



V I L A F

VIETNAM INTERNATIONAL LAW FIRM

Reasoned award under Vietnamese Laws

An arbitration case usually begins with a notice of arbitration/request for arbitration submitted by a disputing party and ends with the issuance of an award by the arbitral tribunal. As a decision of the tribunal resolving the dispute and having binding effect upon disputing parties, the arbitration laws of countries as well as the rules of arbitration centers normally require the award to satisfy certain requirements. One of them is that the award must state the reasons upon which it is based (*a.k.a.* reasoned award).

This article will (i) briefly explain the necessity of such requirement in the arbitration context, (ii) discuss current regulations of Vietnamese laws on this issue in comparison with UNCITRAL Model Law on International Commercial Arbitration (“Model Law”) and the arbitration rules of other reputable arbitration centers before (iii) examine how Vietnamese courts interpret and apply this statutory requirement in practical cases.

A reasoned award is important and necessary because of the following key reasons¹: First, the reasonings offered by the arbitral tribunal in its award is a key element showing the nature and quality of justice provided by the tribunal. Accordingly, a reasoned award provides an assurance that justice has

been exercised carefully and properly by the tribunal itself. Second, this statutory requirement obligates the tribunal itself to study the facts, submissions, issues in disputes as well as arguments of disputing parties cautiously, thereby improving the quality and accuracy in its decisions. Last but not least, disputing parties often want to know not only whether they ultimately win or lose their case, but also why they win or lose it. A reasoned award can satisfy such will of the parties as it would provide them with a more satisfactory answer as to why the tribunal makes such a decision. This in turn makes the losing party feel that it has been “fully heard”, thereby increasing the likelihood of voluntarily enforcing the arbitral award and reducing the risk of the award being canceled or not recognized by competent courts.

1 S.I. Strong. (2015). Reasoned Awards in International Commercial Arbitration: Embracing and Exceeding the Common Law - Civil Law Dichotomy. *Michigan Journal of International Law*, 37(1). <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1086&context=mjil>

A reasoned award seems to be a universal requirement as it is enshrined in the arbitration laws of numerous countries and arbitration rules of arbitration centers around the world. Specifically, Article 31 of Model Law requires the award to state reasons based upon which it is made except for cases where disputing parties agree that such reasons are unnecessary or such award is made on agreed terms (*a.k.a.* award by consent). A similar regulation can also be found in the arbitration rules of Singapore International Arbitration Center (SIAC) or those of International Chamber of Commerce (ICC).

In Vietnam, a reasoned award was mentioned for the very first time in Ordinance No. 08/2003/PL-UBTVQH11 on commercial arbitration ("**Ordinance on Arbitration**"). Under Ordinance on Arbitration, the concept of "arbitral award" is regulated in a different term (but with the same meaning) i.e., "arbitral decision" (*quyết định trọng tài*). Accordingly, Article 44.1.dd of the Ordinance on Arbitration requires that the content of the arbitral decision/award must have "basis for making such decision". This ordinance, however, keeps silent on the right of the parties to agree otherwise on this issue. Thus, it appears that the requirement on reasoned award is fixed by law, which cannot be changed by the agreement of disputing parties themselves.

After the issuance of Law on Commercial Arbitration 2010 ("**2010 Arbitration Law**"), together with changing the concept of "arbitration decision" (defined in Ordinance on Arbitration) into that of "award", the provision on reasoned awards has also been revised to be more compatible with Model Law. Specifically, Article 61.1.dd of 2010 Arbitration Law stipulates that an arbitral award must contain reasons for issuance of the award, unless the parties agree it is unnecessary to specify reasons for the award. A similar provision is also provided in Article 32.1.dd of the Arbitration Rules of the Vietnam International Arbitration Center 2017 ("**VIAC Rules**").

Though a reasoned award is regarded as a universal requirement which is regulated in the arbitration laws of countries as well as arbitration rules of arbitration centers, what an award really means and what criteria that an award must fulfil to be considered as the reasoned one are still the questions controversial in practice. For example, in the United States, there are at least three different views on what qualifies as a

reasoned award. In *Leeward Constr. Co. v. Am. Univ. of Antigua - College of Medicine*, the Second Circuit Court took the view that a reasoned award requires "something more than a line or two of unexplained conclusions, but something less than full findings of fact and conclusions of law on each issue raised before the panel"². However, in the *Cat Charter, LLC vs Schurtenberger*, the court held that for an award to be a reasoned one, it must contain explanation for any conclusion made by the tribunal in such award³. And in *Stage Stores, Inc. v. Gunnerson*, the court opined that a reasoned award should take into account all the significant arguments of the disputing parties in the dispute⁴.

