Fee Arbitration Program Rules and Procedures

The State Bar of Wisconsin's Fee Arbitration Program, which is overseen by the Committee on Resolution of Fee Disputes, has been established so lawyers and clients who have a dispute about legal fees and related costs can submit their dispute to binding arbitration. In doing so, participants will obtain an arbitrator's decision and award which may be enforced by a court of competent jurisdiction under Chapter 788 of the Wisconsin Statutes.

This program is available to both the lawyer and the client, who should carefully review these rules before agreeing to arbitration. Any questions about these rules should be addressed to:

Fee Arbitration Program Administrator
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Section 1: Committee on Resolution of Fee Disputes

(a) The Committee on Resolution of Fee Disputes (hereafter "The Committee") shall consist of up to five attorney members appointed by the President of the State Bar. The President shall designate a chair among the five committee members appointed.

(b) The Committee shall serve in an advisory capacity to the Fee Arbitration Program. The Committee Chair may, in their discretion, request a report on the state of the Fee Arbitration Program. The Program Administrator shall provide such a report at least twice during the fiscal year.

(c) The Committee may make amendments to these rules. Amendment of these rules requires a two-thirds affirmative vote of the Committee members and approval of the Executive Director of the State Bar of Wisconsin.

Section 2: Fee Arbitration Program

(a) Appointment of Fee Arbitration Panel Members. The State Bar of Wisconsin Fee Arbitration Program is comprised of volunteer arbitrators who have agreed to arbitrate individual disputes. Volunteer arbitrators shall serve in a state-wide panel and shall herein be referred to as "volunteer arbitrators," "the arbitrator," and "the Fee Arbitration Panel."

1. The Fee Arbitration Program shall maintain a sufficient list of volunteer arbitrators. Every effort is made to have nonlawyers serve as panelists in cases requiring a three-member panel.

2. Volunteer arbitrators shall be selected from a diverse and broad spectrum of the State Bar and from law firms, solo practitioners, corporate counsel, government counsel, licensed but not practicing attorneys, and from diverse and substantive areas of the law. Lawyer members must be members of the State Bar in good standing and must have practiced or been licensed for at least five years before serving as a volunteer.

3. Non-Lawyer volunteer arbitrators shall be selected from a diverse and broad spectrum of Wisconsin community members. These volunteers should have a demonstrated understanding of small business, client work, bookkeeping or accounting, or other skills as the result of their non-legal work.

4. Volunteer arbitrators shall serve at the discretion of the Fee Arbitration Program and may arbitrate matters that the Fee Arbitration Program has discretion over.

5. Volunteer arbitrators and lawyer participants shall not change or agree to change the rates that they charge for providing legal services based on any information disclosed during the course of the arbitration as doing so may be construed as price-fixing.

(b) Jurisdiction. The State Bar of Wisconsin Fee Arbitration Program has jurisdiction over disputes concerning legal fees (and associated costs) paid, charged, or claimed for services performed for the client by an attorney under an express or implied contract establishing an attorney-client relationship, where the attorney is licensed to practice law in Wisconsin or has been granted permission to represent the client in a matter pending before a court or agency in the state of Wisconsin. The person who paid the client's fees or person who is obligated to do so as a representative of the client can apply for arbitration with the consent of the client.

1. The Fee Arbitration Program does not have jurisdiction to arbitrate disputes concerning:

i. Fees which have been approved by a court or which a court by law has the exclusive jurisdiction to fix or determine; or

ii. Fees which are the subject of a pending lawsuit, unless the court before which the lawsuit is pending requests that the parties participate in fee arbitration.

(c) Confidentiality. When a request for arbitration has been submitted, no party, party representative, volunteer arbitrator, committee member, or member of the program administrative staff shall disclose information on the arbitration to anyone not a party to the arbitration, the arbitrator, or the administrative staff. The records, documents, files, proceedings, transcripts, notes, testimony, and the arbitration decision shall be kept confidential and shall not be made available to the public or to any person or body not involved in the dispute.

1. This prohibition of disclosure shall not prevent disclosure required by law or supreme court rules, internal disclosure for the purpose of administering or conducting the arbitration, or disclosure to one party of information submitted by another for purposes of administering the arbitration.

2. The Program Administrator and administrative staff may provide information about an arbitration request to a person who has been identified as a potential party to determine their willingness to participate or to potential arbitrators to allow them to perform a conflict check.

3. The Program Administrator and administrative staff may provide information when requested by the Office of Lawyer Regulation to confirm whether an attorney has initiated or responded to a request for fee arbitration.

