Protection of Well-known Trademarks in Vietnam

The protection of well-known trademarks was first established under Paris Convention for the Protection of Industrial Property (Art. 6bis) with further clarification in accordance with the TRIPS Agreement (Art. 16.2 & 3), to both of which Vietnam is a party.

In Vietnam, well-known trademarks are defined as marks that are "widely known by consumers throughout the territory of Vietnam." [Article 4.20, the Intellectual Property Law 50/2005, amended and supplemented in 2009 (the "IP Law")]. The criteria to establish the well-known status is further provided in Vietnam IP Law 50/2005 (hereinafter referred to as "the IP Law") as follows:

Article 75. Criteria for evaluation of whether or not a mark is well known

The following criteria shall be taken into account when considering whether or not a mark is well known:

1. The number of relevant consumers who were aware of the mark by purchase or use of goods or services bearing the mark, or from advertising.

2. The territorial area in which goods or services bearing the mark are circulated.

3. Turnover of the sale of goods or provision of services bearing the mark or the quantity of goods sold or services provided.

4. Duration of continuous use of the mark.

5. Wide reputation of goods or services bearing the mark.

6. Number of countries protecting the mark.

7. Number of countries recognizing the mark as a well-known mark.

8. Assignment price, licensing price, or investment capital contribution value of the mark.

Unlike usual marks, the rights to a well-known mark are granted on the basis of intensive use to the extent that it is recognized as well-known. Once protected, a well-known mark enjoys broader protection than a usual one. For instance, a well-known mark can be cited to refuse trademarks even with

dissimilar goods or services if the use of such marks may affect the distinctiveness of the well-known mark or the mark registrations were aimed at taking advantage of the reputation of the well-known mark (Article 74.2.i, the IP Law).
However, having a mark recognized as well-known has never been easy to trademark holders in Vietnam.

Major Obstacles

In fact, the number of marks recognized as well-known in Vietnam is still rather modest. Several factors may have contributed to this fact.
The first factor is the inconsistency in the definition of "well-known" status in the IP Law. Specifically, one of the criteria for evaluating the well-known status of a trademark is the number of consumers among the *relevant sector* of the public who are aware of the mark (Art. 75.2). However, a mark must be widely known to all consumers throughout the territory of Vietnam in order to be considered "well-known" (Art. 4.20). It is evident that no mark, even the most famous ones, is used for all types of goods or services so that it can be known to all consumers of different backgrounds, professions, hobbies and interests. Therefore, proving that a mark has been known to all consumers throughout the country might be an almost impossible mission to any trademark owner, especially those whose marks are used for professional goods or services such as industrial machinery or medical equipment. In light of this, knowledge of the relevant sector would be a more appropriate approach in recognizing well-known trademarks. However, currently the inconsistency in the definition makes the trademark holder get lost in trying to collect evidence to prove that its mark has been well-known.
The second factor is the strictness of the National Office of Intellectual Property of Vietnam (NOIP) in recognizing well-known marks. With the lack of specific quantitative standard for evaluating the well-known status of a trademark, the NOIP seems to be getting stricter and stricter in recognizing well-known marks. In practice, the NOIP often requires intensive evidence showing the use of a mark, especially in Vietnam, in assessing the well-known status of a trademark. Therefore, without evidence of use in Vietnam, a worldwide well-known mark can hardly be regarded as well-known in Vietnam. On the other hand, the vagueness in the definition and criteria of

well-known marks sometimes result in arbitrary decision in recognizing or not recognizing well-known marks by the competent authority.

Last but not least, the lack of efficient system for recognizing and managing well-known trademarks is also worth mentioning. Currently, there is no official procedure for recognizing a well-known trademark in Vietnam. In practice, the NOIP can recognize the well-known status of a mark in any single proceeding such as examination, opposition or cancellation in relation to a specific case. Therefore, the recognition of a well-known mark is only recorded in that case without being systematically managed as a public source of reference. According to the law, well-known trademarks must be recorded in the List of Well-known Marks which is maintained by the NOIP (Rule 42.4, Circular 01/2007/TT-BKHCN). In fact, however, the creation, maintenance and publication of such a list have yet to be known.

Recommendations

To effectively protect the legitimate rights of holders of well-known trademarks, it is hoped that these issues will be addressed in the foreseeable future. More transparency should be made to the process of assessing and recognizing well-known marks. A list of well-known trademarks should also be created and published shortly in order to systemize the management of well-known trademarks as well as to increase public awareness of well-known trademarks in Vietnam./.

