

Book II.  
Title LV (LVI).

Concerning arbitrators, appointed by mutual consent.

Headnote.

Parties might refer a controversy between them to one or more arbitrators selected by mutual consent without the intervention of any authoritative magistrate. The award of such arbitrator was, except as mentioned hereafter, of itself of no binding force and was no bar to a subsequent trial and legal decision of the case. In 529 A.D., Justinian provided that the decision should be directly binding if the submission was under oath authenticated by writing, and in 530 A.D. he further provided that if there was such an oath taken and the parties accepted the decision in writing, or allowed ten days to elapse without notice in writing of rejection, it was to bind in the same way. Laws 4 and 5 of this title. But by Novel 82, c. 11, he forbade the machinery by oath, but left the other provision of 530 A.D.

If an arbitrator agreed to serve as such, and the parties had undertaken to obey the decision, he was bound to act and was compelled to do so by the ordinary courts in case of refusal, unless he had a good excuse. D. 4.8.3.1; D. 4.8.11.4; D. 4.8.15; D. 4.8.16. The common practice was to choose two arbitrators. If they could not agree, they could be compelled to choose a third. A decision by a majority was sufficient. D. 4.8.17.6 and 7. If no date for the arbitration was agreed on by the parties, the arbitrator appointed a day, subject to the consent of the parties. D. 4.8.14. Any man might be an arbitrator, except a slave. D. 4.8.7. Women were forbidden to act as such. C. 2.55.6.

2.55.1. Emperor Antoninus to Nepotiana.

It has often been stated in rescripts that no appeal lies from the decision of an arbitrator, applied to under a legally executed arbitration agreement, because no action on the judgment (action *judicati*) can arise therefrom and a reciprocal penalty is usually promised on that account, so that through fear thereof the agreement may not be broken. But if the decision is given after the time included in the agreement, it is void, nor does the party disobeying it incur any penalty. Promulgated July 24 (213) at Rome.

Note.

An arbitration agreement would, of course, generally provide what matter should be adjudicated, who should be arbitrator, and, within which time the adjudication should be made. The limits of the agreement could not be exceeded. The agreement was not binding until Justinian provided otherwise (L. 4 and L. 5 h.t.), but could be violated with impunity, unless a penalty for non-compliance was provided by stipulation. D. 4.8.2. Weizsacker, Schiedsrichteramt 53-55. Hence no action lay on the decision, or judgment, rendered.

2.55.. Emperors Carus, Carinus and Numerianus to Clemens.

If your adversary declines to appear before the chosen arbitrator, contrary to the arbitration agreement, he is liable to the penalty agreed upon. Promulgated December 25 (283).

Note.

A decision rendered without the appearance of both parties was invalid, unless the agreement was to the contrary. D. 4.8.27.4. The penalty was here provided to be paid, if a party did not appear—did not comply with the agreement.

2.55.3. Emperors Diocletian and Maximian and the Caesars to Petronia.

Disobeying the decision of arbitrators rendered under an arbitration agreement, you may use the defense of fraud (*doli mali*) against your daughter, suing you on the stipulation, if the arbitrators were guilty of corruption or evident favoritism. And you are, further, not forbidden to sue your daughter on the clause of fraud usually attached to the stipulation of an arbitration agreement.

Promulgated January 11 (290 or 293).

2.55.4. Emperor Justinian to Demosthenes, Praetorian Prefect.

Lest perjury be committed in selecting arbitrators under the sanction of an oath, and license be given to perfidious men everywhere to make play of the decisions of judges, we think that we should regulate that matter by an inviolable decision.

1. If, therefore, it shall be agreed between the plaintiff, the defendant and the arbitrator himself, that the suit shall proceed under the sanction of an oath, and the litigants have stated this in writing, either written with their own hand or by public persons, or have declared this with their own mouth before the arbitrator, making it a matter of record, that the arbitrator has been selected under the (previous) administration of an oath, adding that the arbitrator himself has taken an oath that the case should be decided with all fidelity, his determination shall be valid and by all means upheld, and neither the defendant nor plaintiff may disregard it, but it shall in every way be binding, so that they shall be compelled to obey it.

