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Smriti Yadav is a Partner in the Intellectual Property Practice Group in the Mumbai office. With more than 15 years of experience, Smriti has been handling entire gamut of IP for clients in diverse fields like pharmaceuticals, tobacco, music, automobiles, retails, real estate, textiles and garments, FMCG.

Smriti's expertise lies in strategizing and handling contentious and non-contentious matters pertaining to trade marks, copyrights and industrial designs at national and international forums. Being a registered patent agent, Smriti has also handled select patent cases.

Smriti has been recognized in various rankings such as IP Stars, Managing IP, Legal 500 and Asialaw, etc. She has also been recognized in Managing IP's list of Top 250 Women in IP, 2020.



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## Delhi High Court passes first of its kind anti-enforcement injunction order

On 9 June 2020, Xiaomi Corporation and its related entities (**Xiaomi**) filed a standard essential patent royalty rate-setting suit (**Wuhan Suit**) against Interdigital Technology Corporation and its related entities (**Interdigital**) before Wuhan Intermediate People's Court, China (**Wuhan Court**) in respect of Interdigital's global portfolio of 3G and 4G standard essential patents. Thereafter, on 29 July 2020, Interdigital instituted a suit, CS(COMM) 295/2020- Interdigital Technology Corporation & Ors v Xiaomi Corporation & Ors, (**Delhi Suit**) against Xiaomi before the Delhi High Court (**Delhi Court**) claiming infringement of its standard essential patents registered in India viz. IN 262910, IN 295912, IN 298719, IN 313036 and IN 320182 (**said SEPs**), and sought injunction against the use of said SEPs by Xiaomi including an alternative relief for permitting Xiaomi to take license of the said SEPs on fair, reasonable and non-discriminatory (FRAND) terms.

The Delhi Court issued summons to Xiaomi on 4 August 2020. On the same day, Xioami filed an application before Wuhan Court seeking an anti-suit injunction restraining Interdigital from pursuing the Delhi Suit. Thereafter, while the matter came up before Delhi Court on multiple occasions, Xiaomi never informed the Delhi Court or Interdigital of its anti-suit injunction application filed before Wuhan Court.

On 23 September 2020, the Wuhan Court passed an anti-suit injunction order dated 23 September 2020 (**Wuhan Order**) whereby it inter alia directed Interdigital to withdraw or suspend application filed by it before the Delhi Court; and also directed not to apply for any injunction before any courts in China or other countries and regions. Wuhan Court further imposed a huge fine of RMB 1 million yaun (approx. INR 1 Crore) per day upon Interdigital for violating the Wuhan Order.

Immediately on 29 September 2020, Interdigital filed an application before the Delhi Court inter alia for restraining Xiaomi from pursuing or enforcing the Wuhan **Order (said Application)**. In the said Application, Interdigital inter alia contended that the Delhi Court should pass an anti-anti-suit injunction order staying the Wuhan Order, otherwise,

Interdigital would be enjoined from (i) prosecuting the Delhi Suit; and (ii) seeking adjudication of infringement of the said SEPs either before the Delhi Court or any other court all over the world. Further, in any case, the adjudication of infringement of said SEPs which are registered patents in India, can only be done by an Indian Court.

In response, Xiaomi inter alia contended that Interdigital was effectively seeking an anti-enforcement injunction (and not anti-suit injunction or an anti-anti-suit injunction) against the Wuhan Order, which injunction can only be granted when the order is obtained by fraud or Interdigital had no means of knowing that the Wuhan Order would be passed against it. Xiaomi contended that Interdigital was already aware of the proceedings before the Wuhan Court, and it ought to have foreseen that the Wuhan Order would be passed against it. Wuhan Suit was prior in time and the Wuhan Order being a well-reasoned order, does not warrant any interference by the Delhi Court. Interdigital emphatically refuted these contentions and claimed that Xiaomi is guilty of suppression and concealment of facts, as Xiaomi neither served a copy of the application for anti-suit injunction filed by it before Wuhan Court nor disclosed the same before the Delhi Court.

