



AMERICAN  
BANKRUPTCY  
INSTITUTE

# Cross-Border Insolvency Program

## Forensic Panel

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# ABI Cross-Border Insolvency Program

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New York, NY

## Crime and Cross-Border Forensics Today's Panel

The explosion of **information technology** in recent years has revolutionized the way business transactions are conducted, including those conducted for **nefarious** purposes.

Technology has likewise contributed to the **easing of international borders**, increasingly globalizing crime itself.

Today we will discuss recent financial crimes associated with several **high-profile bankruptcies**, as well as the **tools** available for investigating crime in a globalized economy.

# Crime and Cross-Border Forensics

- Case Studies
- Cross-Border Forensic Investigations
- Available Legal Tools

## Today's Panel



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# Case Studies

## Case Studies

- TelexFree
- Luckin
- Celsius

## Case Studies

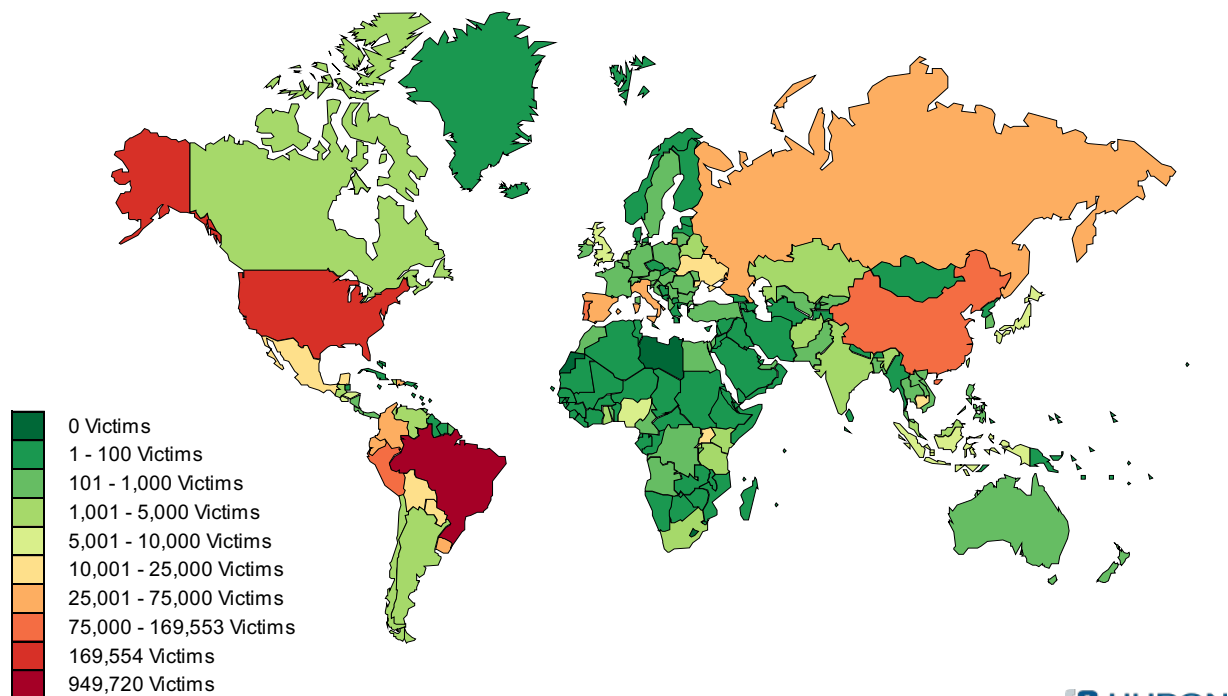


## TelexFree

- **April 13, 2014**: TelexFree, LLC, TelexFree, Inc., and TelexFree Financial, Inc. file for bankruptcy protection
- **June 6, 2014**: Stephen Darr appointed Chapter 11 trustee
- Ympactus Commercial Ltda. and TelexFree operated primarily in Brazil
- **June 2013**: Brazilian authorities shut down Ympactus and TelexFree, which was a multibillion-dollar Pyramid/Ponzi scheme disguised as an internet phone service company

