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 (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 together constituted a breach of the contract and a waiver of the insurer’s right to later demand arbitration. Collectivitz 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 may construe 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. State ex rel. School Teaching Assistants Associates v. UW-Madison 96 Wis. 2d 492, 292 N.W.2d 657 (Ct. App. 1980). But see the note to State v. P.G. Miron Const. Co.

Municipal labor arbitration is within the scope of ch. 788. Milwaukee County Council v. Milwaukee Sewerage Commission, 107 Wis. 2d 590, 321 N.W.2d 392 (Ct. App. 1982).

Insurance coverage is a proper matter for arbitration. Maryland Casualty Co. v. Seidenspinner, 181 Wis. 2d 930, 512 N.W.2d 136 (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, 283 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 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 agree otherwise; 3) in determining whether the parties 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.

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.

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 Neurosciences Associates, LLC v. Great Lakes Neurosurgical 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 formation of the parties’ arbitration agreement nor (absent a valid provision specifically committing such disputes to an arbitrator) its enforceability or applicability to the dispute...
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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 doctrines like 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, 16-0061.

The procedure under this section is somewhat truncated in comparison to s. 788.03, but the circuit court’s responsibility is essentially the same. Both this section and s. 788.02 require the circuit court to do nothing more than determine whether the parties must arbitrate their dispute and then ensure that they do. L.G. v. Aurora Residential Alternatives, Inc., 2019 WI 79, 387 Wis. 2d 724, 929 N.W.2d 590, 18-0065.

An application to stay pursuant to this section is a special proceeding following the terms of s. 808.03 (1), and a circuit court order denying a request to compel arbitration and stay pending lawfulness for the purposes of appeal. L.G. v. Aurora Residential Alternatives, Inc., 2019 WI 79, 387 Wis. 2d 724, 929 N.W.2d 590, 18-0065.

388.03 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 compelling 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 refusal or neglect 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 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: Sup. Ct. Order, 67 Wis. 2d 585, 775 (1975); 1977 c. 187; 135; 1979 c. 32 s. 61; Stats. 1979 c. 788.03 (supp.); Sup. Ct. Order No. 96-08, 207 Wis. 2d xx (1997).

An accused who insured the insurer’s refusal to arbitrate the insured’s uninsured motorist claim until after the insured’s purchasers’ claims were litigated was not an “affected 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 procedure may not properly be claimed as a dispute over an arbitration agreement. Pulson Investment Corp. v. Reed, 156 Wis. 2d 677, 457 N.W.2d 544 (Ct. App. 1990).

This section is only available when an underlying lawsuit has not yet been filed. 860 N.W.2d 498, 18−0656.

When more than one arbitrator is agreed to, all of the 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 court shall designate the speciality, 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 or the issue, except 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: 1975 c. 43, 199; 1977 c. 26 s. 75; 1977 c. 418 s. 929 (41); 1977 c. 499; 1979 c. 32 ss. 64, 92 (15); Stats. 1979 s. 788.04; 2001 a. 103.

388.05 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.

388.06 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 shall 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.

388.07 Depositions. 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.

Updated 2017–18 Wis. Stats. Published and certified under s. 35.18. Changes effective after June 19, 2020, are designated by NOTES. (Published 6–19–20)
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 described in this section. \(\text{Wis. Stat.} 1979\text{c. 32 s. 64}\).

For a party in arbitration to enjoy discovery outside of that allowed by this section, an insurance policy must provide for it expressly, explicitly, 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 they are meant to be available at arbitration. A provision stating “rules of discovery” in the policy and evidence will not be an explicit, specific, and clearly drafted reference to ch. 804 or any other discovery rules.

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WI 51, 317 Wis. 2d 691, 766 N.W.2d 591, 08−0519. See also Milwaukee Police Supervisors’ Organization v. City of Milwaukee, 2012 WI App 59, 341 Wis. 2d 361; 815 N.W.2d 391, 11−1174.

The arbitration panel’s decision in this case 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 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, 09−2848.

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. IDS Property Casualty Insurance Company, 2013 WI 29, 346 Wis. 2d 450, 828 N.W.2d 812, 12−2067.


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 a party 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.

The intent of the parties controls a determination under sub. (1) (b) whether a matter was submitted to the arbitrator. Milwaukee Professional Fire Fighters Local 215 v. Milwaukee, 78 Wis. 2d 1, 253 N.W.2d 481 (1977).

A court had no jurisdiction to vacate or modify an award if grounds under s. 788.10 or 788.11 did not exist. Milwaukee Police Association v. Milwaukee, 92 Wis. 2d 175, 285 N.W.2d 133 (1979).

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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. Finkenburg 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.

The time limit under s. 788.13 does not apply when the prevailing party moves to confirm under s. 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).


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.

History: 1979 c. 32 s. 64; Stats. 1979 s. 788.14; 1995 a. 224.

Section 806.07 (1) can be used to reopen judgments confirming arbitration awards. Under sub. (3), a judgment confirming an arbitration award 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.” Sanders v. Menard, Inc. 2013 WI App 47, 347 Wis. 2d 446, 831 N.W.2d 805, 12−0286.

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

History: 1979 c. 32 s. 64; Stats. 1979 s. 788.15.

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

History: 1979 c. 32 s. 64; Stats. 1979 s. 788.17.

788.18  Not retroactive. The provisions of this chapter shall not apply to contracts made prior to June 19, 1931.

History: 1979 c. 32 s. 64; Stats. 1979 s. 788.18.