



**Settle for less...? Or for more! Tips on timing, confidentiality and strategy in (multijurisdictional) settlement arrangements**

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## **1.1 General**

### **1.1.1 How do you define the term "settlement" in civil procedures?**

Settlement is not in fact defined in the relevant Israeli laws that deal with settlement, such as the Israeli Courts Act of 1984, but the term settlement is usually referred to as an arrangements or agreement either in or out of the court, which concludes the matter pending in court without the need for a court determination (although the court may give certification to the settlement reached).

Another form of settlement could be as provided in section 79A to the Israeli Courts Act of 1984, according to which, the parties authorized the court to determine based on its impression in a manner non appealable and that the court usually does not have to justify or explain how it reached such settlement conclusion.

In Israeli Court Fees Regulations of 2007, the regulations refer to settlement as a general concept as provided in other laws such the Israeli Courts Act of 1984 (usually for the purpose of determining under what circumstances the plaintiff would be entitled for reimbursement of the court fees paid when the claim was submitted).

### **1.1.2 Are there statutory provisions (e.g., in your civil procedural rules or substantive rules) dealing with settlements?**

Section 79A to the Israeli Courts Act of 1984

Section 140 of the Israeli regulation of Civil procedure of 1984.

Said sections and other refer to Settlement in general as an optional possibility for the court to pursue during hearings or so or providing court the authority to approve settlements with a judgment.

### **1.1.3 Are there ethical rules and guidelines that affect your negotiation strategies in practice?**

As opposed to formal mediation, that the law provides for strict confidentiality concerning all that has been discussed or disclosed with in the Mediation process (section 79C of the Israeli Courts Act), it is only a matter of common practice that materials and matters raised within settlement discussions should remain confidential.

Since this is only a matter of practice and many time not honored by opposing parties, this has an effect on negotiation strategies to prevent the miss use of information or materials presented in settlement negotiations in court as evidence. This leads to reluctance to present or provide sensitive material or information expected to further be used in court, or that might harm the client's case if disclosed in court. No guidelines exist in said regard.

**1.1.4 Is there a specific point in time in the history of a case that is particularly suitable for settlement discussions?”**

As a matter of principal, I am not fond of settlements and seek reaching Judgments in any possible way, unless there is great matter of risk to the client, of if clients has some non-legal considerations that lead his to ask for negotiating a settlement.

If there is a matter for settlement in the exceptional cases, it depends whether one is a claimant or defendant, applicant or respondent – since each and every one of those have different points of time that might be suitable to raise the matter.

This may vary all the way from right after the submission of interim measures or statement of claim (even before the time for submitting a statement of defense- for instance if the defendant has reason to refrain from the need to provide his version of things in writing to court) until after the closing arguments – before the judgment is delivered.

It always depends on different circumstances and tactics for instance 10 key points:

- (1)After a judge made initial comments on the case during pretrial;
- (2) When interim measures provide heavy burden;
- (3) Right before a risky witness is expected to testify;
- (4) When there is a need to stall time;
- (5) When a key witness refuses to testify/lack of witnesses to prove the case
- (6) After evidence hearing if you have the feel of how the judge tends to award;
- (7) Before or after submission of sensitive documents;
- (8) When client of either of the parties exhausted resources for the procedure;
- (9) When there is an immediate or attractive out of the box solution or possibility for both parties to gain advantages;
- (10) When the tactical purpose of submission of the lawsuit was accomplished (even if case was not determined – since sometimes that was not the objective).

**1.1.5 We assume that all jurisdictions know the out of court settlement. Is it, however, frequent in your jurisdiction that the court or the judge facilitates settlement discussions between the parties?**

Indeed it is frequent in almost every case.

It seems to be a guiding course of action in all courts, either to save time and money for the parties or to relieve cases from the court system where it is possible.

**What enables (if yes) or prevents (if no) the court from doing so?**

The various platforms and possibilities to engage in settlement discussions either in or out of court, as well as the possibility to have the court engaged in settlement offers or "settlement judgments" make if available, accessible and sometimes attractive to parties that either have risk in the unknown or prefer to save time and money.

**1.2 Enforcement of settlement**

**1.2.1 Are there differences between the in court and the out of court settlement, for example with respect to their effect in enforcement proceedings? Are there other practically relevant differences?**

In General if the settlement agreement was obtained and granted status of a judgment - as usually done as a matter of common practice - there is no difference as to the enforceability.

If the settlement was obtained out of court and not submitted for being granted status of a judgment, it would then be referred to as any other written agreement, that for enforcement would have to involve submitting a claim to court and obtaining a judgment after a full legal procedure.

In some cases, parties include in their settlement agreements provisions for sanctions if violated by the opposing party, thus making it even easier to enforce.

Usually settlement agreements are not eligible for appeal – even if it is a court settlement judgment.

**1.3 Confidentiality and privilege**

**1.3.1 Does your jurisdiction consider a civil settlement agreement and the discussions/correspondence leading to such a settlement confidential by law or other rules (e.g., ethical rules) or do the parties have to agree on confidentiality in the context of their settlement or the settlement discussions?**

The settlement agreement itself is NOT confidential, unless the parties specifically provided and agreed upon it being confidential.

As mentioned above, as opposed to formal mediation, that the law provides for strict confidentiality concerning all that has been discussed or disclosed with in the Mediation process (section 79C of the Israeli Courts Act), it is only a matter of common practice that materials and matters raised within settlement discussions should remain confidential.

**1.3.2 What means do you have to protect the confidentiality of your settlement and related discussions/correspondence for civil and other procedures?**

Applying for a restraining order or an injunction against disclosure or anticipated disclosure of confidential discussions/correspondence – if in formal mediation or if provided for consensual confidentiality.

Applying with a motion to the court within a legal process ordering opposing party not to make use of settlement discussions/correspondence, and asking the court to refrain from referring to any such material either for the purpose of determining the case or for any other purpose whatsoever.

**1.3.3 What are possible consequences of a breach of confidentiality?**

If in bad faith and/or bluntly used while violating a court order, a financial penalty.

Totally disregard in the court when determining the case.

**1.3.4 Are you allowed to disclose the settlement agreement in other proceedings?**

a) between the same parties? Yes unless restricted by parties.

b) between other parties? Yes unless restricted by parties.