4. This section does not limit disclosure necessary to enforce or review the decision under Chapter 788 of the Wisconsin Statutes.

5. Arbitrators and parties shall not discuss outside of the arbitration any information on rates for legal services that was disclosed over the course of the arbitration.

(d) Fee Structure. There is a fee for the State Bar of Wisconsin Fee Arbitration Program. This fee is based on the amount in dispute, and which is paid by each party. The fee schedule is established by the Committee and reviewed annually. A party must pay the designated fee upon requesting arbitration or upon consenting to arbitration to have their case assigned to an arbitrator and scheduling for a hearing. There shall be no refunds of, adjustments to, or offsets against, the arbitration fees. The fee structure for the program is as follows:

Amount in Dispute	Fee Paid by Each Party
Under $5,000	$35.00
$5,001.00 to $20,000.00	$70.00
Over $20,000.00	$150.00

(e) Procedural Irregularities. The failure of an arbitration decision to be filed within the initial thirty (30) day or the extended time-period specified in these rules shall not impair the validity of the arbitration award. Any other error in procedure not affecting the substantive rights of the party claiming the error shall not impair the validity of the decision. This provision is intended to be interpreted in a manner consistent with Chapter 788 of the Wisconsin Statutes.

(f) Immunity. All parties agree that members of the Committee, the arbitrator(s), the Program Administrator or administrative staff shall have no liability for any official act or omission to any arbitration under these rules. The arbitrator(s) may not be called as witnesses in any proceeding regarding the subject of the fee arbitration.

(g) Multiple Clients or Attorneys in Same Proceeding. These rules recognize that more than one attorney may represent the same client in a matter, or that more than one individual may be the client in the same matter. Where necessary to give plain meaning to these rules as applied to a given dispute, the terms “party,” “attorney,” or “client” shall be read in the plural.

Section 3: Administration and Application Process

(a) Requests for arbitration are to be submitted to the State Bar of Wisconsin Fee Arbitration Program using the application form and process developed by the staff in consultation with the Committee. The application should detail the facts of the fee dispute, the names, addresses, and other contact information of the parties to the dispute, the amount in dispute and any other persons who may be directly affected by the outcome. Arbitration may be requested by an attorney or a client.

1. The Program Administrator or administrative staff shall acknowledge receipt of a request for arbitration and provide a copy of the request to the respondent party involved in the dispute. Parties are encouraged to resolve the dispute amicably.

2. A responding party shall inform the Program Administrator or administrative staff within thirty (30) days of whether they consent to participate in binding arbitration and to submit their application. Reasonable extensions for time to respond may be permitted.

3. The consent to arbitration includes consent to the current prevailing judgment rate of interest on any portion of an award not paid within thirty (30) days after a party is provided with a copy of the arbitration decision unless the parties previously contractually agreed to other interest terms. The signed application to the Fee Arbitration program shall include a provision that the parties agree to comply with the arbitration decision within thirty (30) days of mailing or emailing the decision.

(b) Upon receipt of a timely consent to arbitrate, the Program Administrator and administrative staff shall assign the matter to an arbitrator. Disputes involving amounts of $7,500.00 or less shall be heard by a single arbitrator and disputes involving amounts over $7,500.00 shall be heard by a three-member panel, unless the parties agree to a lesser number of panel members.

1. A “party” to the arbitration means each person who has agreed in writing to binding arbitration in the same matter by submitting complete applications to the same matter with the Fee Arbitration Program.

2. Once both parties have agreed to arbitrate, arbitration under these Rules is binding and can be enforced under the provisions of the Rules.

3. When a request for arbitration is made and the responding party consents, no party may withdraw from the arbitration without the agreement of all parties.

4. Participation in binding fee arbitration is optional and requires the consent of both parties. Neither a client nor a lawyer is obligated to agree to arbitrate under these rules, except in the following situations:

    i. When a client was obtained through the State Bar of Wisconsin Lawyer Referral Program (LRIS).

    ii. When an attorney is required to participate as part of a diversion agreement with the Office of Lawyer Regulation.

    iii. When an attorney places unearned fees in their business account under the alternate protection of fees provision under SCR 20:1.5(g).

Section 4: The Arbitration Hearing

(a) Preliminary Procedure. Once the arbitrator(s) has been assigned, the Program Administrator and administrative staff will assist in scheduling the arbitration hearing and coordinating communication between the parties and the arbitrator(s) to the extent needed.