New provisions of Decree 22/2018/ND-CP

Copyright and related rights are an intellectual property protected in Vietnam under the Bern Convention to which Vietnam is a member; Law on Intellectual Property of 2005, amended and supplemented in 2009 (the "**IP Law**"); and subsidiary legislation guiding the IP Law. Previously, regulations on protection of copyright and related rights were

detailed in Decree No. 100/2006/ND-CP dated 21 September 2006 ("**Decree 100**") and Decree No. 85/2011/ND-CP dated 20 September 2011 ("**Decree 85**").

However, after more than 10 years of implementation, some provisions of the IP Law need to be more specifically detailed, such as the operational mechanism, rights and obligations in relation to the activities of the copyright collective management organizations.

Based on the grounds and requirements of development practice, on 23 February 2018, the Government issued Decree No. 22/2018/ND-CP, detailing a number of articles and measures to implement the IP Law with respect to copyright and related rights ("Decree 22"). This Decree will officially come into force on 10 April 2018 and replace Decree 100 and Decree 85.

Compared with previous Decrees, Decree 22 contains some new contents as follows:

1. Decree 22 no longer guided the Civil Code as its predecessors, this Decree only regulates some articles and measures to implement the Law on copyright and related rights.

2. Decree 22 also expands the scope of applied subjects, accordingly the Decree applies not only to organizations and individuals having activities related to copyright and related rights but also to authors, copyright owners, performers and related rights holders according to the provisions of the IP Law and the competent State management agencies in charge of copyright and related rights.

3. The new Decree also clarifies and adds some legal terms; including:

• Anonymous work: It is not only the work of which the author's name is unknown but also the work of which the author's name is not yet identified.

• A copy of the work is a direct or indirect copy of the whole or part of the work by any means or in any form.

• A phonogram or visual recording is a fixation of sounds or images of a performance, or of other sounds or images, or of the reproduction of sounds or images not in the form prescribed, pictures associated with cinematographic works or works created by the same method.

• A copy of a phonogram or visual recording is a direct or indirect reproduction of part or whole of a phonogram or visual recording by any means or in any form.

• Applied artwork is a work characterized by lines, colours, shapes, or layouts with useful features that may be associated with a useful, crafted or industrial item, such as: Graphic design, fashion design, product design, interior design, decoration.
• Re-broadcast is the transmission, transmission or broadcast of a broadcasting organization's program.
• A programmable satellite signal carrying a coded program is a transmitted programmable satellite signal of which either or both of the two audio and visual characteristic properties that have been altered or modified for preventing people without legitimate satellite signal receivers from illegally transmitting the signal in that signal. Royalties mean the amount of money paid by the work users to the authors or owners of copyright in cases where the copyright holders are not concurrently authors.
• Remuneration is the amount of money paid by the work user to the copyright owner; users of performances paid to performers or owners of performances.
• Other material benefits are material benefits that the author, copyright owner or related rights holder receive in addition to royalties, remuneration, material benefits such as the receipt of prizes and gifted books upon publication, receipt of tickets for viewing performances, screenings of cinematographic works, display and exhibition of works.
4. Regarding the State's policies on copyright and related rights, Decree 22 clarifies the following policies:
• Investment priority, application of science and technology in the protection of copyright and related rights;
• Media promotion raising consciousness and awareness of the laws on copyright and related rights. Intensification of the education of knowledge on copyright and related rights in schools and other educational institutions suitable to each educational degree and training level;
and supplements the policy on mobilizing the resources of society to invest in enhancing the capacity of the copyright and related rights protection system to meet the requirements of socio-economic development and international integration.
5. In respect of the responsibilities for and contents of State management on copyright and related rights, Decree 22 supplements the following tasks of the Ministry of Culture,

