

Legal news

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INTELLECTUAL PROPERTY LAW

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

Nguyen Nguyet Dzung & Nguyen Huong Giang

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./.

Other Sectors

Finance

- Decree No. 32/2017/ND-CP dated 31st March 2017, on the State's investment credits.
- Decision No. 469/QD-BTC dated 13th March 2017 of the Ministry of Finance, promulgating the Working Rules and Regulations of the Ministry of Finance.

Banking

- Decision No. 631/QD-NHNN dated 31st March 2017 of the State Bank of Vietnam, correcting Circular No. 35/2016/TT-NHNN dated 29th December 2016 of the State Bank of Vietnam, providing for the safety and confidentiality during the supply of banking services on the Internet.
- Decision No. 312/QD-NHNN dated 14th March 2017 of the State Bank of Vietnam, correcting Circular No. 39/2016/TT-NHNN dated 30th December 2016 of the Governor of State Bank of Vietnam, providing for the lending activities of credit institutions and/or foreign banks' branches in favour of customers.

Securities

- Decision No. 296/QD-UBCK dated 31st March 2017 of the State Securities Commission, promulgating the Rules which guide public companies to use Information declaration system of the State Securities Commission.
- Circular No. 23/2017/TT-BTC dated 16th March 2017 of the Ministry of Finance, amending and supplementing some articles of Circular No. 11/2016/TT-BTC dated 19 January 2016, providing guidelines for some articles of Decree No.42/2015/ND-CP dated 5th May 2015, on derivative securities and derivative securities market.
- Circular No. 22/2017/TT-BTC dated 15th March 2017 of the Ministry of Finance, providing for the repurchases of the Government bonds on the domestic market.

Taxation

- Decree No. 24/2017/ND-CP dated 14th March 2017, providing for the special preferential import tax rates to implement the Agreement on promoting bilateral trade between the Government of Socialist Republic of Vietnam and the Royal Government of Cambodia in 2016.
- Official Letter No. 1041/TCT-HTQT dated 22nd March 2017 of the General Department of Taxation, notifying the validity of the Protocol amending Taxation Treaty between Vietnam and India.

- Official Letter No. 795/TCT-HTQT dated 10th March 2017 of the General Department of Taxation, notifying the validity of Taxation Treaty between Vietnam and Panama.

Trade

- Decision No. 1022/QD-BCT dated 24th March 2017 of the Ministry of Industry and Trade, approving the Scheme on “Planning for the development of trade in Southern major economic zone until 2025, with an orientation to 2035”.
- Decision No. 20/2017/QD-UBND dated 24th March 2017 of Ho Chi Minh City People’s Committee, promulgating the Regulations on standards for titles as Directors and Vice Directors of units under Department of Industry and Trade, and Heads and Vice Heads of Economic Divisions or Economic-Infrastructure Divisions of district-level People’s Committees.
- Decision No. 771/QD-TCHQ dated 14th March 2017 of the General Department of Customs, declaring telephone numbers and email addresses to provide information in electronic customs declaration form in accordance with Decision No. 33/2016/QD-TTg.
- Decision No. 595/QD-TCHQ dated 1st March 2017 of the General Department of Customs, promulgating the Regulation guiding the issuance, management and use of the Public Official Cards for Customs Inspectors.
- Circular No. 04/2017/TT-BCT dated 9th March 2017 of the Ministry of Industry and Trade, amending and supplementing Circular No. 20/2011/TT-BCT dated 12th May 2011 of the Ministry of Industry and Trade, supplementing the procedures for imports of passenger cars with 9 seats and fewer.

Labour

- Decision No. 486/QD-LDTBXH dated 29th March 2017 of the Ministry of Labour, War Invalids and Social Affairs, promulgating the Working Rules and Regulations of the Ministry of Labour, War Invalids and Social Affairs.
- Decision No. 493/QD-TLD dated 9th March 2017 of Vietnam General Confederation of Labour, promulgating the Regulations on powers and procedures for application of disciplinary measures in trade union organizations.
- Circular No. 04/2017/TT-BLDTBXH dated 2nd March 2017 of the Ministry of Labour, War Invalids and Social Affairs, promulgating the List of 4th Grade trained occupations at intermediate and junior college levels.
- Notice No. 611/TB-BHXH dated 28th March 2017 of Ho Chi Minh City Social Security Agency, promulgating the newly-issued, amended, or supplemented procedures and dossier reception notices of the one-stop shop mechanism.
- Notice No. 496/TB-BHXH dated 14th March 2017 of Ho Chi Minh City Social Security Agency, promulgating the newly-issued procedures and dossier

reception notices of the one-stop shop mechanism.

