Sue or Settle? Promoting Compromise

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Questions

(1) David, a lawyer, is approached by Jonathan, whose neighbour Rhonda damaged his yard by riding her ATV on to the grass. All three of them are Jewish. Jonathan attempted to sue Rhonda in religious court, but Rhonda refused to participate. The religious court has given Jonathan dispensation to pursue Rhonda in secular court, but David thinks this case is ripe for mediation. Is David obligated, professionally or religiously, to attempt to persuade Jonathan to settle with Rhonda?

(2) Ralph was a contracted employee of Susan's construction company, before being dismissed without proven cause in the middle of a job. Ralph wants the balance of the salary and benefits on his contract; Susan wants to give him nothing. Julie, the professional arbitrator with whom they have contracted, hears the arguments and feels that Ralph only deserves 10% of what he wants. All three of them are Jewish. Would professional practice and Jewish law consider such a lopsided result an acceptable settlement?

(3) Jewish law insists that Jews pursue litigation in religious courts, ideally. May Jews pursue arbitration with an arbitrator who is not using any particular system of law to decide the case?

Both Systems Favour Settlement

1. Basic varieties of ADR Negotiation, Mediation, Conciliation, Arbitration

2. Owen Fiss, *Against Settlement*, Yale Law Journal 93 (1984) pg. 1075

The advocates of ADR are led to support such measures and to exalt the idea of settlement more generally because they view adjudication as a process to resolve disputes. They act as though courts arose to resolve quarrels between neighbors who had reached an impasse and turned to a stranger for help. Courts are seen as an institutionalization of the stranger and adjudication is viewed as the process by which the stranger exercises power…

I do not believe that settlement as a generic practice is preferable to judgment or should be institutionalized on a wholesale and indiscriminate basis. It should be treated instead as a highly problematic technique for streamlining dockets. Settlement is for me the civil analogue of plea bargaining: Consent is often coerced; the bargain may be struck by someone without authority; the absence of a trial and judgment renders subsequent judicial involvement troublesome; and although dockets are trimmed, justice may not be done. Like plea bargaining, settlement is a capitulation to the conditions of mass society, and should be neither encouraged nor praised.

3. Owen Fiss, *Against Settlement*, Yale Law Journal 93 (1984) pg. 1077

Of course, imbalances of power can distort judgment as well… We count, however, on the guiding presence of the judge, who can employ a number of measures to lessen the impact of distributional inequalities. He can, for example, supplement the parties' presentations by asking questions, calling his own witnesses, and inviting other persons and institutions to participate as amici.

4. Owen Fiss, *Against Settlement*, Yale Law Journal 93 (1984) pg. 1085

In my view, however, the purpose of adjudication should be understood in broader terms. Adjudication uses public resources, and employs not strangers chosen by the parties but public officials chosen by a process in which the public participates. These officials, like members of the legislative and executive branches, possess a power that has been defined and conferred by public law, not by private agreement. Their job is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them. This duty is not discharged when the parties settle.

5. Andrew McThenia, Thomas Shaffer, *For Reconciliation*, Yale Law Journal 94 (1985) pg. 1661-2, 1664

Many advocates of ADR make efficiency-based claims. And a plea for ending the so-called litigation explosion, and for returning to law and order, runs through the rules-of-procedure branch of the ADR literature. But the movement, if it is even appropriate to call it a single movement, is too varied for Fiss's description…

Fiss's description of traditional dispute resolution [settlement - MT] is a story of two neighbors "in a state of nature" who each claim a single piece of property and who, when they cannot agree, turn to "a stranger" to resolve their dispute…
The soundest and deepest part of the ADR movement does not rest on Fiss's two-neighbors model. It rests on values - of religion, community, and work place - that are more vigorous than Fiss thinks. In many, in fact most, of the cultural traditions that argue for ADR, settlement is neither an avoidance mechanism nor a truce. Settlement is a process of reconciliation in which the anger of broken relationships is to be confronted rather than avoided, and in which healing demands not a truce but confrontation. Instead of "trivializing the remedial process," ' settlement exalts that process. Instead of "reducing the social function… to one of resolving private disputes," settlement calls on substantive community values.

