CHAPTER 788
ARBITRATION

788.01 Arbitration clauses in contracts enforceable. A provision in any written contract to settle by arbitration a controversy thereafter arising out of the contract, or out of the refusal to perform the whole or any part of the contract, or an agreement in writing between 2 or more persons to submit to arbitration any controversy existing between them at the time of the agreement to submit, shall be valid, irrevocable and enforceable except upon such grounds as exist at law or in equity for the revocation of any contract. This chapter shall not apply to contracts between employers and employees, or between employers and associations of employees, except as provided in s. 111.10, nor to agreements to arbitrate disputes under s. 292.63 (6) (b) or 230.44 (4) (b).

History: 1979 c. 32 s. 64; Stats. 1979 s. 788.01; 1993 a. 16; 1997 a. 237, 254; 2001 a. 38; 2013 a. 20.

An insurer’s refusal to either pay the plaintiff’s claim under the uninsured motorist provision of its automobile policy or to submit to arbitration an arbitration clause that could be invoked by either party constituted a breach of the contract and a waiver of the insurer’s right to later demand arbitration. Collicott v. Economy Fire and Casualty Co. 68 Wis. 2d 115, 227 N.W.2d 668 (1975).

Failure to comply with provisions of ch. 298 (now ch. 788) constitutes waiver of the contractual right to arbitrate. State ex rel. Carl v. Charles, 71 Wis. 2d 85, 237 N.W.2d 29 (1976).

If the intent of the parties is not clearly expressed, the court favors construing an arbitration agreement as statutory rather than common law arbitration. Stradinger v. City of Whitewater, 89 Wis. 2d 19, 277 N.W.2d 827 (1979).

Although courts have common law jurisdiction to enforce arbitration awards generally, they cannot enforce an award against the state absent express legislative authorization. See Wisconsin Teachers Association v. UW-Madison 96 Wis. 2d 492, 292 N.W.2d 657 (Ct. App. 1980). See also the note to State v. P.G. Miron Const. Co.

Municipal labor arbitration is within the scope of ch. 788. Milwaukee District Council 48 v. Milwaukee Sewerage Commission, 107 Wis. 2d 592, 321 N.W.2d 309 (Ct. App. 1982).

Insurance coverage is a proper matter for arbitration. Maryland Casualty Co. v. Seidenspinner, 181 Wis. 2d 930, 512 N.W.2d 166 (Ct. App. 1994).

Sovereign immunity is not applicable to arbitration and there need not be specific statutory authority for the state to be subject to the arbitration provisions of ch. 788. State v. P.G. Miron Construction Co. 181 Wis. 2d 1045, 512 N.W.2d 499 (1994).

Preclusion doctrines preventing rehearing of identical claims are applicable to a limited extent in arbitration cases. Dane County v. Dane County Union Local 65, 210 Wis. 2d 267, 565 N.W.2d 540 (Ct. App. 1997), 96–0359.

Whether the parties agreed to submit an issue to arbitration is a question of law for the courts to decide. Kimberly Area School District v. Zdanovec, 222 Wis. 2d 27, 586 N.W.2d 41 (Ct. App. 1998), 96–0783.

The trial court erred in ruling that the unavailability of the arbitrator named in an agreement resulted in a dissolution of the agreement’s arbitration provision. When the primary purpose of the dispute resolution provision in the agreement is to arbitrate disputes that arise between the parties, the unavailability of the named arbitrator does not nullify an arbitration provision. Madison Teachers, Inc. v. Wisconsin Education Association Council, 2005 WI App 180, 285 Wis. 2d 737, 703 N.W.2d 711, 04–1053.

The designation of a specific arbitration service and the incorporation of its rules governing all aspects of arbitration was integral to the parties’ alternate dispute resolution (ADR) agreement to a degree as integral as the agreement to arbitrate itself. In light of a consent judgment effectively barring the arbitration service from arbitration, the ADR agreement failed altogether. Riley v. Extendicare Health Facilities, Inc., 2013 WI App 9, 345 Wis. 2d 804, 826 N.W.2d 396, 12–0311.