2. If nothing of the kind concerning the arbitrator was agreed on or written, but the parties themselves have made it known in writing that they have bound themselves by the ties of an oath to abide by the decision of the arbitrator, the determination of the arbitrator shall also in that case by all means be preserved inviolate; and their statement in writing shall have a like effect, whether written at the beginning or orally deposed in the manner aforesaid when the arbitrator was elected, or whether it is found written subsequent to the definitive decision, that they have submitted themselves to his jurisdiction under the sanction of an oath, or that they have sworn to carry the matters decided into effect.

3. And whenever the arbitrator alone, upon demand of the litigants, made known in writing or by oral deposition, (made of record) as aforesaid, has taken an oath to decide the case with all fidelity, in such case, too, his determination shall have a like effect as in the cases aforesaid, and shall by all means be protected by the laws.

4. And in all these cases it shall be permitted to bring an action on the facts (*in factum*), or an unjust enrichment action arising under a law (*condictio ex lege*),<sup>1</sup> or an action analogous to that *in rem*, according as the nature of the facts require.

5. If nothing of that kind, however, appears in writing or by (oral) deposition (made of record), but one of the parties asserts that an oath was taken to the effect that the

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<sup>1</sup> [Blume] C. 4.9.

decision of the arbitrator would be obeyed, such assertions, either of such litigants or of the arbitrator, alone, are not to be credited, since even though one should concede that an oath was taken, not in the presence of the judge (arbitrator), nor testified to by the writing of the parties, still the adjustment of a doubtful dispute, as often happens among inexperienced people, should not give any force to the matters adjudged, but in such case the provisions shall govern, which the ancients made in regard to the selection of arbitrators.<sup>2</sup>

6. But if anyone writes underneath the decision of the arbitrator to abide by, submit to, or fulfill, or to do or give all<sup>3</sup> as directed—for it seems best, on account of custom, to state these things in Greek words—then, although he has not added “I solemnly promise,” he shall also thus by all means be compelled by an action on the facts (in factum) to do the things to which he consented. For what is the difference whether the words “I solemnly promise” are added or are omitted?

7. For if the customary words of stipulations, and the over-refined, or rather useless form thereof has been permitted to pass out of use,<sup>4</sup> and we in the laws recently enacted by us,<sup>5</sup> corrected many faults thereof, and many circumlocutions and captious prolixities, why not also allay all anxiety of the ancient law in connection with such writing as above mentioned, so that a man who has written these words or one of them, may be compelled to abide thereby and by all means to carry them into effect; since it is not likely that he would write simply in order not to contradict, but rather to carry out the things to which he has no objection to offer.

Recited at the 7<sup>th</sup> milestone in the new consistory of the Justinian palace October 30 (529).

#### 2.55.5. The same emperor to Julianus, Praetorian Prefect.

Since it had formerly been ordained in connection with choosing arbitrators, who<sup>6</sup> were not fortified by a penalty attached to the arbitration agreement, nor were appointed by a judge, but were, without a previous order,<sup>7</sup> picked by mutual consent with the understanding of obeying their decision, that, if, forsooth, the decision of the arbitrator were in favor of defendant he should have a defense against a suit in court like that (arising out) of a pact, but if it were for plaintiff, no help would arise out of it in his favor, we ordain concerning the arbitrators mentioned, who were chosen by consent, under an agreement either in writing or without writing, of obeying their determination, that if after the determination has been made, both parties, forsooth, subscribe that (the arbitrators’) decision did not displease them, then not alone shall the defendant have a

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<sup>2</sup> [Blume] par. 1-6 repealed by Nov. 82, c. 11.

<sup>3</sup> [Blume] The words in the text are in Greek.

<sup>4</sup> [Blume] Read with Mommsen: *aboliri concessa est, nosque*. See also 35 Z.S.S. 303, note 2. Riccobono in 43 Z.S.S. 312, note 4, would read: *aula recessa est*—i.e., has passed from our laws (lit., from court).

<sup>5</sup> [Blume] C. 6.23.25; C. 8. 7.11.

<sup>6</sup> [Blume] i.e., whose decision.

