



Member's

Corner

## Another slow boat to China: well worth it, again

by **Steve Grossman**, CPMR  
Former IHRA President / Chair

I have completed my second trip to Hong Kong and to Mainland China. Since I love Chinese food, that was the good part, the 16-hour and 14-hour flights are the bad parts.

I was gone for 10 days, two of which were travel days. It takes the average person 5 or so days to adjust, on the return, to the 13-hour time difference on the other side of the world.

In order to get the best value and spend my time most effectively, I traveled with experienced people.

The cost of the trip was roughly \$1000 for air, \$100 a night for hotels, and another \$800 for meals, cabs, transportation, etc. I plan to make this trip at least once a year to cover multiple shows; I am open to more if it makes financial sense.

The following is a picture of what I saw, felt, and came away with.

The first few days we spent in Hong Kong covering the Housewares Show. It is half the size of the Chicago Show. One of the problems we ran into included the booths being a combination of trading companies and/or manufacturers. There is nothing wrong with a trading company, but you are not dealing with the source. (There are some factories that will not deal direct and need a trading company, so one needs to find out the best way to source the goods.)

Like Chicago, but more so, there were many duplicate companies. So there was a wide choice to pick from and a variety of cost and quality. There were also many

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## Legally Speaking

### As Mom always said, "Be sure to get it in writing"

by **Gerald M. Newman**, IHRA General Counsel  
co-authored with **David Makarski**

You're all set. You've signed a sales representative contract with a new principal and are ready and raring to go. You know all the terms of the contract, so you think it's safe to file it away and forget about it unless some problem arises. Besides, it's not set to expire for two years, so no need to keep it lying around. In the drawer it goes, not to see the light of day unless the unthinkable happens. You and the principal embark on a fantastic relationship, and all goes well - for a while, at least.

After two-and-a-half years, the unthinkable does happen. The principal is not paying your commissions in a timely manner. It wants to bring in a factory sales person or let another representative work in your exclusive territory. It wants to terminate your representation immediately, in violation of the contract's notice provision, and it refuses to pay commissions for a new customer you've been working on for several years. It's true your contract has technically expired, because it contains a provision that it must be renewed in writing, and you and the principal have not done that. But for the last six months, you've been operating as you always have. It is obvious to you that the terms of the contract must still govern your relationship with the principal. Or do they?

In a recent case, the Court of Appeals of Michigan found that an expired contract does not necessarily continue to govern the relationship between a sales representative and its principal, even when they continue to work together after its expiration. In *Mi-Tech Sales, Inc. vs. Enhancements, Inc.*, 2003 Mich. App. Lexis 981 (Court of Appeals of Michigan, 2003), Mi-Tech, a sales representative specializing in electronics, and Enhancements, Inc., a computer and electronics manufacturer, entered into a sales representative contract designating Mi-Tech as Enhancements' exclusive sales agent for a specified territory. The agreement became effective on September 23, 1996, but stated in Paragraph 8 that it would terminate one year from that date unless the parties renewed it in writing. The contract also provided that either party could terminate their agreement on sixty-days' written notice. September 23, 1997, came and went without the parties renewing the contract in writing. Mi-Tech, however, continued to act as Enhancements' sales representative after that date, and Enhancements continued to pay it commissions.

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## Legally Speaking (from page 1)

While the contract was still in force, Mi-Tech undertook unsuccessful efforts to enter an agreement with OfficeMax to sell Enhancements' products. In 1998, Enhancements began producing a product which interested OfficeMax. Enhancements, however, notified Mi-Tech in April 1998 that it was terminating their relationship as of June 1 and immediately entered into a contract with another sales representative to exclusively service the territory covered by Mi-Tech. The new sales representative successfully reached an agreement with OfficeMax to sell Enhancements' new product, but Enhancements refused to pay any commissions to Mi-Tech on the OfficeMax deal. Mi-Tech filed suit alleging that Enhancements breached the parties' contract and violated the Michigan sales representative's act.

Mi-Tech argued, among other

things, that it had not received Enhancements' termination letter until April 30, 1998, and that, pursuant to the termination provision in the contract, their relationship therefore did not end until June 29, 1998. After a trial, the court found that because the parties did not at any time renew the 1996 agreement in writing, it terminated on September 23, 1997. It further found that the terms of the contract no longer governed the parties' relationship after that date, and that Mi-Tech was therefore no longer Enhancements' exclusive sales representative in the specified territory; thus, Mi-Tech was not entitled to any commission from the agreement between Enhancements and OfficeMax. (The court also found that Mi-Tech was not entitled to a commission because it was not the "procuring cause" of the OfficeMax deal - that is, it had not participated

in the negotiation of that particular sale - but that is a subject for another day.)

