

# judgment

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## COURT OF APPEAL

Civil Law Department

Case number : 200.265.385/01

Case number court : C/09/573969/ KG ZA 19-462

### judgment of 17 march 2020

regarding

**SISVEL INTERNATIONAL S.A.**,  
established in Luxembourg, Luxembourg,  
appellant,  
hereinafter referred to as: Sisvel,  
Attorney at law: Mr. G. Kuipers, Amsterdam,

versus

1. the company incorporated under foreign law  
**XIAOMI CORPORATION**,  
established in Beijing, People's Republic of China,
2. the company incorporated under foreign law  
**XIAOMI H.K. LIMITED**,  
established in Hong Kong, People's Republic of China,
3. the company incorporated under foreign law  
**XIAOMI COMMUNICATIONS CO., LTD.**,  
established in Beijing, People's Republic of China,
4. the company incorporated under foreign law  
**BEIJING XIAOMI MOBILE SOFTWARE CO. LTD.**,  
established in Beijing, People's Republic of China,
5. the company incorporated under foreign law  
**XIAOMI INC.**,  
established in Beijing, People's Republic of China,
6. **XIAOMI TECHNOLOGY NETHERLANDS B.V.**,  
based in Amsterdam,  
respondent,  
hereinafter collectively referred to as: Xiaomi,  
Attorney at law: Mr. R.E. Ebbink, Amsterdam.

## **1. The proceedings**

1.1. The Court has taken note of the following procedural documents:

- the file on the proceedings at first instance;
- the writ of summons on appeal of 29 August 2019 (with exhibits);
- the statement in reply (with exhibits);
- the decision of 21 January 2020 concerning the confidentiality regime and the correspondence referred to therein; and
- the minutes of the oral procedure of 6 February 2020 and the additional exhibits referred to therein.

1.2. Judgement is final.

## **2. The facts**

2.1. The facts established by the court in its judgment of 1 August 2019 are not in dispute. The Court of Appeal will also base its judgment on these facts, supplemented by facts put forward on appeal (see below, paragraph 2.13). This case concerns the following.

2.2. Sisvel is the parent company of the Sisvel group. The Sisvel group manages intellectual property rights, including its own patents and patents of third parties in the field of wireless communication, digital video and screen technology, audio and video (de)coding, broadband and localisation. The Sisvel group focuses primarily on licensing negotiations and agreements with companies that exploit the patented technologies with respect to the patents under management.

2.3. Following the transfer by Nokia in 2012, Sisvel is the proprietor of (the Dutch part of) the European patent 1 129 536 BI (hereinafter EP 536) entitled 'Data Transmission in Radio System'.

2.4. EP 536 concerns data transmission in a radio system, in particular a radio system in a so-called Enhanced General Packet Radio Service (EGPRS) system. Such an EGPRS system is part of a telecommunication system based on a Global System for Mobile communications (GSM) that uses Enhanced Data Rates for GSM Evolution (EDGE) techniques to increase the data transmission capacity of the network.

2.5. Sisvel is a member of the European Telecommunications Standards Institute (ETSI). On 10 April 2013, Sisvel issued a so-called ETSI declaration that it will grant licences in accordance with Article 6.1 of the ETSI IPR Policy (in short: under "*Fair, Reasonable and Non-Discriminatory*" (*FRAND*) conditions) in respect of a list of patents, including EP 536.

2.6. Xiaomi is a producer and provider of mobile phones.

2.7. Sisvel sent Xiaomi a letter on 15 October 2013 with the following content:

October 15, 2013

RE: Sisvel Wireless Patent Portfolio – Notice and Offer of License

Dear Mr. [REDACTED]

On January 12, 2012, Sisvel International S.A. ("Sisvel") announced its acquisition of 47 patent families comprised of more than 450 patents and applications originally filed by Nokia (the "Sisvel Wireless Patents").

The Sisvel Wireless Patents cover technologies used in a wide range of mobile communications devices and services. In particular, a number of the families included in the Sisvel Wireless Patents have been deemed essential to the GSM, CDMA2000, WCDMA, T63, IEEE802.16, LTE, SAE, OMA and TD-SCDMA standards, including those identified in Enclosure 1 of this letter for your reference.

