evidence at trial answered is whether contemporaneous references in the context of the 2006-2007 overpayment scheme balance to accrued but un-invoiced interest were to 'default' interest (for late payments) that Noksel had not invoiced or to the fact that Noksel had failed to include the contractual up-front interest charge when invoicing in the first place.

Aged Debt Interest

276. This first interest entitlement is relatively simple. My finding on the evidence is that it was agreed at the June meeting in Ankara, as minuted by Mr Atik on 14 July 2015, that interest would run on the agreed account balance as at 4 June 2015, from 1 July 2015, at Libor + 3.5%.

277. There is however a clear contemporaneous record, in email correspondence in January 2017 and January 2018, of Mr Atik, having been authorised to do so by Mr Yalçin, granting to Mr Ünal retrospectively a discount on that rate, to Libor + 2.5%, for 2016 and 2017 respectively. Mr Dhar invited a conclusion that the

discounted rate should apply for those years, eschewing any possible argument over whether Noksel could be held to its concession.

278. I have already made the point that although the agreed entitlement was to interest accruing from 1 July 2015, the amount accrued up to 31 December 2015 was calculated and agreed as part of what will be the opening balance in a final statement of the account to bring it up to date.

279. Therefore, I can and do determine that in that final statement of the account, Noksel should be credited with interest on the amount outstanding from time to time of the US$7 million balance owed as of 4 June 2015, accruing from 1 January 2016 to date, at Libor + 2.5% for 2016 and 2017, and at Libor + 3.5% thereafter.

Post-Settlement Shipment Debts

280. As I have already recalled, the starting point is that under the ERW Sales Protocol prior to any amendment:

(i) Noksel was entitled to interest at Libor + 2% from the B/L date;

(ii) Noksel was supposed to include interest at that rate, for the agreed credit period of 120 days, when invoicing for its sales under the Protocol;

(iii) if Noksel did that and the resulting invoice was paid in full within 120 days of the B/L date, then BEMACO would be entitled to a pro rata rebate of the up-front interest charge built into the invoice.

281. Comfortable as I have been with the accuracy of Noksel's minuting of the 13 April 2013 meeting and its witness evidence about that meeting, I find on that evidence that the ERW Sales Protocol was then amended to reduce the agreed 120-day credit period to 60 days: as Mr Yalçin put it, simply, "*The interest period was decided to be 60 days*" (rather than 120 days as originally provided in the Protocol); Mr Akkoyunlu said, and I accept, that he had independent recollection of the points set out in the meeting minutes as having been agreed at the meeting, except this 60-day point, which (he said, and again I accept) he did recall having had his memory refreshed by seeing the minutes. The point is expressed in the meeting minutes more awkwardly than Mr Yalçin's succinct summary, or at all events it is a bit cumbersome in the agreed translation, as follows:

"*… no interest will be applied within 60 days as of the date of the invoice, however interest will be calculated and deducted from the interest amount for early payments.*"

The first half of that provision, if there were nothing more, might suggest a 60-day interest-free credit period had been agreed, but that is contradicted by the second half.

282. That April 2013 meeting minute also dealt with the rate for default interest, i.e. interest accruing after the agreed credit period if payment was late, or not made at all. It recorded agreement that:

(i) for 2012 default interest, which Noksel had calculated at Libor + 6%, would be recalculated at 6% flat;

(ii) for 2013, such default interest would accrue at 5% flat;

(iii) thereafter, a default interest rate would be "*reagreed on, in line with market developments, at the end of each year …*".

283. In view of my conclusion that the 2015 year-end balance of account was agreed, inclusive of the aged debt settled at the June meeting and default interest on the post-settlement shipments then in the account, again the starting point for any final statement of the account now will be an opening balance, inclusive of all matters of interest, of US$7,683,027.31 at 31 December 2015, and I am concerned only with the interest terms applicable for interest accruing thereafter.

284. The email exchanges to which I referred in paragraph 277 above dealt with default interest as well as with interest on the aged debt, documenting annual default rate agreements, as envisaged by the April 2013 meeting minute, for 2016 and 2017 fixing a default rate of Libor + 2.5%. However, I was not shown any evidence of an agreement fixing a default rate for any later year, so on the interpretation of the ERW Sales Protocol I have adopted (see paragraph 28 above) the default default rate applies, as I dubbed it, namely Libor + 2%.

