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 submit disputes under s. 292.63 (6s) or 230.44 (4) (bmn).

Vacation of award, rehearing by arbitrators. Any party may apply to the arbitrator(s) for vacation of the award or rehearing of the award on the ground that there was misconduct of the arbitrator(s) or that the arbitrator(s) was not impartial, unless such application is made within 30 days after receipt of the award by the party to whom notice of the award is given. The arbitrator(s) may vacate the award, in whole or in part, or order a rehearing on the ground that there was misconduct of the arbitrator(s) or that the arbitrator(s) was not impartial, unless such application is made within 30 days after receipt of the award by the party to whom notice of the award is given.

Modification of award. A party may request the arbitrator(s) to modify an award, in whole or in part, unless such application is made within 30 days after receipt of the award by the party to whom notice of the award is given. The arbitrator(s) may modify the award, in whole or in part, unless such application is made within 30 days after receipt of the award by the party to whom notice of the award is given.

Notice of motion to change award. A party may request the arbitrator(s) to issue a motion to change an award, unless such application is made within 30 days after receipt of the award by the party to whom notice of the award is given. The arbitrator(s) may issue a motion to change the award, unless such application is made within 30 days after receipt of the award by the party to whom notice of the award is given.

Papers filed with motion regarding award; entry of judgment, effect of judgment. Any party may file and serve papers with a motion regarding an award, unless such application is made within 30 days after receipt of the award by the party to whom notice of the award is given. The arbitrator(s) shall enter judgment, unless such application is made within 30 days after receipt of the award by the party to whom notice of the award is given. Judgment entered shall be conclusive, except as otherwise provided by this chapter or the agreement to arbitrate.

Appeal from order or judgment. A party may appeal from an order or judgment, unless such application is made within 30 days after receipt of the award by the party to whom notice of the award is given. The arbitrator(s) shall enter judgment, unless such application is made within 30 days after receipt of the award by the party to whom notice of the award is given. Judgment entered shall be conclusive, except as otherwise provided by this chapter or the agreement to arbitrate.

Title of act. A party may request that the arbitrator(s) issue a title of act, unless such application is made within 30 days after receipt of the award by the party to whom notice of the award is given. The arbitrator(s) shall issue a title of act, unless such application is made within 30 days after receipt of the award by the party to whom notice of the award is given. The title of act shall be conclusive, except as otherwise provided by this chapter or the agreement to arbitrate.

Arbitration is not retrospective. An agreement to arbitrate shall not be invoked to require arbitration of issues the existence of which was not known to the parties when the agreement to arbitrate was entered into, or which were unsuspected by reason of the care exercised, unless such application is made within 30 days after receipt of the award by the party to whom notice of the award is given. The arbitrator(s) shall invoke arbitration of issues the existence of which was not known to the parties when the agreement to arbitrate was entered into, or which were unsuspected by reason of the care exercised, unless such application is made within 30 days after receipt of the award by the party to whom notice of the award is given.

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 submit disputes under s. 292.63 (6s) or 230.44 (4) (bmn).

History: 1979 c. 32 s. 64; Stats. 1979 s. 788.01; 1993 a. 16; 1997 a. 237 s. 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 was a factor that entitled the insured to recover its expenses of litigation. Wisconsin Mutual Life Ins. Co. v. 38. 703 N.W.2d 711 (Ct. App. 1994).

Although courts have common law jurisdiction to enforce arbitration awards generally, they cannot enforce an award against the state absent express legislative authorization. Association Council, State v. P.G. Miron Construction Co. 68 Wis. 2d 115, 227 N.W.2d 678 (1975).

Failure to comply with provisions of ch. 298 (now ch. 788) constitutes waiver of a right to later demand arbitration. Collicott v. City of Whitewater, 89 Wis. 2d 17, 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. Association Council, 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 590, 321 N.W.2d 109 (Ct. App. 1982).

Insurance coverage is a proper matter for arbitration. Maryland Casualty Co. v. Seidenspinner, 181 Wis. 2d 950, 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 reharing 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. 1999), 98-0783.

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 availability 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’ alternative 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. This section 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. Midwest Neurosciences 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.
788.02 ARBITRATION

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 Group, LLC, referring the issue to a jury summoned and selected under s. 785.06. 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.

