

# Appendix IV to Part Ten

## Rationale for No Findings of Fact in Awards

Arbitration awards, unlike ethics decisions, are not subject to appeal and do not include findings of fact or rationale. While arbitration awards may, at times, involve significant sums of money, they differ from the decisions rendered by ethics hearing panels in two significant ways. First, the fact that a party in arbitration does not prevail is in no way an indication that the non-prevailing party behaved in anything other than an ethical manner. It simply means that they were not entitled to a particular sum of money with respect to a particular transaction. Second, the determinations rendered through arbitration have no effect on a REALTOR<sup>®</sup>'s continued good standing in the association or in the real estate community generally, whereas an adverse decision in a matter involving ethics demonstrates that the respondent has, in some way, failed to live up to the standards expected of REALTORS<sup>®</sup> and may result in discipline being imposed, including the possibility of suspension or expulsion from membership.

Arbitration awards are based on the hearing panel's analysis of the entire course of conduct giving rise to a dispute as demonstrated by the evidence and testimony presented in the course of the arbitration hearing. There is generally not a single act (or in some cases failure to act), statement, or particular event, but rather the entire course of conduct or events related to a transaction that forms the basis for the hearing panel making its arbitration award. Reducing, to a comprehensive writing, the grounds on which an arbitration award was made, could frequently be far more complex—and difficult—than formulating the findings of fact (which may involve a single act or disclosure, or failure to act or disclose) which results in a determination that the Code of Ethics has been violated.

Consider that the obligations imposed by the Code of Ethics are, in most instances, clearly articulated in the Articles themselves, in the Standards of Practice, or in the official case interpretations. Thus, it is frequently readily apparent what a REALTOR<sup>®</sup> must do or say or, alternatively, must avoid saying or doing to ensure compliance with the Code. Arbitrable disputes, on the other hand, are very often (though not always)

determined on the basis of procuring cause, a concept that cannot readily be reduced to a prescribed or proscribed action or event.

It is not uncommon for a non-prevailing party in arbitration to request an explanation or justification of a hearing panel's rationale for making an award. While this might be beneficial, at least in the sense that the non-prevailing party might understand, if not appreciate, the basis on which the award was based, there has been an on-going concern that, given the task of comprehensively and accurately articulating all of the acts and factors that are taken into account by an arbitration panel in rendering its award, there might be an understandable (and possibly unavoidable) tendency to oversimplify or generalize the basis on which an award was made, with the resulting explanation or rationale or "findings", whether written or oral, being relied on by the non-prevailing party (and likely by others) as "precedent" to be introduced and relied on at future arbitration hearings. The unintended consequence of providing explanations or rationale or "findings" is contrary to the policy embodied in Official Interpretation 31 of Article I, Section 2 of the National Association's bylaws which prohibits any rule or policy predetermining awards in arbitration. Arbitrable matters must be decided not on the basis of a single aspect of the total transaction, such as making the first showing, or writing the contract, but rather on careful, deliberate consideration of all relevant facts and circumstances.

While the question of whether arbitration decisions should include findings of fact has been discussed by the Professional Standards Committee on several occasions over the years, the Committee has consistently held that any possible educational benefits are far outweighed by the possibility that a proliferation of local association "arbitration case law" might quickly come into existence and that hearing panels would come to rely on these local determinations as the basis for subsequent arbitration awards instead of looking at each disputed transaction in its totality. It is for these reasons that the policies and procedures in the *Code of Ethics and Arbitration Manual* do not contemplate that written or oral explanations or rationale or "findings" will be part of arbitration awards rendered by hearing panels of associations of REALTORS<sup>®</sup>.