

# THE LEGAL ASPECT OF SWAPS

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Paul Goris

Graham & Trotman / Martinus Nijhoff

# **THE LEGAL ASPECT OF SWAPS**

## **An Analysis Based on Economic Substance**

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### **About the author**

Since September 1987, Paul Goris (born 1962) was a full-time academic assistant at the University of Leuven (Katholieke Universiteit Leuven, Belgium), where he specialized in international financial law. On 19 June 1992, he obtained the degree of Doctor Juris with a comparative legal study on swaps and financial engineering. In October 1993, he joined the Brussels office of the international law firm Clifford Chance.

### **About the legal editor**

Max Foster (graduate of Exeter University and Guildford College of Law) is Vice President at Citibank N.A., based in London. As Derivatives and Capital Markets Counsel, he has responsibility for the legal aspects of Citibank's European Derivatives business.

To my wife and best friend Christine,  
with love.

## Foreword

Banks continuously seek to develop their activities and to satisfy the needs of their clients by means of designing new types of financial transactions. Among those new bank products, the swap merits special attention and has led to this remarkable study by Dr. Paul Goris.

This work displays a number of originalities.

Although the swap is practiced in many countries, the Anglo-American banking community has in particular tried to allot it an ever growing practical importance. Thus, in this instance, it is particularly noteworthy to acknowledge the fact that it is a Belgian who, at the cost of sustained efforts, has searched to define the legal status of a financial transaction-type whose practice is mainly centralized in the U.S. and the U.K.

Commonly, scientific studies can be located within the framework of a well-defined discipline. On this occasion, however, this is not entirely the case. Paul Goris studies the swap from a legal point of view, but also from an economic and financial perspective. The swap principally aims to limit the risks posed to creditors and debtors in the area of foreign exchange and as a consequence of interest rate fluctuations. For that purpose, parties enter into contracts: how must one legally characterize those contracts? Should they be considered as loans or as *sui generis* operations? What is their tax status? The author of this book endeavors to provide answers to these and other questions, sometimes difficult answers. He is obligated to tread upon hazardous paths and is only rarely comforted by the legislator. Thus, he often has no option other than to elaborate himself the rules he proposes to apply. In so doing, he tries to safeguard the swap's future by drawing conclusions based on the many personal findings he confides to his readers.

The subject of this book is not only new. It displays some proper characteristics which the author must continuously take into consideration. Generally, a swap transaction does not operate on its own but attends an underlying operation. As a consequence, one has to determine the relationship between the swap and the commitments whose content it modifies and completes. From a legal perspective, such a situation is new. The French have endowed it with a specific term: in their view, it involves a so-called "groupe de contrats".

Notwithstanding the predominant Anglo-American nature of the swap phenomenon, its application has often also international repercussions which Paul Goris has equally given considerable attention.

Hence, he fully enters the domain of comparative law. The merits of the author are self-evident. He has spent a considerable part of his time, scientific experience and research to the profound study of a financial and legal field

which, certainly, has already been entered by others preceding him but, for the time being, remains full of mysteries to be elucidated.

Prof. Em. R. Vandeputte  
Professor at the Katholieke Universiteit Leuven (Belgium)  
Honorary Governor Banque Nationale de Belgique  
Former Belgian Minister of Finance

## Acknowledgments

At the origin of this book lies the thesis on the legal aspects of swaps and swap engineering for which I received the Doctor Juris title from the Katholieke Universiteit Leuven (K.U. Leuven, Belgium) on 19 June 1992. Logically, the thesis first led to a book in Dutch, which covers the legal impact of the swap's economic substance from a Belgian law perspective and which was published by Kluwer Belgium in November 1992. The present book contains the modified, supplemented and fully up-dated version of those portions of the initial Ph.D thesis addressing the status of swaps and swap structures under U.S., U.K. and international (mainly EC) law. Special care has been taken to enhance the book's value as a practical guide for international lawyers active in swap finance. As such, the author has intended this book to achieve a twofold, somewhat contradictory objective, namely (i) to constitute a comprehensive reference work on the law related to swaps and swap-based products and (ii) to provide an original academic treatise elaborated on the basis of the swap's economic substance, thereby attempting to set the beacons for the design of solutions to future legal swap issues.

For a lawyer belonging to a civil law jurisdiction, the challenge of writing a book exclusively focused on U.S. and U.K law in wide-ranging fields such as contract law, bank regulation, accounting and taxation evidently posed specific hurdles to overcome. Yet, while the task was cumbersome, we hope that the book achieves in providing U.S. and U.K. lawyers an encompassing, original and sometimes surprising view on the contents and lines of force of the quickly emerging legal status of swaps in their respective jurisdictions.

While the writing of this book in many respects constituted a solo effort, a number of people should be expressly mentioned for their support and assistance.

I owe a special debt of gratitude to Mr. Lode Beckers, Country Corporate Officer Citibank Belgium. It was he who first made me aware of the additional value originating from an English publication. It will please him to learn that by so doing he was so convincing that, despite the extra effort required, not the Ph.D. thesis but the realization of this book immediately became the principal goal of my research on swaps and international financial law. I thank him for his interest shown, his good advice and encouraging support, both in the end-stage of completing the original thesis as at the inception and in the course of the translation and up-dating work.

In the person of its Dean, Prof. Dr. R. Versteegen, I want to thank the Faculty of Law of the K.U. Leuven for granting me a one-year extra stay, thereby allowing me to finalize this book. In his capacity as my divisional head, I also want to thank Prof. Versteegen for all his support in the past and for seven years of agreeable co-operation. Special thanks are due to my colleague Dr. Bart Raymaekers, for his untiring concern, counseling and friendship.

Among a large number of people to whom I am indebted, I should mention



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It is a great honor that this book is introduced by a foreword written by a renowned compatriot, Prof. Em. Robert Vandeputte, former Belgian Minister of Finance. I am gratefully indebted to him for his interest, enthusiasm and kind appreciation.

My utmost gratitude goes to Max Foster, Vice President Citibank N.A. London, for his enthusiastic willingness to direct the legal editing of this book. His careful review of the text and his suggestions with regard to the many parts addressing U.K. and English law greatly enhanced the book's legal accuracy. For the preceding language editing, I kindly thank John Steffen and Cynthia Flores. Many thanks also to Peter Dejaeger for his assistance in typing and processing the text.

I want to thank my publishers, Graham & Trotman Limited, and in particular Fergal Martin and Patricia Signorini, for the confident belief in the author and the project, their continuing concern for the book's completion and their patience in the last weeks preceding it.

Finally, I want to thank those whose support, albeit not of a professional nature, proved an invaluable factor in the completion of this book. To my mom and dad, I owe every possible debt of gratitude for all chances they have offered their children. I hope they will consider this book a small reward and a justified reason for contentment. To conclude, I want to thank my wife Christine, who has always been there when I needed her, in the past and in the present, listening, comforting and healing in her unparalleled manner. She made this book team-work in a true sense.

All errors, omissions and shortcomings are the writer's sole responsibility. While the law is stated as of 1 July 1993, all key developments since that time have also been briefly addressed.

P. Goris  
London  
November 1993

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