Health

- Decision No. 1246/QD-BYT dated 31st March 2017 of the Ministry of Health, promulgating the “Guidelines to implement 3-step food examination and food samples storage for business establishments providing food and beverage services”.
- Decision No. 868/QD-BYT dated 14th March 2017 of the Ministry of Health, approving the document “Standard leadership and management capacity for Directors of Institutes in Preventive Medicine sector and Directors of Centres for Disease Control”.
- Decision No. 869/QD-BYT dated 14th March 2017 of the Ministry of Health, approving the document “Fundamental standard capacity of Health Inspectors”.
- Decision No. 1669/QD-UBND dated 13th March 2017 of Hanoi People’s Committee, announcing administrative procedures within the scope of State management function of Hanoi Department of Health.
- Circular No. 02/2017/TT-BYT dated 15th March 2017 of the Ministry of Health, stipulating the maximum levels in price list for medical examination and treatment services, which do not fall within the payment scope of Health Insurance Fund in the State-owned medical examination and treatment facilities and guidance on pricing and payment for medical examination and treatment in some cases.
- Decision No. 866/QD-BYT dated 14th March 2017 of the Ministry of Health, approving the Document “Standard leadership and management skills of Directors of Hospitals”.
- Decision No. 715/QD-BYT dated 3rd March 2017 of the Ministry of Health, providing for the public official cards’ codes for health inspectors.
- Circular No. 01/2017/TT-BYT dated 6th March 2017 of the Ministry of Health, providing for the chemotherapy, radiotherapy, and daily combination of chemotherapy and radiotherapy at medical examination and treatment facilities.

Education

- Decision No. 777/QD-BGDDT dated 14th March 2017 of the Ministry of Education and Training, correcting Circular No. 28/2016/TT-BGDDT dated 30th December 2016, on the amendment and supplement to some contents of Kindergarten Education Program accompanying Circular No. 17/2009/TT-BGDDT dated 25th July 2009 of the Ministry of Education and Training.
- Circular No. 11/2017/TT-BCA dated 23rd March 2017 of the Ministry of Public

Security, providing for the list of State Secrets classified into Confidential category in the Education and Training sector.

- Circular No. 07/2017/TT-BGDDT dated 15th March 2017 of the Ministry of Education and Training, promulgating the Regulations on associations for higher education.
- Circular No. 06/2017/TT-BGDDT dated 15th March 2017 of the Ministry of Education and Training, promulgating the Regulation on continuing higher education.
- Circular No. 10/2017/TT-BLDTBXH dated 13th March 2017 of the Ministry of Labour, War Invalids and Social Affairs, providing for samples of graduation certificates at intermediate and junior college levels; printing, management, issuance, repealing, revocation of graduation certificates at intermediate and junior college levels.
- Circular No. 09/2017/TT-BLDTBXH dated 13th March 2017 of the Ministry of Labour, War Invalids and Social Affairs, providing for the organization of implementing education programs at intermediate and junior college levels in the form of one year or modules or credits; regulation on examination and recognition for graduation.
- Circular No. 08/2017/TT-BLDTBXH dated 10th March 2017 of the Ministry of Labour, War Invalids and Social Affairs, providing standards on the expertise and professional skills of vocational education teachers.
- Circular No. 03/2017/TT-BLDTBXH dated 1st March 2017 of the Ministry of Labour, War Invalids and Social Affairs, providing for the process of preparation, assessment and appraisal, and issuance of programs; organization of the elaboration, selection, assessment and appraisal of textbooks for training at intermediate and junior college levels.

Culture - Sports - Tourism

- Decree No. 28/2017/ND-CP dated 20th March 2017, amending and supplementing some articles of Decree No. 131/2013/ND-CP dated 16th October 2013, providing for the sanctioning of administrative violations of copyright and related rights and Decree No. 158/2013/ND-CP dated 12th November 2013, providing for the sanctioning of administrative violations in the Culture, sports, tourism and advertising sectors.
- Decision No. 13/2017/QĐ-UBND dated 14th March 2017 of Ho Chi Minh City People's Committee, promulgating the Regulation on organization and operations of Ho Chi Minh City Department of Tourism.