On appeal, the Court of Appeals of Michigan upheld the trial court's decision that Enhancements did not owe any commissions to Mi-Tech on the OfficeMax deal. It agreed that the parties' agreement expired by its terms on September 23, 1997, when they failed to renew it in writing. The court also found that even though Mi-Tech continued to act as Enhancements' sales representative after the contract expired, and Enhancements continued to pay Mi-Tech commissions, the parties had never reached any agreement that Mi-Tech was to be the exclusive sales representative in that geographic region, and it was not entitled to any commission on the OfficeMax sales.

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## Grossman to China (from page 1)

more 10 and 20-foot booths verses larger ones. There were many, many suppliers. Most of the booths had people who spoke some level of English, so those of us who did not speak Mandarin or Cantonese, were able to communicate with the suppliers.

After two days at the Hong Kong Show we headed up to Mainland China via an hour train ride to Shenzhen. One goes through Hong Kong and then China customs, for which you need a visa. I visited with a supplier and spent an afternoon in the famous knock-off mall to bring home a few trinkets.

The next day we left Shenzhen by train, an hour ride, to the Canton Fair located in Guangzhou, a city of 16 million people. To attend this show you need a formal invitation by a Chinese manufacturer. The reason for this process is that this show is many years old and it is an honor to be invited. Traditions in China die hard. (I warn you, the beds are like plywood with a piece of gauze on top, so do not jump on the bed.)

The Canton Fair is located in two different parts of Guangzhou, a good 30 minutes from each other. I attended the new convention center first. Areas in this newly completed building the size of McCormick Place were cookware, dinnerware, glassware, luggage and furniture. Products in the old complex of 5 buildings were

school supplies, giftware and other categories I do not remember. Most of the booths were 10 or 20 feet, and the number of manufacturers was never ending. I have been told there are many more that did not bother to show.

I was fortunate to travel with two companies I represent and have Chinese-speaking employees who can communicate with the factories we found that have products I/we believe have good potential.

One thing I learned is one needs to have lots of time when working with Chinese manufacturers direct. Many of them do not have samples and if they do, sending them to the U.S.A. takes either \$200 for airfreight or 30 to 45 days by boat. If you are developing something it could take months going back and forth to get it correct. The Chinese are great at coping but not very good at style or innovation. This is one of the main reasons one needs a Chinese speaking connection, one who can work out the subtle differences between our culture and theirs.

I hope this gives you a taste of the possibilities from China. Take care and have a safe summer.

Feel free to email me if you have questions,

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## Legally Speaking (from page 2)

In reaching this conclusion, the court examined whether the parties' actions after September 23, 1997, had created what is known as a "contract implied in fact." A contract implied in fact is a contract between two parties that "arises when services were performed by a party who at the time expected compensation from another party who expected to pay for the services." However, a "meeting of the minds" must occur for such a contract to be formed; that is, the parties must reach an understanding regarding the terms of their relationship. In this case, the court determined that there was no evidence to show that Mi-Tech and Enhancements had agreed that, after the contract had expired, Mi-Tech was to remain the exclusive sales representative in its geographical area.

The court followed the general rule that in construing a contract, the intent of the parties must be determined by looking at the language of the contract. In this case, the language of the contract unambiguously showed the parties' intent that the agreement would terminate one year from its effective date unless it was renewed in writing. Because it was not renewed in writing, the contract expired on September 23, 1997. Although the parties continued their relationship after that date, with Mi-Tech acting as the sales representative for Enhancements and Enhancements paying commissions to Mi-Tech, the court found that there was no evidence that they had reached a "meeting of the minds" that Mi-Tech was to remain the exclusive sales representative in that territory. Therefore, Enhancements had not breached the parties' contract by entering into a contract with another sales representative for the same territory, and Mi-Tech was not entitled to any commissions from the OfficeMax agreement.

This case illustrates the importance of ensuring that contracts are renewed according to their terms, and not allowed to lapse. Just because the parties continue their relationship after their contract expires does not mean that the terms of that contract will continue to govern their relationship. So before the unthinkable happens, take that contract out of the drawer every once in a while and review it so that you do not end up in Mi-Tech's position.

*Authors' note: While the Michigan Court of Appeals found in favor of the principal, the legal concept of "contracts implied in fact" are well established in the law of most states, particularly when the principal and rep continue working with each other in the same manner following expiration of the contract as during the term of the contract, i.e., same commission rate, same territory, same customer base, commissions paid in accordance with the expired contract, sales literature and samples provided, orders accepted with acknowledgments, call reports provided to principal, etc. With slightly different facts, the court could have easily found in favor of the representative.*

Gerald M. Newman, partner in the Chicago law firm of Schoenberg, Fisher, Newman & Rosenberg, Ltd., serves as general counsel to IHRA and is a regular contributor to The **REPorter**®.