1. Conflicts. Potential arbitrator(s) shall conduct a conflict check before accepting appointment. Further, the arbitrator(s) must disclose to the parties any interest or relationship likely to affect impartiality or which might create an appearance of impartiality.

2. Scheduling. All efforts will be made to schedule and notice the hearing within thirty (30) days after being assigned to the arbitrator(s). The hearing should be held within ninety (90) days after being assigned to the arbitrator(s). Notice of hearing shall be provided to the parties and the arbitrator(s) by mail or email along with other pertinent scheduling information.

    i. A party may waive the right to an oral hearing and submit the party's position in writing, together with exhibits, for the arbitrator(s) to issue a decision on that basis. The arbitrator(s) may, if they deem it desirable after submission in writing, request oral testimony of any party or witness after notice to all parties.

    ii. If a hearing cannot be held within ninety (90) days, the arbitrator(s) may, in their discretion, scheduled the matter to be heard by written statements.

3. The Program Administrator or administrative staff, along with the arbitrator(s) may determine the appropriate means for holding hearings. This may include the use of telephonic or video communication or similar communications equipment. In-person hearings will not be required unless consented to by all parties to an arbitration.

4. A party may waive the right to an oral hearing and submit the party's position in writing, together with exhibits, for the arbitrator(s) to issue a decision on that basis. The arbitrator(s) may, if they deem it desirable after submission in writing, request oral testimony of any party or witness after notice to all parties.

5. Upon notice of a hearing date, all parties shall provide any additional documentation or notice of witnesses at least one week prior, unless other scheduling has been requested by the individual parties.

(b) Rules of Procedure. The parties and arbitrator(s) shall follow the procedure outlined in Chapter 799 of the Wisconsin Statutes, specifically Wis. Stat. 799.209.

1. Burden of Proof.
    i. The attorney has the obligation to establish that his or her fee is reasonable under the circumstances. The attorney should be prepared to provide a copy of the fee agreement and supporting documentation to establish the work performed, such as time sheets, billing statements, copies of documents supporting research undertaken, and testimony of witnesses, such as associated and/or staff who performed billable or billed work, if appropriate.

    ii. The client has the obligation to establish that the fee is not reasonable or the work performed was unnecessary. Clients should be prepared to provide concrete examples of what they believe is an unwarranted fee. Examples could include: agreements to reduce fees or to modify a fee contract or evidence to establish that required work was not performed.

2. Hearsay. This is a legal term which means that a witness can only testify about what they know. Participants may not use letters or affidavits from other people. If either party wishes to offer the testimony of some other person, that person must be available to testify. Hearsay and hearsay exceptions can be found in Chapter 908 of the Wisconsin Statutes.

3. Evidence. A party may present evidence, cross-examine witnesses and raise the same kinds of defenses a party may raise in matters before courts. Evidence shall be admitted in the arbitration if it has reasonable probative value. An essential finding of fact may not be based solely on a party's oral hearsay statement unless it would be admissible under the rules of evidence.

4. Rates. If the client previously agreed to pay a particular hourly rate for the lawyer's services, that rate shall govern. If the client and lawyer did not reach an agreement about a particular rate, the arbitrator(s) may consider the reasonableness of the rate as well as the reasonableness of the total fees charged.

5. Reasonableness. The reasonableness of the lawyer's fees considers the following elements:
    i. The time and labor required,
    ii. The novelty and difficulty of the questions involved,
    iii. The skill required to perform the legal services properly,
    iv. The likelihood that the acceptable of the particular employment will preclude other employment by the lawyer,
    v. The range of fees customarily charged for similar legal services,
    vi. The amount involved and the results obtained,

vii. The time limitations imposed by the client or by the circumstances,
viii. The nature and length of the professional relationship with the client,
ix. The experience, reputation and ability of the lawyer performing the services, and
x. Whether the fee is fixed or contingent.

(c) Hearing Procedure.