6. Rules of Civil Procedure, Rule 50
50.01 The purpose of this Rule is to provide an opportunity for any or all of the issues in a proceeding to be settled without a hearing and, with respect to any issues that are not settled, to obtain from the court orders or directions to assist in the just, most expeditious and least expensive disposition of the proceeding, including orders or directions to ensure that any hearing proceeds in an orderly and efficient manner.
More: http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjr/firstreport/management.asp

7. Rules of Civil Procedure, Rule 24.1 (and see Rule 75.1)
24.1.01 This Rule provides for mandatory mediation in specified actions, in order to reduce cost and delay in litigation and facilitate the early and fair resolution of disputes.
More: http://www.attorneygeneral.jus.gov.on.ca/english/courts/manmed/notice.asp

8. LSO, Rules of Professional Conduct (2014), Rule 5.1-1, 5.1-2
5.1-1: When acting as an advocate, a lawyer shall represent the client resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect.
5.1-2: When acting as an advocate, a lawyer shall not
(a) abuse the process of the tribunal by instituting or prosecuting proceedings which, although legal in themselves, are clearly motivated by malice on the part of the client and are brought solely for the purpose of injuring the other party,
(b) knowingly assist or permit the client to do anything that the lawyer considers to be dishonest or dishonourable,

9. LSO, Rules of Professional Conduct (2014), Rule 3.2-4
A lawyer shall advise and encourage the client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis and shall discourage the client from commencing or continuing useless legal proceedings.

10. Talmud, Sanhedrin 6b
רבי אליעזר בנו של רבי יוסי הגלילי אומר: אסור לבצוע, וכל הבוצע הרי זה חוטא... אלא יקוב הדין את ההר, שנאמר "כי המשפט לאלקים הוא", וכן משה היה אומר "יקוב הדין את ההר", אבל אהרן אוהב שלום ורודף שלום, ומשים שלום בין אדם לחבירו, שנאמר "תורת אמת היתה בפיהו ועולה לא נמצא בשפתיו בשלום ובמישור הלך אתי ורבים השיב מעון."...
רבי יהושע בן קרחה אומר: מצוה לבצוע, שנאמר, "אמת ומשפט שלום שפטו בשעריכם." והלא במקום שיש משפט אין שלום, ובמקום שיש שלום אין משפט! אלא איזהו משפט שיש בו שלום? הוי אומר זה ביצוע. וכן בדוד הוא אומר "ויהי דוד עושה משפט וצדקה". והלא כל מקום שיש משפט אין צדקה, וצדקה אין משפט! אלא איזהו משפט שיש בו צדקה? הוי אומר: זה ביצוע...
רבי שמעון בן מנסיא אומר: שנים שבאו לפניך לדין, עד שלא תשמע דבריהן, או משתשמע דבריהן ואי אתה יודע להיכן דין נוטה, אתה רשאי לומר להן "צאו ובצעו." משתשמע דבריהן ואתה יודע להיכן הדין נוטה, אי אתה רשאי לומר להן "צאו ובצעו." שנאמר, "פוטר מים ראשית מדון ולפני התגלע הריב נטוש"...
Rabbi Eliezer, son of Rabbi Yosi of Galil, said: Splitting is prohibited, and one who splits is a sinner… Rather, let the law pierce the mountain, as Deuteronomy 1:17 says, "For justice is for Gd." And so Moses would say, "Let the law pierce the mountain," but Aaron loved peace and pursued peace, and made peace between people, as Malachi 2:6 says, "The Torah of truth was in his mouth, and corruption was not found on his lips. He walked with Me in peace and integrity, and he brought many back from sin."…

