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Selling into the Gulf: The Legal Gaps That Sink Distribution Agreements

ABSTRACT

Cross-border distribution agreements are among the most technically demanding instruments in commercial legal practice. They must simultaneously serve a client's business urgency, withstand multi-jurisdictional regulatory scrutiny, and sustain a commercial relationship that depends on genuine partnership. This article draws on professional experience advising on the negotiation of a distribution agreement between a foreign-incorporated manufacturer of consumer products and a prospective distributor in a Gulf market, to examine the structural and regulatory traps that most commonly compromise these agreements, and to set out a practical framework for navigating them without sacrificing the client's commercial position.

I. Introduction: The First Tension

The instruction that initiated the matter examined in this article was simple and familiar: a client needed a distribution agreement for a Gulf market, and needed it quickly. He was close to sealing a commercial arrangement and did not want process to become an obstacle. What he wanted, in substance, was fast turnaround — but not to the detriment of his interests.

That phrase captures a tension at the heart of commercial legal practice. Clients under time pressure frequently merge speed with simplicity. They want less, not more: fewer clauses, fewer qualifications, fewer complications. The instinct is understandable. But in cross-border distribution, simplicity is often the most expensive choice a client can make.

An agreement that moves quickly to signature but fails to address how the distributor's performance will be measured during a regulatory setup period, who bears the cost of a product recall initiated by the manufacturer's factory failure, or whether an arbitral award obtained abroad can actually be enforced against the distributor in the destination market, that agreement has not served the client's interests. It has simply postponed the problem.

Speed and substance are not opposites. A well-structured agreement can be produced efficiently. The cost of skipping substance is not saved at drafting; it is collected later, with interest, in dispute.

A lawyer working under commercial time pressure must therefore prioritise relentlessly. There are clauses that can be simplified without meaningful loss of protection. There are others, particularly risk allocation,

regulatory responsibility, dispute resolution, and performance measurement, that cannot be touched without consequence. Knowing the difference, and being able to defend that distinction to a client who wants everything simpler and faster, is one of the core competencies of a commercial solicitor.

II. The Structural Problem: A Well-Drafted Agreement with a Lopsided Soul

The first draft of the agreement in the transaction under review was, in technical terms, competently assembled. It covered the standard architecture of a distribution arrangement: appointment, territory, pricing, ordering, delivery, warranties, compliance, and termination. But on close examination, the risk allocation told a one-sided story.

Consider what was being asked of the prospective distributor:

- Full payment of the first order upfront, structured either as a single prepayment before any goods moved, or as a staged payment divided between purchase order submission and pre-shipment.
- Delivery under FOB terms, meaning risk transferred at the port of origin and the distributor bore all sea transit risk on goods it had already paid for.
- Responsibility for all import duties, customs clearance costs, regulatory filing expenses, and compliance activity in the territory.
- Full funding of local regulatory activity, including product registration, warehouse inspection, and product notification, entirely at its own cost.
- Annual minimum purchase targets measured from the contract's effective date, regardless of the duration of the regulatory setup period.

Each of these provisions, viewed individually, is commercially defensible. Manufacturers commonly require prepayment from new international distributors. FOB is a standard and well-understood Incoterm. Local regulatory costs properly belong with the local operator. But viewed together, the cumulative effect was a document that said, in substance: the distributor bears all the risk of this relationship, and the manufacturer bears almost none.

This creates a practical problem that goes beyond fairness. A quality distributor, one with significant financial resources, regulatory capability, and genuine market relationships, will read that agreement and walk away. Not because any single provision is outrageous, but because the overall business structure signals that the manufacturer views this as a transactional arrangement, not a genuine commercial partnership. Quality distributors, the kind a manufacturer needs to actually build a brand in a new market, have options. And they choose partners whose agreements reflect mutual commitment.

> *An agreement that is legally enforceable but commercially unattractive will not produce the outcome the client wants. The best distribution agreement is one the distributor signs willingly and performs against enthusiastically. Risk allocation is not just a legal question; it is a business development tool.*

III. Business Emotional Intelligence in Commercial Drafting

There is a concept worth naming in the context of commercial drafting: business emotional intelligence, the capacity to understand not just what a clause means legally, but how it will be read and felt by the party who receives it. A clause that is technically accurate but emotionally agitating can destroy a negotiation that should have closed easily.

