

**B E T W E E N:**

**(1) REPUBLIC OF DJIBOUTI  
(2) AUTORITE DES PORTS ET DES ZONES FRANCHES DE DJIBOUTI  
(3) PORT DE DJIBOUTI S.A.**

**Claimants**

**- and -**

**(1) MR ABDOURAHMAN MOHAMED MAHMOUD BOREH  
(2) BOREH INTERNATIONAL FZE  
(3) ESSENCE MANAGEMENT LTD  
(4) NET SUPPORT HOLDINGS LTD**

**Defendants**

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**SUMMARY OF KEY FINDINGS**

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Overview

1. The claims against Mr Boreh and his companies have been dismissed in their entirety. As a consequence, the court has rejected all of Djibouti's allegations that Mr Boreh engaged in fraudulent conduct, corrupt practices and accepted bribes. The judgment represents a real vindication of what Mr Boreh has contended throughout – that the claims against him were baseless and part of a malicious persecution of him, his family and business associates by the President of Djibouti, designed to crush him as a political opponent.

The Abandoned Claims

2. Both immediately before and during the course of trial, Djibouti abandoned all but three of its separate heads of claim. Those that remained were the claims with the greatest potential value, taking in the claim over the shares in the company that owned the Horizon Terminal, which Djibouti alleged Mr Boreh had dishonestly obtained (value: approximately US\$50m – US\$75m) and losses flowing from the alleged “soft terms” Mr Boreh had negotiated in the agreements related to the DCT concession awarded to DP World (Value, on Djibouti's case: potentially in excess of US\$1bn). Also pursued were the alleged bribes that Djibouti said Mr Boreh had accepted from DP World to negotiate in their favour (Value: approximately US\$1.3m).

3. In respect of those heads of its claim that were abandoned before or during trial, Mr Justice Flaux remarked that he could not “*recollect a case in which so many claims (let alone ones involving allegations of dishonesty) have been pursued with such vigour and then abandoned at trial.*” He went on to say that he was “*left with the distinct impression*

*that the Republic was intent on pursuing a scattergun approach against Mr Boreh of throwing as much mud as it could in the hope that something would stick, even though many of the matters were not ones in respect of which the Republic could have had a legitimate or sustainable claim.”*

## Claims in relation to DCT

### *Soft Terms*

4. In relation to the “soft terms” allegations, Flaux J commented that, contrary to being indicative of Mr Boreh having sold his country short, the container terminal concession agreements negotiated by Mr Boreh had proved *“a great success, both commercially and financially, for the Republic...”*

5. Flaux J found that the terms complained of were not “soft” as Djibouti claimed. On the contrary, he described them as *“even-handed and fair”*. Crucially, Flaux J considered that the terms agreed *“represented the basis upon which DP World was prepared to invest in the DCT and manage and operate the terminal.”* In relation to those aspects of the DCT Concession Agreement and related agreements that Djibouti had impugned, Flaux J said: *“I do not consider that DP World would have been prepared to agree to contract on the basis for which the claimants contend, whether as regards the royalty or the management fee or the length of the concession or the level of management control and autonomy which DP World required.”*

6. More specifically, Flaux J concluded that:

- a) **Royalty:** *“At the time of the relevant contractual negotiations in February 2006 and the approval and ratification of the various agreements by the President and the Parliament between May 2006 and December 2007, no-one on behalf of the Republic once suggested that the royalty should be higher than was agreed. As Mr Kendrick QC submits with considerable force, if there were anything in this point it would have been contended and pleaded a long time ago.”*
- b) **Management Fee:** *“the management fee agreed was not some excessive fee agreed because of bribery and corruption of Mr Boreh, but a fair fee reflecting the skill and experience of DP World.”*
- c) **Length of the Concession:** *“there is nothing unusual or excessive about the term of 30 years with two 10 year extensions. Mr Qureshi’s unchallenged evidence in his witness statement confirmed this”*
- d) **Control and Reserved Matters:** *“there is nothing surprising or untoward in DP World having exclusive management and board control of the DCT. Not only was this the established and financially successful model, but this is what the Government wanted, as Mr Douale admitted”.*

7. Flaux J concluded, then, that the President had been aware of the relevant terms and that he and his advisers had scrutinised the agreements. In particular, he had been aware that their effect was that DP World would have “*complete control without government interference*” and he had been aware of the Reserved Matters. Despite having expressed some misgivings, the President made the “*commercial decision to approve and ratify the agreements.*” Flaux J summarised the positions in the following way:

*“even if I had concluded that Mr Boreh was in breach of duty in some way in relation to the negotiations, I would have held that any such breach of duty did not cause the claimants any loss. It was the President’s decision which caused the claimants to be committed to those Agreements and, as I have found, in any event, DP World would not have agreed any different terms.”*

#### The Consultancy Agreement/Alleged Bribes, Value Additions Agreement and DDP Finder’s Fee

8. The court rejected the suggestion that DP World had paid bribes to Mr Boreh in exchange for his negotiation of “soft terms” in the DCT Concession Agreement and related agreements. Indeed, Flaux J found: “*the S Flame Consultancy Agreements and the S Flame Security Services Agreement were genuine Agreements, pursuant to which Mr Boreh provided genuine services to DP World.*” Flaux J also rejected the notion that payments were “rewards” to Mr Boreh for having obtained terms favourable to DP World in the DCT agreements.

9. In respect of the President’s knowledge of the consultancy agreements, Flaux J found both that, “*...Mr Boreh did tell the President that he was providing consultancy services to DP World and that the President knew that Mr Boreh was paid for those services, not least since the President and his wife had demanded payments from Mr Boreh over the years, including a share of anything he received from DP World...*”

10. More specifically in relation to the alleged bribes, Flaux J said the following:

##### **a) S Flame Consultancy Agreement**

- (i) “*I consider that both the services provided inside Djibouti of the sort which Mr Boreh describes and the ensuring of smooth relations with the President and the Government fall within the scope of the services envisaged by the preamble to and clause 2.1 of the Consultancy Agreements. In those circumstances, it is impossible to characterise the Agreements as being a sham.*”
- (ii) “*Try as the claimants may to link the dates when the Agreements were made with the provision of “services” which consisted of agreeing soft terms in the DCT Agreements, there is no such correlation. Whilst it is correct that the first Agreement signed in April 2007 related to services provided by Mr Boreh in the twelve months from April 2006, as I have already held, the essential commercial terms of the DCT deal with DP*

*World had been negotiated by Mr Boreh at the meetings in Dubai in February 2006.”*

b) **S Flame Security Agreement:** *“I reject the claimants’ case that the U.S. \$93,000 paid to S Flame in October 2008 can be construed as a bribe for agreeing soft terms or otherwise as a corrupt payment and I accept Mr Kendrick QC’s submission that this represented the payment of a small monthly sum for genuine local services paid for and provided by Mr Boreh.”*

c) **Value Additions:**

(i) *“It is improbable in the extreme that DP World had already offered Mr Boreh this 5% shareholding in the DCT joint venture company at the time of the February 2006 meetings, whether as some sort of bribe or generally”;*

(ii) *“In my judgment, this suggestion that what was proposed was a gift, as a reward for having agreed soft terms which were favourable to DP World is simply not justified. If that had been the explanation, then it is difficult to see why Mr Boreh would not have executed the Share Purchase Agreement and share transfers, as his nominees chased him to do, particularly if he only had to pay U.S. \$1 to obtain the shares.”*

(iii) *“In my judgment, it is not necessary to reach a final conclusion as to why Mr Boreh did not proceed with the acquisition of the shares in DPWD, although I consider that the most likely explanation is that it would have been part of a “fund” for the President, which is why there was no point in proceeding with the acquisition by the autumn of 2008, when relations between them had irretrievably soured. In any event, even if Mr Boreh/Value Additions had acquired the shares, it would not have been a bribe. As Mr Kendrick QC rightly submits, DP World had a legitimate interest in Mr Boreh having a shareholding in DCT. He would act as a go-between with the Government and would be of assistance in avoiding any disruption of the project.”*

d) **DDP Finder’s Fee:** *“In my judgment, the characterization of this issue of the finder’s fee as complicity between [DP World and Mr Boreh] in entering into corrupt transactions is unwarranted. Even if any agreement had been made, which it was not, it would have had nothing whatever to do with the negotiations of the DCT agreements and would not have been a bribe.”*

11. In summary, Flaux J held that: *“I have concluded that neither the payments made to Mr Boreh or his companies by DP World, nor the proposed shareholding in DCT (never in fact transferred) nor the finder’s fee for DDP (never in fact paid) constituted a bribe or a promise of a bribe to negotiate or agree soft terms in the DCT agreements. Furthermore, none of those matters alleged by the claimants establishes that these were corrupt payments for Mr Boreh’s personal gain which harmed the interests of the Republic.”*

## The Horizon Claim

12. In relation to this head of claim, Flaux J remarked that: *“I am entirely satisfied that Mr Boreh did not obtain the shareholding he did because of any... improper basis. He obtained it entirely properly for commercial reasons”*. He also concluded that Mr Boreh had made the President aware of his shareholdings at the time he took them and had not met with any objection.

