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 (6s) 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 under an arbitration clause that could be invoked by either party constituted a breach of the contract and a waiver of 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 arbitration. 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. Stadlinger 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 authority. See State ex rel. Teaching Associates Associates v. UW—Madison 96 Wis. 2d 492, 292 N.W.2d 657 (Ct. App. 1980). But 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 596, 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 186 (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, 277 N.W.2d 827 (Ct. App. 1979), cert. denied, 439 U.S. 851, 99 S.Ct. 161, 58 L.Ed.2d 146 (1978) (holding that the doctrine of collateral estoppel, applicable to state cases, is also applicable to arbitration agreements).

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

This section provides that a contractual provision to arbitrate “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 an arbitration is contracted as the forum for disputes, 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. This type of freedom does not limit 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.

Arbitration is a matter of contract between private parties who enjoy that freedom. A court has no authority to determine whether a contractually agreed upon arbitration. The circuit court may act only to ensure the parties who contracted for arbitration abide by their contractual agreement. State ex rel. CityDeck Landing LLC v. Circuit Court for Brown County, 2591 W1 15, 385 Wis. 2d 151, 936 N.W.2d 872, 18-0299.

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

Arbitration to a court’s mind 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, 32 Wis. 2d 459, 824 N.W.2d 155, 11–1039.

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, 32 Wis. 2d 459, 824 N.W.2d 155, 11–1039.

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Commercial arbitration agreements: let the signers beware. 61 MLR 466.
pute is in issue. In answering both who determines arbitrability and what is subject to arbitration, a court applies state—law contract principles and this chapter. Accordingly, a court may invalidate an arbitration agreement based on generally applicable contract defenses, such as illegality, fraud or unconscionability, but not on legal rules that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue. Midwest Neurosciences Associates, LLC v. Great Lakes Neurosurgical Associates, LLC, 2018 WI 112, 384 Wis. 2d 669, 920 N.W.2d 767, 16—6601.

788.03 Court order to arbitrate; procedure. The party aggrieved by the alleged failure, neglect or refusal of another to perform under 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 arbitrate 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. If the parties agree that a jury trial of such issue, and upon such demand the court shall make an order referring the issue to a jury summoned 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: 1953 c. 141, 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 xv (1997).

An insurer who acceded to the insurer’s refusal to arbitrate the insured’s uninsured motorist claim until after the insurer’s passengers’ claims were litigated was not an “agreed party” within the meaning of this section. Worthington v. Farmers Insurance Exchange, 77 Wis. 2d 508, 233 N.W.2d 76 (1977).

In the absence of a reservation of rights, “partial participation” in the arbitration process may entitle a party from challenging an arbitration agreement. Pilgrim Investment Corp. v. Reed, 156 Wis. 2d 677, 457 N.W.2d 544 (Clt. App. 1990).

This section is only available when an underlying lawsuit has not yet been filed. When a lawsuit has been commenced, a party may not use the special procedure outlined in this section to compel arbitration. The party may still seek an order to arbitrate, but it must do so in the court where the underlying lawsuit is pending, not by initiating a special proceeding. The Payday Loan Law of Wisconsin Inc. v. Kreuger, 2013 WI App 25, 346 Wis. 2d 237, 828 N.W.2d 587, 12—0751.

Timeliness and estoppel defenses against arbitration are to be determined in the arbitration proceeding, not by a court in a proceeding under this section to compel arbitration. This conclusion in this case was based on Wisconsin’s public policy favoring arbitration, the arbitration agreement in this case, the Realtors’ Association’s arbitration rules that place the limited role of courts as to actions to compel arbitration in this section, and relevant case law. First Weber Group, Inc. v. Synergy Real Estate Group, LLC, 2015 WI 34, 361 Wis. 2d 496, 860 N.W.2d 498, 13—1205.

The legislature has determined that there be a limited role that can be performed by courts in the context of arbitration. In an action to compel arbitration under this section, the issues are limited to the making of the arbitration agreement or the failure, neglect, or refusal to perform under the agreement. When determining whether a dispute is arbitrable, a court’s function is limited to a determination of whether there is a construction of the arbitration clause that would cover the grievance on its face and whether any other provision of the contract specifically excludes it. First Weber Group, Inc. v. Synergy Real Estate Group, LLC, 2015 WI 34, 361 Wis. 2d 496, 860 N.W.2d 498, 13—1205.