Rabbi Yehoshua son of Karchah said: It is a mitzvah to split, as Zecharyah 8:16 says, "Truth, and justice of peace, you shall judge in your gates." Where there is justice there is no peace, and where there is peace there is no justice! What is justice that includes peace? This is splitting. And so regarding [King] David, Samuel II 8:15 says, "And David performed justice and *tzedakah*." But where there is justice there is no *tzedakah*, and where there is *tzedakah* there is no justice! What is justice that includes *tzedakah*? This is splitting…
Rabbi Shimon son of Menasya said: When two parties come before you for judgment, then before you hear their words, or after hearing but before you know where the verdict leans, you may tell them, "Go split." Once you have heard their words and you know where the verdict leans, you may not tell them, "Go split." Proverbs 17:14 says, "Like freeing water is the start of litigation; before the quarrel is exposed, abandon it."

11. Rabbi Moses Maimonides (12th century Egypt), Mishneh Torah, Laws of Courts 22:4
מצוה לומר לבעלי דינים בתחילה, "בדין אתם רוצים או בפשרה?" אם רצו בפשרה עושין ביניהן פשרה, וכל בית דין שעושין פשרה תמיד הרי זה משובח... במה דברים אמורים? קודם גמר דין. אף על פי ששמע דבריהם וידע להיכן הדין נוטה, מצוה לבצוע. אבל אחרי שגמר הדין ואמר איש פלוני אתה זכאי איש פלוני אתה חייב אינו רשאי לעשות פשרה ביניהן אלא יקוב הדין את ההר.
It is a mitzvah to say to the litigants first, "Do you want law or balancing?" If they want balancing, we do that between them. Any court that perpetually practices balancing is praiseworthy… When is this true? Before the verdict. Even though the judges have heard the litigants' words and know in which direction the law leans, there is a mitzvah to split. But after the conclusion of the verdict, when they have said, "You are innocent," "You are liable," the judge may not balance between them, but the law must pierce the mountain.

12. Talmud, Sanhedrin 6a
ביצוע בשלשה, דברי רבי מאיר. וחכמים אומרים: פשרה ביחיד... דמר סבר: מקשינן פשרה לדין, ומר סבר: לא מקשינן פשרה לדין...
אמר רב אשי: שמע מינה פשרה אינה צריכה קנין, דאי סלקא דעתך צריכה קנין, למאן דאמר צריכה, תלתא למה לי? תסגי בתרי, וליקני מיניה! והלכתא: פשרה צריכה קנין.
Splitting requires three judges, per Rabbi Meir. The Sages say: Balancing is with one judge… One view believes that we link balancing and justice, and one view believes that we we do not link balancing and justice…
Rav Ashi said: We see from here that balancing does not require an act of *kinyan*. If *kinyan* were needed, then why would we need three judges? Two would suffice, with a *kinyan* [as may be done in a normal legal proceeding]!
And the law is that balancing does require a *kinyan*.

Why do we prefer settlement?
13. Sable Offshore Energy Inc. v. Ameron International Corp., 2013 SCC 37
Settlements allow parties to reach a mutually acceptable resolution to their dispute without prolonging the personal and public expense and time involved in litigation. The benefits of settlement were summarized by Callaghan A.C.J.H.C. in *Sparling v. Southam Inc.* (1988), 66 O.R. (2d) 225 (H.C.J.):… "the courts consistently favour the settlement of lawsuits in general. To put it another way, there is an overriding public interest in favour of settlement. This policy promotes the interests of litigants generally by saving them the expense of trial of disputed issues, and it reduces the strain upon an already overburdened provincial court system." [p. 230]
This observation was cited with approval in *Kelvin Energy Ltd. v. Lee*, [1992] 3 S.C.R. 235, at p. 259, where L'Heureux-Dubé J. acknowledged that promoting settlement was "sound judicial policy" that "contributes to the effective administration of justice".
More: http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjr/firstreport/cost.asp