This section provides that a contractual provision to arbitrate is irrevocable “except upon such grounds as exist at law or in equity for the revocation of a contract.” No Wisconsin or federal case establishes that, once arbitration is contracted as the forum for dispute resolution, parties can never later contract for an alternative forum for dispute resolution. Fundamental principles of freedom to contract support the proposition that parties can subsequently contract to modify the terms of a previous contract. Accord, after a party loses such freedom to contract, another contract that clearly and expressly supersedes a first contract is grounds as exist at law or in equity for the revocation of a contract. Midwest Neuroscientists Associates, LLC v. Great Lakes Neurological Associates, LLC, 2018 WI 112, 384 Wis. 2d 669, 920 N.W.2d 767, 16–0601.

Commercial arbitration agreements: let the signers beware. 61 MLR 466.

788.015 Agreement to arbitrate real estate transaction disputes. A provision in any written agreement between a purchaser or seller of real estate and a real estate broker, or between a purchaser and seller of real estate, to submit to arbitration any controversy between them arising out of the real estate transaction is valid, irrevocable and enforceable except upon any grounds that exist at law or in equity for the revocation of any agreement. The agreement may limit the types of controversies required to be arbitrated and specify a term during which the parties agree to be bound by the agreement.

History: 1991 a. 163.

788.02 Stay of action to permit arbitration. If any suit or proceeding be brought upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in performing with such arbitration.

History: 1979 c. 32 s. 64; Stats. 1979 s. 788.02.

Commencing litigation did not waive a contractual right to arbitration. J.J. Andrews, Inc. v. Midwest, 164 Wis. 2d 215, 474 N.W.2d 756 (Ct. App. 1991). The right to arbitrate may be waived. Conduct that allows an action to proceed to a point where the purpose of arbitration is frustrated estops a party from claiming a right to arbitration. Meyer v. Classified Ins. Corp. 179 Wis. 2d 386, 507 N.W.2d 149 (Ct. App. 1993).

In determining whether a dispute is arbitrable, a court’s function is limited to a determination of whether: 1) there is a construction of the arbitration clause that would cover the grievance on its face; and 2) whether any other provision of the contract specifically excludes it. Mortimore v. Merge Technologies Inc., 2012 WI App 109, 344 Wis. 2d 459, 824 N.W.2d 155, 11–1039.

In determining a court’s function in arbitration disputes, Wisconsin has adopted the following general teachings: 1) arbitration is a matter of contract, and, as such, no party can be compelled to arbitrate a matter that the party has not agreed to submit to arbitration; 2) the question of arbitrability is one for judicial determination unless the parties expressly agree otherwise; 3) in determining whether the parties have agreed to submit a matter for arbitration, the court does not consider the merits of the underlying claim; 4) contracts that contain arbitration clauses carry a strong presumption of arbitration; therefore, doubts are resolved in favor of arbitration coverage. Mortimore v. Merge Technologies Inc., 2012 WI App 109, 344 Wis. 2d 459, 824 N.W.2d 155, 11–1039.

Parties may contract broadly and agree to arbitrate even the issue of arbitrability. However, arbitrators cannot determine whether they have the authority to decide arbitrability unless the parties give arbitrators such authority. The evidence of this grant of authority must be clear and unmistakable; otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator. Midwest Neuroscientists Associates, LLC v. Great Lakes Neurological Associates, LLC, 2018 WI 112, 384 Wis. 2d 669, 920 N.W.2d 767, 16–0601.

A court should order arbitration only if the court is satisfied that neither the form nor the substance of the parties’ arbitration agreement nor (absent a valid provision specifically committing such disputes to arbitration) its enforceability or applicability to the dispute in issue is in question. In answering both who determines arbitrability and what is subject to arbitration, a court applies state–law contract principles and this chapter. Accord, after a party loses such freedom to contract, another contract that clearly and expressly supersedes a first contract is grounds as exist at law or in equity for the revocation of a contract. Midwest Neuroscientists Associates, LLC v. Great Lakes Neurological Associates, LLC, 2018 WI 112, 384 Wis. 2d 669, 920 N.W.2d 767, 16–0601.

