Enforcement: Article V(1)(b) [adequate notice]
Article V(2)(b) (Public policy)
These due process provisions encompass the due process standards of the forum state

5TH CASE of Focus printed in FULL format.

In the Matter of the Arbitration Between GENERICA LIMITED, Petitioner, v. PHARMACEUTICAL BASICS, INC., ROSEMONT PHARMACEUTICAL CORPORATION, and AKZO NOBEL, INC., Respondents.

No. 95 C 5935

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

1996 U.S. Dist. LEXIS 13716

September 16, 1996, Decided

September 18, 1996, DOCKETED

DISPOSITION: [*1] Generica's Petition for Order Confirming Arbitral Award GRANTED; PBI's Cross-Petition to Vacate Arbitral Award DENIED; Motion to Dismiss of Rosemont and Akzo DENIED; Generica final judgment as to PBI pursuant to Rule 54(b) GRANTED; and Generica's Motion for Registration of Judgment Pursuant to *28 U.S.C. § 1963* DENIED.

COUNSEL: For in the Matter of the Arbitration between, petitioner: Patricia Susan Spratt, James Donehoo Wilson, Shefsky, Froelich & Devine, Ltd., Chicago, IL. George A. Borden, Williams & Connolly, Washington, DC. Gerson A. Zweifach, Michael R. Pompeo, Williams & Connolly, Washington, DC.

For PHARMACEUTICAL BASICS, INC., respondent: William Joseph Linklater, Baker & McKenzie, Chicago, IL. Jonathan D. Schiller, Randall L. Speck, Kaye, Scholer, Fierman, Hays & Handler, Washington, DC.

For ROSEMONT PHARMACEUTICAL CORPORATION, respondent: William Joseph Linklater, (See above). Jonathan D. Schiller, (See above). Randall L. Speck, (See above).

For AKZO NOBEL, INC., respondent: William Joseph Linklater, (See above). Jonathan D. Schiller, (See above). Randall L. Speck, (See above).

JUDGES: JOHN A. NORDBERG, United States District Judge

OPINIONBY: JOHN A. NORDBERG

OPINION: MEMORANDUM [*2] OPINION AND ORDER

Before the Court are Generica Ltd.'s ("Generica") Petition for Order Confirming Arbitral Award ("Petition"), Pharmaceutical Basics, Inc.'s ("PBI") Cross-Petition to Vacate Arbitral Award, Rosemont Pharmaceutical Corp.'s and Akzo Nobel, Inc.'s Motion to Dismiss the Petition, and Generica's Motion for an Order Pursuant to Rule 54(b) Directing Entry of Final Judgment Against PBI and for Registration of Judgment Pursuant to *28 U.S.C. § 1963*. This Court has jurisdiction pursuant to Chapter Two of the Federal Arbitration Act ("the Act"), *9 U.S.C. § 203*, which implements the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the Convention"), § 201, and allows parties to arbitral awards falling under the Convention to petition the federal courts for an order confirming the award, § 207.

BACKGROUND

On August 3, 1995 an arbitrator for the International Chamber of Commerce granted an award in favor of Generica and against PBI in the amount of $ 6,621,628 and L 392,482. The arbitration arose out of a contract that Generica and PBI entered into on December 20, 1989, namely, the Agreement for Pharmaceutical Development, Manufacturing [*3] and Marketing of Clomiphene Citrate ("Agreement"). Article 16 of the agreement required that any dispute arising therefrom be submitted to arbitration conducted under the auspices of the International Chamber of Commerce and interpreted in accordance with the laws of England. A dispute arose in September 1992, resulting in a demand by Generica for payment on March 9, 1993 and culminating

in Generica's submission of the dispute to arbitration on April 20, 1993 for breach of contract.