We are writing to inform Xiaomi Technology Co., Ltd. ("Xiaomi") that Sisvel is offering licenses under the Sisvel Wireless Patents on fair, reasonable, and non-discriminatory (FRAND) conditions.

We understand that your company has been selling wireless devices that incorporate one or more of the standards identified above, including, without limitation mobile phones Xiaomi ZS, Xiaomi 2A, Hongmi.

These devices manufactured or sold by Xiaomi are covered by claims included at least in those Sisvel Wireless Patents listed in Enclosure 1.

A license under the Sisvel Wireless Patents is available to Xiaomi from Sisvel. Please contact us at your earliest convenience to discuss this matter in further detail.

Sincerely,

2.8. Sisvel subsequently approached Xiaomi with a letter dated 16 July 2014 and email messages dated 3 December 2014, 4 December 2014 and 5 March 2015. In this correspondence, Sisvel invited Xiaomi to contact Sisvel in order to conclude a licence agreement.

2.9. By judgment of 30 March 2017, the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf) held that Sisvel had acted vis-à-vis a third party other than FRAND.<sup>1</sup>

2.10. On the website [belsimpel.nl](http://belsimpel.nl) the following news item was posted on 21 November 2018:

### Xiaomi kiest Belsimpel als officiële partner

Woensdag 21 November 2018

Smartphonegigant Xiaomi en telefoonverkooper Belsimpel slaan de handen ineen. Daarmee wordt Belsimpel officieel partner van Xiaomi en worden vanuit Nederland Xiaomi telefoons geleverd. Na de strategische samenwerking met OnePlus is dit het volgende merk dat kiest voor Belsimpel als partner.

Belsimpel haait als eerste officiële Nederlandse partner van Xiaomi de toestellen van dit Chinese merk naar Nederland.

Belsimpel-oprichter [REDACTED] zegt over de samenwerking: "Met dank aan deze nieuwe partnership kunnen we Xiaomi toestellen met ondersteuning van Xiaomi in Nederland aanbieden. Het past in het Belsimpel-DNA om nieuwe merken naar Nederland te halen. Zo hebben onze klanten een nog breder aanbod om uit te kiezen".

Voor de samenwerking geldt dat Belsimpel de modellen die Xiaomi in Nederland u brengt rechtstreeks bij het bedrijf zelf inkoop. Belsimpel vult dit aan met overige modellen uit het Xiaomi portfolio via hun eigen inkoopkanalen zoals dit eerder ook het geval was.

Dit is niet de eerste keer dat Belsimpel een populair merk officieel naar Nederland haait. Zo mocht het bedrijf in mei 2013 al aankondigen dat de enige officiële Nederlandse partner van OnePlus te zijn. Door steeds meer nieuwe merken naar Nederland te halen, zorgt Belsimpel ervoor dat klanten een telefoon kunnen vinden die aansluit bij hun wensen.

Xiaomi is wereldwijd een van de grote telefoonverkoopers maar is voor het Nederlandse publiek nog geen heel bekende naam. Steeds meer Xiaomi-telefoons vinden hun weg richting Nederland vanwege hun goede specificaties en uitstekende prijs/kwaliteitsverhouding.

<sup>1</sup> Oberlandesgericht Düsseldorf 30 March 2017, ECLI:DE:OLGD:2017:0330.1151166.15.00.

2.11. According to articles on nu.nl and ad.nl dated 29 March 2019, Xiaomi has announced it will enter the Dutch market, opening a webshop and physical stores.

2.12. On 23 April 2019, Sisvel brought proceedings before the High Court of Justice in London against, inter alia, Xiaomi and (inter alia) brought an action:

- (1) A declaration that the terms and conditions of the MCP Pool Licence are FRAND;
- (2) Alternatively, a determination of the FRAND licence terms for the licensing of the Patents to the Defendants and a declaration that such terms are FRAND;
- (3) A declaration that each of the Patents is valid and has been infringed by the Defendants:
- (4) Save insofar as the Defendants and each of them agree to take a licence to the Patents on the FRAND terms to be determined by the Court:  
(...)
- (5) Costs together with interest thereon: and/or
- (6) Further or other relief.