Commercial arbitration agreements: let the signers beware. 61 MLR 466.

788.10 Vacation of award, rehearing by arbitrators. 788.11 Modification of award. 788.12 Judgment. 788.13 Notice of motion to change award. 788.14 Papers filed with motion regarding award; entry of judgment, effect of judgment. 788.15 Appeal from order or judgment. 788.17 Title of act. 788.18 Not retroactive.

788.03 Court order to arbitrate; procedure. The party aggrieved by the alleged failure, neglect or refusal of another to perform any provision of a written agreement for arbitration may petition any court of record having jurisdiction of the parties or of the property for an order directing that such arbitration proceed as provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made as provided by law for the service of a summons. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. If the making of the arbitration agreement or the failure, neglect or refusal to perform the same is in issue, the court shall proceed summarily to the trial thereof. If no jury trial is demanded, the court shall hear and determine such issue. Where such an issue is raised, either party may, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the dispute to a jury summonsed and selected under s. 756.06. If the jury finds that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury finds that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

History:
788.03 Sup. Ct. Order, 67 Wis. 2d 585, 775 (1975); 1977 c. 187 s. 135; 1979 c. 32 s. 64; Stats. 1979 s. 788.03; Sup. Ct. Order No. 96-08, 207 Wis. 2d (1997).

An insurance company that may be wounded by its insurer's refusal to arbitrate the insured's uninsured motorist claim until after the insured's passengers' claims were litigated was not an "aggrieved party" within the meaning of this section. Worthington v. Farmers Insurance Exchange, 77 Wis. 2d 508, 253 N.W.2d 76 (1977).

In the absence of a reservation of rights, "partial participation" in the arbitration process is not a reservation of rights. The Payday Loan Store of Wisconsin Inc. v. Krueger, 2015 WI App 25, 346 Wis. 2d 237, 828 N.W.2d 587, 12-0751.

788.04 Arbitrators, how chosen. (1) If, in the agreement, provision is made for a method of naming or appointing an arbitrator or arbitrators or an umpire that method shall be followed. If no method is provided in the agreement, or if a method is provided and any party thereto fails to make use of the method, or if for any other reason there is a lapse in the naming of an arbitrator or arbitrators or an umpire, or in filling a vacancy, then upon the application of either party to the controversy, the court specified in s. 788.02 or the circuit court for the county in which the arbitration is to be held shall designate and appoint an arbitrator, arbitrators or umpire, as the case or sub. (2) May require, who shall act under the agreement with the same force and effect as if specifically named in the agreement; and, except as provided in sub. (2) or unless otherwise provided in the agreement, the arbitration shall be by a single arbitrator.

(2) A panel of arbitrators, consisting of 3 persons shall be appointed to arbitrate actions to recover damages for injuries to the person arising from any treatment or operation performed by or any omission by any person who is required to be licensed, registered or certified to treat the sick as defined in s. 448.01 (10).

(a) One arbitrator shall be appointed by the court from a list of attorneys with trial experience. The list shall be prepared and periodically revised by the State Bar of Wisconsin.

(b) One arbitrator shall be appointed by the court from lists of health professionals prepared and periodically revised by the appropriate statewide organizations of health professionals. The lists shall designate the specialty, if any, of each health professional listed. The organizations of health professionals shall assist the court to determine the appropriate specialty of the arbitrator for each action to be arbitrated.

(c) One arbitrator who is not an attorney or a health professional shall be appointed by the court.

(d) Any person appointed to the arbitration panel may disqualify himself or herself or be disqualified by the court if any reason exists which requires disqualification. A substitute member of the arbitration panel shall be chosen in the same manner as the person disqualified was chosen.

(e) No member of the panel may participate in any subsequent court proceeding on the action arbitrated as either a counsel or a witness unless the court deems the member's testimony necessary for hearings under s. 788.10 or 788.11.

History:
788.04 1979 c. 32 s. 64; Stats. 1979 s. 788.05.