Sports and Tourism:
• Managing and exploiting copyright over works, related rights to performances, phonograms, visual recordings, and broadcasts belonging to State ownership; Receiving the transfer of copyright of organizations and individuals to the State according to the provisions of law;
• Managing the activities of collective management organizations of copyright and related rights, consultancy organizations, copyright and related rights services.
6. On the author's side, the new Decree also added provisions on the protection of copyright and related rights, partly guiding the resolution of disputes on copyright and related rights.
With regard to copyright, Decree 22 further provides for a new subject "co-authors" being those who directly create a part or the whole of a literary, artistic or scientific work. Persons who support, contribute opinions or provide materials to other persons to create works shall not be recognized as authors or co-authors.
According to this Decree, subjects not covered by copyright protection include: pure news and administrative documents; in which the news is daily short news, of informative nature only, not being creative; administrative documents include documents of State agencies, political organizations, social organizations, etc. and units of the people's armed forces.
Copyright for cinematographic works, theatrical works, architectural works, computer programs are specified in each particular article (Articles 11, 12, 15 and 17).
Transfer of rights to anonymous works: According to the new Decree, for anonymous works, organizations or individuals managing anonymous works may transfer the rights to these works to other organizations or individuals. and be entitled to remuneration from the transfer of such right; They also enjoy the rights of the owner until the identity of the author is determined. This is also a new content not defined in the two previous Decrees.
In the provisions on property rights there is a small but significant change in the definition of the right to perform a work in the public domain. According to Article 23 of Decree 100, *"performance of a work before the public includes the performance of a work at any place except at home"*. Meanwhile,

Article 21 of Decree 22 states that *"performance of a work before the public includes the performance of a work in any place accessible by the public."*

The new provision reflects a change in the views of the State management agency on copyright and related rights in order to adapt to the advances of technology that allow any organization or individual to actually present copyrighted works to the public anywhere including their office or home. This change is important for protecting and enforcing copyright and related rights in the network environment.

For Related Rights: The rights of performers such as the right to direct or indirect copying, etc. must first be the right performed by an exclusive performance' owner.

These changes are expected to help resolve the difficulties and disputes in protecting and enforcing copyright and related rights in Vietnam.

Regarding procedures for registration of copyrights and related rights as well as the grant, re-grant, renewal and revocation of Copyright registration certificates and Related rights registration certificates ("Certificates"), they are clearly defined in Chapter IV of this Decree. However, the authority to grant, re-grant and revoke the Certificates in the new Decree is unclear. According to Decree 100, the name of the State agency responsible for carrying out these procedures is clear – the Copyright Office of Vietnam. The new Decree states that "the Ministry of Culture, Sports and Tourism (the Copyright Office)" may lead to confusion about the authority of the Copyright Office and the Ministry of Culture, Sports and Tourism until a guiding document is issued.

Another new point of Decree 22 is to create favorable conditions for organizations and individuals to register copyright. Specifically, such as the time-limit for completion of the formalities is fixed at 7 working days for re-grant of a Certificate and 12 working days for the re-grant of a Certificate from the date of receipt of the valid application dossier, and the reduction of application dossier-related procedures.

This Decree also regulates with more details the cancellation of the Copyright registration certificates and Related rights registration certificates by the Copyright Office in the cases

stipulated in Clause 3, Article 55 of the IP Law. Accordingly, within 15 working days after receipt of one of the following papers, the Copyright Office shall issue a decision to invalidate a Certificate:

• An effective judgement or decision of a court or a decision of a competent authority to deal with the infringement act as provided for in Article 200 of the IP Law on the invalidation of the Certificate;

• Documents of the organization or individual who has been issued with the Certificate sent to the Copyright Office proposing for revocation of the issued Certificate.

7. Particularly, Decree 22 has dedicated Chapter V for copyright collective management organizations, consultancy organizations, copyright and related rights services. In general, the new Decree has slightly amended the provisions of Decree 100 on the role of copyright and related rights collective management organizations, thereby contributing to solve the difficulties in exercising these rights in practice by such organizations. However, certain issues arising from these organizations' protection and enforcement of copyright and related rights, in particularly their collection and distribution of royalties, remuneration and other material benefits to the owners of copyright and related rights, raise a number of differences in viewpoints and concerns about abuse of power by these organizations, which need to be addressed.

According to Decree 22, collective management organizations of copyrights and related rights are required to set up their own tables of royalties, remunerations and other material benefits to be applied to collect the royalties and remuneration from the subjects who intend to use works protected in Vietnam.

Royalties, remuneration and other material benefits must be agreed between the copyright owners/ related rights holders and those who are interested in the use of their protected works. For the purpose of limiting the difference among these parties during negotiations, the new Decree also stipulates the principles for determining royalties and remuneration as follows:

• The payment of royalties, remunerations and material benefits must ensure that the interests of creators, exploiting organizations and individuals, and enjoying public are in line with socio-economic conditions of the country.