# TelexFree

- The scheme:
  - TelexFree recruited thousands of “promoters”
  - Promoters were required to buy into TelexFree
  - Between February 2012 and April 2014, TelexFree participants purchased approx. 12.4 million VoIP plans and 6 million promoter plans
- Prosecutors described it as the largest all-time fraud by number of persons affected:
  - 1.8 million victims worldwide
  - \$3.0 billion in losses



## TelexFree

- “The scope of this alleged fraud is **breathhtaking**. These defendants devised a scheme which reaped **hundreds of millions of dollars** from hard-working people around the globe.” – U.S. Attorney Carmen Ortiz
- Ch. 11 Trustee worked with **U.S. and Brazilian law enforcement** to obtain access to the Debtors’ records
- Trustee developed an **online claim form** to assist victims in filing proofs of claim (the “ePOC”).
- Claimants are expected to recover at least 50% of losses

## Case Studies

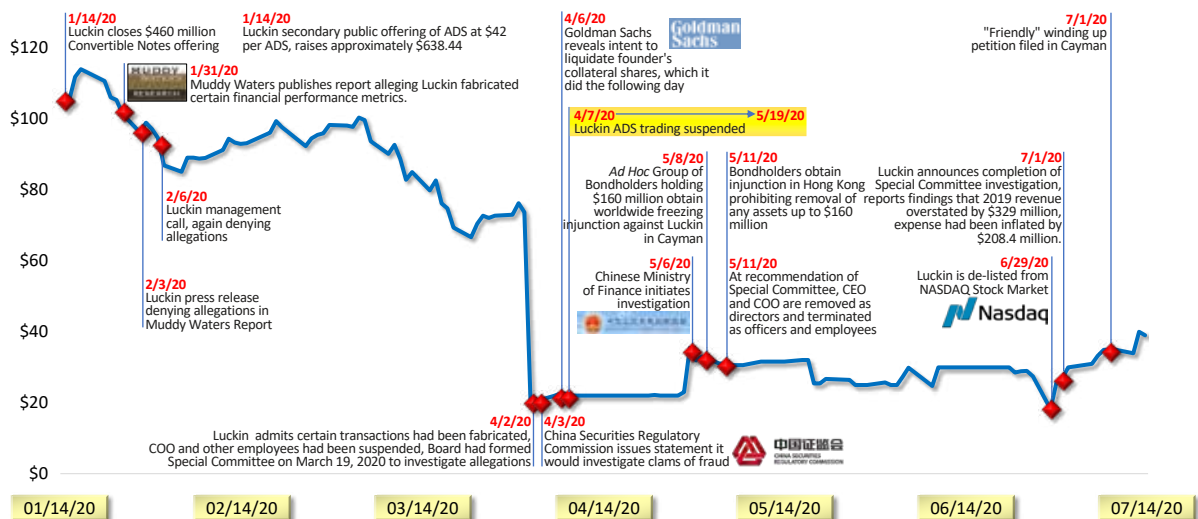


**luckin coffee**

# Luckin Coffee

- **June 16, 2017:** Luckin Coffee, Inc. incorporated in the **Cayman Islands** offering premium and other products to 3,898 self-operated stores and 894 partnership stores and mobile applications in the PRC
- **May 17, 2019:** Luckin completes IPO, listing on the NASDAQ, offering ADS at \$17 per ADS, generating \$607 million in net proceeds
- **SOMETHING ABOUT THE JAN-2020 TWEET HERE?**
- **June 14, 2020:** Luckin closed \$460 million Convertible Notes offering