These English proceedings relate to three patents that fall under Sisvel's Mobile Communication Program (MCP) portfolio. According to Sisvel, EP 536 is part of this MCP portfolio.

2.13. On 30 August 2019, Xiaomi brought two lawsuits against Sisvel before the Beijing Court. In one case, she is seeking to establish the FRAND conditions for a Chinese license between the parties. In the other case, Xiaomi takes the view that Sisvel is abusing a dominant position.

### **3. The dispute**

3.1. In the first instance Sisvel - after amendment of the claim and presented in a brief manner - claimed a statement of profits and provision of documents relating to resellers and primarily an unconditional injunction of infringement for EP 536, as well as rectification, recall and destruction, in the alternative as long as Xiaomi has not accepted Sisvel's offer of arbitration, and in the further alternative disabling the EGPRS / EDGE extension of the GSM functionality, all this with penalty payments and legal costs in accordance with Article 1019h of the Code of Civil Procedure (hereinafter referred to as 'the Code of Civil Procedure'): Rv).

3.2. In summary, Sisvel provides the following basis for these claims. Xiaomi infringes (directly or indirectly) EP 536. Xiaomi puts forward a defence. She argues (inter alia) that a balancing of interests militates against granting the applications for interim measures. Xiaomi further contests the validity and infringement of EP 536 and defends that Sisvel's claims constitute an abuse of a dominant position in light of the fact that Sisvel has declared that it will grant licenses on FRAND terms ('the FRAND defence').

3.3. By judgment of 1 August 2019, the Interim Relief Judge dismissed the claims and ordered Sisvel to pay the costs. In the opinion of the Interim Relief Judge the case is unsuitable for preliminary relief proceedings because of - in summary - the complexity of the case and a balancing of the interests of the parties.

3.4. On appeal, Sisvel claims that the Court of Appeal should set aside the judgment and - in summary - grant the claims again, order Xiaomi to pay the costs of the proceedings and

order Xiaomi to pay the costs of the proceedings of both instances pursuant to Article 1019h of the Dutch Code of Civil Procedure, plus interest and subsequent costs. Sisvel puts forward eight grievances against the judgment. Xiaomi disputes the grievances.

3.5. On 22 January 2020, pending appeal, Xiaomi secured payment of license fees to Sisvel by entering into an escrow agreement with the company Intertrust. On the basis of that agreement, Sisvel, as a third party beneficiary, is entitled under certain conditions to claim payment of the amount given in escrow of *[redacted]*.

#### **4. The assessment on appeal**

*primary claim: balancing of interests*

4.1. The nature of interlocutory proceedings means that the granting of an order for an injunction depends on a balancing of interests. In doing so it is necessary to take into account, inter alia, the provisional nature of the judgment in interim relief proceedings and the far-reaching consequences of a possible injunction for the defendant, on the one hand, and the extent of the damage which, also in connection with the fear of repetition, the plaintiff would suffer if an injunction were not imposed, on the other hand. The fact that such an assessment, if the court in summary proceedings finds the conduct unlawful, generally makes it obvious to grant the injunction sought, in particular where there is a risk of damage as a result of the continuation of that conduct, does not prevent the court in summary proceedings from dispensing with an injunction in the given circumstances, for example in connection with its finding that the interests of the plaintiff have been or can be sufficiently accommodated for the time being by other means.<sup>2</sup>

4.2. Taking this criterion into account, it must be held for the following reasons that the Court in preliminary relief proceedings rightly concluded that the primarily claimed infringement injunction must be rejected on the basis of a weighing of interests.

*primary claim: interests Sisvel*

4.3. The damage that Sisvel wants to prevent with the claimed injunction relates to the continuation of the alleged infringement of EP 536 in the Netherlands. That damage is limited to the extent that it concerns the infringement of one (soon to expire) patent from Sisvel's patent portfolio for the territory of the Netherlands only. In addition, this damage lends itself relatively well to subsequent compensation. It is not disputed that Sisvel's business model is aimed at making the patented technology accessible to as many parties as possible in exchange for licence fees, rather than exclusively marketing products in which the patented technology has been implemented. The harm suffered by Sisvel as a result of the continuation of the alleged infringement therefore does not consist in the loss of an exclusive position on the market for telephones but (mainly) in lost licence fees and thus generated profits. That damage is purely financial in nature and can therefore be relatively easily estimated and remedied retrospectively.