285. It follows that I can and do now determine that, subject to any argument, which I intend by this judgment to leave open, as to the consequences in law if Noksel did not include element (i) below when invoicing, any final statement of the account between the parties should be drawn up on the basis that, in respect of post-settlement shipments:

(i) Noksel was entitled to interest at Libor + 2% for an agreed credit period of 60 days from the B/L date;

(ii) BEMACO was entitled to an interest rebate pro rata to (i) above if it paid sooner than 60 days from the B/L date;

(iii) Noksel was entitled to interest at Libor + 2.5% in respect of default periods, i.e. periods during which a payment was overdue, having not been made within 60 days from the relevant B/L date, falling within 2016 or 2017; and

(iv) Noksel was entitled to interest at Libor + 2% in respect of default periods falling after 2017.

Conclusions

286. The term of the ERW Sales Protocol entitling BEMACO to exclusivity in England (meaning the UK) and Spain was varied, so as to remove it from the

contract, by agreement between the parties at the meeting in Istanbul in April 2013. The counterclaim alleging breach of that term by sales to the UK or Spain from April 2013 fails and will be dismissed.

287. There was a balance due to Noksel on the US$1.8 million 2010 cancellation debt of US$690,824.66. Noksel has claimed only US$589,983.06 in that respect, and I hold it to its pleaded claim. The evidence has therefore over-proved that claim.

288. It was agreed between the parties in December 2013 that the balance of the 2010 cancellation debt was separate from the general current account between them, and that payment would be deferred until after the differences between them as to that general account had been resolved and the resulting current account balance had been cleared.

289. Those differences were finally resolved at the June 2015 meeting in Ankara, at which the general current account balance as at 4 June 2015 was settled at US$7 million payable to Noksel by BEMACO, and it was agreed that that balance would be cleared by the end of January 2018.

290. Therefore, there should be judgment for Noksel against Bemaco and Prime, as a joint and several liability, for US$589,983.06, plus interest under section 35A of the Senior Courts Act 1981 from 1 February 2018 until judgment at a rate to be determined by the court unless the parties are content now to agree a rate, on Noksel's claim in respect of the 2010 cancellation debt.

291. The settlement of the current account balance as at 4 June 2015 at the meeting in Ankara was overtaken by the agreement between Mr Atik and Mr Ünal in January 2016, building on that June settlement, of the current account balance as calculated and stated by Mr Atik at US$7,683,027.31 as at 31 December 2015, inclusive of interest accrued between 1 July and 31 December 2015 of US$148,927.32.

292. There being no claim to set aside or undo the consequences of that agreement, if it was concluded (as I have held that it was), any final statement now of the current account between the parties must open with that balance as at that date. Strictly, the agreement on the account balance in June 2015, likewise its 2015 year-end update in January 2016, included an allocation of the agreed balance between Bemaco and Prime; but their liability on the account with Noksel in respect of the ERW Sales Protocol is joint and several, so for the purpose of taking a final account now and/or fixing a judgment sum the aggregate total is all that matters.

293. Whatever other points may yet need to be resolved, if they cannot be agreed, in stating a final account updated to the present from that opening balance:

    (i) US$57,508.53 must be included in favour of BEMACO in respect of Item 3 in BEMACO Schedule 1, and US$401,826.29 in respect of BEMACO Schedule 2, i.e. that Schedule is allowed in full;

(ii) nothing must be included in respect of any of the other Items in BEMACO Schedule 1 or in respect of BEMACO Schedules 3 and 4, i.e. BEMACO Schedule 1 (apart from Item 3) and BEMACO Schedules 3 and 4 are disallowed in full;

(iii) interest accruing from 1 January 2016 should be dealt with on the basis determined in paragraphs 279 and 285 above.

294. The claims pleaded against Mr Ünal personally fail and will be dismissed, (a) because they were advanced only in the alternative if, contrary to my finding, there was no settlement of the current account balance between the parties at the June 2015 meeting in Ankara or in the correspondence that followed it, and (b) because they are bad claims on their own terms in any event.