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### Two new Members Only benefits/services!

1. In mid-May you received, via eMail, the first issue of the monthly **REPTops**. **REPTops** features informative and still-timely articles that have appeared in past issues of IHRA's monthly newsletter, The **REPorter**® . . . one each month.
2. These articles have been compiled and categorized into **IHRA's Article Library** . . . a collection of over 60 significant commentaries by IHRA consultants in the legal, financial, sales, marketing, human resources, and employee benefits areas.

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**2004 INDUSTRY CALENDAR OF EVENTS****June**

Portland Gift & Accessories Show  
June 05 - June 08, 2004  
Portland, OR

IDDBA Dairy-Deli-Bake  
June 06 - June 08, 2004  
Washington, DC

All Candy Expo  
June 08 - June 10, 2004  
Chicago, IL

Coffee Fest Las Vegas  
June 12 - June 14, 2004  
Las Vegas, NV

Dallas International Gift & Home Accessories Market  
June 23 - June 30, 2004  
Dallas, TX

NASFT Summer Fancy Food Show  
June 27 - June 29, 2004  
New York, NY

**July**

Atlanta International Gift & Home Furnishings Market  
July 06 - July 15, 2004  
Atlanta, GA

The Gift Fair in Atlanta  
July 09 - July 12, 2004  
Atlanta, GA

California Gift Show  
July 17 - July 20, 2004  
Los Angeles, CA

San Francisco International Gift Fair  
July 24 - July 28, 2004  
San Francisco, CA

Washington Gift Show  
July 25 - July 28, 2004  
Chantilly, VA

**August**

Orlando Gift Show  
August 07 - August 10, 2004  
Orlando, FL

CGTA Canadian Gift & Tableware Show  
August 08 - August 12, 2004  
Toronto, Canada

New York Gift Show at 225  
August 11 - August 19, 2004  
New York, NY

New York International Gift Fair  
August 14 - August 19, 2004  
New York, NY

New York Gift Show at 41 Madison  
August 15 - August 19, 2004  
New York, NY

The Seattle Gift Show  
August 21 - August 25, 2004  
Seattle, WA

Tendence Lifestyle 2004  
August 27 - August 31, 2004  
Frankfurt, Germany

**September**

IN'NOVA, Innovative Solutions for Table & Living  
September 02 - September 05, 2004  
Lisbon, Portugal

Atlanta Fall Gourmet Show & Gift & Accessories Market  
September 11 - September 14, 2004  
Atlanta, GA

Boston Gift Show  
September 11 - September 14, 2004  
Boston, MA

Dallas International Gift & Home Accessories Market  
September 11 - September 14, 2004  
Dallas, TX

Philadelphia Candy Show  
September 12 - September 14, 2004  
Valley Forge, PA

Sweets China  
September 21 - September 24, 2004  
Shanghai, China

Los Angeles Gift & Home Accessories Market  
September 26 - September 28, 2004  
Los Angeles, CA

**October**

New York Home Textiles Show  
October 08 - October 11, 2004  
New York, NY

Natural Products Expo East  
October 14 - October 17, 2004  
Washington, DC

Coffee Fest Seattle  
October 15 - October 17, 2004  
Seattle, WA (425-283-5058)

SIAL Paris  
October 17 - October 21, 2004  
Paris, France

New York Fall Tabletop Market at 225  
October 30 - November 04, 2004  
New York, NY

New York Fall Tabletop Market at 41 Madison  
October 30 - November 04, 2004  
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For a complete list of ECRM-EPPS Conferences, see their website at: <http://www.ecrm-epps.com>

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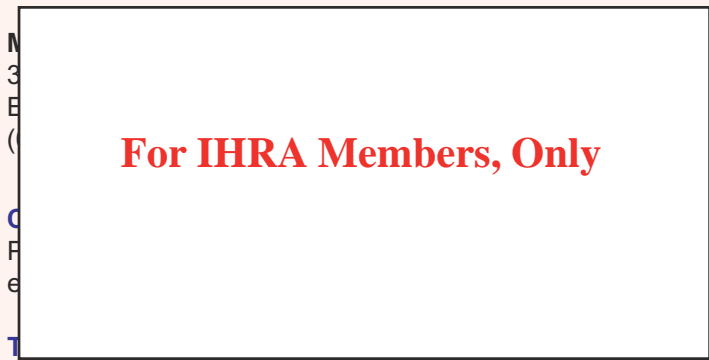
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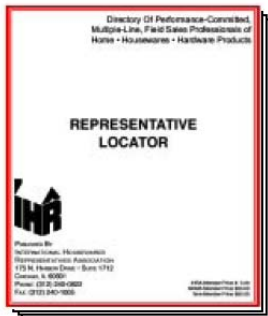
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