<sup>7</sup> [Blume] Reference is made to an order of a judge, appointing a referee or petty judge to hear a case, as stated in C. 3.3. Such appointee had no relation to an arbitrator selected under an arbitration agreement.

defense like that (arising out) of a pact, but the plaintiff also shall have, pursuant to our command, a right of action on the facts (in factum), so that the decision may be carried into effect, namely, in this city by the office-staff of the eminent prefect, or the office-staff of the official who has jurisdiction over defendant, (and) in the provinces by the moderators as well as their apparitors or the judges who have jurisdiction over the defeated party.<sup>8</sup>

1. Even if, moreover, the parties do not, after the decision, write under the written order<sup>9</sup> of the arbitrator that they accept it, but confirm it by silence, and neither party, within ten days thereafter, sends a witnessed protest to the arbitrator or his adversaries by which he makes it known that the decision is not to be accepted, then the decision shall become ratified through silence, and the defendant shall have the aforesaid defense and the plaintiff the aforementioned action.

2. If either of the parties objects in the manner aforesaid, not at all desiring to execute the decision, no prejudice shall result; nor shall a defense arise for the defendant, nor an action for the plaintiff, except, forsooth, (in the case of) arbitrators who have been selected under the sanction of an oath, according to the new constitution of our majesty;<sup>10</sup> for than all provisions made concerning such hearing shall be observed.

3. (1) Although we are not unaware of the opinion of Julius Paulus and of certain other jurisconsults, who touched upon the subject to which we pass at present; but did not treat it very fully, thinking, however, that the rule as to certain actions, limited in time, should be adhered to,<sup>11</sup> we, however, more fully, and generally, determine that the summoning of defendant, in writing, before an arbitrator, shall interrupt the running of the time for prescription the same as if a suit had been commenced in an ordinary court.

4. (2) In addition to this we ordain, generally, concerning the matters tried before the arbitrators, that the acknowledgment or proof of any fact may also be used before the ordinary judges.<sup>12</sup>

Given at Constantinople March 27 (530).

#### 2.55.6. The same emperor to Johannes, Praetorian Prefect.

We ordain that women, mindful of their modesty, and of the work which nature has permitted them to do, and from which it has ordered them to abstain, shall be kept away from every judicial proceeding, although they, of the most eminent and best repute, have consented to act in an arbitration, or, as patronesses, have given a hearing to their freedmen. Therefore, as a consequence of selecting them (as arbitrators), no penalty, no defense arising out of a pact, shall be had against those who rightly disregard them.<sup>13</sup>

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<sup>8</sup> [Blume] Literally, “whose government the defeated party fears.”

<sup>9</sup> [Blume] forma. This was the decision as reduced to writing.

<sup>10</sup> [Blume] Law 4 h.t. 1-5. Repealed by Nov. 82, c. 11.

<sup>11</sup> [Blume] Refers to the rule, prevailing in classical law, that not the mere institution of a suit, but only joinder of issues, interrupted prescription—the statute of limitations. In later law, prescription was interrupted when defendant was summoned. See, Hunter, Roman Law 648; Buckland, Textbook 558; Weizsacker, Schiedsrichteramt, 75.

<sup>12</sup> [Blume] i.e., if an action in the ordinary court arises out of the arbitration agreement. See C. 4.20.20 note.

<sup>13</sup> [Blume] Read contemptores instead of conventores.

Given at Constantinople September 1 (531).

Extract from Nov. 82, c. 11 (539):

It provides in substance: many, ignorant of the usages of courts, readily swear that they will abide by the decision of an arbitrator who does not know what is just, and then, forgetting their oath, and afflicted with damage, ask that the matter be re-examined. In order that such perjury may not be committed hereafter, no arbitrators shall hereafter be chosen under the sanction of an oath, but parties must stipulate for a penalty. If that is done, and a party does not want to abide by the decision, he must first pay the penalty agreed on, and he may then have the matter re-examined in (a regular) court. If no penalty has been agreed on, but the parties are satisfied with an oath, they will not be bound by the decision. All other laws on this subject aside from that relating to the oath, shall remain in effect.