U.S. no. 47
YB IX

1221.

Courts will recognise it and will accord it the priority which a right *of that nature* would be given under English procedure."

In our opinion the English Court of Appeal in *The Colorado* adopted the approach which is correct in principle. A maritime lien is a right of property given by way of security for a maritime claim. If the Admiralty court has, as in the present case, jurisdiction to entertain the claim, it will not disregard the lien. A maritime lien validly conferred by the *lex loci* is as much part of the claim as is a mortgage similarly valid by the *lex loci*. Each is a limited right of property securing the claim. The lien travels with the claim, as does the mortgage and the claim travels with the ship. It would be a denial of history and principle, in the present chaos of the law of the sea governing the recognition and priority of maritime liens and mortgages, to refuse the aid of private international law.

For these reasons, we think that the Court of Appeal reached the correct conclusion and would dismiss the appeal.

IN THE MATTER OF THE ARBITRATION BETWEEN HANSKAR SHIPPING COMPANY, *Petitioner*

v.

IRON ORE COMPANY OF CANADA, *Respondent.*

United States District Court, Southern District of New York, February 1, 1980.

79 Civ. 5820 (RLC) #49664.

ARBITRATION—111. Agreement to Arbitrate Future Disputes—126. Time to Demand Arbitration—CHARTER—24. Actions and Arbitrations.

Whether shipowner's alleged failure to appoint an arbitrator within the one year period stipulated in charter party clause bars its cargo damage claim against charterer is an issue to be decided by the arbitrators, not the courts. This well-established principle is not affected by Art. II(3) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, empowering court to find an arbitration agreement "null and void, inoperative or incapable of being enforced." Since no such finding is possible here, shipowner's petition to compel arbitration *granted.*

Joseph E. DeMay, Jr. (Halley & Chales) *for Hanskar Shipping Company.*

John J. Devine, Jr. (Poles, Tublin, Patrestides & Stratakis) *for Iron Ore Company of Canada.*

ROBERT L. CARTER, D.J.:

Petitioner Hanskar Shipping Company ("Hanskar"), pursuant to the

Federal Arbitration Act ("Act"), 9 U.S. Code, sec. 4, seeks an order compelling respondent Iron Ore Company of Canada ("Iron") to proceed to arbitration in accordance with the terms of an agreement between the parties. This dispute arose under a charter party by which Iron chartered a vessel owned by Hanskar. The vessel sustained certain damages for which Hanskar claims Iron to be liable under the agreement, and Hanskar desires that this claim be submitted to arbitrators for determination. Iron opposes the petition on the ground that Hanskar has waived its right to arbitration.

The charter party contained a provision by which the parties agreed that all disputes arising under the agreement would be referred to a panel of arbitrators. This provision also contained a limitation: any claim would be "waived and absolutely barred" unless the claimant appointed his arbitrator to the panel and stated his claim in writing within twelve months of final discharge.[1]

Iron contends as the basis of its opposition to the instant petition that Hanskar failed to meet the twelve-month deadline and thereby waived its claim. Hanskar responds that any issue of waiver or time-bar is for the arbitrators to decide, not the court. This question was considered recently by the Court of Appeals for this circuit in *Conticommodity Services, Inc. v. Philipp & Lion*, (2 Cir., 613 F.2d 1222, 1980). The facts in that case were similar to those here: the parties had an arbitration agreement requiring that arbitration be commenced within one year of the accrual of a cause of action, and the party resisting arbitration did so on the ground that the claimant's demand for arbitration was not timely under the agreement. Interpreting section 4 of the Act, 9 U.S. Code, sec. 4,[2] and applying its former decisions in

[1] This clause of the charter party provides in pertinent part:

"All disputes from time to time arising out of this contract shall, unless the parties agree forthwith on a single Arbitrator, be referred to the final arbitrament of two [arbitrators], one to be appointed by each of the parties, with power to such Arbitrators to appoint an Umpire. Any claim must be made in writing and Claimant's arbitrator appointed within twelve months of final discharge and where this provision is not complied with the claim shall be deemed to be waived and absolutely barred * * *."

[2] Section 4 of the Act, 9 U.S. Code, sec. 4, provides in pertinent part that:

"A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court * * * for an order directing that such arbitration proceed in the manner provided for in such agreement * * *. The court shall hear the parties, and upon being satisfied that the making of the agreement for

1249.