Transport

- Decree No. 29/2017/ND-CP dated 20th March 2017, providing for the conditions for seafarer training facilities and seafarer recruitment and supply service providers.
- Decision No. 09/2017/QD-TTg dated 31st March 2017 of the Prime Minister, providing guidelines for the implementation of the Protocol between the Government of the Socialist Republic of Vietnam and the Government of Republic of Belarus on supporting the manufacture of motorized means of transport on Vietnam's territory.
- Decision No. 08/2017/QD-TTg dated 31st March 2017 of the Prime Minister, providing guidelines for the implementation of the Protocol between the Government of the Socialist Republic of Vietnam and the Government of Russian Federation on supporting the manufacture of motorized means of transport on Vietnam's territory.
- Decision No. 860/QD-BGTVT dated 31st March 2017 of the Ministry of Transport, correcting Circular No. 07/2017/TT-BGTVT dated 14th March 2017 of the Ministry of Transport, on the amendment and supplement to some articles of Circular No. 36/2015/TT-BGTVT dated 24th July 2015 of the Ministry of Transport, on the management of prices of domestic air transportation services and prices of specialized air services.
- Decision No. 810/QD-BGTVT dated 28th March 2017 of the Ministry of Transport, announcing the amended administrative procedures within the scope of management function of the Ministry of Transport.
- Decision No. 685/QD-BGTVT dated 14th March 2017 of the Ministry of Transport, promulgating the Working Rules and Regulations of Ministry of Transport.
- Circular No. 09/2017/TT-BGTVT dated 20th March 2017 of the Ministry of Transport, promulgating the National Technical Regulations on lifting equipment on means of domestic waterways transportation.
- Circular No. 07/2017/TT-BGTVT dated 14th March 2017 of the Ministry of Transport, on the amendment and supplement to some articles of Circular No.36/2015/TT-BGTVT dated 24th July 2015 of the Ministry of Transport, on the management of prices of domestic air transportation services and air specialized services.
- Circular No. 49/2017/TT-BQP dated 8th March 2017 of the Ministry of Defence, providing guidelines for the implementation of Decision No. 10/2016/QD-TTg dated 3rd March 2016 of the Prime Minister, on implementing the e-border guard procedures at seaports.

Natural Resources - Environment

- Decision No. 673/QD-BTNMT dated 31st March 2017 of the Ministry of Natural Resources and Environment, promulgating the List of legal documents that are partly or wholly no longer valid in the fields under the state management of the Ministry of Natural Resources and Environment up to 30th January 2017.
- Decision No. 857/QD-UBND dated 1st March 2017 of Ho Chi Minh City People's Committee, announcing the administrative procedures within the scope of State management function of Ho Chi Minh City Department of Natural Resources and Environment.
- Circular No. 03/2017/TT-BTNMT dated 21st March 2017 of the Ministry of Natural Resources and Environment, providing guidelines for the lending with preferential interest rate and post-investment interest rate support from Vietnam Environment Protection Fund.
- Circular No. 02/2017/TT-BTNMT dated 7th March 2017 of the Ministry of Natural Resources and Environment, providing for the techniques and economic-technical standards to prepare reports on current environmental status.

Construction

- Decision No. 07/2017/QD-UBND dated 17th March 2017 of Hanoi People's Committee, promulgating the "Regulations on management and issuance of construction permits to construct building works, which are antennas receiving and transmitting mobile data in Hanoi".
- Decision No. 1737/QD-UBND dated 15th March 2017 of Hanoi People's Committee, promulgating the criteria on economical and efficient use of energy for major facilities using energy in industrial manufacture and building works in Hanoi.
- Decision No. 1616/QD-UBND dated 8th March 2017 of Hanoi People's Committee, announcing administrative procedures in the field of construction activities within the scope of State management function of Department of Construction.
- Circular No. 03/2017/TT-BXD dated 16th March 2017 of the Ministry of Construction, providing guidelines for determination of the maintenance costs of building works.
- Circular No. 02/2017/TT-BXD dated 1st March 2017 of the Ministry of Construction, providing guidelines on planning for rural construction.

Land

- Decision No. 13/2017/QD-UBND dated 31st March 2017 of Hanoi People's Committee, promulgating some regulations on the registration and issuance of

Certificates of land use rights, ownership of houses and other assets attached to land; registration of land use movements and changes in ownership of assets attached to land for organizations in the area of Hanoi.

- Decision No. 12/2017/QD-UBND dated 31st March 2017 of Hanoi People's Committee, promulgating the Regulations on registration and issuance of Certificates of land use rights, ownership of houses and other assets attached to land for households, individuals, communities, Vietnamese people residing overseas, and foreign individuals; conversion of the using purposes of adjacent land areas with gardens and ponds, agricultural lands located in residential areas into residential lands in the area of Hanoi.
- Decision No. 11/2017/QD-UBND dated 31st March 2017 of Hanoi People's Committee, promulgating some regulations on land recovery, land allocation, land lease, and conversion of land using purposes to implement investment projects in the area of Hanoi.
- Decision No. 10/2017/QD-UBND dated 29th March 2017 of Hanoi People's Committee, promulgating some regulations under the authority of Hanoi People's Committee on compensation, support and resettlement when the State recovers land in the area of Hanoi.