14. Rabbi Yehoshua Boaz (16th century Italy), Shiltei haGiborim to Rif Sanhedrin 1b
עד שלא נגמר הדין רשאי הדיין להטיל פשרה ביניהם אף על פי שידע היכן הדין נוטה אבל משנגמר הדין ואמר להם איש פלוני אתה זכאי איש פ' אתה חייב אין הדיין רשאי לפשר ביניהם ונראה בעיני שאין כל הדברים הללו אמורים אלא כשהדיינים רוצים להטיל פשרה ביניהם ושלא מדעת הבעלי דינים אבל אם הם מודיעים להם טיב הפשרה ומפייסים אותם עד שהם מתרצים למחול אחד לחבירו או לתת א' לחבירו דבר ידוע אפי' לאחר גמר דין ראוי לעשות כן ובלבד שלא יהיה שם שום צד הכרח בדבר אלא פיוסים ופתויים וזו היא מצוה גדולה והיא הבאת שלום בין אדם לחבירו וכך היה ענינו של אהרן אוהב שלום וכו'

Until the verdict is concluded, the judge may impose balancing among them, even when he knows which way the verdict leans. But after the conclusion of the verdict, when he has said, "You are innocent," "You are liable," the judge may not balance between them.
But it appears to me that all of this is said only when the judges wish to impose balancing among them without the agreement of the litigants. However, where they inform the litigants of the nature of the balancing [presenting a proposal - MT], and persuade them until one forgives the other or gives the other an identified sum, even after the conclusion of the verdict it is appropriate to do this. The only requirement is that there be no compulsion in the matter, only persuasion. This is a great mitzvah, bringing peace between parties, and this was Aaron's practice, loving peace, etc.

15. Rabbi Joseph Caro (16th century Israel), Code of Jewish Law Choshen Mishpat 12:5

יש כח לדיין לעשות דין כעין הפשרה, במקום שאין הדבר יכול להתברר
A judge may practice law in the manner of balancing, where the matter cannot be clarified.

16. Rabbi Joseph Caro (16th century Israel), Code of Jewish Law Choshen Mishpat 12:20

צריכים הדיינים להתרחק בכל היכולת שלא יקבלו עליהם לדון דין תורה.
Judges must distance themselves, with all of their strength, from accepting that they will judge by the law of Torah.

17. Talmud Yerushalmi, Sanhedrin 1:1

בימי שמעון בן שטח ניטלו דיני ממונות. אמר ר"ש בן יוחי בריך רחמנא דלינא חכים מידון.
In the days of Shimon ben Shetach, the right to judge financial cases was removed [by decree of the Roman government – MT]. Rabbi Shimon bar Yochai said: Thank Gd, for we are not wise enough to judge.

18. Rabbi Abraham Isaac Kook (20th century Israel), Igrot Raayah 1 pg. 224 (#176)

ישים נא כבודו אל לבו, כי כל חק ומשפט שבעולם לא ימלא לעולם את כל הדרישות של כל הפרטים. חקי דת ודין, כמו חקי הטבע, הנם כוללים, וזאת היא תהלתם ועוזם. החמה תצא בגבורתה, ואם תקפח לפעמים על ראש איזה נפש חיה, בהמה או איש, לא תחדל בשביל כך את אורה וחומה הטוב לכל... וכשם שאנו ממתיקים את מרירותם של חקי הטבע, שלפעמים הם חזקים יותר מכוחותינו, לא ע"י העברתם מן העולם, שלא נוכל ולא נחפץ בזה, כ"א ע"י תיקונים מלאכותיים המכשירים אותנו ליהנות מטובם, על פי אותה המדה המתאמת למצבנו, כן אנו משתדלים בכל עת הצורך, כשיש אפשרות לדבר, להכנס בפשרה, ע"פ רצונם של בעלי הדין, ביחוד במקום שמדת המשפט היא חריפה יותר מדאי לאיזה צד ,ומכ"ש כמו שיזדמן גם זה כשהיא כבדה על שני הצדדים יחד, ועל זה אנו קוראים "צדק צדק תרדוף, אחד לדין ואחד לפשרה".
His honour should realize that no law or statute in the world could fulfill all of the needs of every individual. Legislated laws, like natural laws, are general, and this is their glory and their strength. The Sun emerges with its might, and if it will burn the head of some being, animal or beast, from time to time, this will not cause it to withhold its light and heat for the benefit of all… We sweeten the bitterness of natural law, which sometimes overpowers us, not by removing it – which we cannot and would not do – but by creating artificial solutions which enable us to benefit from their good. So, too, in a suitable way, we work when necessary and possible to enter into balancing, at the desire of the litigants. This is especially so when justice is too harsh for one side, and certainly when it is too harsh for both sides. For this we say, "Justice, justice shall you pursue – one for law, one for balancing.'"

