Unified Patent Court
Einheitliches Patentgericht
Juridiction unifiée du brevet

UPC Court of Appeal
UPC_CoA_889/2025

ORDER

of the Court of Appeal of the Unified Patent Court
issued on 18 February 2026
concerning security for costs (R. 158 RoP)

HEADNOTES
(1) When exercising its discretion under Art. 69(4) UPCA and R.158.1 RoP, the Court must determine, in the light of the facts and arguments brought forward by the parties, whether the financial position of the claimant gives rise to a legitimate and real concern that a possible order for costs may not be recoverable and/or the likelihood that a possible order for costs by the UPC may not, or in an unduly burdensome way, be enforceable.

(2) A litigation insurance that covers the legal costs of the defendant must be considered when assessing whether the claimant's financial position gives rise to a concern that a possible order for costs may not be enforceable, or in an unduly burdensome way, by the defendant.

KEYWORDS
Security for costs – Financial position of the claimant – Litigation insurance (After The Event insurance) with an anti-avoidance endorsement.

APPELLANT (AND CLAIMANT BEFORE THE COURT OF FIRST INSTANCE)

Syntorr LP, Georgiou Gennadiou, 6031 Larnaca, Cyprus

(hereinafter referred to as 'Syntorr')

represented by attorney-at-law Dr Henrik Holzapfel, McDermott Will & Schulte, Düsseldorf, Germany

RESPONDENTS (AND DEFENDANTS BEFORE THE COURT OF FIRST INSTANCE)

1. **Arthrex Inc.**, 1370 Creekside Boulevard, Naples, Florida, USA
2. **Arthrex GmbH**, Erwin-Hielscher-Str. 9, 81249 Munich, Germany
3. **Arthrex Distribution Hub EMEA B.V.**, Ampèrestraat 9, 5928 PE, Venlo, The Netherlands

(hereinafter jointly referred to as 'Arthrex' or 'the Arthrex companies')

represented by attorney-at-law Dr Ralph Nack, Noerr Partnerschaftsgesellschaft mbB, Munich, Germany

PATENT AT ISSUE

EP 3 835 470

PANEL AND DECIDING JUDGES

Panel 3:
Ulrike Voß, presiding judge
Nathalie Sabotier, legally qualified judge and judge-rapporteur
Bart van den Broek, legally qualified judge

IMPUGNED ORDERS OF THE COURT OF FIRST INSTANCE

Local Division Munich, 26 September 2025, in UPC_CFI_114/2025 (R. 333 RoP) in relation to the Procedural Order, 11 August 2025 in UPC_CFI_114/2025 (security for costs)

LANGUAGE OF THE PROCEEDINGS

English

ORAL HEARING
26 January 2026

SUMMARY OF FACTS AND PARTIES' REQUESTS

1. On 13 February 2025, Syntorr lodged an infringement action against the Arthrex companies at the Local Division Munich (hereinafter referred to as 'the LD' or 'the LD Munich').

2. On 29 April 2025, the Arthrex companies filed an application for security for costs pursuant to R. 158.1 RoP.

3. On 11 August 2025, the judge-rapporteur of the LD Munich granted this application and ordered Syntorr to provide security for costs to Arthrex in the total amount of € 2 000 000 by 30 September 2025, either by a bank guarantee or by deposit. By procedural order of 26 September 2025 pursuant to R. 333 RoP, the panel of the LD Munich upheld this order and refused leave to appeal.

4. In response to the order, Syntorr provided a bank guarantee dated 1 October 2025.

5. On 13 October 2025, Syntorr lodged a request for a discretionary review by the Court of Appeal under R. 220.3 RoP and an application for release of the security pursuant to R. 352.2 RoP.

6. On 15 October 2025, the standing judge of the Court of Appeal invited Arthrex to comment on Syntorr's request in accordance with R. 220.4 RoP

7. In its application for a discretionary review dated 13 October 2025, Syntorr requests that:

   I. the procedural orders of 26 September 2025 and 11 August 2025 are overturned.
   II. the procedural order of 11 August 2025 is amended to dismiss the Arthrex companies' request for cost security.
   III. in the alternative, Syntorr is ordered to provide security in the total amount of up to € 2.000.000, in aggregate for all defendants, for the costs and expenses incurred and/or to be incurred by the defendants, and the claimant is allowed to provide security by insurance with anti-avoidance endorsement from an insurer licensed in the European Union, in a way and with terms as deemed appropriate by the Court, within a time limit of six weeks after the decision.
   IV. the bank guarantee ("Legal Proceedings Suretyship (Prozessbürgschaft)") No. 513A078077 dated 1 October 2025 provided by the claimant be released, and the defendants be ordered to surrender the original copy of said bank guarantee to the claimant.