1. Arbitrators.

i. The arbitrator(s) assigned to a matter are vested with all the powers and duties granted and imposed upon arbitrators by Chapter 788 of the Wisconsin Statutes, consistent with the terms of these rules.

ii. Procedure for Panels. A three-member panel shall include a panel chairperson. If all three members of a panel are not present at the time set for a hearing, the panelists present may, in their discretion, postpone the hearing or, with the parties' consent, proceed with the hearing with no fewer than two panelists. A decision of a three-member panel shall be made by majority rule if not by unanimous vote. If a member of a three-member panel dies or becomes unable to serve while the matter is pending hearing or decision and award, the proceedings shall then be reassigned to a new panel for rehearing unless the parties consent to proceed to hearing or decision with one or both of the remaining panelists.

iii. If the appointed arbitrator(s) cannot ethically or conscientiously hear the assigned the dispute, the arbitrator(s) shall notify the Program Administrator of their inability to hear the dispute and the reasons for it.

iv. The arbitrator, or panel chairperson, is in charge of the hearing. The arbitrator, or panel chairperson, is the person who rules on the admission and exclusion of evidence, on questions of procedure and on other issues that may arise concerning the hearing.

v. The arbitrator, or panel chairperson, may request opening statements at the beginning of the hearing and will set which party goes first with that party's testimony and evidence. Generally, the attorney will start. All parties will be given an equal chance to present appropriate evidence. The arbitration hearing will be kept as informal as possible while still assuring that all parties have a fair hearing.

vi. If a hearing cannot be finished on the day it begins, the arbitrator, or panel chairperson, may schedule the hearing to finish on the first available date that works for the parties, witnesses, attorney for a party,

and the arbitrators. If the parties to the arbitration cannot agree upon a date, the arbitrator(s) shall select the date.

vii. Before the conclusion of the hearing, the arbitrator, or panel chair, will make a final request of all parties whether they have further evidence to give. If the answer is "no," the hearing will be closed.

2. Parties.

i. A party's appearance at a scheduled hearing constitutes a waiver by that party of claims of deficiency in the notice of hearing.

ii. When a party properly given notice of the hearing date fails to appear the hearing, the arbitrator(s) may in their discretion proceed with the hearing based on the evidence given by the party who has or parties who have appeared, or by the original submission, and render a binding decision and award.

iii. Transcripts. If a party wishes to make a record of the hearing, the party must use a certified court reporter to do so and must advise the Program Administrator that a court reporter will be used at the hearing at least ten (10) days before the hearing begins. The Program Administrator should then give notice to all parties. The ten-day period may be waived or shortened by agreement if the parties and the arbitrator, or panel chair, agrees. The party recording the hearing must pay for the fees and transcript costs of the court reporter unless the other party also wants a copy of the transcript. In which case, all requesting parties will equally share the court reporter's fees and costs of the transcript. In such event, the arbitrator or panel chair is entitled to a copy of the transcript and the time period for issuing a decision is extended by the number of days between the conclusion of the hearing and the day when the transcript has been received. The Fee Arbitration Program, the Program Administrator or administrative staff, or the volunteer arbitrator(s) shall not share in the fees and transcript costs when a party requests a record of the hearing.

iv. Witnesses and Observers.

1) Non-lawyer parties may have an individual accompany the non-lawyer party during the hearing to provide moral support but not representation. Permitted attendance of such a person shall be at the discretion of the arbitrator or the panel chairperson, who shall grant such permission freely but who shall also have the authority to limit the person's attendance reasonably considering such

factors as whether the individual will testify as a witness in the arbitration.

2) At the discretion of the arbitrator(s) all witnesses may be excluded from the hearing until they have testified.

3) Witnesses, including parties, must testify under oath or affirmation just as in court proceedings. Any member of the arbitration panel may give the oath to witnesses testifying at the hearing.

4) If either party calls an “expert” witness, that party shall be responsible for any costs or fees of their own experts.

5) The hearing is not open to members of the public except as specified in this rule.

(d) Post Hearing Procedure.

1. Upon request of either party, the arbitrator(s) may set a date for submitting written summaries in the form of a memoranda or briefs. If such a request is made, the period for the arbitrator(s) to issue a decision and award is extended by the number of days between the end of the hearing and the date the arbitrator(s) receive the written summaries. If such a date is given, the arbitrator(s) shall notify the Program Administrator and administrative staff.

2. If there is a good reason to do so, a hearing may be reopened by a written request of a party or the volunteer arbitrator(s) at any time before the arbitrators have filed their decision. Written requests shall be provided to the Program Administrator and administrative staff. The volunteer arbitrator(s) shall have the final decision on whether a hearing is reopened.

Section 5: The Arbitration Decision

(a) Form.

1. The arbitration decision and award shall be in writing and signed, including by electronic means, by the sole arbitrator or by all panel members hearing the arbitration. No particular form is required for the decision. However, at the minimum, it is to consist of:

    i. A preliminary statement reciting the jurisdictional facts (e.g., that the hearing was held upon notice and proper consent to arbitration, that the parties were given an opportunity to testify under direct and cross examination, etc.).

    ii. A brief statement of the dispute, the findings of fact; and,

    iii. The decision and award.