19. Rabbi Abraham Isaac Kook (20th century Israel), Orach Mishpat, Choshen Mishpat 1

י"ל דכונת "בין לדין בין לפשרה" היא שידונו הדיינים על שני האופנים, דהיינו:

- שיבררו להם דרך הדין, ויראו אם הדין אינו רחוק מדרך היושר של מצב הענין, אז ישאירו הדין, ואם יראה להם שלערך הפשרה הדין הוא כבד יותר מדאי לצד אחד או לשניהם, אז יעשו פשרה...
- והדרך האחר הוא שאם יראו שהדין הוא נגד היושר השכלי לפי מצב הענין, שאז כיון שיש בידם לעשות פשרה, יש מצוה ד"צדק צדק תרדוף" בין לדין בין לפשרה...

One could explain the [litigants' acceptance of] "whether for law or for balancing" to mean that the judges will judge in these two ways, meaning:

- They should clarify the law, and should they see that the law would not be far from justice in these circumstances, then they would leave the law as is. But were they to see that when compared to balancing, the law would be <u>too harsh</u> for one side or both, then they would balance…

- The other approach is this: should they see that the law would be against intellectual justice in these circumstances, then since they are empowered to perform balancing, they would have a mitzvah of "Justice, justice you shall pursue", whether for law or for balancing…

20. Rabbi Naftali Zvi Yehudah Berlin (19th century Russia), Meishiv Davar III 10

אם הדין אינו יכול להביא לידי שלום, ההכרח לעשותו פשרה...

If the law cannot bring about peace, then they must enact balancing…

21. Rabbi Abraham Besdin, citing Rabbi Yosef Dov Soloveitchik (20th century USA), Reflections of the Rav pp. 54-56

In *pesharah*, however, social harmony is the primary concern of the *dayyan*. The fine points of the law and the determination of precise facts are of secondary importance. The goal is not to be juridically astute but to be socially healing…

The first verse reads: "Execute the judgment of truth and peace in your gates"… Where there is strict adherence to *din*, there is justice but no *shalom*, because one of the parties is humiliated and antagonized. The immediate issue is resolved but the conflict persists, with ensuing social discord… He should seek to persuade both parties to retreat from their presumed points of advantages, and he should preach to them about the corrosive personal and social effects of sustained rancor. His responsibility is primarily to enlighten, rather than to render decisions on points of law. The first verse, therefore, projects the social welfare of society and the happiness of individuals as primary ideals, as being truly a higher form of justice.

22. Rabbi Abraham Besdin, citing Rabbi Yosef Dov Soloveitchik (20th century USA), Reflections of the Rav pp. 56-57

The second verse states: "And David executed justice and righteousness toward his people"… This verse is concerned with the attainment of *tzedek*. In Aristotelian logic, there is a law of contradiction which states that a thesis and its antithesis cannot both be valid… It follows from this logic that, when two litigants present opposing claims, only one can be right. Strict logic demands the application of *din* whereby the claim of the righteous party will be vindicated, while the other party will be discredited.