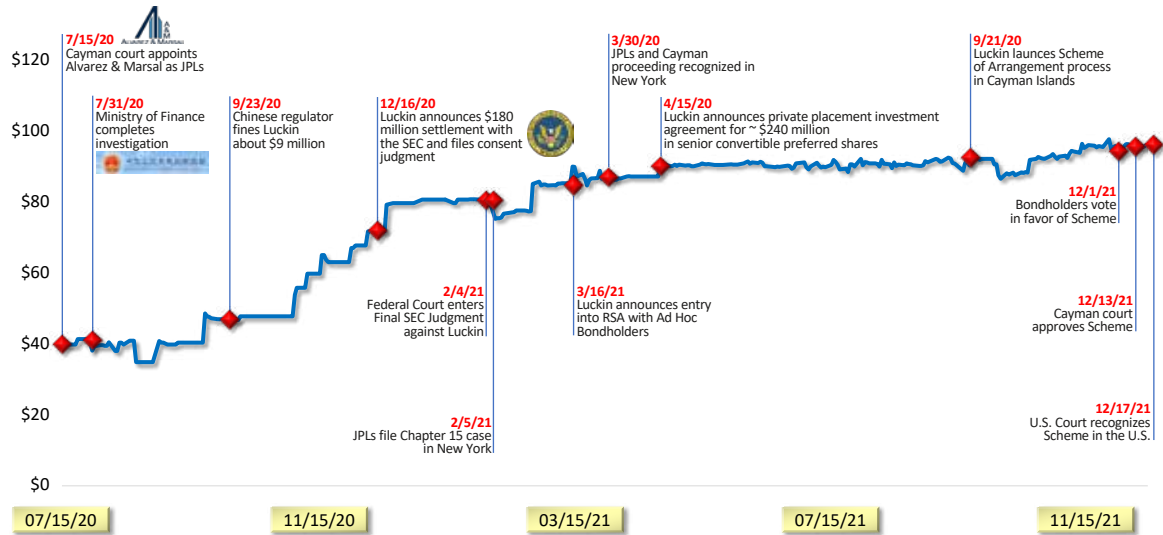
## Luckin Coffee Inc. Price History January 14, 2020 – July 14, 2020





# Luckin Coffee Inc. Price History

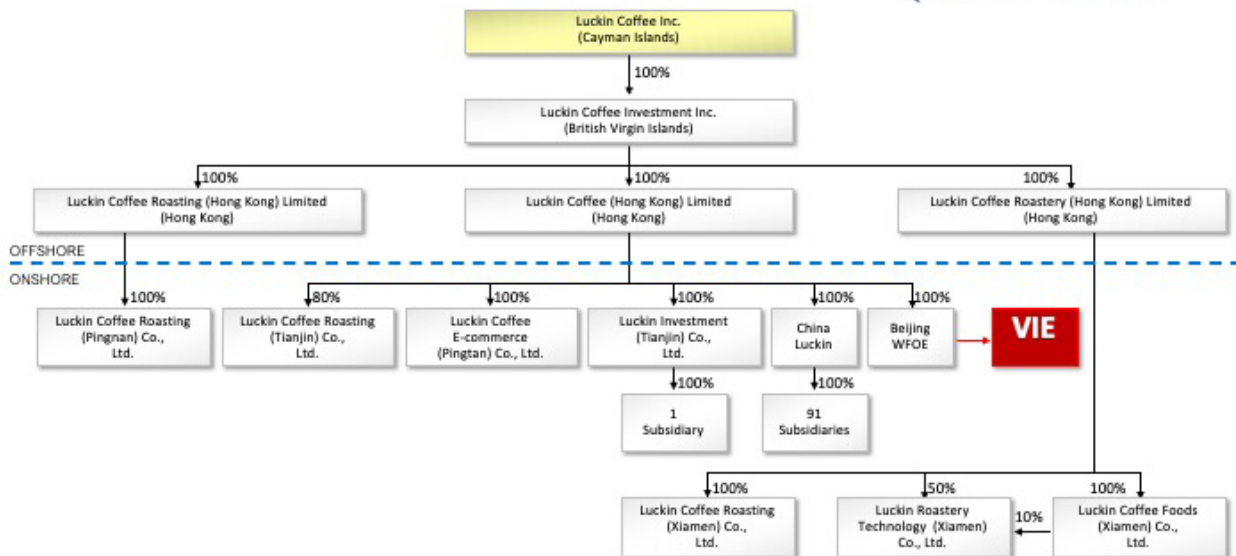
July 15, 2020 – December 16, 2021



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# Luckin Coffee Organizational Chart



