



**The Dispute Resolution Board Foundation**  
Fostering common-sense dispute resolution worldwide

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# Dispute Boards and the Southern African Water Infrastructure Sector

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**David Keyser**  
**Head: Engineering**

- 1. TCTA**
  - 2. South African History on DB's**
  - 3. Personal observations**
  - 4. Conclusions**
  - 5. Acknowledgements**
  - 6. Finis**
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- The background of the slide features a landscape with rolling hills and mountains under a clear sky. In the foreground, there is a large, detailed image of a butterfly with orange and black wings, partially overlapping the landscape. The entire scene is overlaid with a large, faint white circular graphic.

# 1 TCTA the Organisation (1)

- TCTA is a state enterprise that functions as a Special Purpose Vehicle (SPV) to implement and fund commercially viable bulk raw water projects in South Africa.
- Initially created in 1986 in terms of the National Water Act to implement and fund the South African portion of the bi-national Lesotho Highlands Water Project (LHWP).
- Currently involved in implementation of:
  - Berg Water Project (SAR 1.5 billion)
  - Vaal River Eastern Sub-System Augmentation Project (SAR 3.2 billion)
  - Mooi-Mgeni Transfer Scheme Phase 2 (SAR 1.0 billion)



# 1 TCTA Mission (2)

- TCTA is a specialized liability management entity to fund and implement bulk raw water infrastructure:
  - Within an acceptable risk frame work
  - In the most cost-effective manner
  - To the benefit of the water consumer



# 1 TCTA STRATEGIC OBJECTIVE/ACTION PLANS (3)

- To implement projects in accordance with best practice on time, within budget and to acceptable technical standards :
  - Monitoring of engineering services to ensure that the components are constructed as scheduled **in accordance with contractual conditions** and specifications, within budget.
  - Evaluation of engineers' **administration of construction contracts and assessment of claims and variation orders to ensure strict adherence** to contracts.
  - Following of competitive procurement processes to ensure that **cost effective** services are obtained.
  - Subject **critical engineering processes to independent review** to ensure maintenance of acceptable technical standards.
  - Appoint Service Providers and **manage contracts** within the guidelines, framework and statutes which govern TCTA.



## 2 HISTORY OF LOCAL DB' s (1)

### LESOTHO HIGHLANDS WATER PROJECT

- **TCTA:**
  - Contract TCTA 20: Construction of Delivery Tunnel North (1991)
    - TCTA the first employer in South Africa to engage a Dispute Review Board
    - DRB consisted of senior representatives of Employer, Engineer and Contractor.
- **LHDA**
  - **LHWP Phases 1A:**
    - Contract LHDA 123: Construction of Katse Dam (1994).
    - Contract LHDA 124/5: Construction of Transfer Tunnel (1994).
    - Contract LHDA 126: Construction of Delivery Tunnel South (1994)
    - FIDIC 4 (1987 Red Book”) were amended (Clause 67) to facilitate DRB involvement as part of the amicable settlement process, once dissatisfaction notified and before arbitration.

## 2 HISTORY OF LOCAL DB' s (2)

### ■ LHWP Phase 1B:

- Contract LHDA 1009: Construction of Mohale Dam (1998).
- Contract LHDA 1008: Construction of Matsoku Tunnel & Weir (1998).
- Contract LHDA 1007: Construction of Mohale Tunnel (1998).
  - These DRB's all had independent international members.
  - FIDIC 4 (1992 "Red Book") were amended (Clause 67) to facilitate DRB involvement as adjudicator as part of the amicable settlement process, once dissatisfaction notified and before arbitration.

## 2 HISTORY OF LOCAL DB' s (3)

### DWAF

- Construction of Injaka Dam (1995)
  - CoC SA Blue Book General Conditions of Contract 1990
  - DRB replaced mediation

### IMPALA IRRIGATION BOARD

- Construction of Paris Dam (1997)
  - CoC SA Blue Book General Conditions of Contract 1990
  - DRB replaced mediation

### KOBWA

- Construction of Maguga Dam (1998)
  - CoC FIDIC 4 (1992)