2. If there is a dissent on a three-member panel decision and award, the decision and award shall be signed separately, indicating the majority and minority votes.

3. Unless the written contract for legal services provides otherwise, the decision and award may grant any remedy or relief deemed proper, including a direction for specific performance.

4. The decision and award may, at the discretion of the arbitrator(s), include interest accrued prior to the date of the decision and award at the legal rate unless the parties have contractually agreed to other interest terms in writing.

5. A decision and award may also be entered on the consent of the parties if an agreement is reached between them.

6. The decision and award shall be provided to the Program Administrator and administrative staff, and each party shall be provided with a signed copy of the decision and award. The date that the decision and award is communicated to the parties shall serve as notice of the commencement of the 30-day agreement to comply with the arbitration decision and award and the conclusion of the dispute.

7. The consent to arbitration includes consent to the current prevailing judgment rate of interest on any portion of an award not paid within thirty (30) days after a party is provided with a copy of the arbitration decision, unless the parties previously contractually agreed to other interest terms.

8. A decision and award shall be provided to the Program Administrator and administrative staff within thirty (30) days or as soon as reasonably possible after the close of the hearing, subject to any extensions permissible in these rules.

(b) Confidentiality. The decision and award shall not be disclosed to any individual or entity other than the parties who are to receive a copy of the decision and award, with the following exceptions:

1. In the event that a party appeals the decision and award under Chapter 788 of the Wisconsin Statutes, the decision and award may be filed with the court and used in that court proceeding.

2. If either party does not comply with the decision and a ward within thirty (30) days of it being provided to the parties as provided in these rules, the other party may file the decision and award with a court to be used to obtain an Order confirming the decision and award.

3. Any party filing a decision and award with a court pursuant to this section shall request that the decision and award is sealed so as to remain confidential except among the parties to the court action, or as ordered by the court.

4. Any judgment obtained pursuant to Chapter 788 of the Wisconsin Statutes shall not be considered confidential under these rules.

(c) Enforcement or Review.

1. Attorneys. If a decision or award is rendered in favor of the attorney to the dispute, the decision shall terminate the dispute and further provide that within thirty (30) days:

i. The client shall pay that amount of the disputed legal fees and/or associated costs contained in the decision.

ii. The client shall pay interest at the legal rate if the entire award is not paid within thirty (30) days of the date of the decision.

iii. The attorney shall return to the client any client documents that the attorney is holding.

iv. If the attorney is representing the client in any pending litigation or other matter, which gave rise to the dispute, if necessary and at the request of the client, shall stipulate to the substitution of new counsel in any such litigation or matter.

2. Clients. If the decision or award is rendered in favor of the client to the dispute, the decision shall terminate the dispute and further provide that within thirty (30) days:

    i. The attorney shall return any funds or other property of the client held by the attorney in excess of the amount of the award.

    ii. The attorney shall pay interest at the legal rate if the entire award is not paid within thirty (30) days of the date of the decision.

    iii. The attorney shall release, remove, or dismiss any lien in excess of the amount of the award the attorney claimed or filed concerning the dispute without any cost to the client but with written notice to the client.

    iv. The attorney shall return to the client any client documents that the attorney is holding.

    v. If the attorney is representing the client in any pending litigation or other matter, at the request of the client, the attorney shall stipulate to the substitution of new counsel in any such litigation or matter.

3. Enforcement with the Circuit Court.

    i. The decision and award, and any exhibits admitted into evidence, constitute the record for enforcement or review under Chapter 788 of the Wisconsin Statutes.

    ii. Any party looking to confirm, vacate, modify, or correct an arbitration award shall use Wisconsin Circuit Court Form SC-500 Summons and Complaint (small claims).

    iii. Specific questions about preparing for court or your hearing should be directed to the Clerk of Court in the county in which you are filing. The Fee Arbitration Program is unable to give legal advice.

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) (bm).

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 the insurer's right to later demand arbitration. Collicott v. Economy Fire & Casualty Co., 68 Wis. 2d 115, 227 N.W.2d 668 (1975).

Failure to comply with provisions of ch. 298 [now this chapter] 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. 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. Teaching Assistants Ass'n v. University of Wisconsin−Madison, 96 Wis. 2d 492, 292 N.W.2d 657 (Ct. App. 1980). But see State v. P.G. Miron Construction Co., 181 Wis. 2d 1045, 512 N.W.2d 499 (1994).