Reconstruction Finance Corp. v. Harrisons & Crosfield, 1953 AMC 1013, 204 F.2d 366 (2 Cir.), *cert. denied*, 346 U.S. 854 (1953), and *Trafalgar Shipping Co. v. International Milling Co.*, 1969 AMC 1066, 401 F.2d 568 (2 Cir., 1968), the court determined that the only questions a district court properly may consider on a petition to compel arbitration are whether there was an agreement to arbitrate and whether one party has failed to submit to arbitration; "unless the 'making' of the agreement to arbitrate or 'the failure, neglect, or refusal' of one party to arbitrate is in dispute, the court must compel arbitration." *Conticommodity Services Inc. v. Philipp & Lion*, supra, 6[illegible] F.2d at 1225. See *Prima Paint Corp. v. Flood & Conklin*, 388 U.S. 395, 404, 1969 AMC 222-223 (Sy.) (1967).

In fact, the Court of Appeals has ruled previously that an arbitration clause broadly encompassing all disputes arising under a contract includes among the disputes to be resolved by arbitration any question of waiver of arbitration. *World Brilliance Corp. v. Bethlehem Steel Co.*, 1965 AMC 831, 832-33, 342 F.2d 362, 364 (2 Cir., 1965); see *Auxiliary Power Corp. v. Eckhardt & Co.*, 1966 AMC 2546, 2548-49, 266 F. Supp. 1020, 1022 (S.D. N.Y., 1966) (Tyler, J.). "Nothing * * * in section 4, or elsewhere in the Act, expressly bars enforcement of an agreement to arbitrate the defense of waiver in a suit brought under section 4." *World Brilliance Corp. v. Bethlehem Steel Co.*, supra, 1965 AMC at 835, 342 F.2d at 365.

The only issue raised by Iron in opposing Hanskar's petition is the timeliness of Hanskar's demand for arbitration. Neither the making of the arbitration agreement nor Iron's failure to comply therewith is disputed, section 4 of the Act therefore requires the court to order the parties to proceed to arbitration.[2]

> arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement * * *. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof."

[2] In an eleventh-hour letter to the court, written long after the time for responding to the instant petition had expired, Iron suggests that section 4 does not control, and that this case should be determined under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention"), implemented by Chapter 2 of the Act, 9 U.S. Code, sec. 201 *et seq.* Chapter 2, in section 206, authorizes the district courts to compel arbitration in much the same manner as section 4, see note 2, supra, but Article II.3 of the

Hanskar's petition is granted, and the clerk is directed to enter judgment for the petitioner. Iron shall appoint its arbitrator pursuant to its agreement with Hanskar within thirty days of the filing of this opinion, and the parties' two arbitrators shall designate an umpire promptly thereafter[4] so that this matter can proceed to arbitration in accordance with their agreement.

Convention, Iron claims, permits a broader inquiry by the court in determining whether to compel arbitration than does section 4. Iron's implicit suggestion is that under such an expanded inquiry the court may recognize its claim of time-bar as sufficient to avoid arbitration.

Article II.3 provides:

> "The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

The agreement in question here, because it is one "under which the parties undertake to submit [their disputes] to arbitration," Article II.1, and because it is not "entirely between citizens of the United States," 9 U.S. Code, sec. 202—respondent is a Canadian corporation and petitioner's nationality is unclear—is subject to the terms of the Convention. See 9 U.S. Code, sec. 202. Therefore, as respondent suggests, Article II.3 controls. It should be noted that section 4 of the Act, 9 U.S. Code, sec. 4, also applies to the extent not in conflict with the Convention. 9 U.S. Code, sec. 208.

It is evident that applying Article II.3 will not affect the outcome of this case. Nothing in the affidavit submitted on Iron's behalf in opposition to Hanskar's petition suggests any basis for finding the arbitration agreement between the parties to be "null and void, inoperative or incapable of being performed." At most, Iron claims that the particular claim raised here by Hanskar has been waived under the agreement. Such a claim in no way addresses the validity of the underlying agreement, and under Article II.3, as much as under section 4 of the Act, the court is "bound to give effect" to the parties' agreement to arbitrate. *Matter of Ferrara S.p.A.*, 441 F. Supp. 778, 780 n.2 (S.D. N.Y., 1977) (Frankel, J.), *aff'd* 580 F.2d 1044 (2 Cir., 1978).

[4] The procedure for selecting arbitrators under the parties' agreement is stated in note 1, supra.