Administration - Judiciary

- Decree No. 23/2017/ND-CP dated 13th March 2017, amending and supplementing some articles of Decree No. 162/2013/ND-CP dated 12th November 2013, providing for the sanctioning of administrative violations in the areas of seas, islands and continental shelf of the Socialist Republic of Vietnam.
- Resolution No. 03/2017/NQ-HDTP dated 16th March 2017 of the Supreme People's Court, publishing certain judgements and decisions on its website.
- Resolution No. 351/2017/UBTVQH14 dated 14th March 2017 of the National Assembly's Standing Committee, providing for the formalities and techniques for presenting legal documents of the National Assembly, Standing Committee of National Assembly, and State President.
- Decision No. 1665/QD-UBND dated 10th March 2017 of Hanoi People's Committee, promulgating the Code of conducts at public places in the area of Hanoi.
- Decision No. 855/QD-UBND dated 1st March 2017 of Ho Chi Minh City People's Committee, announcing the list of legal documents of Ho Chi Minh City People's Council and People's Committee, which are wholly or partly no longer valid in 2016.
- Circular No. 01/2017/TT-VPCP dated 31st March 2017 of the Government Office, providing guidelines for the implementation of provisions on Official

Gazette in Decree No. 34/2016/ND-CP dated 14th May 2016, detailing some articles and implementation measures of Law on Promulgation of Legal Documents.

- Circular No. 02/2017/TT-BTP dated 23rd March 2017 of the Ministry of Justice, providing guidelines for some contents on the management of public officials, public servants, and labourers of the system of civil judgements enforcement agencies.

Agriculture - Forestry - Fishery

- Decision No. 1050/QD-BNN-TCLN dated 30th March 2017 of the Ministry of Agriculture and Rural Development, announcing the newly-issued administrative procedures; and replacing or replaced administrative procedures within the scope of management function of the Ministry of Agriculture and Rural Development.
- Decision No. 1919/QD-UBND dated 24th March 2017 of Hanoi People's Committee, announcing administrative procedures under the settlement authority of Hanoi Department of Agriculture and Rural Development.
- Decision No. 738/QD-BNN-KHCN dated 14th March 2017 of the Ministry of Agriculture and Rural Development, on the criteria to determine agricultural projects and programs that apply high technologies, clean agriculture, and list of high technologies applied in agriculture.
- Decision No. 728/QD-BNN-CN dated 14th March 2017 of the Ministry of Agriculture and Rural Development, announcing the standardized administrative procedures within the scope of State management function of the Ministry of Agriculture and Rural Development in livestock breeding sector.
- Circular No. 08/2017/TT-BNNPTNT dated 28th March 2017 of the Ministry of Agriculture and Rural Development, providing for the training on expertise and professional skills, and uniforms for forest owners' teams specialized in forests protection.
- Circular No. 06/2017/TT-BNNPTNT dated 8th March 2017 of the Ministry of Agriculture and Rural Development, amending and supplementing some contents of Circular No. 03/2016/TT-BNNPTNT dated 21st April 2016 of the Ministry of Agriculture and Rural Development, promulgating a List of plant protection medicines allowed to use, or banned from use in Vietnam; and announcing HS codes for plant protection medicines allowed to use or banned from use in Vietnam.

Miscellaneous

- Decision No. 15/2017/QD-UBND dated 16th March 2017 of Ho Chi Minh City People's Committee, issuing the Regulations on supporting enterprises to invest and manufacture in Industry sector and supporting industries.

Contact Details

Hanoi Office

Mr. Pham Nghiem Xuan Bac

Managing Partner

Mr. Luu Tien Ngoc

Director, Business Development

Ms. Le Quynh Anh

Executive Partner, Legal Practice

Ms. Nguyen Nguyet Dzung

Partner, Intellectual Property Practice

Unit 308-310, 3rd Floor, Hanoi Towers

49 Hai Ba Trung, Hanoi, Vietnam

Tel: 84-4-3934 0629/ 3826 4797 Fax: 84-4-3934 0631

E-mail: vision@vision-associates.com

Ho Chi Minh City Office

Mr. Luu Tien Ngoc

Director, Business Development

Mrs. Nguyen Thi Van

Head of Ho Chi Minh City Office

Unit 905, 9th Floor, CitiLight Tower

45 Vo Thi Sau, District 1, Ho Chi Minh City, Vietnam

Tel: 84-8-3823 6495 Fax: 84-8-3823 6496

E-mail: hcmvision@vision-associates.com

www.vision-associates.com