The *halakhah*, however, believes that absolute right and wrong can be realized only in heaven. In dealing with imperfect man, we posit that no man is totally wrong or right and that, in the case of the litigants, both are partially right and wrong. The application of *din* can only take account of obvious surface conditions; it fails to perceive subtleties underneath, which dilute our certainty about the right and the wrong of the litigants. Each has some responsibility for the situation and is partially guilty of the misunderstanding, for misleading innuendoes, and for contributing indirectly to a climate in society which places others at a disadvantage. Strict justice deals with plain facts and salient reality; real responsibility, however, goes much deeper and is obscured from the scrutiny of the court. Metaphysically, no one is entirely absolved in situations of conflict.

Tzedek, therefore, is realized only through *pesharah*, which declares the parties both winners and losers. Thus, *pesharah* is not only socially desirable, as the first verse claims, but it is also morally just. The principle of *tzedek* demands that *mishpat* reflect the existential condition of man's inevitable imperfection.

23. Rabbi Hershel Schachter citing Rabbi Yosef Dov Soloveitchik (20th century USA), Nefesh haRav pp. 267-268

ענין הפשרה היה רגיל רבינו לבאר שהוא ג"כ פסק דין... אלא שהוא פסק של לפנים משורת הדין המיוסד ע"פ יושר. ואין ההלכה אומרת לחלק לשנים את סכום הממון אשר עליו הם מחולקים, אלא לקבוע על פי רגש היושר – מי הוא הצודק בעסק הזה. ולפעמים יהיה הפסק בפשרה להיפך במאה אחוז מהפסק אילו פסקוהו לפי הדין.

והעולם רגילים לומר [וכך היא באחרונים] שיש ב' סוגי פשרה, שיש פשרה הקרובה לדין, ויש פשרה סתם. ורבינו אמר שאינו מבין הבדל זה, דהלא כל הענין של פשרה יסודו בקרא ד"ועשית הישר והטוב" – שמחוייבים תמיד לנהוג כפי היושר (ולפנים משורת הדין), ואם כן זה הענין גופא הוי דין התורה.

Our master would explain that "balancing" is also a legal verdict… but it is a verdict of transcending the line of the law, based on justice. The law does not say to split the monetary sum in dispute [as a means of balancing - MT], but to establish, based on a sense of justice – who is right in this case. Sometimes, the verdict of balancing will be 100% opposite what it would have been in law.

People are accustomed to say [and so is found in latter-day authorities] that there are two kinds of balancing, there is balancing that is close to law and there is general balancing. Our master said that he did not understand this

distinction; the entire matter of balancing is established by the verse, "You shall do that which is just and good" – we are always obligated to act according to justice (and transcending the line of the law), and if so, this itself is the Torah's law.

24. Rabbi David HaLevi (17th century Poland), Taz to Choshen Mishpat 12:2
כתב מהר"ל מפראג מדאמר רב הונא אי דינא בעיתו אי פשרה בעיתו, נראה שאין לרדוף כל כך אחר הפשרה, רק דאמרי להו אי דינא בעיתו כו'
The Maharal of Prague wrote that since Rav Huna would say, "Do you want law or do you want balancing," it appears that one should not pursue balancing so much. We only say to them, "Do you want law, etc."

25. Rabbi Joshua Falk (16th century Poland), Sefer Meirat Einayim to Choshen Mishpat 12:6
צריך הדיין להסביר לבעלי דינים שבפשרה נוח להם ולדבר על לבם אולי יסכימו על הפשרה, וכן היא ג"כ כונת המחבר במ"ש שאומר להם "הדין אתם רוצים", ר"ל במה שבאתם לפנינו לדון, אם כונתכם דוקא אדין או הפשרה, כי כן הוא נכון לעשות פשרה, ע"ש:
The judge must explain to the litigants that balancing will be better for them, and he must speak to their hearts, so that they might agree to balancing. This is what Rabbi Caro meant when he said that the judge should ask, "Do you want law?" Meaning: "You came to us to judge the case; do you want law, specifically, or balancing? For it would be appropriate to use balancing."