The Delhi Court, after hearing both the parties, passed an ad-interim anti-anti-suit/anti-enforcement injunction order dated 9 October 2020 (**Decision**) restraining Xiaomi from enforcing the Wuhan Order. At the outset, the Delhi Court observed that the issue involved in the matter is res integra as there is no precedent on anti-anti-suit/anti-enforcement injunction in India. The Delhi Court further observed that it acts ex debito justitiae, and therefore, wherever injustice is found to exist, a court would necessarily step in. The Delhi Court further observed that (i) an order passed by a foreign court which results in substantial injustice to an Indian citizen to prosecute a cause in India, which it is entitled to do under the Indian law, can be interdicted by it; (ii) the principle of Comity of Courts (as per which courts of one state will give effect to the laws and decisions of another, not as a matter of obligation, but out of deference and respect) cannot extend to allowing a defendant to



use a foreign order to stop a plaintiff's suit which is lawfully filed under Indian law; (iii) the Wuhan Order had the effect of stalling the Delhi Suit, which Interdigital is legally entitled to prosecute; and (iv) the distinction between an anti-suit injunction, anti-anti-suit injunction and anti-enforcement injunction is more of a form than substance, and the Delhi Court is not powerless to stay the Wuhan Order since it causes substantial injustice to Interdigital.

In view of the above and based on settled principles of anti-suit injunction in India, the Delhi Court restrained Xiaomi from enforcing the Wuhan Order.

The Decision was carried in appeal by Xiaomi before the Division Bench of the Delhi Court, however, the Division Bench vide order dated 6 November 2020, refused to interfere with the Decision as it was an ad-interim order and Xiaomi had an opportunity to make further submissions in the final hearing of the said Application. Thereafter, the Learned Single Judge of the Delhi Court heard the said Application finally and the judgment is reserved as on date.

The Decision is a first of its kind passed by an Indian court. Relying on the principle of Comity of Courts, Xiaomi was effectively trying to curtail the power of an Indian court to adjudicate a lawfully filed Indian suit, which the Delhi Court vetoed. The Decision sets an apposite precedent especially for a right holder in India. However, it remains to be seen if the Decision will be made absolute by the Learned Single Judge.

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**The views of the author(s) in this article are personal and do not constitute legal / professional advice of Khaitan & Co.**



Kapil Chaudhary is an established and reputable legal, privacy & technology professional with more than twenty years' experience in General Counsel leadership roles across leading technology firms such as Schlumberger, IBM (India and Singapore) and Autodesk.

He's a Fellow, Singapore Institute of Arbitrators (SiArb) and the New Delhi Knowledge Net Co-Chair with Intl. Association of Privacy Professionals (IAPP). As India Corporate Counsel & APAC Privacy Lead Counsel for Autodesk, he leads industry events as a speaker on AI, privacy, data security.

Kapil speaks, writes and shares "future focused" thoughts and ideas on all of his passions, viz. the intersection of Technology, Law, Policy, Regulation, Data, Legal Tech, AI and Ethics via his LinkedIn newsletter titled as "The Infinite Lawyer" here: <https://www.linkedin.com/pulse/issue1-you-lawyer-professional-brand-kapil-chaudhary/?trackingId=>

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## *Recent trends in Regulation and Governance of Artificial Intelligence.*

-By Kapil Chaudhary, FSI Arb

### **Introduction**

The year 2021 is emerging as the annus mirabilis year for the regulation of Big Technology and AI across the world.

For the purposes of this article, I will be touching upon some recent developments and the broad themes that are emerging around the proposed regulation of Artificial Intelligence (AI).

I. Background: Can India lead the world in AI?

India has the talent. By 2030, India will add 90 million to the global workforce while 9 other major economies will add zero. (China's workforce will contract by ~68 million). India has credibility. India ranks 3rd by the number AI publications in the world (OECD: 2015-19). India also ranks 3rd as the country of origin for top AI researchers in the world. India's IT industry is already \$200 billion and growing

India has rich data. India has data on 1.2 billion Aadhar users, 400 million Jan Dhan accounts and 500 million smartphone users. India has scaled application areas of AI across sectors such as agriculture, healthcare, banking, transportation, telecom and other sectors

II. Emerging concerns in Technology Ethics: The principles of Fairness, Accountability and Transparency have emerged as among the key issues while dealing with AI Ethical frameworks. As well as the need to build in principles of "Ethics by algorithmic design and by default" while creating or embedding AI in day to day systems. There is also a need for regular AI/ algorithmic audits in order to create and maintain accountable, trusted and verifiable audit trails.