

The legal aftermath: the Zug case

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The reduction of the programme had consequences for the cantons that had pledged subsidies for particular lines. Zug had promised CHF 250,000 in 1870 on the condition that the line from Zug through Walchwil to Goldau was secured. When the supplementary treaty of 1878 deferred that line, the canton sought to make its contribution depend on construction. A compromise of 1879 provided that the company would pay Zug CHF 5,000 a year for 25 years as compensation for the delay, if the canton paid its full subsidy. In 1889 Zug sued the company. The Federal Court dismissed the claim on 1 November 1889 because there was no direct contractual obligation between the canton and the company to build the line.¹ The access lines from Lucerne to Immensee and from Zug to Arth-Goldau were completed only in 1897.²

The judgment illustrates a general point of infrastructure law. Subsidies that are promised for a public purpose create rights only to the extent that they are expressed as enforceable obligations between identifiable parties. Where the obligations run through an international treaty or through the concession granted by a public authority, the subsidizing entity may find that it has paid without acquiring a claim to performance.

1 The crisis as a lesson in project governance

The crisis of 1876 to 1878 is instructive for anyone who structures or finances a large infrastructure project today, because its causes were institutional as well as technical. The cost estimate of 1869 had been prepared to win subsidies and investors, at a stage when the geology of the tunnel and the alignment of the ramps were known only in outline. The same person, Alfred Escher, presided over the sponsoring railway company, the bank that helped to place the securities and the project company itself, so that no independent body had an interest in questioning the figures before the capital was raised. The technical director was an

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employee of the board that had promised the states a fixed programme, and his successor's revision came only after the money had been committed and part of it spent.

The legal structure made the correction slow. Because the programme was fixed by treaty, every economy required an international conference and every new franc of public money required the approval of three parliaments and, in Switzerland, of the people. The construction risk had been transferred to Favre, but only in form, since his ruin could not relieve the company of the need to finish the tunnel. Modern practice responds to these problems with independent technical advisers, cost estimates with explicit contingencies, separation between sponsor, lender and project company, and contractual mechanisms for changes in scope. The Swiss Confederation adopted some of these lessons for the NRLA, which Parliament placed under a special supervisory delegation, and the base tunnels still exceeded their initial estimates by a wide margin (see the final section).³

In figures. The financial plan of 1869 estimated the cost of the Gotthard railway at CHF 187 million.⁴ In 1876 Hellwag identified a deficit of CHF 102 million, reduced by the economies of the Lucerne conference of 1877 to CHF 40 million.⁵ The supplementary subsidies of 1878 amounted to CHF 28 million: Germany and Italy CHF 10 million each, Switzerland CHF 8 million.⁶ The Federal Act of 22 August 1878 granted CHF 4.5 million for the Gotthard, CHF 2 million for the Monte Ceneri and CHF 4.5 million each for future eastern and western Alpine railways.⁷ It was approved by the people on 19 January 1879 with 70.7 per cent.

2 Notes

1. Federal Court, judgment of 1 November 1889 (as above). ↩
2. HLS, art. "Gottardo, Ferrovia del" (as above), for the completion of the access lines in 1897 after the moratorium. ↩
3. The analysis is the author's. On the NRLA Supervisory Delegation of the Federal Assembly: Neat-Aufsichtsdelegation der eidgenössischen Räte, Oberaufsicht über den Bau der Neat im Jahre 2016, report of 26 April 2017, <https://www.parlament.ch/centers/documents/de/bericht-nad-2017-04-26-d.pdf>, submitted under Art. 20 para. 5 of the Federal Act of 4 October 1991 on the construction of the Swiss transalpine railway line. ↩

4. Swissvotes, vote no. 20 (as above), for the estimate of 1869 and the result of 1879. ↩
5. H. Etter (as above); Swissvotes, vote no. 20 (as above). ↩
6. H. Etter (as above); Die Grenzboten (as above). ↩
7. Federal Act of 22 August 1878 (as above), Art. 1, 4 and 5. ↩

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