<u>How Theory Affects Practice</u>
26. Rabbi Joseph Caro (16th century Israel), Code of Jewish Law Choshen Mishpat 12:7
אף על פי שנתרצו הבעלי דינין בפשרה בב"ד, יכולים לחזור בהם כל זמן שלא קנו מידם, דפשרה צריכה קנין, אפילו בשלשה; אבל אם קנו מידם, אין יכולים לחזור בהם אפילו ביחיד; ויש אומרים דדוקא בשנים.
Even though the litigants agree to balancing in rabbinical court, they may retract as long as no *kinyan* has taken place, even if there are three arbitrators. But if they have performed *kinyan* then the litigants may not retract, even with one arbitrator. And some say only with two arbitrators.

27. Rabbi Joseph Caro (16th century Israel), Code of Jewish Law Choshen Mishpat 12:2
וכשם שמוזהר שלא להטות הדין, כך מוזהר שלא יטה הפשרה לאחד יותר מחבירו
Just as the judge is instructed not to warp justice, so he is instructed not to warp the balancing for one over the other.

28. Rabbi Abraham Tzvi Hirsch Eisenstadt (19th century Poland), Pitchei Teshuvah Choshen Mishpat 9:13
עיין באר היטב [סק"י] בשם הב"ח דשכר פשרה שרי ליטול. וכ"כ בתשובה סי' נ"א. ועיין בתשובת אא"ז פנים מאירות ח"ב סי' קנ"ט שכתב דאין דברי הב"ח מוכרחים מן הש"ס שלא יהיה זה בכלל מה אני בחנם, כיון דמצוה להתחיל בפשרה, ואם בעלי דין מתרצים בפשרה חזרה הפשרה כמו דין, והוי בכלל מה אני בחנם.
See Be'er Heiteiv, citing Bach that one may accept remuneration for balancing... See my father's responsum (Panim Meirot II 159); he wrote that Bach's position, that [balancing] is not included in the principle of "Just as I act free of charge", is not necessarily so, based on the Talmud. Since there is a mitzvah of starting with balancing, and should the litigants agree to balancing then it would have the status of law, therefore, it should be within "Just as I act free of charge."

29. Rabbi Joseph Caro (16th century Israel), Code of Jewish Law Choshen Mishpat 12:2
במה דברים אמורים, קודם גמר דין, אף על פי ששמע דבריהם ויודע להיכן הדין נוטה, מצוה לבצוע. אבל אחר שגמר הדין ואמר: איש פלוני אתה זכאי, איש פלוני אתה חייב, אינו רשאי לעשות פשרה ביניהם.
When [should judges promote balancing]? Before the verdict; even if they have already heard the claims and they know which way the verdict is inclined, there is a mitzvah to balance. But after the verdict is concluded and they have said, "You win, you lose," they may not perform balancing between the litigants.

<u>Our Questions</u>
30. Kenneth J. Glasner, QC, *Shifting the Paradigm: Moving from Litigation to Arbitration*, Huberman pp. 94-95
Arbitration clauses have become commonplace in national and international consumer contracts, or contracts of adhesion. Coupled with the proliferation of these "standard form contracts" (take a look at your credit card contract)

are arbitration clauses very favourable to one of the parties (e.g., the credit card issuer). The American courts have considered a number of these arbitration clauses to be unconscionable.
Paul Marrow sets out criteria for identifying procedural and substantive unconscionability.46 In terms of procedural unconscionability, the following factors are to be considered…
5) Was there gross inequality in bargaining power?
6) Was there exploitation of a weakness such as lack of sophistication or education?
In terms of substantive unconscionability, the following factors are to be considered:…
3) Is there a denial of a basic right or remedy?…
7) Are there limitations on remedies?
8) Is there an absence of mutuality concerning access to the judicial system?