788.06 Hearings before arbitrators; procedure. (1) When more than one arbitrator is agreed to, all of the arbitrators shall hear the case unless all parties agree in writing to proceed with a lesser number.

(2) Any arbitrator may issue a subpoena under ch. 885 or may furnish blank forms therefor to a representative for any party to the arbitration. The representative may issue a subpoena under s. 805.07. The arbitrator or representative who issues the subpoena shall sign the subpoena and provide that the subpoena is served as prescribed in s. 805.07 (5). If any person so served neglects or refuses to obey the subpoena, the issuing party may petition the circuit court for the county in which the hearing is held to impose a remedial sanction under ch. 785 in the same manner provided for witnesses in circuit court. Witnesses and interpreters attending before an arbitration shall receive fees as prescribed in s. 814.67.

History:
788.06 1985 a. 168.

788.07 Depositions. Upon petition, approved by the arbitrator or by a majority of them, any court of record in and for the county in which such arbitrators, or a majority of them, are sitting may direct the taking of depositions to be used as evidence before the arbitrators, in the same manner and for the same reasons as provided by law for the taking of depositions in suits or proceedings pending in the courts of record in this state.

History:
788.07 1979 c. 32 s. 64; Stats. 1979 s. 788.07.

Arbitrators have no inherent authority to dictate the scope of discovery. An excepted agreement, the parties are limited to the procedure for depositions described in this section. Borst v. Allstate Insurance Company, 2006 WI 70, 291 Wis. 2d 361, 717 N.W.2d 42, 04-2004.

A party in arbitration to enjoy discovery outside of that allowed by this section, an insurance policy must provide for it expressly, explicitly, specifically, and in a clearly drafted clause. For a policy to adequately describe the discovery mechanisms to be used at arbitration it must indicate the mechanism that the mechanisms are in fact discovery mechanisms and that they are meant to be available at arbitration. A provision stating that "local rules of law as to procedure and evidence will apply" was not found to be specific, and clearly drafted reference to ch. 804 or to any other discovery rules. Marlowe v. IDS Property Casualty Insurance Company, 2013 WI 29, 346 Wis. 2d 490, 828 N.W.2d 812, 11-2067.


788.08 Written awards. The award must be in writing and must be signed by the arbitrators or by a majority of them.

History:
788.08 1979 c. 32 s. 64; Stats. 1979 s. 788.08.

2017-18 Wisconsin Statutes updated through 2019 Wis. Act 8 and through all Supreme Court and Controlled Substances Board Orders filed before and in effect on July 25, 2019. Published and certified under s. 35.18. Changes effective after July 25, 2019, are designated by NOTES. (Published 7-25-19)
An arbitrator exceeded his authority by directing that the grievant be transferred when the contract reserved transfer authority to the city and chief of police. Milwaukee v. Milwaukee Police Association 97 Wis. 2d 15, 292 N.W.2d 841 (1980).

Under a contract gave management to management the arbitrators, the arbitrator did not exceed his authority by overruling management's determination that an employee with 8 years of job experience was not qualified for an advertised position to a job requiring 2 years of college “or its equivalent in management.” Oshkosh v. Union Local 796–9, 99 Wis. 2d 95, 299 N.W.2d 210 (1980).

The burden of proving “evident partiality” of an arbitrator was not met when the apparently biased remarks of the arbitrator represented merely an initial impression, not a final conclusion. Diversified Management Services v. Slotten, 119 Wis. 2d 441, 351 N.W.2d 176 (Ct. App. 1984).

A claim was made for “evident partiality” because the arbitrator failed to disclose past employment with the entity supplying a party’s counsel. Spooner Dist. v. N. W. Educators, 136 Wis. 2d 263, 401 N.W.2d 578 (1987).

A challenge cannot be made to an arbitrator who acted outside the scope of his authority if an objection was not raised before the arbitrator. DePue v. Mastermold, Inc. 161 Wis. 2d 697, 468 N.W.2d 750 (Ct. App. 1991).

A party disputing the existence of an agreement to arbitrate may choose not to participate in arbitration and may challenge the existence of the agreement by motion to vacate the award under sub. (1) (d). Scholl v. Lundberg, 178 Wis. 2d 239, 504 N.W.2d 115 (Ct. App. 1993).