8. In their comments on the application for discretionary review dated 23 October 2025, the Arthrex companies request that:

   I. the procedural orders of 26 September 2025 and 11 August 2025 of the Court of First Instance, Local Division Munich are upheld.
   II. Syntorr's auxiliary request for allowance of providing security by insurance with anti-avoidance endorsement from an insurer licensed in the European Union is dismissed.
   III. Syntorr's request that the bank guarantee ("Legal Proceedings Suretyship (Prozessbürgschaft)") No. 513A078077 dated 1 October 2025 be released and that respondents surrender the original of said bank guarantee is dismissed.

9. On 24 October 2025 the standing judge allowed leave to appeal.

INDICATION OF PARTIES' SUBMISSIONS

Syntorr

10. Syntorr argues that the Court of First Instance failed to properly use its discretionary power under R. 158.1 RoP and that it did not address the substance of its arguments. In particular, no comment was made in the orders on the adequacy and sufficiency of Syntorr's existing litigation insurance. Syntorr refers in this context, *inter alia*, to the Court of Appeal's statements in the ICPillar decision (Order of 16 September 2024, UPC_CoA_301/2024, *ICPillar v ARM Limited at al*., para. 35) regarding the potential relevance of a litigation insurance.

11. Syntorr adds that, with the existing litigation insurance, particularly its anti-avoidance endorsement (AAE), the Arthrex companies are not exposed to any risk of a potential inability to cover a possible claim for recovery of their legal costs, as this insurance, obtained from an insurer authorized to operate in the EU, is as reliable as a guarantee from a bank.

12. Syntorr also asserts that the Court of First Instance's interpretation of R. 158.1 RoP, is unduly narrow. In particular, the purely literal interpretation of this provision adopted in the impugned order, according to which the forms for security cited in the second sentence of this provision (bank guarantee and deposit) are exhaustive, fell short in view of a necessary systematic and teleological interpretation, for example, in view of R. 352.1 RoP, as well as, more generally, a flexible interpretation of the Rules of Procedure.

13. Moreover, Syntorr argues that the impugned order is disproportionate and do not provide a reasonable path for SMEs to operate in the UPC.

The Arthrex companies

14. The Arthrex companies argue that the wording of R. 158.1 RoP, as the Court of First Instance rightly stated, contains nothing to indicate that the alternative means in R. 158.1 RoP, second sentence, to provide security for the legal costs and other expenses of the other party, i.e., a deposit or a bank guarantee, are merely exemplary. Rather, the Courts' discretion is limited to deciding whether to order security in the form of one of these two statutory alternatives. The Arthrex companies also contest any analogous application of R. 352 RoP to R. 158 RoP.

15. The Arthrex companies further state that if one were to agree that the court may order other means than a deposit or a bank guarantee, such alternative means must at least provide an equal level of protection for the other party compared to the means expressly allowed by the rules. Yet, in the case at hand, the insurance policy obtained by Syntorr, does not provide an adequate level of protection, in particular due to concerns regarding its validity (the absence of a valid signature of the policy and the absence of proof that a stipulated condition precedent was fulfilled), concerns on the solvability of the insurer established in Malta, and the insurer's right of termination of the insurance and the AAE.

16. In this regard, the Arthrex companies point out that the policy can be terminated unilaterally by the insurer, and that such termination and its effects are not balanced out by the AAE or the 60-day moratorium period included therein, as the possibility to secure alternative security, lodge a claim for costs and issuance of a decision by default (which, according to Arthrex, should all be done within the 60-day moratorium period) depends on circumstances out of Arthrex' control.

GROUNDS FOR THE ORDER

LEGAL FRAMEWORK

17. According to Art. 69(4) UPCA, at the request of the defendant, the Court may order the applicant to provide adequate security for the legal costs and other expenses incurred by the defendant which the applicant may be liable to bear, in particular in the cases referred to in Art. 59 to 62 UPCA. The ratio behind Art. 69(4) UPCA is the protection of a defendant against a claimant, who initiates an action, without having sufficient means to compensate the

defendant for the legal costs incurred in the proceedings the defendant was involved in at the initiative of the claimant (CoA Order of 20 June 2025, UPC_CoA_393/2025, *AorticLab v Emboline*, paras. 15 and 28).

18. R. 158.1, first sentence, RoP provides that, at any time during proceedings, following a reasoned request by one party, the Court may order the other party to provide, within a specified time period, adequate security for the legal costs and other expenses incurred and/or to be incurred by the requesting party, which the other party may be liable to bear. The second sentence of R. 158.1 RoP adds that where the Court decides to order such security, it shall decide whether it is appropriate to order the security by deposit or bank guarantee.