4.4. In addition, Xiaomi has met Sisvel's interests by providing security for the payment of licence fees for the use of Sisvel's patents in the Netherlands (see section 3.5 above). The problems put forward by Sisvel with regard to Xiaomi's inability to pay and the unrecoverability of its claim for damages have thus been sufficiently overcome.

4.5. Sisvel's contention that the escrow agreement by which Xiaomi provided security has

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<sup>2</sup> HR 15 December 1995, ECLI:NL:HR:1995:ZC1919 (Procter & Gamble/Kimberly Clark), paragraph 3.4.

been drafted in such a way that it will never result in payment to Sisvel must be rejected. Sisvel may unilaterally claim payment under that agreement, inter alia, if the applicable FRAND royalty is determined in the proceedings pending between the parties in England. That is to be regarded as sufficient, since in the English proceedings Sisvel primarily seeks a declaratory judgment that its MCP terms and conditions are FRAND and, in the alternative, that the court itself determines the licensing terms and conditions. In addition, Xiaomi has stated that it is willing to amend the agreement by mutual agreement if Sisvel has any wishes or requests with respect to that agreement. It has neither been asserted nor appeared that Sisvel has taken advantage of that opportunity to request that the terms of payment be amended.

4.6. Nor can the argument that Xiaomi provided security for an insufficient amount have any purpose. The security was calculated on the basis of Sisvel's desired licence fee for use of the entire MCP portfolio on the basis of sales in the Netherlands during the whole term of EP 536. This is sufficient to meet Sisvel's interest in security for the compensation of its loss resulting from the continuation of the alleged infringement of EP 536 in the Netherlands, even if Sisvel would like to estimate that loss on the basis of a higher rate for non-compliant users or on the basis of the profits made by the infringement. It can be left open whether the provision of security is also 'appropriate' within the meaning of the judgment of the Court of Justice in the Huawei case.<sup>3</sup> The assessment of whether the security is appropriate in this sense is relevant in the context of the FRAND defence. The judgment on this must be distinguished from the judgment on the balancing of interests in interlocutory proceedings.

*primary claim: interests Xiaomi*

4.7. On the other hand, it is certain that the consequences of granting an injunction are far-reaching for Xiaomi. On the basis of Sisvel's assertion that EP 536 is essential for the application of (the EGPRS/EDGE extension of) the GSM standard, it must be assumed that an injunction will force Xiaomi to stop selling telephones in the Netherlands altogether, close its stores and stop agreed supplies to customers. Partly in view of the damage this will cause to Xiaomi's relationship with its customers, these are serious consequences, even if account is taken of the fact that Xiaomi could resume sales after the end of EP 536 in September of this year.

4.8. The only possibility that Xiaomi has, when granting the injunction, to prevent the demolition of its business built up in the Netherlands, is to accept Sisvel's licence offer. This alternative also has far-reaching consequences for Xiaomi. Indeed, Sisvel's licence offer does not only concern the use of the technology claimed in EP 536 in the Netherlands, but the use of the more than 1,000 patents from the MCP portfolio in more than a billion telephones in all countries worldwide. The licence fee claimed by Sisvel in that context is therefore the substantial amount [redacted].

4.9. In addition, it is relatively difficult or impossible to undo the above effects of the allocation of the injunction. It must be assumed that Xiaomi is irrevocably bound to comply with Sisvel's licence offer upon acceptance, including payment of the licence fee. If Xiaomi were instead to opt for a cessation of sales in the Netherlands, it would have to pay compensation for, among other things, the loss of profits and damage to relations with its customers. Xiaomi has undisputedly pointed out that such damage is difficult to prove, partly because there are many other suppliers on the market and Xiaomi is still in the process of building up its market position.

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<sup>3</sup> ECLI:EU:C:2015:477 (Huawei/ZTE).

