

# **(Pre)-insolvency considerations: WHOA**

Financial Markets Legal Update –  
the webinar series

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# Agenda

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Background WHOA

- Existing restructuring tools
- Aim WHOA
- Next steps

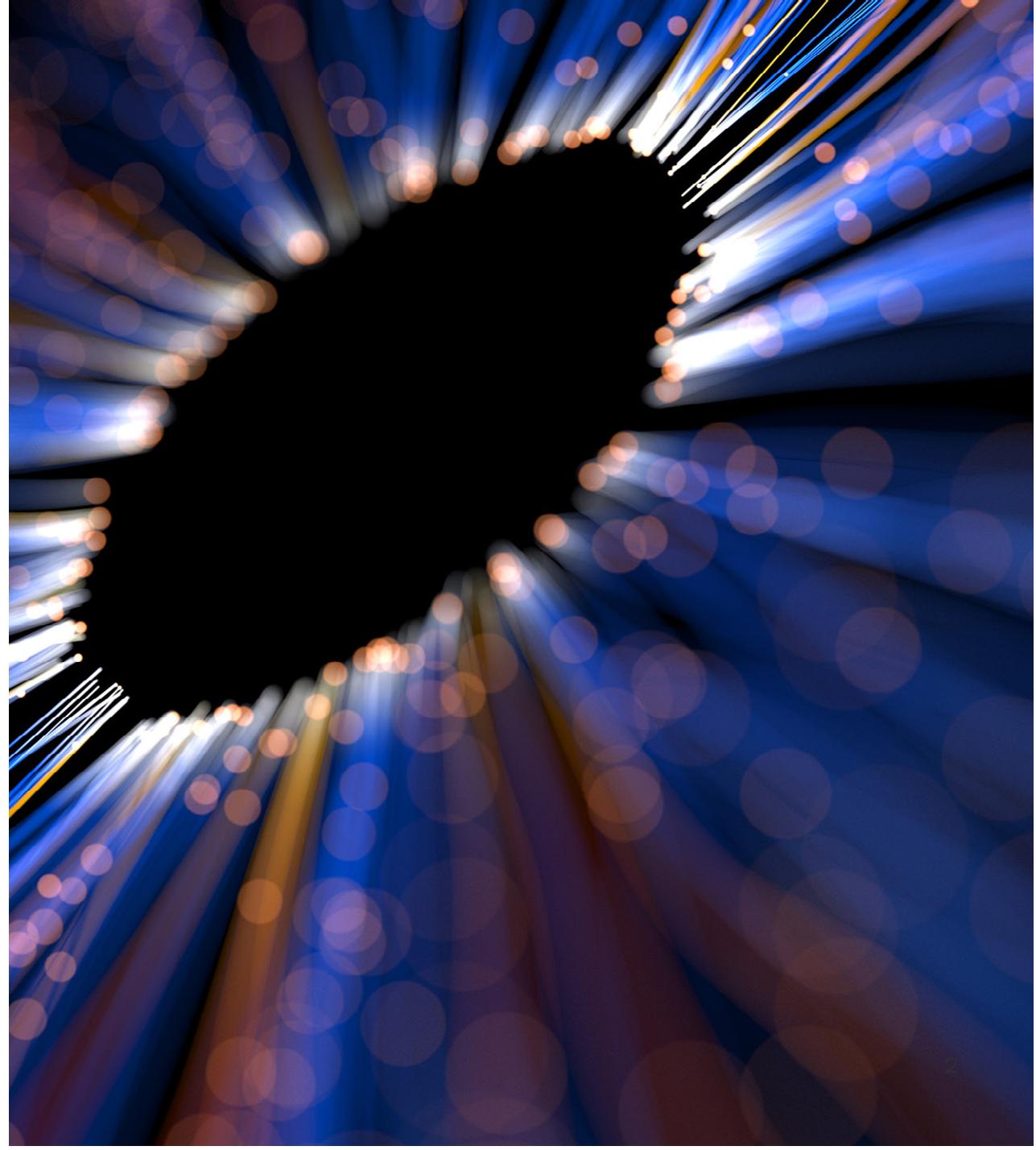
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Key characteristics WHOA

- Short overview
- Class constitution
- Binding on creditors
- Security for new money

3

Questions



# Background WHOA



- Existing insolvency tools
  - Bankruptcy – aimed at liquidation
  - Suspension of payments – 100% creditor’s consent required
  - Pre-pack – smooth restart, but position employees uncertain
  - Dutch Debtors restructured via UK Scheme
  - Switch of ‘*centre of main interests*’ to UK
- WHOA
  - Aim to keep debtor going concern (but liquidation possible)
  - Pre-insolvency
  - Only 2/3 creditor consent
  - Not applicable to employees
- Controversy / Next steps