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# Case Studies



## Celsius

- **Decentralized workforce**
  - Executives located in multiple countries (U.S., Serbia, Israel, others)
  - Significant time zone issues
  - Most interviews conducted remotely
- **Work-from-home culture**
  - Difficulty isolating documents
  - “Watercooler” talk now happens online
- **Rapid growth**
  - Start-ups often lack appropriate infrastructure
  - \$20B+ company operating on Google Sheets and QuickBooks

# Cross-Border Forensic Investigations

## Cross-Border Forensic Investigations

- Substantial growth in recent years in international investigations, both in **number** and **scale**<sup>1</sup>
- Money, digital assets, and IP are able to move across borders in **milliseconds**, resulting in more bankruptcies with international components.
- Forensic accounts are an **integral part** of large-scale, complex cross-border fraud investigations.

<sup>1</sup> Law Review UK

# The Role of the Forensic Accountant

## BEYOND ACCOUNTING:

- Data forensics and hosting
- Knowledge gathering/discovery
- Witness interviews
- Expert knowledge of financial fraud
- Valuation
- Asset tracing and recovery
- Language skills

# The Role of the Forensic Accountant

## FORENSIC TECHNOLOGY SKILLS ESSENTIAL TO LARGE INVESTIGATIONS

- Data imaging
- Data mining
- Database management
- Cryptocurrency tracing
- Data visualization
- Machine learning

# The Role of the Forensic Accountant

The quality of the financial analyses prepared by the forensic accountant is dependent on the quality of the **data collection and analysis**.

For this reason, it is best to have the forensic accountant involved in the **planning** stages of any investigation, working closely with the legal team.

**Legal Tools Available  
to Gather  
Documents and Data**

## Available Legal Tools

- Mareva injunction
- Anton Piller order
- Norwich Pharmacal order
- Bankers Trust
- LMN v. Bitflyer Holdings

## Mareva Injunction & Anton Piller Order

- Increased risks posed by globalization and improved technology
- English courts developed remedies to act with speed and secrecy
- English law has become a preferred choice in international commercial contracts
- Very effective incentive for settlement
- Recognized in Canada, South Africa, and the U.K.

## Anton Piller Order – Presuit or Prejudgement Discovery

- Ex parte
- Seize and preserve evidence that
  - Might be destroyed
  - If the defendant was forewarned of impending litigation
- Highly intrusive remedy (possible damages if unwarranted)
- Enforced through contempt power

## Anton Piller Order – Presuit or Prejudgement Discovery

### Three elements:

1. Prove the movant is **entitled** to the remedy
2. Demonstrate serious **harm**, which can be present or potential
3. Show that defendants have evidence and there is a real possibility that they will **destroy** the evidence pre-hearing

## Mareva Injunction

A Mareva Injunction is an **asset freeze order** to prevent the defendant from dissipating or disposing of assets by removing them from or within the jurisdiction in a manner that would **frustrate a judgment**.

## Norwich Pharmacal Order

- An investigative tool for **victims** to investigate and pursue those responsible for their losses
- Allows information to be obtained from **third parties** who have become “**mixed up**” in the malfeasance
- Usually done **on notice** but can be **ex parte** (for cause)
- Discovery device requiring (usually innocent) third parties to **disclose information** to identify fraudsters, trace funds, or assist parties in determining whether a cause of action exists.