Take payment terms as an example. A manufacturer may have a genuine and legitimate reason for requiring prepayment: it manufactures to order, commits factory capacity and raw materials on the strength of a purchase order, and cannot absorb the risk of an order that is placed and then abandoned. That is a reasonable commercial concern. But expressed as full prepayment with no credit and no safeguards, it communicates bad

faith rather than commercial prudence.

There are several ways to restructure payment terms so that the manufacturer's commercial position is preserved while the distributor is genuinely protected. Those options are examined in Section IV of this article. The underlying point is simple: the moment a lawyer asks "how will this clause be read by the person receiving it," the drafting changes. That question is the difference between a transactional document and a genuine partnership agreement, and that difference often determines whether a quality distributor signs or walks.

IV. Incoterms, Payment Structuring, and the Logic of Good-Faith Gestures

The delivery terms commonly found in first-order cross-border distribution agreements are FOB terms under Incoterms® 2020, under which risk passes to the buyer when goods are loaded on board the vessel at the named port of origin. From that moment, the distributor bears the full risk of the sea voyage. This is commercially valid. But its implications for a distributor who has already paid in full, and who may not receive the shipping documents for some time after loading, are also essential.

FOB: What the Distributor Is Actually Accepting

Under FOB terms, the distributor is responsible for arranging marine cargo insurance. It cannot, however, activate that insurance until it holds the bill of lading, which only comes into existence once the goods are on board. If the manufacturer does not transmit the bill of lading promptly after loading, the distributor sits in an uninsured gap at precisely the moment its financial exposure is at its highest.

The practical fix is straightforward: a clause requiring the manufacturer to transmit the bill of lading, packing list, commercial invoice, and certificate of origin to the distributor within twenty-four hours of vessel loading. This does not change the Incoterm. It ensures the distributor has the tools it needs to manage the risk it has agreed to carry from the moment that risk transfers.

CIF: The Alternative Worth Understanding

CIF otherwise known as Cost, Insurance and Freight is a seller-friendly term under which the manufacturer, not the distributor, arranges and pays for sea freight and marine cargo insurance to the named destination port. The critical distinction from FOB is this: under CIF, the manufacturer must obtain cargo insurance on the distributor's behalf, include the insurance cost in the contract (product) price, and provide a policy the distributor can claim against directly. The distributor does not face an uninsured gap at the point of loading.

CIF is the cleaner solution where the manufacturer has established freight relationships and Gulf market familiarity. Where they do not, the more practical route is FOB with a tightly drafted documentation clause, requiring transmission of the bill of lading, packing list, commercial invoice, and certificate of origin within twenty-four hours of vessel loading, so the distributor can activate its own insurance immediately without facing the uninsured gap.

> *Under FOB, the distributor arranges its own insurance from the moment of loading. Under CIF, the manufacturer arranges insurance all the way to the destination port. CIF is more distributor-friendly because the seller carries the administrative burden and the distributor does not face an uninsured gap at the point of loading. The manufacturer recovers the insurance cost through the unit price.*

Structuring Payment to Signal Partnership, Not Just Obligation

On the question of payment protection, three workable approaches are available, and the right choice depends on the commercial relationship and the size of the order.

The simplest adjustment is staged payment: for example, thirty per cent on purchase order submission and seventy per cent before shipment. The distributor still pays in full before receiving anything, but it is not fully committed at the very first moment of the relationship.

A more refined approach is full prepayment backed by a refund warranty. The distributor pays one hundred per cent upfront as originally required, but the agreement includes a clear obligation on the manufacturer: if the goods are not shipped within the agreed period, the manufacturer must refund the full prepayment promptly and without deduction. This does not reduce the distributor's financial commitment. What it does is neutralise its deepest concern , paying everything and receiving nothing. The warranty costs the manufacturer nothing if it performs. Its only function is to protect the distributor from non-performance, and that protection alone can be the difference between a distributor that signs confidently and one that hesitates.

However, it should further be noted that the warranty in this instance protects against wilful non-performance and ordinary contractual default. It does not protect against insolvency. Where the order value is material, or where the distributor has limited visibility into the manufacturer's financial standing, the warranty should be paired with either a bank guarantee, a standby letter of credit, or an escrow arrangement. The choice depends on the order value and the stage of the relationship. For a first order of modest value, trade credit insurance is usually sufficient. For a larger or strategically significant first order, escrow or a Standby Letter of Credit (SBLC) which is the third option.

> A refund warranty is a contractual remedy; it operates against the manufacturer's estate. Where insolvency risk is a genuine concern, the distributor should seek a remedy that operates independently of that estate, a bank guarantee, SBLC, or escrow mechanism.