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 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 issue to a jury summoned and selected under s. 756.06. If the court finds that there is no agreement in writing for arbitration, it shall order the change of the party.

When a lawsuit has been commenced, a party may not use the special procedure outlined in ch. 785 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, by initiating a separate action. The Payday Loan Store of Wisconsin Inc. v. Krueger, 2013 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 disqualified 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: 1975 c. 43; 1977 c. 26 s. 75; 1977 c. 418 s. 929 (41); 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 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 bind 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 issue a subpoena; the court 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 circuit court for the county in which the hearing is held to issue 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 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.

Arbitrators have no inherent authority to dictate the scope of discovery. A party to an arbitration shall be allowed to take discovery under the procedures described in this section. Bolt v. Allstate Insurance Company, 2006 WI 70, 291 Wis. 2d 361, 717 N.W.2d 42, 04–004. A party to a 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 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 sufficient, 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: 1979 c. 32 s. 64; Stats. 1979 s. 788.08.
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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).

Where a contract gave management the right to appeal an arbitration award through its classification, 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 a job requiring 2 years of college “or its equivalent for 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. Slotten, 119 Wis. 2d 441, 351 N.W.2d 176 (Ct. App. 1984).

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

An arbitrator cannot complain to the court that an arbitrator 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 the 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 an arbitrator had a reasonable basis for not following case law, the arbitrators’ decision will not be interfered with by the court. Lukowski v. Dankert, 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. DeBaker v. Shawano, 204 Wis. 2d 104, 533 N.W.2d 194 (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, 202 Wis. 2d 673, 552 N.W.2d 420 (Ct. App. 1996), 95–2930.

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. 56 F.3d 96 (1996).

Courts may vacate an arbitration award that was procured by fraud, but should be hasty in doing so in order to protect the integrity of arbitration. Where a party fails to provide its version 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 denial of the discovery will not have an adverse impact on the discovery due to the expiration of the arbitration. Steichen v. Hensler, 2005 WI App 117, 283 Wis. 2d 755, 701 N.W.2d 1, 03–2990.

Evident partiality under sub. (1) (b) cannot 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 a serious doubt about the impartiality of the arbitrator. Therefore, where the arbitrator was evidently partial and the arbitration award must be vacated. Bossl v. Allstate Insurance Company, 2006 WI 70, 291 Wis. 2d 361, 717 N.W.2d 42, 04–2004.

The appointment of impartial arbitrators is the province of the parties. Where an arbitrator exceeded his authority by overruling management’s determination that an employee with 8 years of job experience was not qualified for a job requiring 2 years of college “or its equivalent for management.” City of Milwaukee v. Manitowoc Police Department, 2006 WI 70, 291 Wis. 2d 361, 717 N.W.2d 42, 04–2004.

Sub. (1) (d) requires a court to vacate an arbitrator’s award when the arbitrator exceeds his powers. An arbitrator must act in accordance with governing law, as set forth in the constitution, a statute, or case law interpreting the constitution or a statute. Racine County v. International Association of Machinists, Aerospace Workers, 2008 WI 70, 310 Wis. 2d 508, 751 N.W.2d 312, 06–0964.

Courts will vacate an award when arbitrators exceeded their powers through per se misconstruction, positive misconduct, a manifest disregard of the law, or when the award is illegal or in violation of strong public policy. When there is no contractual language for an award that would allow the arbitrator’s discretion, there is no reasonable foundation for the award. In such a case, the arbitrator’s interpretation of the contract and exceeds the authority granted by the collective bargaining agreement. Baldwin–Woodville Area School District v. West Central Education Association, 2009 WI App 95, 317 Wis. 2d 691, 760 N.W.2d 48 (Ct. App. 2009), 96–0519. See, however, between the parties in the United Steelworkers’ Organization v. City of Milwaukee, 2012 WI App 59, 341 Wis. 2d 361; 815 Wis. 2d 391, 11–1711.

The trial court 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. Oradell 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 arbitrator has reached a final decision to challenge the arbitrator’s partiality 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 intervention of the courts. Markley v. BSS Property Claims Adjustment Company, 2013 WI 29, 346 Wis. 2d 450, 828 N.W.2d 812, 11–2067.

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 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 or 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).

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.

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), 97-0337.

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.