In the Agreement, Generica granted PBI all of its rights to manufacture and market clomiphene citrate tablets in the United States and "all other rights it has with respect to the Product including rights to the manufacturing formula, manufacturing procedure(s), analytical testing, know-how and data relating to the Product." (Agreement P 2). PBI agreed, inter alia, "to cause the required pharmaceutical development if any such is needed, testing of both raw material and of finished products, stability tests and all and any chemistry/pharmaceutical tests needed for FDA approval of the Product to be completed as soon as practicable." (Id. P 4(i)). Further, "PBI and Generica agreed to co-operate in [*4] all respects in their joint efforts to complete [the required] bioavailability study and to file an Abbreviated New Drug Application (ANDA)" with the FDA. (Id. P 4(iii)). PBI subsequently completed a bioequivalence study and draft ANDA. However, in September 1992 PBI advised Generica that it would not submit the ANDA to the FDA because difficulties with the formulation and processes provided by Generica made FDA approval impossible without reformulation of the product and repetition of the bioequivalence study.

PBI counterclaimed and defended the breach of contract claim, responding that a necessary, implied term in the Contract is that the formulation and processes provided by Generica must be amenable to FDA approval, but Generica's formulation and processes are so fundamentally flawed for use in the United States that FDA approval is not practicable, even with further pharmaceutical development. (Interim Award p. 29 (hereinafter "I.A.")).

ANALYSIS

I. Petition to Confirm & Cross-Petition to Vacate

A. Timeliness

Generica contends that PBI's Cross-Petition to Vacate is untimely and all defenses to confirmation are therefore waived. Generica invites the Court to [*5] apply the three-month statute of limitations for actions to vacate provided in Chapter 1 of the Act, *9 U.S.C. § 12*, because the Convention and its implementing statute -- Chapter 2 -- do not provide for actions to vacate arbitral awards and Chapter 2 provides that "Chapter 1 [of the Act] applies to actions and proceedings brought under this chapter to the extent that that chapter is not in conflict with this chapter or the Convention as ratified by the United States." *9 U.S.C. § 208*.

However, the contention that all defenses are waived if not asserted in an action to vacate within three months of the award is untenable. As the only other court to have received such an invitation explained upon declining: the argument

> ignores the plain language of section 207 of the implementing statute, which establishes that there are significant differences between the Convention and the Arbitration Act. . . .
>
> . . . .
>
> The first notable difference between the two statutes is that under the Convention a party has three years to move to confirm the award, in contrast to the Arbitration Act which allows a party one year to confirm the award. Second, and most importantly, under the Convention [*6] a party may raise one of the grounds for vacating an award at any time during the three-year period in opposition to a motion to confirm.

Jamaica Commodity Trading Co. v. Connell Rice & Sugar Co., 1991 U.S. Dist. LEXIS 8976, No. 87 C 6369, 1991 WL 123962, at *2-3 (S.D.N.Y. July 3, 1991).

Specifically, the Act provides that "at any time within one year after the award is made any party to the arbitration may apply to the court . . . for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 12 of this title," with Section 12 providing the ninety-day limitation period. *9 U.S.C. § 9* (emphasis added). Accordingly, it is a well-settled principle that a party's failure to file a timely motion to vacate bars it from raising a defense to a motion to confirm. See, e.g., *International Union of Operating Engineers v. Murphy Co., 82 F.3d 185, 188 (7th Cir. 1996)*. In contrast, Chapter 2 provides:

> Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming [*7] the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the Convention.

9 U.S.C. § 207. Accordingly, because the Act's limitation period conflicts with Chapter 2, this Court holds that the limitation period does not apply to the present action, pursuant to *9 U.S.C. § 208*.

B. PBI's Defenses to Enforcement of the Award

PBI opposes Generica's Petition for Order Confirming

Arbitral Award on the grounds that it was denied due process by the arbitrator in violation of the public policy of the United States, invoking Article V(1)(b) and (2)(b) of the Convention, reproduced in their entirety below. "Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case." *9 U.S.C. § [*8] 201*, Article V(1)(b) (emphasis added). "Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: The recognition or enforcement of the award would be contrary to the public policy of that country." Id. Article V(2)(b). Because PBI's invocation of Article V(2)(b) is essentially duplicative of the due process defense, the Court will treat the two defenses as one.