It is more common in larger transactions. In this instance, the distributor's bank holds the payment and releases it to the manufacturer only once the shipping documents, bill of lading, commercial invoice, packing list, certificate of origin, are presented and verified by the distributor.

That way, the manufacturer receives payment certainty; the distributor receives documentary assurance that its money moves only when the goods do. The administrative setup and bank charges make this less practical for smaller first orders, but it is worth considering where the order value justifies it.

None of these options require the manufacturer to abandon its commercial position. Together, they signal to the distributor that its partner has thought carefully about the risks it is being asked to carry. That signal matters most on the first transaction.

V. Guiding the Client: When Their Goal Creates Legal Exposure

One of the most important things a commercial solicitor does is not draft clauses. It is to help a client see the full picture of what they have decided, including the parts they may not have considered, and make an informed choice.

In the transaction under review, the client's commercial instinct was to hold firm on payment terms and delivery structure. Full prepayment. FOB terms. No concessions. That was a business decision for the client to make, and it was respected as such. But the advising lawyer's professional responsibility was to ensure the client made it with full awareness of what that structure meant in practice: for the quality of distributor it might attract, for the client's exposure if a shipping or production failure occurred, and for the signal it sent to a party being asked to bear all the downside risk of entering a new market.

> *The solicitor's role is not to make the client's commercial decisions. It is to ensure those decisions are made with clear eyes. Where a client's chosen structure creates legal or commercial exposure, the lawyer's obligation is to identify it plainly, present the alternatives, record the advice, and then execute the client's instructions, however the client chooses.*

A lawyer who softens or withholds an uncomfortable observation to avoid friction has not served the client. A lawyer who raises every concern but presents it in a format the client cannot easily engage with has technically discharged the duty but practically failed it.

VI. The Compliance Dimension: Where the Real Work Lives

Product Classification: Start Here or Risk Everything

Before any distribution agreement can be properly drafted, the advising lawyer must know what the product is in the eyes of the regulatory authority that governs the destination market. Not what the client calls it. Not what the marketing material says. What the relevant authority says it is, because that classification determines the entire regulatory pathway.

In the Kingdom of Saudi Arabia, the Saudi Food and Drug Authority (SFDA) is the competent body for cosmetics, food, pharmaceuticals, and medical devices. The distinction between a cosmetic and a medical device is not always obvious from the product itself; it is determined principally by the claims made for it.[1] For instance, a product that cleans, refreshes, or perfumes is a cosmetic. A product that prevents disease, treats infection, or claims any therapeutic action crosses into regulated medical device or pharmaceutical territory.

In the transaction under review, the product was a personal care item. Framed as a cosmetic, making only refreshing and cleansing claims, it was registrable through the SFDA's eCosma and GHAD notification systems with a manageable regulatory timeline. The same product, marketed with antiseptic or antimicrobial language, would have triggered a fundamentally different regulatory pathway, with a dramatically longer registration process, higher documentation requirements, and substantially greater compliance risk.

> *A product's regulatory classification is determined by its intended use and its marketing claims, not its ingredients alone. Before drafting a single clause in a cross-border distribution agreement for a Gulf market, confirm the product's classification under SFDA guidelines. In KSA, the distinction between a cosmetic and a medical device turns on the claims made for the product; language that is routine in other jurisdictions may trigger reclassification in the Kingdom.*

The Power of Attorney: It Is Not Enough to Write It Into the Agreement

Distribution agreements in regulated markets frequently include a Power of Attorney (POA) through which the foreign manufacturer authorises the local distributor to act as its agent for regulatory filings, customs clearance, and product registration. This is commercially necessary, as the local distributor is the Importer of Record and the SFDA's primary point of contact for the product in KSA.

A common and consequential mistake is to embed the POA as a clause within the distribution agreement itself, or as a schedule to it, and assume that this automatically creates a valid and enforceable agency. In the Kingdom of Saudi Arabia, it does not.

A foreign company's Power of Attorney for use in KSA must be a standalone notarised document, and it must pass through a specific attestation chain before it has legal effect in the Kingdom. That chain is:

- Notarisation before a licensed notary in the principal's home jurisdiction;
- Authentication by the Ministry of Foreign Affairs (or equivalent) in the principal's home country;
- Legalisation by the Saudi Embassy in that country; and
- Attestation by the Saudi Ministry of Foreign Affairs and, where required, the Saudi Chamber of Commerce.