In Vietnam, 2010 Arbitration Law just says that an award must have reasons for making such award unless otherwise agreed by disputing parties without offering any further guidance on what are necessary criteria for an award to be the reasoned one. In consequence, the interpretation and application of this statutory requirement on reasoned award heavily depend upon the subjective viewpoint of the judges which are varied from court to court. Nevertheless, in terms of this issue, based upon the cases below, it seems that two following approaches are currently taken by Vietnamese courts in practice:

1st Approach: The arbitral tribunal only needs to mention or cite a legal provision or legislative document in its award to satisfy the reasoned-award requirement specified in Article 61.1.dd of 2010 Arbitration Law

This approach seems to be reflected in Decision No. 871/2016/QĐ-PQTT dated 25 August 2016 of the People's Court of Ho Chi Minh City where the requestor (*bên yêu cầu*) asked the court to set aside the award No. 50/13/HCM on the ground that such award contains no reason as required by Article 61.1.dd of 2010 Arbitration Law. The court, however, opined that the award did contain reasons as the tribunal stated that the award is made based upon 2010 Arbitration Law and 2005 Law on Enterprises. Therefore, the request for setting aside the award was rejected.⁵

2nd Approach: The arbitral tribunal must provide the basis for each decision made in the award

Although disagreeing with the court's "excessive" intervention below, according to the author, the 2nd

2 *Leeward Constr. Co. v. Am. Univ. of Antigua - Coll. of Med.*, 826 F.3d 634 (2d Cir. 2016). <https://casetext.com/case/leeward-constr-co-v-am-univ-of-antigua-college-of-med-1>

3 *Cat Charter, LLC v. Schurtenberger*, 646 F.3d 836 (11th Cir. 2011). <https://casetext.com/case/cat-charter-llc-v-schurtenberger>

4 *Stage Stores, Inc. v. Gunnerson*, 477 S.W.3d 848 (Tex. App. 2015). <https://casetext.com/case/stage-stores-inc-v-gunnerson>

5 Đỗ Văn Đại. (2017). *Pháp luật Trọng tài Thương mại Việt Nam*. Nhà Xuất Bản Hồng Đức – Hội Luật Gia Việt Nam.

approach is partly illustrated in the following cases:

Case 1: In its decision No. 51/2011/KDTM-QDPT dated April 8, 2011, the Court of Appeal of the Supreme People's Court (*Tòa phúc thẩm Tòa án Nhân dân Tối cao*) in Ho Chi Minh City set aside the award resolving the dispute between Hoang Son Company and Valency Company. The court reasoned that the award lacked the summary and grounds for making the award as required by Article 44.1.d and Article 44.1.dd of Ordinance on Arbitration. Particularly, the tribunal ordered Valency to compensate Hoang Son for its damages, but failed to summarize and explain why it rejected Hoang Son's claim requesting Valency to deliver the remaining goods (500 MT) under Contract No. 139/RCN. Based upon this ground, the court further reasoned that the tribunal has violated its obligation on complying with Ordinance on Arbitration as provided in Article 13.2.a thereof before relying on Article 54.5 of the ordinance to set aside this arbitral award.⁶

Case 2: In Decision 04/2020/QĐ-PQTT dated 29 May 2020, one of the reasons based upon which Hanoi People's Court set aside the arbitration award No. 36/19 between Company B and NC Company is that while the tribunal only explained and provided its reasoning without citing any ground, statutory provision or specific legislative document, its decision to reject all claims of the Company B and forcing Company B to pay arbitration fees did not comply with the agreement of the parties, violating the requirement on a reasoned award stipulated in Article 61.1.dd of 2010 Arbitration Law.⁷

Case 3: In Decision No. 06/2021/QĐ-PQTT dated July 6, 2021, Hanoi People's Court decided to annul the award No. 72/19 of the tribunal resolving the dispute between Company K and Company A. The rationale behind the court's decision is that the tribunal ordered Company A to pay the late-payment interest of 6% per year based on Article 387.2 of Korean Civil Law, but the content of this provision did not specify the rate as concluded by the tribunal. This was a violation against Article 61.1.dd of 2010 Arbitration Law requiring the award must have reasons for making such award. This award, according to the court, was contrary to the basic principle of Vietnamese laws *i.e.*, arbitrators must be independent, objective, impartial and comply with the provisions of the law as specified in Article 4.2 of 2010 Arbitration Law.