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, 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 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 state wide 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: 1977 c. 43, 1977 c. 26, 75; 1977 c. 449; 1979 c. 32 ss. 64, 92 (15); Stats. 1979 s. 788.04; 2001 a. 103.

788.05 Court procedure. Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

History: 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 thereto for a representative for any party to the arbitration. The representative may issue a subpoena under ch. 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: 1985 a. 168.

788.07 Depositories. Upon petition, approved by the arbitrators 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: 1979 c. 32, s. 64; Stats. 1979 s. 788.07.

Arbitrators have no inherent authority to dictate the scope of discovery. Absent an express agreement, the parties are limited to the procedure for depositions, as defined in this section. Borst v. Allstate Insurance Company, 2006 WI 70, 231 Wis. 2d 361, 717 N.W.2d 42, 04—2004.

For 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 in the policy that the mechanisms are in fact discovery mechanisms and that the information is to be made available at arbitration. A provision stating that “local rules of law as to procedure and evidence will apply” was not an explicit, specific, and clearly drafted reference to ch. 804 or to any other discovery
Courts should apply one standard of review of arbitration awards under municipal collective bargaining agreements. Madison Metropolitan School District v. WERC, 86 Wis.2d 249, 272 N.W.2d 314 (Cl. App. 1978).

An arbitrator does not apply when the prevailing party moves to confirm under ss. 788.09 and an adverse party wishes to raise objections under ss. 788.10 and 788.11. Milwaukee Police Association v. Milwaukee, 92 Wis. 2d 145, 285 N.W.2d 119 (1979).

An arbitrator appointed under a specific contract had no power to make awards under successor contracts not in existence at the time the grievance was submitted. Milwaukee Board of School Directors v. Milwaukee Teachers’ Education Association, 72 Wis. 4d 135, 287 N.W.2d 481 (1980).

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 Police Association v. Milwaukee, 72 Wis. 2d 25, 252 N.W.2d 884 (1977).

Although a contract gave management the right to determine job classification, the arbitrator did not exceed his authority by overriding management’s determination that an employee with 8 years of experience was not qualified for promotion to a job requiring 2 years of college “or its equivalent as determined by management.” Oshkosh v. Union Local 796-A, 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. Sloten, 119 Wis. 2d 441, 351 N.W.2d 176 (1984).

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

A party cannot complain to the courts that an arbitrator acted outside the scope of his authority if an objection was not raised before the arbitrator. DePue v. Mastermark, 161 Wis. 2d 697, 468 N.W.2d 750 (Cl. 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 259, 504 N.W.2d 5 (Cl. 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. Danekert, 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 such doubts about the arbitrator’s impartiality that the party would have taken action on the information. DeBaker v. Shah, 194 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 of London, 206 Wis. 2d 467, 552 N.W.2d 423 (Cl. App. 1996), 95-2930.

An arbitrator’s award that relied on oral testimony with no formal record, rather than the wording of the prevailing party’s proposal, was not final and definite as required by sub. (1) (d). LaCrosse Professional Police Association v. City of LaCrosse, 212 Wis. 2d 90, 568 N.W.2d 20 (Cl. App. 1997), 96-2741.

That 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., 96 F.3d 996 (1996).

Courts may vacate an arbitration award that was procured by fraud, but should be hesitant to do so in order to protect the finality of arbitration decisions. To merit vacation of the award, the plaintiff must demonstrate: 1) clear and convincing evidence of fraud; 2) that the fraud materially relates to an issue involved in the arbitration; and 3) that the fraud caused a party to enter into a contract and exceed the authority granted by the collective bargaining agreement. 291 Wis. 2d 361, 717 N.W.2d 42, 04-0044.

An arbitrator exceeded his authority under sub. (1) (d) in determining that the discharge of a city employee for a violation of an ordinance residency requirement was not for just cause within the meaning of the collective bargaining agreement. WERC v. Teamsters Local No. 653, 75 Wis. 2d 602, 250 N.W.2d 696 (1977).

An arbitrator did not exceed his powers by adopting a ministerial–substantive distinction in determining the scope of the unfettered management function provided by the agreement. The arbitrator did exceed his powers by ordering maintenance of past practice which was contrary to the agreement and such action. Milwaukee Firefighters Local 215 v. Milwaukee, 78 Wis. 2d 253, 253 N.W.2d 481 (1973).

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An arbitrator exceeded his authority by determining that the discharge of the counterculture was not for just cause. The arbitrator’s decision was properly modified by the circuit court under ss. 788.10 and 788.11 because the arbitrators exceeded their authority by failing to fully review and apply the supreme court’s decisions on the collateral source rule. Kee v. Milwaukee Police Association, 93 Wis. 2d 415, 287 N.W.2d 481 (1980).