Only once this chain is complete does the POA have standing before Saudi regulatory bodies, the customs authority, and Saudi courts.[2]

Ministry of Commerce Registration: The Step Most Lawyers Miss

Saudi Arabia regulates commercial agency and distribution arrangements through its Commercial Agency Regulations. A distribution agreement that is not registered with the Saudi Ministry of Commerce within 30 (ninety days) of signing does not carry the standing it would otherwise have before Saudi courts and the

Ministry.[3]

This does not mean an unregistered agreement is void. It means that in any dispute, the distributor's ability to rely on Saudi statutory protections for commercial agents, including compensation rights on termination and inventory buyback obligations, is significantly weakened. On the other hand, for the foreign principal, an unregistered agreement may also complicate the enforcement of its contractual rights in Saudi courts.

The practical consequence is straightforward: the distribution agreement must include a clause requiring both parties to cooperate to register it with the Ministry of Commerce, with a clear deadline, an allocation of registration costs, and a mechanism for good-faith renegotiation if registration is refused.

VII. Effective Date, Regulatory Licensing, and the Minimum Purchase Target Trap

Of all the technical issues that arise in cross-border distribution agreements for regulated Gulf markets, the one with the greatest practical consequences for the commercial relationship is the interaction between the agreement's effective date, the regulatory licensing timeline, and the minimum purchase targets.

Most distribution agreements set an effective date, the date the agreement is signed, or a date shortly after, and begin measuring the distributor's performance obligations from that date. In a domestic context, where the distributor can begin trading immediately, this is logical. In a regulated cross-border context, particularly in the Kingdom of Saudi Arabia, it can be commercially unjust and strategically counterproductive and c ounterintuitive.

The Regulatory Reality: Months Before a Single Unit Can Move

For a new consumer product entering KSA, the full SFDA compliance process, obtaining the distributor's import licence, securing SFDA approval of the warehouse, completing product notification through the eCosma platform, and obtaining Certificates of Conformity through FASEH for each shipment, takes between three and six months from the date a fully prepared application is submitted. This timeline assumes the distributor is well-resourced and the application is complete and correct.

Consider what it means to set a minimum annual purchase target from the contract's effective date when regulatory clearance will not arrive for three to six months after that date. The distributor is contractually committed to purchasing a defined volume of goods in Year 1, but legally prohibited from importing those goods for the first quarter to half of the year. The target is not a performance standard in those circumstances but a structuring failure.

The solution recommended for this class of transaction is to anchor the commencement of the purchase commitment period to the date of SFDA import licence activation, not the contract effective date.

Sell-In vs. Sell-Through: The Measurement Question That Shapes the Relationship

Closely related to the effective date question is the choice between measuring the distributor's performance on a sell-in or sell-through basis.

Sell-in refers to units purchased by the distributor from the manufacturer, what appears on invoices and in the manufacturer's accounts as revenue. Sell-through refers to units actually sold by the distributor to end consumers or retail customers.

A distributor measured purely on sell-in has an incentive to place large orders to satisfy contractual targets, regardless of whether the market is actually moving the product. The manufacturer's targets look healthy on paper. But without visibility into what is happening at the retail or end-user level, neither party can tell whether the brand is genuinely gaining traction or simply accumulating in a warehouse.

However, a distributor measured on sell-through cannot game the metric in this way, but sell-through data is harder to verify, requires reporting systems, and creates disputes about whether returns or unsold stock count against the target.

The better approach is to use both metrics, but for different purposes.

Sell-in is the legal commitment. It is the minimum purchase number written into the contract that the distributor must hit to remain in good standing. It appears on invoices, is objective, and is straightforward to enforce. The manufacturer always knows where it stands.

Sell-through is the monitoring tool. Not a contractual obligation, but a reporting requirement. At defined intervals, quarterly is workable, the distributor submits market data showing how much product has actually moved to retailers or end customers. Low numbers do not automatically trigger a penalty. What they do is give both parties a shared, honest picture of whether the brand is gaining real traction or sitting in a warehouse. That visibility allows problems to be caught and addressed early, before they become disputes.

Growth Plans Over Automatic Penalties: A Better Architecture

The standard distribution agreement includes annual minimum purchase targets with significant consequences for shortfall: loss of exclusivity, territory reduction, or termination. In many markets, that structure is appropriate. But for a new brand entering a regulated Gulf market for the first time, it creates the wrong incentives.