## Norwich Pharmacal Order

Banks, internet service providers, and mobile phone operators keep detailed information about their users but will not simply hand over this information because of concerns about

- Customer confidentiality
- Data protection
- Privacy

## Norwich Pharmacal Order

### Applications for a Norwich Pharmacal Order:

- Check of **real estate records** to see if stolen funds have been used to purchase properties
- Trace proceeds of **intellectual property infringements** in counterfeiting matters
- Obtain **IP address data** from an ISP or website operator to identify anonymous defamatory or fraudulent content or illegal file-sharing
- Compel confidential personal information to reveal **sources of fraud**

## Norwich Pharmacal Order

### Standards for Receiving a Norwich Pharmacal Order:

- **Malfeasance** must be demonstrated
- The need for the applicant to **obtain relief** must be demonstrated, though it's not necessary to prove the case will be successful
- The **connection** to the transaction by the target must be shown
- The target must be believed to **possess** the relevant documents or information
- The order is **necessary and proportionate**

## Norwich Pharmacal Order

### Necessary and Proportionate Factors to Consider:

- The **strength** of the victim's potential claim
- The **public interest** in allowing the victim to vindicate his legal rights
- The possibility the order will **deter future wrongdoing**
- The potential for the information to be **obtained from other sources**
- Whether the respondent knew or should have known that he was **facilitating wrongdoing**

## Norwich Pharmacal Order

### Necessary and Proportionate Factors to Consider (cont'd.):

- Whether complying with the order reveals the names of **innocent parties**
- How **confidential** the information is (including privacy and data protection rights of any individuals)
- The public interest in **maintaining confidentiality** of sources
- Whether compliance with the order will be **onerous**

## Bankers Trust Order

The bank discloses a third party's account information to assist a victim in tracing assets (similar to a Norwich Pharmacal Order)

There must be good grounds for concluding that the assets about which the information is sought **belonged to the claimant**, and there must be a real prospect that the information sought will **lead to the location or preservation** of such assets.

## LMN v Bitflyer Holdings, Inc.

**November 29, 2022:**

LMN v Bitflyer Holdings, Inc. judgment handed down – the first successful Bankers Trust application against **overseas cryptocurrency exchanges** based on the new “gateway” for service of the jurisdiction.

## Crime and Cross-Border Forensics

## Audience Q&A

# Faculty

**Mathew Clingerman, CFA, CFE, CPA** is a managing director in Kroll, LLC's Restructuring practice in Hamilton, Bermuda, and heads the firm's Bermuda office. He leverages more than 20 years of advisory experience focusing on cross-border insolvency, restructuring, investigations, litigation support and financial analysis. Mr. Clingerman regularly takes on private and court-appointed roles as a liquidator and receiver of distressed corporate entities, with a number of those appointments having achieved recognition in foreign jurisdictions. He is accustomed to working alongside top-tier legal advisors in pursuing the best outcomes for stakeholders and is known for his practical-yet-innovative approaches. Mr. Clingerman has experience examining the reasons for underlying financial distress and irregular financial activity, tracing hundreds of millions of dollars in transactions through complex cross-border networks and pursuing numerous types of litigation against relevant parties. He has been appointed as an expert witness evidence in matters before the Supreme Court of Bermuda and the Bermuda Human Rights Tribunal (including the jurisdiction's largest-ever personal injury award). His remits also include work for local regulatory and law enforcement agencies, including preparation and submission of reports and evidence. Mr. Clingerman is an INSOL International Fellow, as well as a committee member and officer of Bermuda's Restructuring and Insolvency Specialist Association.

**Anne Eberhardt** is a New York-based forensic accountant with Gavin/Solmonese LLC. She has performed numerous complex investigations in matters involving Ponzi schemes, FCPA violations, securities fraud and embezzlement, advising top-tier financial services companies, global energy and pharmaceutical firms, the U.S. Government and nongovernmental organizations. Ms. Eberhardt's work has often taken her to conflict and disaster zones, including Iraq, Pakistan, Serbia and Ukraine. Proficient in Spanish, she has worked with various clients based in Latin America. Ms. Eberhardt received her B.S. in finance with an emphasis in quantitative methods from Brigham Young University and her M.B.A. from Brigham Young University's Marriott School of Management.