If arbitrators had a reasonable basis for not following case law, the arbitrators’ decision will not be interfered with by the court. Lukowski v. Danner, 184 Wis. 2d 142, 515 N.W.2d 883 (1994).

“Evident partiality” under sub. (1) (b) exists only when a reasonable person knowing previously undisclosed information would have doubts about the arbitrator’s impartiality that the person would have taken action on the information. DeBarber v. Shriver, 153 Wis. 2d 104, 533 N.W.2d 464 (1995).

This section does not prevent the vacation of an arbitration award on the basis of a manifest disregard of the law. Employers Insurance of Wausau v. Lloyd’s London, 202 Wis. 2d 673, 552 N.W.2d 420 (Ct. App. 1996), 95–2930.

An arbitrator made a mistake by erroneously rejecting a valid legal defense does not provide grounds for vacating an award unless the arbitrator deliberately disregarded the law. Flexible Manufacturing Systems v. Super Products Corp. 56 F.3d 96 (1996).

Courts may vacate an arbitration award that was procured by fraud, but should be hound to do so in order to protect the integrity of arbitration. Arbitrators are not required to adhere to the procedural law of an arbitration, but must necessarily proceed in accordance with the law. Evident partiality under sub. (1) (b) may be avoided simply by a full disclosure and a declaration of impartiality. The circuit court must vacate an arbitration award under sub. (1) (b) due to evident partiality if, based on evidence that is clear, plain, and apparent, a reasonable person would have serious doubts about the impartiality of the arbitrator. An ongoing attorney–client relationship between an insurer and its named arbitrator is of such a substantial nature that a reasonable person would have the same doubts about the arbitrator’s impartiality. An ongoing attorney–client relationship between an insurer and its named arbitrator is of such a substantial nature that a reasonable person would have the same doubts about the arbitrator’s impartiality. An ongoing attorney–client relationship between an insurer and its named arbitrator is of such a substantial nature that a reasonable person would have the same doubts about the arbitrator’s impartiality.

A party involved in an arbitration proceeding must ordinarily wait until the arbitrator provides a final award before challenging the award. A party had the burden of proving that the arbitrator had exceeded his authority by directing that the grievant be transferred when the contract reserved transfer authority to the city and chief of police. A party involved in an arbitration proceeding must ordinarily wait until the arbitrator provides a final award before challenging the award. A party had the burden of proving that the arbitrator had exceeded his authority by directing that the grievant be transferred when the contract reserved transfer authority to the city and chief of police. A party involved in an arbitration proceeding must ordinarily wait until the arbitrator provides a final award before challenging the award. A party had the burden of proving that the arbitrator had exceeded his authority by directing that the grievant be transferred when the contract reserved transfer authority to the city and chief of police.
788.11 **Modification of award.** (1) In either of the following cases the court in and for the county wherein the award was made must make an order modifying or correcting the award upon the application of any party to the arbitration:

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing or property referred to in the award;

(b) Where the arbitrators have awarded upon a matter not submitted to them unless it is a matter not affecting the merits of the decision upon the matters submitted;

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

(2) The order must modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

**History:** 1979 c. 32 s. 64; Stats. 1979 s. 788.11.

788.12 **Judgment.** Upon the granting of an order confirming, modifying or correcting an award, judgment may be entered in conformity therewith in the court wherein the order was granted.

**History:** 1979 c. 32 s. 64; Stats. 1979 s. 788.12.

There is no statutory authority for awarding costs to a party in an arbitration proceeding. Finkenbinder v. State Farm Mutual Insurance Co. 215 Wis. 2d 145, 572 N.W.2d 501 (Ct. App. 1997), 97−0357.

788.13 **Notice of motion to change award.** Notice of a motion to vacate, modify or correct an award must be served upon the adverse party or attorney within 3 months after the award is filed or delivered, as prescribed by law for service of notice of a motion in an action. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

**History:** 1979 c. 32 s. 64; 1979 c. 176; Stats. 1979 s. 788.13.