Consider a distributor that has invested substantially in regulatory setup, warehouse compliance, and market introduction. Regulatory delays push the effective launch from Month 2 to Month 7. The distributor performs strongly once on-shelf, but the annual target, set without reference to the delay, is missed. Under a standard shortfall clause, that missed target triggers automatic breach, loss of exclusivity, or termination. The distributor loses the market position it spent months and significant capital building. The manufacturer loses its only foothold in the territory and must start the regulatory process again with a new partner.

Both parties lose. Neither needed to.

Under a milestone review and growth plan structure, the same situation produces a different outcome: both parties meet, review what happened, agree a revised forecast, and recommit to a shared plan for Year 2. A problem becomes a planning exercise.

The minimum purchase target is often the most bluntly drafted clause in a distribution agreement. It should not be. A graduated milestone structure, connected to real-world regulatory timelines, is more likely to produce the sustained performance the manufacturer actually needs.

VIII. Governing Law, Arbitration, and the Enforcement Gap

Many distribution agreements involving foreign-incorporated manufacturers specify the governing law of the manufacturer's home jurisdiction and a domestic dispute resolution mechanism. For the manufacturer, this is instinctive: a familiar legal system, sophisticated courts, and predictable jurisprudence. As a governing law choice, it is defensible. The problem is not the choice of governing law. The problem is the assumption that a judgment or award obtained under that law can be enforced in Saudi Arabia if a dispute arises.

The New York Convention and Why SIAC Is the Right Seat

Saudi Arabia is a signatory to the New York Convention? on the Recognition and Enforcement of Foreign Arbitral Awards. What this means in practice is that a properly rendered arbitral award from a recognised arbitration institution seated in any Convention signatory country can be submitted to the Saudi Enforcement Courts for recognition and execution. However, a court judgment from a foreign domestic court cannot. The New York Convention covers arbitral awards only.

For a court judgment to be enforceable across borders, the two countries involved require a separate bilateral treaty specifically covering mutual recognition of court decisions. Saudi Arabia does not have such a treaty with every jurisdiction whose manufacturers trade in its market.

Where no such treaty exists, a foreign court judgment is, in practice, unenforceable against a Saudi resident's assets in the Kingdom without fresh proceedings before a Saudi court, which could be slow, costly, and uncertain.

This means the choice is not between a foreign domestic court and arbitration as two equivalent options as many people think. It is a more fundamental choice between a mechanism that produces an enforceable outcome in the territory and one that may not.

Once arbitration is chosen as the dispute resolution mechanism, the question of seat becomes important. The Singapore International Arbitration Centre (SIAC) is recommended for two practical reasons, not merely as a

matter of eligibility. First, Saudi enforcement courts have accumulated more experience handling SIAC awards than awards from many other institutions, and that familiarity reduces friction and uncertainty at the enforcement stage.

Second, in 2024 SIAC signed a cooperation agreement with the Saudi Center for Commercial Arbitration,? creating a formal working relationship between the two systems. SIAC awards currently move through Saudi enforcement courts with less resistance than awards from most comparable institutions.

The governing law of the contract and the seat of arbitration are entirely separate questions. The contract may be interpreted under the law of the manufacturer's home jurisdiction. The dispute is resolved through SIAC arbitration seated in Singapore. The award is enforced through the Saudi Enforcement Courts. That combination is tested and enforceable in the Kingdom.

IX. The Wider Principle: Local Law is Non-Negotiable

Every point in this article converges on a single principle: in cross-border commercial practice, local law is not an optional extra. It is the foundation. An agreement that is commercially thoughtful, internally consistent, and properly drafted will still fail if it is built on an incorrect understanding of what the law of the territory actually requires.

In the context of the Gulf market examined in this article, that means understanding that the SFDA licensing process takes three to six months. That a Power of Attorney embedded in a distribution agreement is not a valid POA in KSA without more.

That the Kingdom's Commercial Agency Regulations require Ministry of Commerce registration. That a product's marketing language determines its regulatory classification, not just its chemistry.

None of these are facts that would typically appear in a standard distribution agreement template. All of them have the potential to render an otherwise well-crafted agreement operationally useless or legally unenforceable.

A quality business partner, on either side of a distribution arrangement, looks at an agreement and asks: does the lawyer who drafted this understand the market I operate in? The answer is visible in the document. It shows in whether the performance targets reflect the regulatory setup timeline. It shows in whether the POA is structured for actual use in the destination jurisdiction. It shows in whether the arbitration clause produces an enforceable award. Competence is what attracts serious partners to the table and the agreement is the evidence of it.

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