

EIP

Security for Costs Application

Emboline, Inc. v AorticLab srl (UPC_CFI_628/2024)**Order of 16 April 2025 (ORD_9097/2025)[1]**

The LD Munich has recently provided some guidance on when security for costs will be available as well as how to interpret the rules on eligibility to request security for the purposes of Art. 69(4) UPCA.

In the present application, the applicant Emboline, who is also the claimant in the infringement proceedings, had sought security for costs, alleging that the Respondent, AorticLab, was in a precarious financial situation and may be unable to pay Emboline's costs should it succeed at trial. This allegation was based on statements in AorticLab's defence that it might be driven to insolvency if an injunction was entered against it.

AorticLab's defence to the present application focussed on the language of Art. 69(4) UPCA, which states that the Court may make an order for security for costs "at the request of the defendant". It was argued that since Emboline was the claimant in the infringement proceedings, it could not rely on this provision. AorticLabs also pointed to the fact that it had raised funds amounting to some \$10.5m to rebut the notion that it was impecunious and thus a suitable target for an order for security for costs.

In coming to its decision, the Court made it clear that, since AorticLabs had raised a counterclaim to the original infringement action, this meant Emboline was a defendant (at least in respect of the counterclaim) and therefore entitled to rely on Art. 69(4) in support of its application for security. In this way, the Court appears to be recognising that it is possible for parties in UPC actions such as this to hold dual roles as both claimant and defendant.

The Court was reluctant to get into how Art. 69(4) interacts with Rule 158 of the UPC Rules of Procedure, which states:

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. [Emphasis added]

This rule does not explicitly limit the right to request security for costs to a defendant, however the Court in the present case considered it was “at least questionable whether a party who only has the position as a claimant is entitled to request for security”, both in light of the wording of Art. 69(4) and “the way this issue is handed in the law of the member states”.

Further, the Court held that AorticLabs’ financial position did give rise to a “legitimate and real concern” that they may not be good for any adverse costs award, on the basis that AorticLabs itself had complained that an injunction would leave it insolvent. The reasoning was that any order for costs would come after any injunction awarded, by which time, if AorticLabs was correct, they would be rendered insolvent.

On the basis of the above, the Court allowed Emboline’s application for security for costs, setting the amount of that security at €200,000. The Court noted in the order that a default judgment may be entered in accordance with Rule 355 RoP if the security is not provided within the time limit set.

[1] <https://www.unified-patent-court.org/en/node/97000>