Having ignored the persuasiveness in the court's grounds and reasoning for setting aside the awards in the cases above which is not within the scope of this paper, as for the issue of determining whether or not an award satisfies the requirement on reasons as prescribed in Article 61.1.dd of 2010 Arbitration Law, the author takes the view that while the first approach mentioned in the first case seems to be incomprehensive as it emphasizes too much on searching for a legal ground in the award as whole rather than paying attention to each decision or conclusion made by the tribunal in the award and its reasonings or grounds for such decision or conclusion, the courts in the last three cases above go too deeply into examining the righteousness and accuracy of the reasoning made by the tribunal in the award.

From the author's perspective, an arbitral award should only be considered as having satisfied the requirement of reasons under 2010 Arbitration Law if the tribunal does state the basis for each of its decisions/conclusions to each dispute issue or claim which the parties request for its decision/resolution. This, however, does not mean that the court is allowed to dig into the quality, persuasiveness or accuracy of the reasonings offered by the tribunal in its award.

In terms of how the word of "basis/reason" (*căn cứ*) as stipulated in Article 61.1.dd of 2010 Arbitration Law should be understood, according to the Vietnamese Dictionary this word means "*something that is used as a support, as a basis for establishing opinion or action*"⁸. Since Article 61.1.dd of 2010 Arbitration Law uses the word of "basis/reason", but not "legal basis/reason", according to the author, its meaning should not be limited to a specific law or legal document.

Instead, it should be interpreted in a broad manner to cover other basis/reasons such as evidences submitted to the tribunal by disputing parties, factual data, fairness, logic, common senses, expert opinions or any other basis/reasons that the tribunal considers appropriate.

When the court considers whether or not an award meets the requirements on reasons as regulated under Ordinance on Arbitration/2010 Arbitration Law or VIAC Rules before moving forward with its decision to setting aside such award, the author shares the view that the court ought to limit itself to examining the existence or non-existence of basis/reason for

6 Đỗ Văn Đại. (2017). *Pháp luật Trọng tài Thương mại Việt Nam*. Nhà Xuất Bản Hồng Đức – Hội Luật Gia Việt Nam.

7 <https://congboanan.toaan.gov.vn/2ta521364t1cvn/chi-tiet-ban-an>

8 Hoàng Khê. (2003). *Căn cứ*. In *Từ điển Tiếng Việt* (Tái bản lần 3, tr. 118). Nhà Xuất Bản Đà Nẵng. <https://archive.org/details/tu-dien-tieng-viet-vien-ngon-ngu-hoc/mode/2up>

each decision/conclusion made by the tribunal in the award only instead of digging into the contents of the award/dispute to evaluate and consider the accuracy and persuasiveness of the basis or reason stated by the tribunal therein.⁹ Practical cases on setting aside arbitral awards show that there is a very thin line between examining the satisfaction on reasoning requirements of an award and re-hearing the merits of dispute. Unfortunately, in Cases No. 2 and 3 above, the court seemingly allowed itself to cross this line when it delved into assessing and considering the accuracy and persuasiveness of the reasonings that the tribunal made in its award. This, according to the author, does constitute a violation against the principle of “not re-hearing the merits of dispute” as enshrined in Article 71.4 of 2010 Arbitration Law.

As a remedy to awards which are not considered as reasoned ones, despite of the issue in terms of the *funtus officio* doctrine, the courts in some countries, instead of setting aside such award immediately, normally remand it to the tribunal for its revision or supplementation to make it be a reasoned one. In fact, a similar mechanism is regulated in Article 71.7 of 2010 Arbitration Law saying that “*The council of judges may, at the request of a party and if the council considers it appropriate, adjourn a petition to set aside an arbitral award for a period of not to exceed sixty (60) days in order to facilitate the arbitration tribunal in rectifying what in the opinion of the arbitration tribunal were errors in proceedings, thereby removing the grounds for setting aside the arbitral award [...]*” But, unfortunately, an opportunity to rectify or amend awards to avoid them being set aside still seems to be quite luxury to the tribunal in Vietnam.

9 Đỗ Văn Đại. (2017). *Pháp luật Trọng tài Thương mại Việt Nam*. Nhà Xuất Bản Hồng Đức – Hội Luật Gia Việt Nam.

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