Municipal labor arbitration is within the scope of this chapter. Milwaukee District Council 48 v. Milwaukee Sewerage Commission, 107 Wis. 2d 590, 321 N.W.2d 309 (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 this chapter. 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), 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 unavailability of the named arbitrator does not nullify an arbitration provision. Madison Teachers, Inc. v. Wisconsin Education Ass'n 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 398, 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 chapter 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 Neurosurgical Associates, LLC, 2018 WI 112, 384 Wis. 2d 669, 920 N.W.2d 767, 16−0601.

Arbitration is a matter of contract between private parties who enjoy that freedom. A circuit court has no authority to halt 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, 2019 WI 15, 385 Wis. 2d 516, 922 N.W.2d 832, 18−0291.

In this case, the credit union's contractual authority to "change" the terms of its member agreement did not authorize it to unilaterally "add" an arbitration clause because the arbitration clause was not the type of change contemplated by the parties at the time of the original agreement. Pruett v. WESTconsin Credit Union, 2023 WI App 57, 409 Wis. 2d 607, 998 N.W.2d 529, 22−0887.

While a court's authority under the Federal Arbitration Act to compel arbitration may be considerable, it isn't unconditional. A court should decide for itself whether 9 USC 1 of the Act's "contracts of employment" exclusion applies before ordering arbitration. After all, to invoke its statutory powers to stay litigation and compel arbitration according to a contract's terms, a court must first know whether the contract itself falls within or beyond the boundaries of the Act. New Prime Inc. v. Oliveira, 586 U.S. ___, 139 S. Ct. 532, 202 L. Ed. 2d 536 (2019).

The Federal Arbitration Act (FAA) precludes states from singling out arbitration provisions for suspect status. When state law prohibits outright the arbitration of a particular type of claim, the conflicting rule is displaced by the FAA. This section prohibits outright enforcing arbitration agreements in employment disputes, which means that it is displaced by the FAA. Nevill v. Johnson Controls International PLC, 364 F. Supp. 3d 932 (2019).

Commercial Arbitration Agreements: Let the Signers Beware. Farmer. 61 MLR 466 (1978).

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 proceeding 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. Midland, 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 Insurance Corp. of Wisconsin, 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) 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 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 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 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, 16–0601.

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. 788.03 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, 18–0656.

An application to stay pursuant to this section is a special proceeding within the meaning of s. 808.03 (1), and a circuit court order denying a request to compel arbitration and stay a pending lawsuit is final for the purposes of appeal. L.G. v. Aurora Residential Alternatives, Inc., 2019 WI 79, 387 Wis. 2d 724, 929 N.W.2d 590, 18–0656.

Unless an arbitration agreement clearly and unmistakably provides otherwise, whether a party has waived the right to arbitrate through its litigation conduct is an issue for a court, not an arbitrator, to decide. In other words, there is a presumption that this issue will be resolved in court. U.S. Bank National Ass'n v. Klein, 2024 WI App 7, ___ Wis. 2d ___, 3 N.W.3d 726, 22–0920.

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 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 s. 135; 1979 c. 32 s. 64; Stats. 1979 s. 788.03; Sup. Ct. Order No. 96–08, 207 Wis. 2d xv (1997).

An insured who acceded to the 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 may estop a party from challenging an arbitration agreement. Pilgrim 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. 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 in which the underlying lawsuit is pending, not by initiating a separate action. Payday Loan Store of Wisconsin Inc. v. Krueger, 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 proceedings, 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 procedures, the limited role of courts in actions to compel arbitration under 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 the courts have a limited role 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.

The procedure under s. 788.02 is somewhat truncated in comparison to this section, 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, 18–0656.

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: 1975 c. 43, 199; 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 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 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. Absent an express agreement, the parties are limited to the procedure for depositions, as described in this section. Borst v. Allstate Insurance Co., 2006 WI 70, 291 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 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 an explicit, specific, and clearly drafted reference to ch. 804 or to any other discovery rules. Marlowe v. IDS Property Casualty Insurance Co., 2013 WI 29, 346 Wis. 2d 450, 828 N.W.2d 812, 11−2067.

Borst Clarifies Arbitration Procedures. Frankel. Wis. Law. Dec. 2006.

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.

788.09 Court confirmation award, time limit. At any time within one year after the award is made any party to the arbitration may apply to the court in and for the county within which such award was made for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified or corrected under s. 788.10 or 788.11. Notice in writing of the application shall be served upon the adverse party or the adverse party's attorney 5 days before the hearing thereof.