• The amounts of royalties, remunerations and material benefits shall be determined on the basis of type, form, quality, quantity or frequency of exploitation and use.
• The co-owners of copyright and co-holders of related rights agree on the proportion of royalties and remunerations according to their level of creativity and being suitable with the form of exploitation and use.
• The amounts of royalties, remuneration and material benefits shall be determined in a written contract in accordance with the laws.

Collective management organizations of copyright and related rights shall have the responsibility to draw up their lists of members, works, phonograms, video recordings and broadcasting programs of their members and take responsibility when executing contracts to authorize collective management organizations of copyrights and related rights to receive delegations for negotiation on agreements, and collection of royalties, remunerations and material benefits.

Collective management organizations of copyright and related rights shall only be responsible for negotiating agreements on the collection of royalties, remunerations and material benefits according to their lists of members, works, performances, phonograms, visual recordings, and broadcasting programs as provided for in the authorization contract.

The new Decree also amended and supplemented the provisions on the collection and distribution of royalties, remunerations and material benefits (Article 44). Accordingly, the collection and distribution of royalties, remunerations and material benefits shall comply with the provisions in the Charter on operations of the collective management organization of copyright and related rights and the written power of attorney of the copyright owners or related rights holders, which agree on the level or percentage, mode and time of distribution of royalties, remunerations and material benefits.

The collection and distribution of royalties, remunerations and material benefits by collective management organizations of copyrights and related rights shall be based on the principle of publicity and transparency of works, phonograms, visual recordings, and broadcasting programs exploited and used in accordance with the provisions of law.

In the case of works, phonograms, visual recordings and broadcasts related to the rights and interests of several collective management organizations authorized for representing a right or a specific group of rights, it is possible to agree for an organization to negotiate on behalf of the licensor(s) for licensing the use of work, collection and distribution of funds in accordance with the Charter and the authorization document.

The collection and distribution of royalties, remunerations and material benefits from corresponding foreign organizations or international organizations shall comply with regulations on foreign exchange control.

Added provisions on the exploitation and use of phonograms and visual recordings (Article 45) is one of the important contents of Decree 22. Specifically, organizations and individuals directly or indirectly using phonograms and visual recordings for commercial purposes as provided for in Clauses 1 and 2, Article 33 of the IP Law must pay royalties, remunerations and material benefits to copyright owners or related rights holders. Collective management organizations of copyright and related rights may agree, unanimously agree on, authorize the negotiation on, collection of royalties, remunerations and material benefits in accordance with the provisions of law. The share ratios of collected royalties, remunerations and material benefits shall be self-agreed by these organizations.

This Decree also specifies the use of phonograms and visual recordings, which have been published in commercial and commercial activities, means that organizations and individuals directly or indirectly use phonograms and visual recordings already published for use in restaurants, hotels, shops, supermarkets; establishments providing karaoke services, postal, telecommunications and digital environment services; in tourism, aviation and public transport (Article 32.3).

This provision creates a safe legal corridor encouraging creative activities, protecting the achievements of creative activities, and promoting the protection of copyright and related rights, which is more and more improved.

Organizations and individuals that exploit and use works, phonograms, visual recordings, and broadcasting programs in

Vietnam are required to communicate directly with the copyright owners, related rights holders or collective management organizations of copyright and related rights on their exploitation and use. In case where direct communication with copyright owners or related right holders is impossible, such organizations or individuals must make announcement on the mass media.

Even if the organization or individual who wishes to use the work in Vietnam has successfully contacted the collective management organization of copyright or related rights, they are still required to notify their intention on the media. This is a new obligation of the person who intends to use works, phonograms or visual recordings. Persons who do not perform this obligation shall be deemed to have infringed upon copyright or related rights. More guidance is needed on what kind of media can be used for publicity.

To further clarify the activities of the collective management organizations of copyright and related rights, Decree 22 provides new obligations for these organizations. Accordingly, these organizations must publicly disclose on their websites information about the name of the author, copyright owner, related rights holder, name of the work or related rights' object, and scope of authorization. In addition, these organizations are also required to build their websites connected with State management agencies in charge of copyright and related rights, and collective management organizations of copyright and related rights. Database systems of copyright and related rights of these organizations must be linked to the national database on copyright and related rights.

Decree 22, which shall take effect on 10 April 2018, will contribute to strengthening the capacity and activities of organizations protecting copyright and related rights, creating an environment for individuals and enterprises to compete fairly and to raise their business ethics, and protecting copyright in a manner which is more stringent and in line with international practices./.