**R. Craig Martin** is the managing partner of DLA Piper LLP's Wilmington, Del., office and is Global Co-Chair of Restructuring. He has spent his legal career working on complex distressed situations. He has represented numerous parties in a variety of cases, including equity committees, committees of unsecured creditors, bank groups, indenture trustees and debtors. He has also advised purchasers of assets in bankruptcy auctions and court-approved sales and frequently provides bankruptcy-specific advice in complex mergers and acquisition situations involving distressed entities. Mr. Martin has appeared in the bankruptcy courts all across the U.S., but his work frequently focuses on cross-border situations. He has acted as counsel in cases in Canada, Germany, Ireland, Hong Kong, Spain, Bermuda, the Dominican Republic, Africa, the U.K. and Argentina. He has also acted as first-chair litigation counsel in a number of cases involving terms of bond indentures, such as x-clauses, permitted indebtedness clauses and other covenants. Mr. Martin co-authored ABI's *Chapter 15 for Foreign Debtors* and is admitted to practice in Delaware, the District of Columbia, New York, Pennsylvania and Texas. He received his B.A. in history from Texas Christian University, his M.Sc. from the University of Edinburgh and his J.D. *cum laude* from the University of Houston Law Center.

**Timothy J. Martin, CIRA, CFE, CTP, CCFI** is a managing director at Huron Consulting Group in Boston and leads its Corporate Dispute Advisory practice. He focuses his practice on providing forensic, investigative and financial advisory consulting services, primarily related to distressed situations. Mr. Martin has advised secured lenders, creditors' committees, debtors, shareholders, trustees, receivers and examiners in cases throughout the U.S. He has been involved in many high-profile investigations, including investigating the failures at HealthSouth, the Kmart Stewardship investigation, the Thomas Petters and TelexFree Ponzi schemes, the Residential Capital examiner report and advising parties in the Purdue Pharma opioid litigation. Mr. Martin recently served as financial advisor to the court appointed Examiner in the Celsius Networks LLC chapter 11 case. He previously held positions with KPMG, LLP and Arthur Andersen, LLP. Mr. Martin received his B.A. in accounting in 1997 from the Isenberg School of Management at the University of Massachusetts at Amherst.

**Rafael X. Zahralddin-Aravena** is a partner with Lewis Brisbois Bisgaard & Smith LLP in Wilmington, Del., and a member of its Corporate, Bankruptcy, Complex Business & Commercial Litigation, Digital Asset, and Ukraine Conflict Response Practices. He has advised clients on corporate and commercial litigation, insolvency, distressed M&A, compliance, corporate law and entity formation, corporate governance, commercial transactions, cyber law, regulatory actions and cross-border issues. Mr. Zahralddin-Aravena represents clients in all aspects of bankruptcy and restructuring and has experience in international commercial law issues, including cross-border insolvency, federal bankruptcy court matters, assignments for the benefit of creditors, and receiverships. He also has worked for two decades with early-stage companies and venture capitalists and private venture funds as both a transactional lawyer and corporate litigator. He has assisted businesses in starting, selling or buying a business, and dealing with employees and contracts, among other operational issues, and has worked with trade creditors, bondholders, labor unions and other key stakeholders in insolvency matters. Mr. Zahralddin-Aravena is a Fellow of the American Bar Foundation and is a National Association of Corporate Directors (NACD) Governance Fellow. He has been recognized as a *Philadelphia Inquirer* Influencer of Law, and the *Philadelphia Business Journal* awarded him both "Best of the Bar" and "Top Minority Business Leader" in 2020. Mr. Zahralddin-Aravena received his B.S. in architecture from the University of Virginia and his J.D. from Widener University School of Law, where he served as an articles editor for its law review and was published as a law student. In addition, he received his LL.M in international and comparative law from Georgetown University Law Center.