4.10. These far-reaching consequences, which are not or hardly reversible, require caution when granting the injunction in preliminary relief proceedings. The procedural limitations of the debate and the provision of evidence in preliminary relief proceedings mean that only a preliminary opinion can be given on the basis of the claim and the defences. This preliminary assessment certainly applies in these interlocutory proceedings, because this is a relatively complex dispute. Granting the injunction requires an assessment of the validity and scope of protection of a patent relating to relatively complex technology and of Xiaomi's FRAND defence, in the context of which the parties dispute, among other things, the (valuation of) a large number of facts and the principles in the determination of a FRAND licence fee. Therefore, even if in these interim injunction proceedings it were assumed for the time being that there was an infringement of a valid patent and that, *inter alia*, the FRAND defence was unsuccessful, serious account would have to be taken of the possibility that the court on the merits would reach a different judgment on one of those points and that in that case - with hindsight - there was therefore no ground to force Xiaomi to withdraw from the market or to accept Sisvel's license offer.

4.11. Sisvel's argument that continuation of the infringement of EP 536 is not in Xiaomi's legal interest cannot succeed. As considered above, in these interim proceedings only a preliminary view can be given on the alleged infringement of EP 536 and therefore, even if an infringement of EP 536 were to be assumed for the time being, the possibility that the court on the merits would reach a different judgment and that Xiaomi would still be free to apply the technology claimed in EP 536 must be taken into account. In addition, the effect of the claimed injunction on Xiaomi is that the entire sale of telephones will have to be stopped, including all technology and design that is not protected by EP 536. Xiaomi's interest in denying the injunction is therefore much broader than the continuation of the alleged infringement of EP 536.

4.12. The same goes for Sisvel's argument that Xiaomi behaves like an *unwilling licensee*. Also with respect to Xiaomi's alleged unwillingness, a preliminary opinion can only be given in these preliminary relief proceedings. The fact that Xiaomi's alleged unwillingness may be a ground to reject Xiaomi's FRAND defence does not compel a different conclusion. The FRAND defence must be distinguished from the balancing of interests in summary proceedings. *primary claim: balancing of interests*

4.13. It follows from the foregoing that the balancing of interests must be to the disadvantage of Sisvel, even if for the time being it were to be assumed that EP 536 is valid, that Xiaomi infringes it and that Xiaomi's FRAND defence cannot succeed.

4.14. Sisvel's reliance on the European Enforcement Directive (hereinafter: Hrl)<sup>4</sup> does not force a different outcome. Article 9(1)(a) Hrl obliges the member states to ensure that courts can issue a provisional injunction intended to prevent an imminent infringement or to prohibit the temporary continuation of an alleged infringement if this is desirable. That provision must be read in the light of the general principles of Union law, including the principle of proportionality, which is also expressed in Article 3 Hrl and recital 22 Hrl. In view of the balancing of interests discussed above, it must be held that granting an injunction is not proportionate in this case and that the Court of Appeal is therefore not obliged to make use of the power referred to in Article 9, paragraph 1 (a) Hrl.

4.15. The obligation in Article 3 Hrl to adopt measures which are effective and do not entail

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<sup>4</sup> Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.

unreasonable deadlines or delays and the right to an effective remedy for infringements of the right to the protection of intellectual property within the meaning of Article 17(2) of the Charter, guaranteed by Article<sup>5</sup> 47 of the Charter of Fundamental Rights ('the Charter'), do not give rise to a different interpretation. The requirements deriving from those provisions are met even if it is considered that, because of the short remaining term of EP 536, bringing an action for an injunction in proceedings on the merits would not have provided a solution for Sisvel in this case. Proceedings on the merits in which Sisvel can claim compensation for the damage it claims to suffer as a result of the alleged infringement is, in view of what the Court has considered above about the nature and extent of the damage that Sisvel is at risk of suffering and the security provided by Xiaomi, in this case an effective remedy against the infringement of EP 536 alleged by Sisvel and does not entail unreasonable terms or delays. This is supported by the fact that Sisvel brought only proceedings on the merits against various parties it accuses of infringing EP 536 and other patents in the MCP portfolio in the Netherlands and abroad.

