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When is a Deal a Deal? Looking at In re Lehman Brothers Holdings Inc.

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Our recent case-note "When is it Due: A Cautionary Tale for Business and Legal Professionals" focused on the perils of waiting until the last minute to file a pleading. *Shinhan Bank v. Lehman Brothers Holdings Inc. (In re Lehman Brothers Holdings Inc.)*[1], a recent decision from the Second Circuit, addresses a corollary issue: whether one is bound by an agreement which is to be signed by the parties before the parties sign it.

The short answer is that, unless signing the agreement is specifically made a condition precedent to enforceability, once the parties come to an agreement, even if that agreement is not signed, they are bound to its terms. Why? Because when the elements of a valid contract – offer, acceptance, consideration, mutual assent and intent to be bound – are present, the parties will be bound.[2] The *Lehman Brothers* decision offers us a refresher on basic contract law principles, while also providing us with another cautionary tale – this time regarding the use of email throughout settlement discussions.

In 2010, the Lehman Brothers estate sued over 250 defendants, including Shinhan Bank, in an effort to "claw back" approximately $1 billion in transfers that Lehman Brothers made prior to filing for bankruptcy in 2008. In April 2016, while a motion to dismiss was pending, Lehman Brothers and Shinhan Bank reached an agreement with the help of a mediator. After the mediator informed both parties of a proposed resolution, counsel for Shinhan Bank emailed the mediator that "Shinhan ha[d] agreed to accept" the proposed settlement. The parties continued to correspond via email, exchanging drafts of the settlement agreement. On June 28, 2016, Shinhan Bank's counsel sent an email to the parties confirming that Shinhan Bank had internally approved the settlement and that the agreement would be signed within the next few days, after which Shinhan Bank would remit the agreed upon settlement amount. However, mere hours later, the Bankruptcy Court dismissed Lehman Brother's claims against Shinhan Bank, and Shinhan Bank told Lehman Brothers that it would not pay the settlement amount because the parties had not entered an enforceable agreement. Lehman Brothers subsequently filed a motion to enforce the terms of the unsigned settlement agreement. The Bankruptcy Court granted Lehman Brother's motion, and the District Court affirmed.

Settlement agreements are contracts and, thus, are guided by the principles of contract law.[3] Therefore, for parties to effectuate an enforceable settlement, there must have been an offer, acceptance, consideration,

mutual assent and intent to be bound.[4] New York courts have questioned the binding effect of emails when attempting to determine whether an enforceable settlement has been reached; and the Second Circuit has just joined in on the debate. The Second Circuit, affirming the District Court's decision, found that the emails sent between Shinhan Bank and Lehman Brothers constituted a binding settlement agreement.

The Court relied on another Second Circuit case from 1985 which utilizes four factors – the *Winston* factors – to determine whether parties intended to be bound by a settlement in the absence of a written document executed by both sides. Pursuant to the *Winston* factors, the following must be asked: "(1) whether there has been an express reservation of the right not to be bound in the absence of a writing; (2) whether there has been partial performance of the contract; (3) whether all of the terms of the alleged contract have been agreed upon; and (4) whether the agreement at issue is the type of contract that is usually committed to writing."[5] In a fact intensive analysis, the Second Circuit determined that the factors ultimately weighed in favor of a finding that the parties intended to be bound by the settlement agreement. While the Court could not identify any partial performance of the agreement, and conceded that settlements are generally required to be in writing, the Court also found that Shinhan Bank did not expressly reserve the right not to be bound by the proposed settlement in the absence of a writing in any of its correspondence with the mediator or Lehman Brothers, and was convinced by the email correspondence between the parties that all material terms of the settlement had been agreed to. All that remained to be done was to sign the document itself.

The *Lehman Brothers* ruling, which was given by summary order, does not have precedential effect. Nevertheless, practitioners should take note of the decision, as it serves as a lesson to us all to be cautious about how we use email in our everyday practice, especially when in the midst of settlement negotiations. It should be noted, however, that the statute of frauds, which requires that certain types of agreements be in writing and signed by the party to be charged, may impact this issue significantly. But, that too is a subject for yet another discussion.

1. *Shinhan Bank v. Lehman Brothers Holdings Inc. (In re Lehman Brothers Holdings Inc.)*, Case No. 17-2700, 2018 WL 3469004 (2d Cir. July 18, 2018).
2. *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 427 (2d Cir. 2004).
3. *Red Ball Interior Demolition Corp. v. Palmadessa*, 173 F.3d 481, 484 (2d Cir. 1999).
4. *Register.com, Inc.*, 356 F.3d at 427.
5. *Winston v. Mediafare Entm't Corp.*, 777 F.2d 78, 80 (2d Cir. 1985).

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