### BOTSWANA

- North-South Carrier Pipeline
- Letsibogo Dam



## 2 HISTORY OF LOCAL DB' s (4)

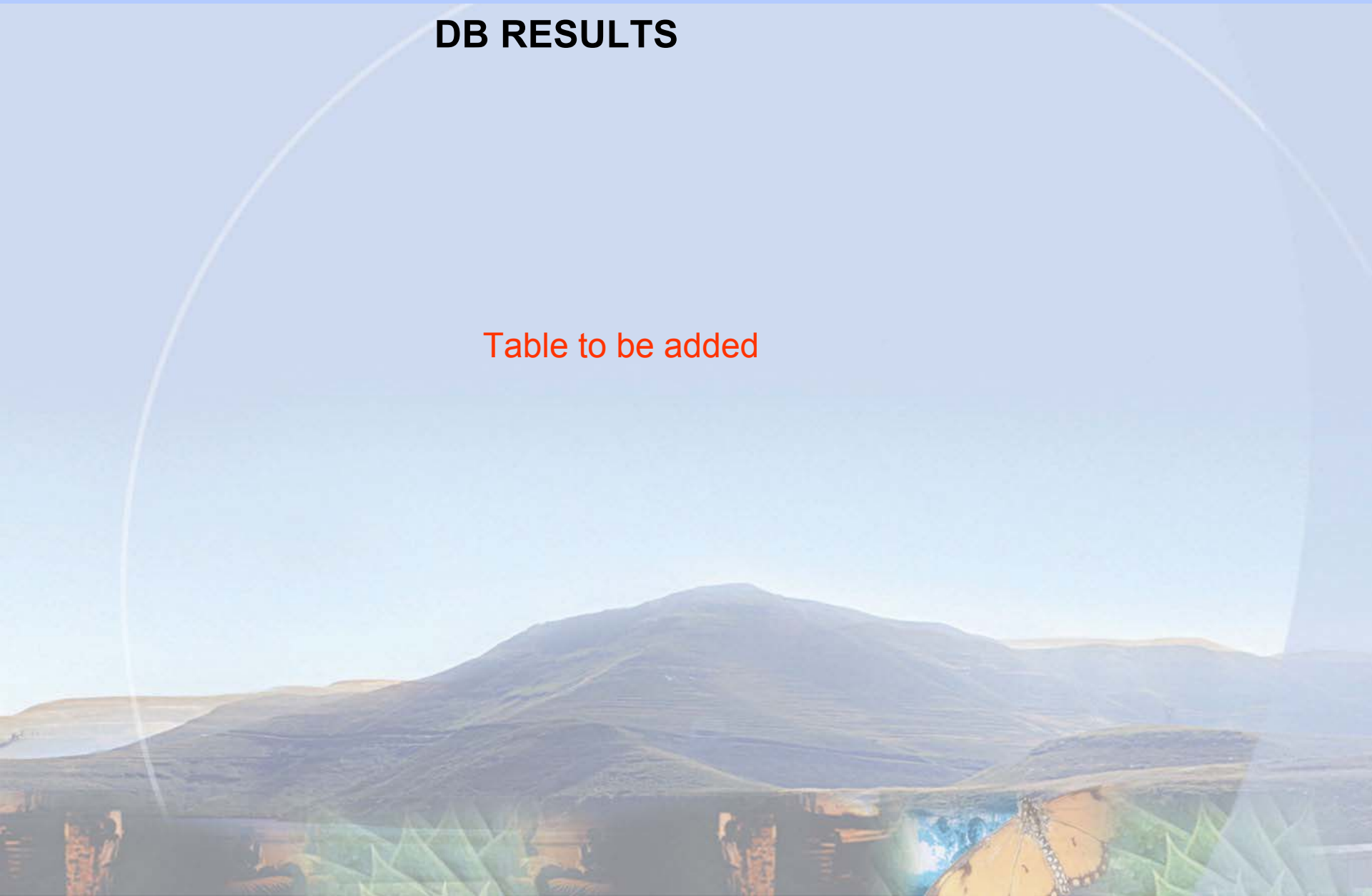
### TCTA (CURRENT)

- Contract TCTA-B020: Construction of Berg River Dam (2004)
- Contract TCTA-B021: Construction of Supplement Scheme
  - B021A: Pump stations and Tunnel works (2004)
  - B021B: Mechanical & Electrical Works (2004)
  - B021C: Pipelines (2004)
- Contract TCTA-V020: Construction of pipelines (2006)
- Contract TCTA-V021: Construction of Electrical, Mechanical & Instrumentation Works (2006)
  - FIDIC 1999 CoC for Construction for works designed by the employer:
    - Clause 3.5: Introduced a provisional determination by Engineers' assistant, followed by a final determination by the Engineer - Mirrors FIDIC 4 procedures re Engineers' Decision.
    - Clause 20.4: Added conditions precedent before DAB is empowered to decide on matters – to ensure a matter has reached sufficient maturity before DAB involvement.