4.16. Sisvel's argument that the refusal of the claimed injunction creates an unlevel playing field because other market participants have purchased a licence and are paying licence fees must be rejected. The security provided by Xiaomi combined with the possibility for Sisvel to obtain an order for damages on the merits creates a sufficiently level playing field.

4.17. Nor does Sisvel's reference to the Supreme Court's opinion that patent law can generally only be effectively protected by a rapid injunction of further infringement<sup>6</sup> compel a different conclusion. The judgment referred to is based on the consideration that the damage caused by patent infringements is often difficult to determine. On the contrary, as has been considered above, in this case the damage caused by the alleged infringement is relatively easy to determine. Moreover, the judgment referred to does not affect the rule (subsequently) formulated by the Supreme Court that the granting of an order for an injunction in preliminary relief proceedings is subject to a balancing of interests (see section 4.1 above).

#### *subsidiary claim*

4.18. The action brought in the alternative by Sisvel is also vitiated by a balancing of interests. In the alternative variant, Sisvel seeks an injunction for as long as Xiaomi has not agreed to have the licence conditions of the MCP portfolio established in arbitration proceedings. Even with that condition, the injunction is far-reaching for Xiaomi. Indeed, if Xiaomi does not opt for the far-reaching consequences of a cessation of sales in the Netherlands or acceptance of Sisvel's licensing offer, it will be forced to adopt a certain method of determining the licensing terms and conditions for all patents in the MCP portfolio for the whole world. This would also force Xiaomi to waive its fundamental right of access to the courts established by law. These far-reaching consequences are also irreversible, because according to Sisvel, Xiaomi must 'unconditionally' accept arbitration. For the rest, the balancing of interests is identical to that with respect to the primary claim. Therefore, it is sufficient to refer to the considerations above, including Sisvel's relatively limited interest and the precursor of the judicial opinion.

#### *further subsidiary claim*

4.19. In the further alternative, Sisvel seeks an injunction to deactivate the EGPRS/EDGE extension of the GSM functionality. Xiaomi rightly pointed out that this more subsidiary claim is even more far-reaching for it than the primary claim, because the more subsidiary

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<sup>5</sup> Charter of Fundamental Rights of the European Union.

<sup>6</sup> HR 4 June 1993, ECLI:NL:HR:1993:ZC0986 (Vredo/Veenhuis).



claim forces Xiaomi not only to stop the use of the extension on telephones which are still to be sold, but also to switch that extension off on telephones which have already been delivered. For the rest, the balancing of interests is identical to that of the primary claim. Therefore, this balancing with respect to the more subsidiary claim is even more disadvantageous to Sisvel.

### *Claims*

4.20. Sisvel did not formulate, or at least did not formulate sufficiently clear, specific grievances against the rejection of the ancillary claims. For this reason alone, the ancillary claims must share the fate of the main actions.

4.21. The ancillary claims were also rightly rejected. The ancillary claims relating to, among other things, recall, destruction of infringing products, removal of referrals, informing the market and declaration of stocks and resellers are closely related to the main claims dealt with above. The urgent interest that Sisvel claims to have in these ancillary claims is the same as in its main claims: discontinuation and prevention of infringements of EP 536. These ancillary claims are also far-reaching and must therefore share the fate of the main claims. There is no urgent interest in the claimed declaration of profits, or at least no urgent interest that outweighs Xiaomi's interest in keeping those data confidential as long as an infringement of EP 536.

EP 536 has not been established in any proceedings on the merits. Sisvel also did not explain why profit data should be disclosed in anticipation of a judgment in proceedings on the merits.

4.22. On the basis of the foregoing, it must be concluded that grievances 1 to 7, which are directed against the considerations on the unsuitability of the case for interlocutory proceedings, cannot lead to the judgment being set aside.