13. Further, Flaux J made it clear that he rejected the allegation pursued by Djibouti that the agreement entered into between Mr Boreh and the company that owned the Horizon Terminal to provide consultancy services in relation to its construction was corrupt or a sham. Flaux J commented on the fact that Djibouti had been prepared to make a serious allegation against ENOC without properly pleading it or putting ENOC on notice. In summary, Flaux J found that there was nothing improper in any of the dealings between Mr Boreh and ENOC. Any criticism of ENOC by Djibouti was without foundation.

## The Arab Funds Allegations

14. Flaux J did not accept the criticisms of Mr Boreh or DP World in relation to their interaction with the Arab Funds in the context of raising funds for the Doraleh project. Flaux J found, not least because as much was conceded by Messrs Douale and Hag in cross-examination that the Arab Funds were only being asked to finance the jetty and related infrastructure and not the terminal itself. He concluded by saying: *“I have considerable doubts as to whether ultimately the Funds would have been prepared to provide the finance, but that point was not reached, because the President made the decision to seek private sector finance.”*

## Judicial Comment on Witnesses

### *Mr Boreh*

15. Mr Boreh’s evidence on all material points was accepted. Flaux J remarked that the Republic *“seek to portray him as a greedy, unscrupulous, corrupt businessman, who would stop at nothing to make himself money, including the betrayal of his country by agreeing soft terms in the DCT Agreement. That is not the man I observed giving evidence in the witness box for four and a half days.”* He went on to say: *“...I simply refuse to accept the claimant’s picture of him as a traitor, who sold his country short for what, given his wealth, was the very modest amount of U.S. \$1,250,000 paid [as alleged bribes]. As Mr Kendrick QC put it, he is a patriot. He has a strong desire to improve his country and is justly proud of what has been achieved at Doraleh through his and the Republic’s cooperation with Dubai. He is not a man who would take bribes to sell his country short.”*

### *DP World Witnesses*

16. Mr Qureshi was described as a *“measured and straightforward”* witness and Flaux J accepted his evidence.

17. Mr Fewer was described as an *“impressive and careful”* witness and Flaux J accepted his evidence.

18. Mr Hawker was described as “*defensive and evasive*” in relation to his evidence on the DDP Finder’s Fee. However, Flaux J remarked that, “*Apart from that, I considered him to be a truthful witness and I certainly do not think that he is someone who would have been prepared to bribe Mr Boreh to agree soft terms on the DCT contracts.*”

#### Djibouti Witnesses

19. The President was criticised for his refusal to attend court to be cross-examined and failure to engage properly with the evidence in his witness statements. The Judge also criticised the evidence of the present and former Djibouti officials who did testify at court, finding that they had been trained to adopt the “party line” and not contradict anything the President said, the result of which was that their evidence was untruthful.

#### Judicial Comment on DP World’s involvement in Djibouti

20. Flaux J remarked that those projects in Djibouti in which DP World and its affiliate JAFZA had been involved had been unqualified successes. Specifically, DP World’s management of the Old Port was described as “*On any view...a success*”, JAFZA’s management of the free zone led to the enterprise being “*extremely successful*”, and DCT was described as a “*tremendous success*”.

#### Political Motivation

21. Flaux J accepted that the most likely explanation for the way in which Djibouti had conducted itself was that its actions were politically motivated and designed to ruin Mr Boreh.

22. In the context of the abandoned claims, Flaux J commented that “*This cynical approach to litigation is indicative of the political motivation which Mr Boreh contends lies behind this litigation.*”

23. Flaux J concluded by criticising Djibouti for the campaign it had pursued against Mr Boreh. Flaux J commented, “*[The campaign] does cast doubt upon the bona fides of the claims, many of which have been abandoned before and during the trial, and of the conduct of the litigation, not I emphasise by the lawyers in England, but by those with control of the litigation in Djibouti, Mr Sultan, the State Inspector General and, ultimately the President. It provides an explanation for why witnesses called by the Republic did not tell the truth, specifically about their knowledge of Mr Boreh’s shareholding in Horizon. It also provides confirmation of the capricious nature of the regime in Djibouti and why those investing there, specifically DP World and the banks who financed these projects, were only prepared to do so, on the basis that management control rested with DP World and that there was no interference from the Government.*”