Patent co-operation lessens local backlog

With Vietnam's recent and imminent free trade pacts, a great number of new businesses are seeking entry to the growing market. But first, they want to make sure that their intellectual property rights are safe – which makes for a torrent of work for the local patent office. Nguyen Nguyet Dzung and Nguyen Huong Giang of law firm Vision & Associates examine the early results of a co-operation between Japan and Vietnam to ease the backlog of patent applications.

On the basis of bilateral office agreements made in October 2015, on April 1, 2016, the National Office of Intellectual Property of Vietnam (NOIP) and the Japan Patent Office (JPO) commenced the Patent Prosecution Highway (PPH) pilot programme between the two offices. This is the very first PPH programme that the NOIP has joined so far, showing the willingness of the NOIP to use positive examination results issued by a partner jurisdiction to expedite examination of Vietnamese patent applications.

Although there are two expedited examination systems in Vietnam at present – the NOIP's standard expedited examination system stipulated in the Intellectual Property Law of Vietnam and the ASEAN Patent Examination Cooperation (ASPEC) programme between ASEAN jurisdictions – they have not been widely applied. A reason for the uncommon usage of the standard acceleration system is that the NOIP's examiners are often not willing to accept the acceleration request due to their great backlog of pending patent applications. As for the ASPEC programme, it has not been as effective as hoped since the NOIP's examiners are quite reluctant to rely on the examination results issued by the ASEAN patent offices.

This NOIP-JPO PPH pilot programme is expected to improve the current situation and shorten the substantive examination period for Vietnamese patent applications which have submitted corresponding Japanese applications.

Accordingly, applicants can now request expedited examination of their Vietnamese patent applications based on the Japanese

patents/allowances for corresponding Japanese applications by following a prescribed procedure and satisfying certain requirements under this PPH pilot programme. There are some important points the applicants should keep in mind when considering participation in this programme, particularly: (i) a request for substantive examination of the Vietnamese patent application must have been filed at NOIP either prior to or at the time of the PPH request, (ii) the first office action for the Vietnamese patent application has not yet been issued by the NOIP at the time the PPH request is filed, and (iii) the claims of the Vietnamese patent applications must be identical and/or equivalent to those determined to be patentable/allowable in the corresponding Japanese applications.

This PPH pilot programme will run for three years initially, from April 1, 2016 to March 31, 2019. However, the pilot programme may be extended after a joint NOIP-JPO review and assessment of the programme implementation. It is noted that this pilot programme is not applicable on the basis of the JPO utility model applications. In view of its handling capacity, the NOIP has agreed to accept 100 PPH requests per year at maximum in this three-year pilot period, and may refuse PPH requests which are filed thereafter. When the maximum acceptable volume of PPH requests is close to being reached, an ex-ante notice will be published by the NOIP on its website.

In the first year of the programme, the number of PPH requests at the NOIP reached 100 by August 24, 2016. After one year of operation, the PPH pilot programme has shown its remarkable effectiveness in the expedited examination of Vietnamese patent applications, with a substantial number of Vietnamese patents having been granted 9-12 months after their PPH requests. Given the huge backlog of pending cases, it has demonstrated the great efforts of NOIP’s examiners in seriously implementing the pilot programme.

For this second year dating from April 1, 2017, the number of PPH requests already reached the maximum of 100 requests by May 24, 2017. Thus, this second year of the programme was closed; and any other PPH requests which could not be duly filed have to wait for the third year, starting on April 1, 2018. In view of this situation, if applicants wish to take

advantage of this first-come, first-served programme, they should either have their PPH requests on hand or be well prepared to file them as soon as the NOIP resumes accepting them./.

Practice in construction of product-by-process claim in Vietnam

A product-by-process claim is understood worldwide as a patent claim in which a product claimed by defining the process by which the product is made, and this claim type is at present permitted in many jurisdictions. In Vietnam, such a product-by-process claim format is also permitted, however it is allowed under certain special circumstances only.