4.23. Ground 8 is directed against the decision of the Court in preliminary relief proceedings to disregard an objection of Sisvel against the specification of the costs of proceedings of Xiaomi in the first instance on the ground that Sisvel had lodged this objection too late. In the middle can be left whether that decision is correct, because the Court of Appeal has to assess the objection anyway, now that Sisvel maintains the objection on appeal. Sisvel objects that Xiaomi estimated the costs of the first instance at half of the costs specified in one cost overview for both these proceedings and the interlocutory proceedings between the parties on another patent (C/09/574487 KG ZA 19-487), which was heard at first instance together with the present case. According to Sisvel, Xiaomi should have submitted a separate specification of the costs of these proceedings. That argument must be rejected. Xiaomi contended that its defences in both cases were to a large extent identical, including the defence on which both cases were decided. Nor did Sisvel argue, let alone make clear, that for the other defences too many costs have been allocated to this case. For example, it has not argued that the debate on the scope of protection and validity of EP 536 took or should have taken less time than the debate on the other patent in the other case. In view of this and the fact that Sisvel was ordered to pay the costs in both cases, Xiaomi and the Court in preliminary relief proceedings were able to estimate the costs at half of the total costs of both cases.

4.24. The verdict must therefore be upheld. The reimbursement of costs claimed on appeal must be rejected.

4.25. As the losing party, Sisvel should be ordered to pay the costs of the appeal in accordance with Article 1019h of the Code of Civil Procedure. Xiaomi claims a total amount of € 942,714.64. A substantial part of that amount, namely € 385,815.91, relates to a report by

an expert hired by Xiaomi on the question which license fee is FRAND. In view of the various proceedings between the parties in which that question is involved and for which the expert's opinion is therefore important, it must be assumed that these costs were not incurred solely in the context of these proceedings. For example, Xiaomi has already announced, as Sisvel notes, that it will also submit the report in Dutch proceedings on the merits between the parties concerning another patent. In view of this, the Court of Appeal will allocate a quarter of the costs to these preliminary relief proceedings and will therefore deduct an amount of € 289,361.93 ( $\frac{3}{4} \times € 385,815.91$ ).

4.26. For the rest, Sisvel's objections to the costs of the expert's report are unfounded. Contrary to Sisvel's opinion, the report is relevant to the decision because it serves to substantiate Xiaomi's FRAND defence. The costs are also sufficiently substantiated with a detailed overview detailing which employee spent how much time on which activities and which additional costs were incurred, such as taxi rides. From the mere fact that in one case an employee claims costs for a taxi ride while that employee did not claim any hours on that day, it cannot be deduced that the cost substantiation is unreliable, only because according to the overview that employee did make a considerable number of hours the day before and the taxi costs are claimed under the statement '*worked late, taxi home*'.

4.27. Sisvel's objections to the costs claimed by Xiaomi's lawyers are also unfounded. Sisvel argues that costs have been incurred for work relating to several files while it is unclear whether those costs have been split. However, Sisvel has not specified the costs to which it refers and Xiaomi claims that all lawyer's costs have been incurred in this case.

4.28. Other arguments as to why Xiaomi's legal costs are not reasonable or proportionate have neither been put forward nor demonstrated. Those costs will therefore be estimated at € 653,352.71 (€ 942,714.64 - € 289,361.93).

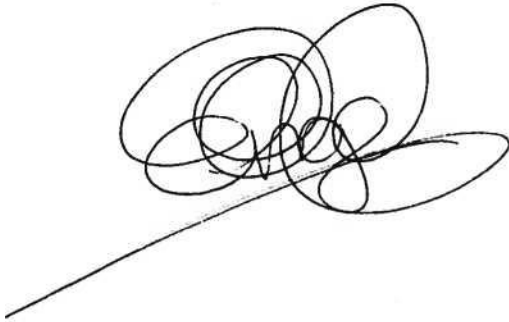
## **5. The decision**

The court

- 5.1. ratifies the judgment of 1 August 2019 of the Court of The Hague in preliminary relief proceedings between the parties;
- 5.2. rejects what Sisvel has claimed more or differently on appeal;
- 5.3. orders Sisvel to pay the costs of the appeal, to date estimated on the part of Xiaomi at €653,352.71;
- 5.4. declares the order for costs enforceable on a provisional basis.

This judgment was delivered by Mr. P.H. Blok, Mr. M.Y. Bonneur and A. Kamperman Sanders and was pronounced at the public hearing on 17 March 2020 in the presence of the court clerk.

griffier.



Voor afschrift,  
De Griffier van het Gerechtshof  
te Den Haag

