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 employes, or between employers and associations of employes, except as provided in s. 111.10, nor to agreements to arbitrate disputes under s. 101.143 (6s) or 230.44 (4) (bm).

NOTE: This section is shown as affected by two acts of the 1997 legislature and as merged by the revisor under s. 13.93 (2) (c).

History: 1979 c. 32 s. 64; Stats. 1979 s. 788.01; 1993 a. 16; 1997 a. 237, 254; s. 13.93 (2) (c).

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

Failure to comply with provisions of ch. 298 constitutes waiver of contractual right to arbitration. State ex rel. Carl v. Charles, 71 W (2d) 85, 237 NW (2d) 29.

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

See note to art. IV, sec. 27, citing State ex rel. Teach. Assts. v. Wis.−Madison Univ. 96 W (2d) 492, 292 NW (2d) 657 (Ct. App. 1980).

Municipal labor arbitration is within scope of ch. 788. District Council 48 v. Sewerage Comm. 107 W (2d) 590, 321 NW (2d) 309 (Ct. App. 1982).

Insurance coverage is a proper matter for arbitration. Maryland Cas. Co. v. Seidenspinner, 181 W (2d) 950, 512 NW (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 Const. Co. 181 W (2d) 1045, 512 NW (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 W (2d) 268, 565 NW (2d) 540 (Ct. App.1997).

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

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

History: 1991 a. 163.

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

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

Commencing litigation did not waive contractual right to arbitration. J.J. Andrews, Inc. v. Midland, 164 W (2d) 215, 474 NW (2d) 756 (Ct. App. 1991).

The right to arbitrate may be waived; conduct which allows an action to proceed to a point where the purpose of arbitration is frustrated estops a party from claiming a right to arbitration. Meyer v. Classified Ins. Corp. 179 W (2d) 386, 507 NW (2d) 149 (Ct. App. 1993).

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 W (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 W (2d) xv (1997).

Insured who acceded to insurer's refusal to arbitrate insured's uninsured motorist claim until after the insured's passengers' claims were litigated was not an "aggrieved party" within meaning of this section. Worthington v. Farmers Ins. Exchange, 77 W (2d) 508, 253 NW (2d) 76.

In absence of reservation of rights, "partial participation" in arbitration process may estop party from challenging arbitration agreement. Pilgrim Inv. Corp. v. Reed, 156 W (2d) 677, 457 NW (2d) 544 (Ct. App. 1990).

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.

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.

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.

Time limit under 788.13 does not apply when prevailing party moves to confirm under 788.09 and adverse party wishes to raise objections under 788.10 and 788.11. Milwaukee Police Asso. v. Milwaukee, 92 W (2d) 145, 285 NW (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 W (2d) 143, 208 NW (2d) 437.

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. Milw. Deputy Sheriffs' Asso. v. Milw. County, 64 W (2d) 651, 221 NW (2d) 673.

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

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 where the challenger does not demonstrate either improper intent or influence by clear and convincing evidence. Manitowoc v. Manitowoc Police Dept. 70 W (2d) 1006, 236 NW (2d) 231.

Arbitrator exceeded authority within meaning of (1) (d) in determining that discharge of city employe for violation of ordinance residency requirement was not for just cause within meaning of collective bargaining agreement. WERC v. Teamsters Local No. 563, 75 W (2d) 602, 250 NW (2d) 696.

Arbitrator did not exceed powers by adopting ministerial−substantive distinction in determining scope of unfettered management function provided by agreement. Arbitrator did exceed powers by ordering maintenance of past practice without finding that agreement required such action. Milw. Pro. Fire Fighters Local 215 v. Milwaukee, 78 W (2d) 1, 253 NW (2d) 481.

Arbitrator did not exceed powers by arbitrating grievance under "discharge and nonrenewal" clause of bargaining agreement where contract offered by board was signed by teacher after deleting title "probationary contract" and board did not accept this counteroffer or offer teacher 2nd contract. Jt. Sch. Dist. No. 10 v. Jefferson Ed. Asso. 78 W (2d) 94, 253 NW (2d) 536.