19. As the wording of the first sentence of R. 158.1 RoP ("*the Court may order*") makes clear, the ordering of security is a discretionary decision of the Court. This discretion refers to the question "whether" a security should be ordered. When exercising its discretion under Art. 69(4) UPCA and R. 158.1 RoP, the Court must determine, in the light of the facts and arguments brought forward by the parties, whether the financial position of the claimant gives rise to a legitimate and real concern that a possible order for costs may not be recoverable and/or the likelihood that a possible order for costs by the UPC may not, or in an unduly burdensome way, be enforceable (CoA Order of 17 September 2024, UPC_CoA_217/2024, UPC_CoA_219/2024, UPC_CoA_221/2024, *AUDI AG v. Network System Technologies LLC*, para 7; CoA Order of 9 July 2025, UPC_CoA_431/2025, *Chint v JingAO*, para. 10; CoA Order of 30 October 2025, UPC_CoA_8/2025, *Oerlikon v. Bhagat*, para. 20). If the Court comes to the conclusion that a security for costs should be ordered in a particular case, the second sentence of R. 158.1 RoP specifies "how" such security could be provided.

20. The burden of substantiation and proof why an order for security for costs is appropriate in a particular case is on the applicant making such a request. However, once the reasons and facts in the request have been presented in a credible manner, it is up to the the other party to challenge these reasons and facts in a substantiated manner, especially since that party will normally have knowledge and evidence of its financial situation. It is for this partyto argue that and why a security order would unduly interfere with its right to an effective remedy (CoA Order of 17 September 2024, UPC_CoA_218/2024, UPC_CoA_220/2024, UPC_CoA_222/2024, *Volkswagen vs Network System Technologies*, para 8; CoA Order of 12 July 2025, UPC_CoA_596/2025– *Suinno v. Microsoft*, para. 21).

21. Given that the Court of First Instance has a margin of discretion when deciding on a request for security for costs regarding R. 158.1 RoP, the review by the Court of Appeal is limited in this regard (, *Audi AG v Network System Technologies*, para. 8 and 9; *Chint v JingAO*, para. 11; *Suinno v. Microsoft*, para 22). The review only targets errors of discretion, i.e. non-use, misuse or exceeding of discretion.

PRESENT CASE

22. In the present case, the Court of First Instance stated that Syntorr did not dispute the obligation to provide security. As a consequence, the Court of First Instance ordered Syntorr

to provide a deposit or a bank guarantee in accordance with R. 158.1 RoP, as, according to the Court, the list of R. 158.1 RoP, is exhaustive.

23. The Court of First Instance, by disregarding a significant circumstance of Syntorr's financial position, wrongly exercised its discretion.

24. When asserting that "*the claimant did not dispute the obligation to provide security",* the Court of First Instance erred, as Syntorr specifically argued that, given the existence of an anti-avoidance endorsement (AAE), the litigation insurance that Syntorr had obtained from an EU based (Maltese) insurance company, provided adequate security to the Arthrex companies, so that there was no obligation to provide further security in the form of a deposit or a bank guarantee.

25. In this regard, as it is an element of the "financial position" of Syntorr (the insurance relates to the present dispute and is, *inter alia*, based on an assessment of the patents at stake and the present claims), the Court of First Instance should have taken careful consideration of the terms of the insurance policy disclosed by Syntorr, in order to assess the likelihood that a possible order for costs may not be enforceable, or be enforceable in an unduly burdensome way for the Arthrex companies. In that sense, the insurance policy is of particular relevance to demonstrate that there is no need for a security for costs (*ICPillar LLC vs ARM Limited et al*, para 35).

26. In the present case, the insurance policy (exhibit MWE-30), digitally signed by [redacted] head of underwriting of the insurance company (exhibit MWE-39), contains the obligation for the insurer to indemnify the insured for the Opponents' costs (clause 1.1) with a limit of indemnity of € 4 000 000 (clause 7 of the schedule). The Opponents are defined as the Arthrex companies (Endorsement No. 3) (exhibit MWE-30a).

27. As stated by [redacted] in its letter dated 7 July 2025 (exhibit MWE-39), the insurance provided by his company under n° 02328224 is valid and in force.

28. In this respect, the Court of Appeal is of the opinion that Syntorr sufficiently substantiated the validity and the terms of the insurance policy in the course of the proceedings before the Court of First Instance in response to the Arthrex companies' arguments, while the Arthrex companies still merely assert their "ignorance" of the validity of the signature and the fulfilment of the condition precedent, without putting forward any concrete element that would affect this opinion. In particular, having regard to the additional evidence submitted by Syntorr, this is insufficient to substantiate the alleged concerns regarding the validity of the insurance policy.

