

## Second Circuit Allows Broader Judicial Discretion in Denying Attachments

**A**ttachment is a powerful litigation tool that can have the drastic effect of tying up a defendant's assets at the start of a litigation, well before a judgment is entered. Most commonly, the purpose of an attachment is to provide security to the plaintiff. If the plaintiff wins the case, the attached assets may be applied to pay down a money judgment.

Under New York law, attachment is a creature of statute. Its application, and limitations, derive from Article 62 of the New York Civil Practice Law and Rules (CPLR). The first hurdle to obtaining an attachment is found in §6201. This section states that an order of attachment may be granted in

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any action, other than matrimonial, where the plaintiff seeks a money judgment and at least one of five statutory grounds exists. Of the five grounds listed in §6201, two of the most commonly asserted are (1) the defendant is a non-domiciliary residing without the state, or is a foreign corporation not qualified to do business in the state, and (2) the defendant, with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts.

Additionally, in order to maintain an attachment, §6212 requires a showing that (a) it is probable that plaintiff will succeed on the merits of a cause of action, and (b) the amount demanded is in excess of all known counterclaims. Moreover, under §6223, a plaintiff has the burden of showing a "need" for the attachment. In other words, the party seeking the attachment "must demonstrate an identifiable risk that the defendant will not be able to satisfy the judgment." *VisionChina Media v. S'holder Representative Servs.*, 109 A.D.3d 49, 60 (1st Dep't 2013). If the attachment is found to be unnecessary to the security of the plaintiff, the attachment will be vacated. CPLR 6223(a).

On top of the express statutory requirements, both federal and state courts have acknowledged that judges retain a certain level of discretion in deciding

whether to grant an attachment. Courts commonly exercise this discretion when determining whether the party has a “need” for the attachment, as required under §6223. The exact breadth of judicial discretion in this context, however, has been point of debate. For example, can a court, in its discretion, deny an attachment even if plaintiff satisfies each of the express statutory requirements of Article 62 (including establishing a requisite “need” for one)? The Second Circuit has grappled with this question in several cases.

### The Exercise of Discretion

Because attachment is available in federal court “under the law of the state where the court is located” (Fed. R. Civ. P. 64), both federal and state courts look to New York’s Article 62 in analyzing the limits of judicial discretion in granting attachments. The problem, however, is that Article 62 provides no express guidance on the subject. Making the issue murkier, courts, for decades, ruled on attachment motions without clearly addressing specific limitations of judicial discretion in this context. In the 2006 decision of *Capital Ventures Intern. v. Republic of Argentina*, 443 F.3d 214, 220 (*Capital Ventures I*), the Second

Circuit recognized this lack of clarity, noting that the case law’s “general observations” on the subject “are not instructive as to the nature and extent of that discretion or the factors that properly inform its exercise.” In that case, the Second Circuit reviewed the district court’s denial of an attachment based on considerations outside the statutory requirements and concluded that the district judge’s discretion was improperly

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exercised. The Second Circuit held that “[w]here ... a statutory ground for attachment exists and both need and likelihood of success are established, [a court’s] discretion does not permit denial of the remedy for some other reason, at least absent extraordinary circumstances and perhaps even then.” *Id.* at 222.

*Capital Ventures I*’s holding that judicial discretion was limited, coupled with dicta indicating that “perhaps” this limitation could be overcome by some undescribed “extraordinary circumstances,” did little to settle questions surrounding judicial discretion. In

fact, this issue was raised again in that same case five years later when the defendant argued that “extraordinary circumstances” presented grounds to vacate plaintiff’s otherwise statutorily appropriate attachment. Defendant Argentina argued, among other things, that the attachment’s impact on bondholders and on Argentina as a sovereign nation were extraordinary circumstances that weighed against the order of attachment. In deciding this issue, the Second Circuit, again, alluded to the fact that “extraordinary circumstances” may be grounds to deny an attachment application that met all of the statutory requirements, but ultimately did not find it necessary to resolve that question because no such circumstances were shown to exist. *Capital Ventures Intern. v. Republic of Argentina*, 652 F.3d 266, 273 (2d Cir. 2011) (*Capital Ventures II*).

### ‘Iraq Telecom’

For several years after the *Capital Ventures II* decision, there remained uncertainty as to whether a judge has discretion to consider extraordinary circumstances as a basis to deny an attachment where the statutory requirements for attachment had been satisfied. But recently, in *Iraq Telecom Ltd. v. IBL Bank S.A.L.*,

43 F.4th 263, 271 (2d. Cir. 2022), the Second Circuit was once again presented with this question. This time the court gave a clear answer.

In this case, Iraq Telecom obtained an ex parte attachment covering up to \$100 million held in the New York-based correspondent bank accounts of respondent IBL, a Lebanese bank. Iraq Telecom had brought several arbitrations against IBL relating to loan defaults, and the attachment was sought in order to secure assets while arbitration proceedings were pending. IBL then moved to vacate the attachment based on certain extraordinary circumstances. These circumstances included the impact of the attachment on IBL's account holders, the Lebanese economy, New York's correspondent banking system, and IBL's regulatory compliance.

In deciding IBL's motion, the district court found that Iraq Telecom had established the statutory requirements for an attachment, but that it was likely to succeed on the merits only up to \$8.92 million in damages. In exercising its discretion, the district court then held that the extraordinary circumstances cited by IBL warranted a further reduction of the attachment down to \$3 million. Iraq Telecom, unhappy with losing \$97 million in attached assets,

appealed. Iraq Telecom argued, among other things, that the district court was not permitted, in exercising its discretion, to consider any "extraordinary circumstances" beyond the statutory requirements.

On appeal, the Second Circuit held that the district court properly considered "extraordinary circumstances" in exercising its discretion over the scope of attachment. In doing so, the court relied heavily on the First Department's ruling in *Cargill Fin. Servs. Int'l v. Bank Fin. & Credit Ltd.*, 70 A.D.3d 456, 896 N.Y.S.2d 317, 318 (1st Dep't 2010). In *Cargill*, the First Department affirmed the denial of an attachment over funds in correspondents accounts because some funds were held for the benefit of third-party clients of defendant, who would unfairly be impacted. The Second Circuit noted that, "although *Cargill* did not explicitly mention 'extraordinary circumstances,' it dealt with a circumstance that militated against granting an attachment even though all the statutory factors had been met. In short, the Appellate Division approved consideration of a nonstatutory, discretionary factor." *Id.* at 272. Thus, the First Department case law compelled the conclusion that "a court has discretion to weigh

extraordinary circumstances even where the statutory requirements for attachment are satisfied." *Id.*

In sum, *Iraq Telecom* provides a clearer path for defendants to argue that an attachment should be denied or vacated based on "extraordinary" non-statutory considerations, particularly in federal court. Whether a particular circumstance is "extraordinary" enough to warrant the denial of a statutory-compliant attachment application will, most likely, hinge on the specific facts of the case and the nature of the attachment. Moreover, given that this is an issue of New York statutory interpretation, New York state courts are not bound by *Iraq Telecom*, and will have the ability to clarify the scope of judicial discretion in this context going forward.

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