Although report of arbitrator did not explicitly mention counterclaim, trial court did not err in determining that denial of counterclaim was implicit in report. Failure of arbitrator to set forth theories or support finding is not grounds for objection to arbitrator's award. McKenzie v. Warmka, 81 W (2d) 591, 260 NW (2d) 752.

Disclosure requirements for neutral arbitrator discussed regarding vacation of award under (1) (b). Richco Structures v. Parkside Village, Inc. 82 W (2d) 547, 263 NW (2d) 204.

Courts should apply one standard of review of arbitration awards under municipal collective bargaining agreements. Madison Metropolitan School Dist. v. WERC, 86 W (2d) 249, 272 NW (2d) 314 (Ct. App. 1978).

Arbitrator appointed under specific contract had no power to make award under successor contracts not in existence at time grievance was submitted. Milw. Bd. Sch. Dirs. v. Milw. Teachers' Ed. Asso. 93 W (2d) 415, 287 NW (2d) 131 (1980).

Arbitrator exceeded power by directing that grievant be transferred where contract reserved transfer authority to city and chief of police. Milwaukee v. Milwaukee Police Asso. 97 W (2d) 15, 292 NW (2d) 841 (1980).

Although contract gave management right to determine job description classifications, arbitrator did not exceed powers by overruling management's determination that employe with 8 years of job experience was not qualified for promotion to job requiring 2 years of college "or its equivalent as determined by management". Oshkosh v. Union Local 796−A, 99 W (2d) 95, 299 NW (2d) 210 (1980).

Burden of proving "evident partiality" of arbitrator was not met where apparently biased remarks of arbitrator represented merely an initial impression, not final con-

clusion. Diversified Management Services v. Slotten, 119 W (2d) 441, 351 NW (2d) 176 (Ct. App. 1984).

Award was vacated for "evident partiality" because arbitrator failed to disclose past employment with entity supplying party's counsel. Spooner Dist. v. N. W. Educators, 136 W (2d) 263, 401 NW (2d) 578 (1987).

Party cannot complain to courts that arbitrator acted outside scope of authority if objection not raised before arbitrator. DePue v. Mastermold, Inc., 161 W (2d) 697, 468 NW (2d) 750 (Ct. App. 1991).

A party disputing the existence of an agreement to arbitrate may choose not to participate in arbitration and challenge the existence of the agreement by motion to vacate the award under sub. (10) (d). Scholl v. Lundberg, 178 W (2d) 259, 504 NW (2d) 115 (Ct. App. 1993).

Where 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 W (2d) 142, 515 NW (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 W (2d) 104, 533 NW (2d) 464 (1995).

This section does not prevent vacation of an arbitration award on the basis of a manifest disregard of the law. Employers Insurance of Wausau, 202 W (2d) 674, 552 NW (2d) 420 (Ct. App. 1996).

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

That an arbitrator makes 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).

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.

Intent of parties controls determination under (1) (b) whether matter was submitted to arbitrator. Milw. Pro. Fire Fighters Local 215 v. Milwaukee, 78 W (2d) 1, 253 NW (2d) 481.

Court had no jurisdiction to vacate or modify award where grounds under 788.10 or 788.11 did not exist. Milwaukee Police Asso. v. Milwaukee, 92 W (2d) 175, 285 NW (2d) 133 (1979).

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 W (2d) 145, 572 NW (2d) 501 (Ct. App. 1997).

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.

See note to 788.09, citing Milwaukee Police Asso. v. Milwaukee, 92 W (2d) 145, 285 NW (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.

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.

An order or judgment of the court directing the parties to submit a dispute to arbitration is not appealable. Teamsters Union Local 695 v. Waukesha County, 57 W (2d) 62, 203 NW (2d) 707.

An order to proceed with arbitration is not appealable. Worthington v. Farmers Ins. Exch. 64 W (2d) 108, 218 NW (2d) 373.

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.