

ARBITRATION IN WISCONSIN

Over the past decade I have written several articles for the WSPE publications on the subject of arbitration. My August, 2006 article outlined in some detail the current arbitration procedures of the American Arbitration Association. Whether one uses the AAA arbitration services or other arbitration services, the arbitration procedures ultimately applicable are subject to state and federal law. In Wisconsin, Chapter 788 of the Wisconsin Statutes governs arbitration clauses entered into and enforced in Wisconsin.

Section 788.01 of the Wisconsin Statutes provides for the enforcement of arbitration clauses in contracts. In order for an arbitration clause to be enforced, it must exist in a written contract. The intent of the parties to arbitrate their contractual disputes should be made clear in the written contract language. Limitations that the parties place on the issues to be arbitrated should also be expressed clearly in the written contract.

Under § 788.02 of the Wisconsin Statutes, where a party to a contract which provides for arbitration ignores the arbitration clause and commences a court proceeding against the other contracting party, the party sued may seek a stay of the judicial proceeding from the court and an order referring the matter to arbitration. § 788.03 of the Wisconsin Statutes provides the procedure for petitioning a court for an order directing that the arbitration proceed as provided for in the contract. The court will entertain a petition to refer the matter to arbitration and will take evidence and hear arguments from the parties so that the court may be satisfied that the subject matter in dispute is covered by a contractual arbitration agreement. If the parties disagree as to whether the arbitration agreement requires them to arbitrate, the court will ordinarily rule on that question, but a jury trial may be demanded where factual issues are involved which may entitle a contracting party to a jury trial. If the jury finds that an agreement for arbitration was

made in writing and that there was a default of the provisions, the court will then order arbitration.

Section 788.04 of the Wisconsin Statutes provides for naming or appointing arbitrators in the manner provided for in the parties' written contract. If no method is provided in the contract for the choosing of arbitrators, the parties may apply to the court for the designation and appointment of a single arbitrator or a panel of arbitrators, as the case may require. Any arbitration brought to recover damages for injuries sustained by a person arising out of a treatment or operation performed by one licensed to practice a health care profession requires a three-person arbitration panel. Often complex arbitrations involving owners, design professionals and contractors are handled by three arbitrators.

Section 788.06 provides for an evidentiary hearing before the arbitrators and provides that the arbitrators have the power of subpoena. Any person served by a subpoena authorized by the arbitrators, who refuses to obey the subpoena may become the subject of a petition to the circuit court in the county in which the arbitration hearing is being held for sanctions. Subpoenaed witnesses in an arbitration proceeding are entitled to the same witness fees as required in court proceedings.

Section 788.07 of the Wisconsin Statutes provides that pre-trial depositions may be taken of witnesses by parties to an arbitration proceeding. Those parties wishing to discover the testimony of witnesses prior to the arbitration hearing must petition to the arbitrators and once approved by the arbitrators a court of record in the county where the arbitration proceedings are to take place may direct the depositions be taken. These depositions may then be used as evidence in the arbitration proceeding. Under a recent court decision, Borst v. Allstate Insurance, the Court of Appeals held that pre-trial discovery is limited to that which the legislature has

provided. The Wisconsin Court of Appeals held that except to the extent the legislature has authorized pre-hearing discovery in arbitration, there shall be no pre-hearing discovery. Thus, under current statutory law, arbitrators have no ability to determine the necessity and scope of other discovery procedures such as document inspection, written interrogatories and requests to admit or deny.

In Borst, the court also held that impartiality was required by party-appointed arbitrators unless the contract language specifically allowed a party to appoint an arbitrator to function in an advocacy capacity. Some arbitration clauses in contracts call for each party to the contract to name an arbitrator, and the two arbitrators named to select the third. Questions have arisen under this procedure as to whether the party-designated arbitrators are truly neutrals. The third selected arbitrator has generally always been considered as a neutral. The Borst court held that even the party-appointed arbitrators are presumed to be neutral and any bias that they exhibit will be grounds for invalidating the arbitration award. The presumption of neutrality of all arbitrators including party-appointed arbitrators may be subject to an explicit provision permitting party-appointed arbitrators to be advocates rather than neutrals. In the absence of such explicit language, even party-appointed arbitrators must be impartial.

Under § 788.08 of the Wisconsin Statutes, the arbitrators' award must be in writing and signed by the arbitrators or by a majority of them.

Under § 788.09 of the Wisconsin Statutes, at any time within one year after the award is issued, any party to the arbitration may apply to the court for a court order confirming the award and the court is expected to grant such an order unless the award is vacated or modified. Section 788.10 provides for the vacation or modification of awards. Under that statute, any award may be vacated where (a) the award was procured by corruption, fraud or undue means, or (b) the

award was the product of partiality or corruption on the part of the arbitrators, or either of them, or (c) 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, or (d) where the arbitrators have exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter at issue cannot be made. Where the award is vacated by the court, the court may direct a rehearing by the arbitrators or by newly appointed arbitrators.

The written award may be modified by the court where (a) 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, or (b) the arbitrators awarded upon a matter not submitted to them unless it is a matter not affecting the merits of the decision upon the matter submitted, or (c) the award is imperfect in matter of form not affecting the merits of the controversy. The court may order the modification and correct the award so as to effect the intent of the award and promote justice between the parties.

Except for these limited grounds, the award will not be affected by judicial review and the court will grant an order confirming, modifying or correcting an award and enter judgment accordingly.

Under § 788.15 of the Wisconsin Statutes, an appeal may be taken from an order confirming, modifying, correcting or vacating an award, but the grounds for an appeal must relate to the limited power of the court to vacate or modify an award.

The Wisconsin courts have expressed support for the alternative disputes resolution procedure of arbitration, provided that the statutory requirements are met.