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 Police Association v. Milwaukee, 92 Wis. 2d 145, 285 N.W.2d 119 (1979).

A court may order arbitrators to hear further testimony without establishing a new panel. Gallagher v. Schmermek, 60 Wis. 2d 143, 208 N.W.2d 437 (1973).

The arbitration panel’s decision in this case was properly modified by the circuit court under ss. 788.10 and 788.11. The arbitration panel’s decision in this case was properly modified by the circuit court under ss. 788.10 and 788.11. Therefore, as a matter of law, the arbitrator was evidently partial and the arbitration award must be vacated. Borst v. Allstate Insurance Company, 2006 WI 70, 291 Wis. 2d 361, 717 N.W.2d 42, 04-0044.

A party cannot complain to the courts that an arbitrator acted outside the scope of his authority if an objection was not raised before the arbitrator. DePue v. Mastermark, 161 Wis. 2d 697, 468 N.W.2d 750 (Cl. 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 259, 504 N.W.2d 5 (Cl. 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. Danekert, 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 such doubts about the arbitrator’s impartiality that the party would have taken action on the information. DeBaker v. Shah, 194 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 of London, 206 Wis. 2d 467, 552 N.W.2d 423 (Cl. App. 1996), 95-2930.

An arbitrator’s award that relied on oral testimony with no formal record, rather than the wording of the prevailing party’s proposal, was not final and definite as required by sub. (1) (d). LaCrosse Professional Police Association v. City of LaCrosse, 212 Wis. 2d 90, 568 N.W.2d 20 (Cl. App. 1997), 96-2741.

That 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., 96 F.3d 996 (1996).

Courts may vacate an arbitration award that was procured by fraud, but should be hesitant to do so in order to protect the finality of arbitration decisions. To merit vacation of the award, the plaintiff must demonstrate: 1) clear and convincing evidence of fraud; 2) that the fraud materially relates to an issue involved in the arbitration; and 3) that the fraud caused a party to enter into a contract and exceed the authority granted by the collective bargaining agreement. 291 Wis. 2d 361, 717 N.W.2d 42, 04-0044.
rule and the law of damages. Orlowski v. State Farm Mutual Automobile Insurance Company, 2012 WI 21, 339 Wis. 2d 1, 810 N.W.2d 775, 09–2484.

A party involved in an arbitration proceeding must ordinarily wait until the arbitrators have reached a final decision on the award to be given, if any, before turning to the circuit courts. Courts that have permitted interlocutory review during an arbitration proceeding have done so only in rare circumstances that present a compelling reason to depart from the normal practice, balancing the need for efficient and orderly arbitration proceedings with the need for an occasional exception to accommodate especially urgent or potentially irreparably prejudicial matters that demand the immediate attention of the courts. Marlowe v. IJS Property Casualty Insurance Company, 2013 WI 29, 346 Wis. 2d 450, 828 N.W.2d 812, 11–2067.

788.10 ARBITRATION

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 motion in an action. For the purposes of the motion any judge who filed or delivered, as prescribed by law for service of notice of a motion to vacate, modify or correct an award must be served upon failing to fully review and apply the supreme court's decisions on the collateral source rule and the law of damages. Orlowski v. State Farm Mutual Automobile Insurance Company, 2012 WI 21, 339 Wis. 2d 1, 810 N.W.2d 775, 09–2484.

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.

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.

788.14 Papers filed with motion regarding award; entry of judgment, effect of judgment. (1) Any party to a proceeding for an order confirming, modifying or correcting an award shall, at the time the order is filed with the clerk of circuit court for the entry of judgment thereon, also file the following papers with the clerk of circuit court:

(a) The agreement, the selection or appointment, if any, of an additional arbitrator or umpire, and each written extension of the time, if any, within which to make the award;

(b) The award;

(c) Each notice, affidavit or other paper used upon an application to confirm, modify or correct the award, and a copy of each order of the court upon such an application.

(2) The judgment shall be entered in the judgment and lien docket as if it was rendered in an action.

(3) The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

788.15 Appeal from order or judgment. An appeal may be taken from an order confirming, modifying or vacating an award, or from a judgment entered upon an award, as from an order or judgment in an action.

788.16 Title of act. This chapter may be referred to as “The Wisconsin Arbitration Act”.