History: 1979 c. 32 s. 64; Stats. 1979 s. 788.09; 1981 c. 390; 1993 a. 486.

The time limit under s. 788.13 does not apply when the prevailing party moves to confirm under this section and the adverse party wishes to raise objections under ss. 788.10 and 788.11. Milwaukee Police Ass'n v. City of Milwaukee, 92 Wis. 2d 145, 285 N.W.2d 119 (1979).

788.10 Vacation of award, rehearing by arbitrators. (1) In either of the following cases the court in and for the county wherein the award was made must make an order vacating the award upon the application of any party to the arbitration:

(a) Where the award was procured by corruption, fraud or undue means;

(b) Where there was evident partiality or corruption on the part of the arbitrators, or either of them;

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced;

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.

(2) Where an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

History: 1979 c. 32 s. 64; Stats. 1979 s. 788.10.

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

The interjection of a new contract time period in an amended final offer after the petition is filed presents a question beyond the statutory jurisdiction of the arbitrators. Milwaukee Deputy Sheriffs' Ass'n v. Milwaukee County, 64 Wis. 2d 651, 221 N.W.2d 673 (1974).

Arbitration awards are presumptively valid, and an award may not be attacked on the grounds that a portion of it could conceivably be allocable to an allegedly improper item. Scherrer Construction Co. v. Burlington Memorial Hospital, 64 Wis. 2d 720, 221 N.W.2d 855 (1974).

Contacts between the arbitrator and one party outside the presence of the other do not in themselves justify vacating an award to the party involved if the challenger does not demonstrate either improper intent or influence by clear and convincing evidence. City of Manitowoc v. Manitowoc Police Department, 70 Wis. 2d 1006, 236 N.W.2d 231 (1975).

An arbitrator exceeded the arbitrator's 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. 563, 75 Wis. 2d 602, 250 N.W.2d 696 (1977).

An arbitrator did not exceed the arbitrator's powers by adopting a ministerial−substantive distinction in determining the scope of the unfettered management function provided by agreement. The arbitrator did exceed the arbitrator's powers by ordering maintenance of past practice without finding that the agreement required such action. Milwaukee Professional Firefighters, Local 215 v. City of Milwaukee, 78 Wis. 2d 1, 253 N.W.2d 481 (1977).

Arbitrators did not exceed their authority by arbitrating a grievance under a "discharge and nonrenewal" clause of a collective bargaining agreement when the contract offered by the board was signed by a teacher after deleting the title "probationary contract" and the board did not accept this counteroffer or offer the teacher a second contract. Joint School District No. 10 v. Jefferson Education Ass'n, 78 Wis. 2d 94, 253 N.W.2d 536 (1977).

Although the report of an arbitrator did not explicitly mention a counterclaim, the trial court did not err in determining that the denial of the counterclaim was implicit in the report. The failure of the arbitrator to set forth theories or support the arbitrator's findings is not grounds for objection to the arbitrator's award. McKenzie v. Warmka, 81 Wis. 2d 591, 260 N.W.2d 752 (1978).

Discussing the disclosure requirements for neutral arbitrators regarding the vacation of an award under sub. (1) (b). Richco Structures v. Parkside Village, Inc., 82 Wis. 2d 547, 263 N.W.2d 204 (1978).

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 (Ct. App. 1978).

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 Ass'n v. City of 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 Ass'n, 93 Wis. 2d 415, 287 N.W.2d 131 (1980).

An arbitrator exceeded the arbitrator's authority by directing that the grievant be transferred when the contract reserved transfer authority to the city and chief of police. City of Milwaukee v. Milwaukee Police Ass'n, 97 Wis. 2d 15, 292 N.W.2d 841 (1980).

Although a contract gave management the right to determine job description classifications, the arbitrator did not exceed the arbitrator's authority by overruling management's determination that an employee with eight years of job experience was not qualified for promotion to a job requiring two years of college "or its equivalent as determined by management." City of Oshkosh v. Oshkosh Public Library Clerical Employees 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, Inc. 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. School District v. Northwest United 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 the arbitrator's 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 259, 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. 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 such doubts about the arbitrator's impartiality that the person 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. Certain Underwriters at Lloyd's London, 202 Wis. 2d 673, 552 N.W.2d 420 (Ct. 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). La Crosse Professional Police Ass'n v. City of La Crosse, 212 Wis. 2d 90, 568 N.W.2d 20 (Ct. App. 1997), 96−2741.