31. Arbitration Act, s. 46 (1)
On a party's application, the court may set aside an award on any of the following grounds:
(a) a party entered into the arbitration agreement while under a legal incapacity;…
(f) the applicant was not treated equally and fairly, was not given an opportunity to present a case or to respond to another party's case, or was not given proper notice of the arbitration or of the appointment of an arbitrator;…

32. Rabbi Jacob Reischer (17th-18th centuries Prague/Germany), Responsa Shevut Yaakov II 145
"פשר" הוא מלשון פושרין לא קר ולא חם... אכתי לא ידענו שיעור מוחלט לדבר אך ורק לבי אומר לי דעל כל פנים לא יפטור זה שמתחייב בדין בכל השלש מאות לא יפטור אותו יותר משליש שהוא מאה ר"ט ויתחייב עכ"פ בשני שלישים שזה מקרי קרוב לדין
The word *pesher* is like the word *poshrin* (lukewarm), neither cold nor hot… We do not have a precise threshold for this, but my heart tells me that at least the guilty party should not get away with paying less than two-thirds of the sum. This way it is still close to the law.

33. Rabbi Joseph Caro and Rabbi Moses Isserles (16th c. Israel, Poland), Code of Jewish Law Choshen Mishpat 22:2
אם קבל עליו עובד כוכבים לדיין, אפילו קנו מיניה, אין הקנין כלום, ואסור לידון לפניו. (אבל אם כבר דן לפניו, לא יכול לחזור בו)
Rabbi Caro: If a litigant accepts a non-Jew as judge, even with a formal act of acceptance, the act is nothing and he may not litigate before him.
Rabbi Isserles: But if he already judged before him, he cannot recant.

34. Rabbi Shabbtai HaKohen (17th century Poland), Shach to Choshen Mishpat 22:15
המעיין במרדכי שם יראה דאין חילוק בכך... נראה לומר דדוקא התם דמיירי להדיא שקנו מידו סתם לדון בדיני גויים דהוי אויבינו פלילים שמחזיק ערכותיהם ודתם, משא"כ בהך דהמרדכי שקנו על גוי אחד בפירוש, הרי שגוי זה נאמן בעיניהם, ולא משום שמחזיקים משפטי הגויים ודתם...
One who examines the words of the Mordechai there will see that this is not his distinction… It appears that specifically in that case [he said to recant] where the party had clearly accepted to litigate under the laws of the nations, "our enemies as judges" holding to their values and law. As opposed to the case of the Mordechai [where he said not to recant] where they had accepted to be judged by a specific non-Jew, explicitly. This non-Jew was credible to them, and it was not about accepting the statutes of the nations and their law…

35. Rabbi Avraham Yeshayah Karelitz (Chazon Ish, 20th century Israel), Sanhedrin 15:4
ואף על גב דליכא ביניהם דיין שידין עפ"י משפטי התורה ומוכרחים להמנות בעל שכל לפי מוסרי האדם, אינם רשאים לקבל עליהם חקי עמים או לחוקק חוקים, שהשופט כל דין שלפניו הנראה אליו זהו בכלל פשרה, ואין ניכר הדבר שעזבו מקור מים חיים לחצוב בורות נשברים אבל אם יסכימו על חקים הרי הם מחללים את התורה ועל זה נאמר אשר תשים לפניהם ולא לפני הדיוטות.
Even though the community has no judge to adjudicate via Torah law, and they need to appoint a wise person to follow human ethics, they may not accept the laws of the nations or to establish their own laws. One who judges every case that comes before him as it appears to him, is carrying out what is recognized as compromise, and it does not appear that they have left the source of living water to excavate broken cisterns. But if they settle on laws, they desecrate Torah, and regarding this it is said, "Which you will place before them" – and not before laypeople.