## 2 HISTORY OF LOCAL DB' s (5)

### DB RESULTS

Table to be added



### **BENEFITS OF DB's**

- Provides procedural justice in resolving disputes.
- International best practice (IBRD funded requirement)
- Independent review and opinion by experts that is familiar with conditions on the project provides credible resolution to support management proposals to higher echelons in the organisation to settle disputes.
- Ensure compliance contractual conditions and installs discipline in claim formulation and assessment
- Cost effectiveness vs. arbitration/litigation.
- Competitive tender price – contractors assured of fair application of contract.

## 3 Observations (2)

### **BENEFITS OF DB's (cont.).**

- Claim avoidance or settlement – tenuous and exaggerated positions are restricted as it will impact on credibility of a party if pursued to DB resulting in a reduced number of referrals
- Early resolution results in:
  - higher productivity
  - Improved relationship, trust, communications and co-operation
  - Improved cash flows
- Independent check and balance on Engineer.
- Aggregation of claims should be avoided providing higher probability on cost at completion

### CONCERNS ON DB's

- Impartiality of members due to familiarity with a party/bias/prejudice.
- Code of Ethics of DB not enough assurance in current professional environment and accountability.
- No time limit on dispute referral (FIDIC 20.4); negates early resolution.
- Tendency to rule/decide "fair & equitable" settlement rather than strict application of the contract (equity vs. law).
- Difficulties surrounding the DB role in providing an early advisory opinion on matter of principle like interpretation of contract.
- Pressure for early intervention of DB, before claim has sufficiently matured.



### CONCERNS ON DB's (cont.)

- Prevalence of lawyers vs. engineers on boards
- Limited pool of qualified/experienced board members in SA.
- Formality of the DB process seems to be increasing and can follow same route as Arbitration and becomes prohibitively expensive and time consuming, negating the objective.
- Cost currently being split 50/50 and DB in no position to award cost to either party if other party has been obstructive or withdraws referral just before or after hearing.
- No record of case law on matters of principle (legal/contractual/interpretation) is being created.

### WAY FORWARD

- To remain successful it is essential that a balance between engineers and lawyers on boards are established.
- Develop a local data base of DB members with certification from an agreed institution.
- Hearings should only be convened if the written submissions and responses need extensive clarification, and should not be a forum to present new argument.
- Participation at hearings to be limited to project personnel, and third party legal representation as a rule to be excluded (unless dispute is a pure legal matter). Otherwise DB will follow same route as Arbitration and becomes prohibitively expensive and more time consuming.

### WAY FORWARD (cont)

- Professional liability of DB members to be instituted, currently only their reputation is at stake, which is not comparable to the liability of other professionals involved in project implementation.
- Resolve the problems of the DB giving an advisory opinion on matters of principle vs. a party “testing the waters” on entitlement before claim has sufficiently matured.



## 4 Conclusion-1

- In my experience only the Katse Dam DRB has failed, as disputes were referred to arbitration and after more than 7 years were eventually concluded in a ruling by the UK House of Lords.
  - The main reason for the specific failure being the DRB's bias toward settlement, subject to their concept of fairness and equity, rather than strict legal/contractual adjudication on the issue.
- Even though the majority of DB recommendations or decisions on the contracts I have been involved in, have not been accepted the rulings have usually provided the basis of further negotiations which resulted in the settlement of the issue, sometimes as a package in conjunction with other claims, but only at the end of the contract.
- The time benefit of early resolution of claims or disputes seems not to materialise through the DB process.



## 4 Conclusion-2

- In my opinion, DB's currently remain the most cost effective and appropriate mechanism to resolve disputes on large construction projects. However for the DB movement to maintain this status and successfully grow it is necessary to learn from our practical experiences and continually improve the process.
- We must refrain from legalising it too much (like arbitration) to lose the current benefit, which will in time enviably result in the development of a new more cost and time effective alternative dispute resolution mechanism.





## 5 Acknowledgement

- TCTA
- Lesotho Highlands Development Authority (LHDA)
- Lesotho Highlands Water Commission (LHWC)
- South African National Department of Water Affairs & Forestry (DWAf)
- Impala Irrigation Board (IIB)
- Komati Basin Water Authority (KOBWA)



- **Thank you!**

**David Keyser**  
**Head: Engineering**

**Telephone:** +27 (0)12 683 1203

**Website:** <http://www.tcta.co.za>

**e-mail:** [dkeyser@tcta.co.za](mailto:dkeyser@tcta.co.za)