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 due diligence would not have prompted the discovery of the fraud during or prior to 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 serious doubts about the partiality of the arbitrator. Therefore, as a matter of law, the arbitrator was evidently partial, and the arbitration award must be vacated. Borst v. Allstate Insurance Co., 2006 WI 70, 291 Wis. 2d 361, 717 N.W.2d 42, 04–2004.

A presumption of impartiality among all arbitrators, whether named by the parties or not, is adopted. This presumption may be rebutted, and an arbitrator may act as a non–neutral when the parties contract for non–neutral arbitrators or the arbitration rules otherwise provide for non–neutral arbitrators. Borst v. Allstate Insurance Co., 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 or her powers. Arbitration awards must be vacated when they conflict with governing law, as set forth in the constitution, a statute, or case law interpreting the constitution or a statute. Racine County v. International Ass'n 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 perverse 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 that would allow for the arbitrator's construction, there is no reasonable foundation for the award. In such a case, the arbitrator perversely misconstrues the contract and exceeds the authority granted by the collective bargaining agreement. Baldwin–Woodville Area School District v. West Central Education Ass'n, 2009 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 this section and s. 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 Co., 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 Co., 2013 WI 29, 346 Wis. 2d 450, 828 N.W.2d 812, 11–2067.

During an arbitration, a proper time to raise an objection in order to preserve it is before the arbitration award is issued. The arbitral award is the arbitrator's decision on the merits of the disputes that were subjected to arbitration. Therefore, as long as an objection to a new issue is raised before the merits are decided, the policy goals underlying forfeiture are protected and the fairness of the proceeding is preserved. In this case, because a party objected to the arbitrator's sleeping following the conclusion of the evidentiary hearing, but before the arbitrator issued the arbitral award, the party did not forfeit its objection. Loren Imhoff Homebuilder, Inc. v. Taylor, 2022 WI 12, 400 Wis. 2d 611, 970 N.W.2d 831, 19–2205.

An omission by an arbitrator that deprives the parties of the benefit of execution of a fundamental duty assigned to the arbitrator through the mutual agreement of the parties can constitute such imperfect execution of an arbitrator's powers that a mutual, final, and definite award upon the subject matter submitted was not made under sub. (1) (d). In this case, the arbitrator failed to perform a fundamental duty that was assigned to him as the arbitrator: remain awake to consider the presentation of material evidence, most notably significant portions of the testimony of the expert called by the homeowners. Loren Imhoff Homebuilder, Inc. v. Taylor, 2022 WI App 14, 401 Wis. 2d 510, 973 N.W.2d 836, 19–2205.

There is a role for trial court fact finding in response to some categories of challenges to arbitration orders, and the clearly erroneous standard applies to the court of appeals' review of that fact finding. Loren Imhoff Homebuilder, Inc. v. Taylor, 2022 WI App 14, 401 Wis. 2d 510, 973 N.W.2d 836, 19–2205.

Arbitrators exceed their powers when: 1) they demonstrate "perverse misconstruction" or "positive misconduct"; 2) they manifestly disregard the law; 3) the award is illegal; or 4) the award violates a strong public policy. A court will reverse an arbitration award as manifestly disregarding the law when the arbitrator fails to examine and apply the relevant law because parties to arbitration have a legitimate expectation that the governing law will be followed and applied properly. However, a court will not reverse an arbitration award for mere errors of judgment as to law or fact on the part of the arbitrator. Arbitrators are bound to follow precedent, but they are not expected to anticipate how a court might apply or extend that precedent when faced with novel arguments or fact scenarios. Parties do not have the same "legitimate expectation" regarding new applications of the law that they have in established applications. Green Bay Professional Police Ass'n v. City of Green Bay, 2023 WI 33, 407 Wis. 2d 11, 988 N.W.2d 664, 21–0102.

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., 86 F.3d 96 (1996).

Borst Clarifies Arbitration Procedures. Frankel. Wis. Law. Dec. 2006.

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.

The intent of the parties controls a determination under sub. (1) (b) whether a matter was submitted to the arbitrator. Milwaukee Professional Firefighters, Local 215 v. City of 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 this section or s. 788.10 did not exist. Milwaukee Police Ass'n v. City of 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 this section and s. 788.10 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 Co., 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 Auto 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 this section 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 Ass'n v. City of Milwaukee, 92 Wis. 2d 145, 285 N.W.2d 119 (1979).

Under federal labor law, this section governs challenges to arbitration decisions. Teamsters Local No. 579 v. B&M Transit, Inc., 882 F. 2d 274 (1989).

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." Sands 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.