29. In addition, the AAE (exhibit MWE-31) provides that "*this Policy is non-voidable and non-cancellable and any claim made against it for the Insured Liability will be honoured in full up to an aggregate amount equal to the Limit of Indemnity in the Policy irrespective of any exclusions or any provisions of the Policy or of the general law, which would have otherwise rendered the Policy or the claim unenforceable or entitled the Insurer to avoid, rescind or*

discharge the Policy or avoid, reduce, exclude or deny cover or otherwise repudiate liability for Opponent's Costs under the terms of the Policy." (clause 1). Given that the exclusions in the insurance policy do not apply to the Opponents (the Arthrex companies) under the AAE, the Arthrex companies' reference to these exclusions is of no relevance to the protection provided to them by the litigation insurance.

30. The AAE further specifies that its terms "a*re intended to benefit the Opponents and may be enforced by the Opponents directly pursuant to the provisions of the Contracts*" (clause 4).

31. Moreover, clause 2 of the AAE specifies how the Opponents can obtain reimbursement for their legal costs: "*A request for payment will be finalised upon the provision of: (i) a binding agreement to pay and/or the relevant court order; (ii) the relevant bank details for payment, and (iii) the Opponent verifying those bank details to the Insurer by way of a telephone call ahead of the payment being processed*." The Court fails to see how this straightforward mechanism would be "burdensome" or would create an impediment to the enforcement of a decision to pay costs, as argued by the Arthrex companies during the oral hearing.

32. Regarding the termination provisions, clause 5 of the anti-avoidance endorsement reads as follows: "*the insurer remains entitled to terminate the policy (including this endorsement) in accordance with the terms of the policy, provided that termination will only take effect 60 days after notice has been received by all Opponents* (…)". Clause 4.2 of the insurance policy specifies that, if the insurer cancels this policy, the insurer will not pay the insured liability incurred after the date of cancellation. However, as clause 5 of the AAE confirms: "*The Insurer remains liable to pay the Insured Liability incurred by the Opponents before (but not after) the date on which the termination takes effect*" (i.e. at the end of the 60-day moratorium period).

33. This means that, under the litigation insurance the effect of termination is limited to prospective costs. As the insurer must give notice to the Opponents of this termination, within the 60-day moratorium period, the Arthrex companies could apply for further security or for a stay until adequate security would be provided by Syntorr pursuant to R. 158.1 RoP. There is no ground for Arthrex' assertion that also the decision on costs needs to be issued within the 60-day period, as the AAE specifically states in clause 5 that "*the timing conditions relate to when the cost in question was incurred by the Opponents, not when the judgement, order, award or agreement causes such costs to become Opponent's costs*".

34. Finally, the assertion by the Arthrex companies that the Maltese insurer would not be solvable, is baseless. Syntorr has sufficiently shown that there are no viable concerns about the solvability of the insurer, which, as an EU based insurance company, must comply with the strict requirements of the Solvency II Directive (Directive 2009/138/EC of 25 November 2009) (cf. exhibits MWE-35 to MWE-38 and MWE-41 and MWE-42). The Arthrex companies have submitted no evidence to substantiate any of their alleged concerns about the solvability of the insurer.

35. It follows from the above that the objections raised by the Arthrex companies regarding the insurance policy are not successful. Due to the existing insurance policy and its specific terms

and conditions, the financial situation of Syntorr does not give rise to a legitimate and real concern that a possible order for costs may not be recoverable or in an unduly burdensome way. The order for security pursuant to R. 158.1 RoP is therefore not necessary.

36. In view of this, the further question disputed between the parties as to whether the court is entitled to order the provision of an insurance policy as a form of security pursuant to R. 158.1, second sentence, RoP, is irrelevant.

37. For these reasons, the impugned orders shall be set aside, the request for security shall be dismissed and the bank guarantee shall be released by analogy to R. 352.2 RoP.

ORDER

The Court of Appeal:

- Sets aside the impugned orders;
- Dismisses the request for security;
- Orders the bank guarantee ("Legal Proceedings Suretyship (Prozessbürgschaft)") N°. 513A078077 dated 1 October 2025 provided by Syntorr to be released, and orders the Arthrex companies to surrender the original copy of said bank guarantee to Syntorr.

Issued on 18 February 2026

Ulrike Voß
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Date: 2026.02.18 09:11:11 +01'00'

Ulrike Voß, presiding judge

Nathalie, Jeanne, Danielle SABOTIER
Digitally signed by Nathalie, Jeanne, Danielle SABOTIER
Date: 2026.02.18 09:40:10 +01'00'

Nathalie Sabotier, legally qualified judge and judge-rapporteur

Ulrike Voß
Digitally signed by Ulrike Voß
Date: 2026.02.18 09:11:38 +01'00'

On behalf of
Bart van den Broek, legally qualified judge