As stated in the Guidelines for Patent Examination issued by the National Office of Intellectual Property of Vietnam (hereinafter referred to as "the NOIP's Guidelines") dated 31 March 2010, in the case that a product whose structure is unknown at the time of application, such as a product having an extremely complex structure (e.g., polymer) or a product comprising various compounds (e.g., extract, fraction), such a product can be identified by its manufacturing process (e.g., a product X obtained by a process Y), provided that this technical feature is sufficient for the comparison and distinguishing of the claimed product with other products of the prior art (Point 5.7.2f). In the patent practice before the NOIP, when the NOIP's examiners consider that the product claimed in a product-by-process claim could be defined by its own characteristics (e.g., structure, composition, amount of each component, or the like), they will reject such a product-by-process claim drafting and request the applicant to define the claim by the characteristics of the product per se. For example, in one Office Action issued by the NOIP for a patent application, the NOIP's examiner in charge of the application

did raise an objection to one claim which was drafted as a product-by-process claim for the reason that the mixture claimed in this claim was defined by its composition and amount of each component contained therein, and it thus could not be expressed in the format of product-by-process claim.

With regard to the substantive examination of a product-by-process claim, the above-mentioned NOIP's Guidelines states that when assessing the novelty of this claim format, the NOIP's examiners have to consider whether the recited manufacturing process feature imparts a certain specific structure and/or component to the claimed product. If a person skilled in the art could conclude that this process necessarily produces a product whose structure and/or component is different from that of the products of the prior art, then said product-by-process claim meets the requirement of novelty. In contrast, if the claimed product made by the recited process has the same structure and/or component as the product of the prior art, then the product set forth in the product-by-process claim will be considered as lacking novelty even though it is made by a different process, unless the applicant can prove that the recited process will produce a product having different structure and/or component, or having different function through which a change on the structure and/or component of the claimed product could be perceived (Point 22.2.2.5 (3)). This implies that during the patentability assessment for this claim type in Vietnam, only the product per se is examined (i.e., product identity theory), taking into consideration the specific structure and/or component of the claimed product which is implied by the recited process.

The NOIP's Guidelines also gives a specific example relating to an invention on a glass which is made by process X, and in the prior art a process Y for making an identical glass is already disclosed (Point 22.2.2.5 (3)). This example shows that if the glasses made by these two processes have the same structure, shape, and/or material, then the invention is not new. In contrast, if process X comprises an incubating step at a specified temperature which has not yet been disclosed in the prior art, and thanks to this incubating temperature, the claimed glass made by process X has an increased resistance to cracking and breakage as compared to that made by process Y,

then the invention has novelty. This is because the increased resistance to cracking and breakage does imply that the claimed glass has a different inner and micro-structure thanks to the different manufacturing process as compared to the glass of the prior art.

As regards the infringement analysis of a product-by-process claim, there are no explicit provisions in relation to the technical scope and/or the enforcement of such a claim type provided for in the Intellectual Property Law of Vietnam and relevant legal regulations. Also, there have been no case laws, and thus no trial decisions, with respect to this issue in Vietnam up to date. Thus, if there is a case, the infringement assessment for this special form of claim seems to be based upon current Circular No. 11/2015/TT-BKHCN dated 26 June 2015 of the Ministry of Science and Technology detailing and guiding a number of articles of the government's Decree No. 99/2013/ND-CP dated 29 August 2013 on sanctioning of administrative violations in the field of industrial property, which provides that an accused product shall be regarded as "identical" or "equivalent" to a product protected by a claim if all essential technical features recited in the claim are present in the identical or equivalent form in the accused product, and shall be regarded as "not identical" or "not equivalent" if the accused product does not contain at least one essential technical feature recited in the claim, wherein two technical features shall be considered as a) "identical" if they have the same nature, the same purpose, the same manner of achieving purpose, and are in the same relationship with other features stated in the claim, and b) "equivalent" if they have the similar or interchangeable nature, the substantially identical purpose, and the substantially identical manner of achieving purpose (Rule 11). As such, it could be interpreted that in case of a product-by-process claim, an accused product seems to infringe a patented product-by-process claim which is defined by its manufacturing process feature only when it is made by a process having the same, similar or interchangeable nature, the same or substantially identical purpose, and the same or substantially identical manner of achieving the purpose to the process recited in the product-by-process claim at issue. That is to say, when assessing the possibility of infringement to a

product-by-process claim in Vietnam, it seems that the recited process may be considered as a limitation (i.e., process limitation theory).

To conclude, the product-by-process claim format is permitted in Vietnam in some exceptional cases. While the NOIP adopts the “product identity theory” when considering the patentability of this claim type as established in the NOIP’s Guidelines, the current legal regulations indicate that the “process limitation theory” seems to be applied by the competent enforcement authorities in the infringement analysis when there is a case./.