# WHOA – Dutch Scheme

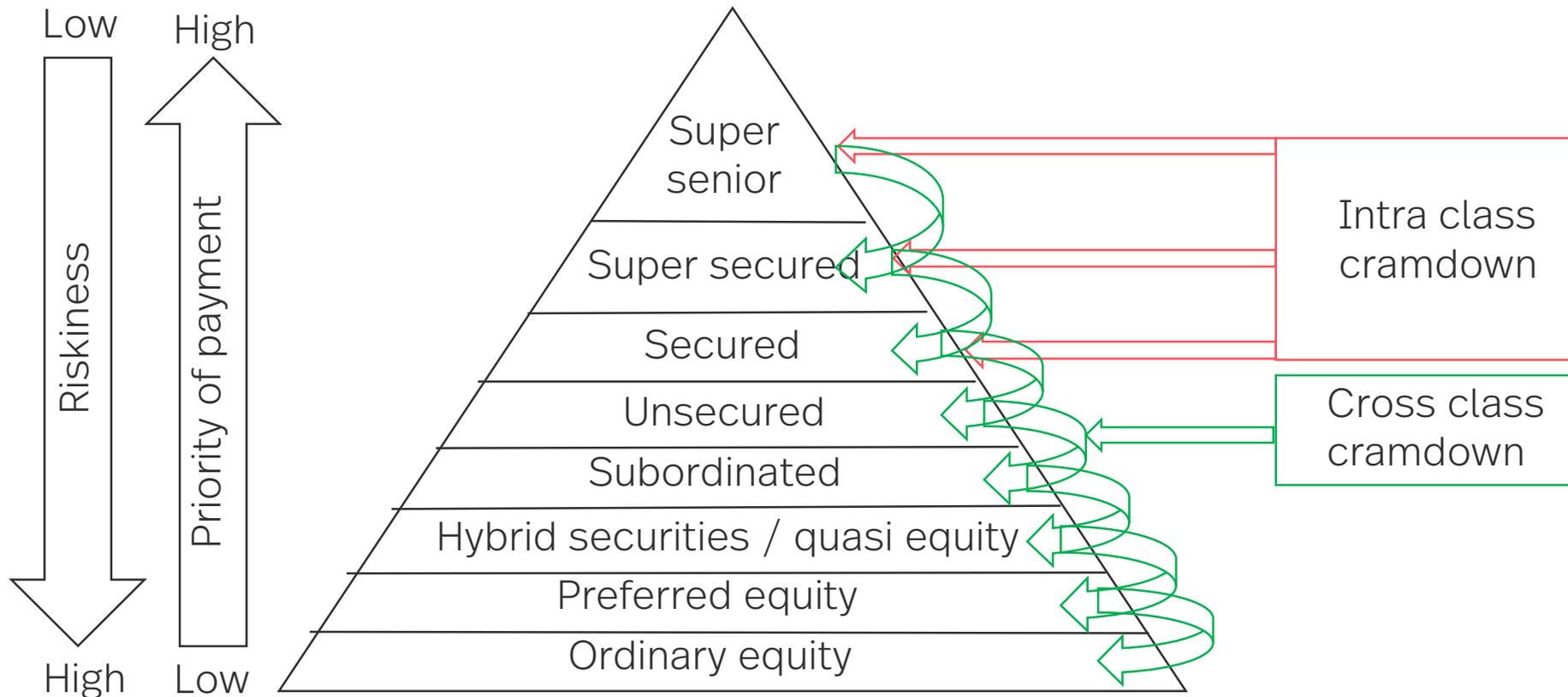


- Characteristics WHOA
  - Pre-insolvency restructuring plan
  - Initiated by debtor or its creditors
  - Freedom of contract
  - Class constitution
  - *Ipso facto* clauses without effect
  - New money security
  - Confirmation (*homologatie*) by a Dutch court
  - Binding on all creditors – cram down, including cross class cramdown
  - No creditor worse off

# WHOA – Class constitution



- Classes based on creditor's rights (i) in bankruptcy and (ii) restructuring plan.
- Specific class for small unsecured creditors that receive less than 20%.
- Claims secured creditors divided into 'secured' and 'unsecured'.



# WHOA – Binding on all creditors



- Binding on all creditors if approved by court
- ‘Horizontal cram-down’
  - A class votes in favour if 2/3 of the claim value votes in favour
- ‘Cross-class cram-down’
  - Court can approve if at least one class voted in favour
  - At least the class that in bankruptcy would have been partially or fully repaid must have voted in favour, if those creditor’s rights are affected (i.e. secured creditors)
- Court can reject if dissenting creditor is worse off as he would be in bankruptcy
- Court can reject if dissenting creditors of a dissenting class:
  - its distribution under the plan deviates from statutory/contractual priority
  - Secured creditors are only offered shares (but they have no right to request cash)
  - Small creditors are not offered 20%, unless compelling grounds

# WHOA – New money + new security



- Additional financing necessary for debtor in restructuring
- Additional secured financing is currently subject to *pauliana* risk
- Under the WHOA, new loans and securities can be authorised by the court
- If authorised, a bankruptcy trustee cannot invoke *pauliana*.
- The court authorises if:
  - Financing is necessary to keep the business ‘going concern’; and
  - expected to serve the interests of creditors without being prejudicial to an individual creditor

# WHOA – Questions?



- Questions?

# Key Contacts



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## Thank you for joining

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# Q&A

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