Specifically, PBI complains of the following acts by the arbitrator: (1) not allowing adequate cross examination; (2) refusing to accept rebuttal affidavits; (3) refusing to require Generica to produce a letter; and (4) refusing to require Generica to disclose the basis for its damages claim.

STANDARD

Although the United States Supreme Court and the Seventh Circuit have not spoken on the due process defense to confirmation of a foreign arbitral award under the Convention, the Supreme Court has articulated an overarching principle that applies here: "Courts . . . do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts." United [*9] *Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 38, 98 L. Ed. 2d 286, 108 S. Ct. 364 (1987)*. Moreover, "when the subject matter of a dispute is arbitral, 'procedural' questions which grow out of the dispute and bear on its final disposition are to be left to the arbitrator." *Id. at 40.*

The Second Circuit has addressed the due process defense, concluding "that the defense provided for in Article V(1)(b) 'essentially sanctions the application of the forum state's standards of due process,' and that due process rights are 'entitled to full force under the Convention as defenses to enforcement.'" *Iran Aircraft Indus. v. Avco Corp., 980 F.2d 141, 145 (2d Cir. 1992)*(quoting *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier, 508 F.2d 969, 975-76 (2d Cir. 1974)*). Accordingly, the Second Circuit applied the Supreme Court's description of due process in *Mathews v. Eldridge, 424 U.S. 319, 333, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976)*: "the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Avco, 980 F.2d at 146* (citation omitted). However, as Generica points out and another [*10] court has explained, "the exception arising from an inability to present one's case 'should be narrowly construed'" in light of the Convention's goal of encouraging the timely and efficient enforcement of awards. *Fitzroy Engineering, Ltd. v. Flame Engineering, Inc., 1994 U.S. Dist. LEXIS 17781*, No. 94 C 2029, 1994 WL 700173, at *5 (N.D. Ill. Dec. 13, 1994)(quoting *Biotronik Mess-Und Therapiegeraete GmbH & Co. v. Medford Medical Instrument Co., 415 F. Supp. 133, 139 (D.N.J. 1976)* & citing *Parsons, 508 F.2d at 976*)).

The First Circuit has elaborated on the procedural protections of arbitration, stating: "The arbitrator is not bound to hear all of the evidence tendered by the parties: however, he must give each party an adequate opportunity to present its evidence and arguments." *Hoteles Condado Beach, La Concha & Convention Center v. Union De Tronquistas Local 901, 763 F.2d 34, 39 (1st Cir. 1985)*. Thus, the right to cross-examine witnesses is not absolute. *Sunshine Mining Co. v. United Steelworkers of America, 823 F.2d 1289, 1295 (9th Cir. 1987)*(citing *Bell Aerospace Co. v. Local 516, 500 F.2d 921, 923 (2d Cir. 1974)* & *Hoteles, 763 F.2d at 40*). Specifically, "vacatur is appropriate only [*11] when the exclusion of evidence so affects the rights of a party that it may be said that he was deprived of a fair hearing." *Hoteles, 763 F.2d at 40* (citation & internal quotation marks omitted); see also *Sunshine, 823 F.2d at 1295; Wailua Assoc. v. Aetna Casualty & Surety Co., 904 F. Supp. 1142, 1148 (D. Haw. 1995)*.

1. Cross-Examination of Generica's Witness

PBI first alleges that the arbitrator denied it due process when it limited the cross-examination of Generica's witness Tony Hynds, who is the director of Athlone, Generica's U.K. manufacturer of the product. Generica introduced written and oral testimony through Hynds on the issue of whether the product could be validated, a prerequisite for FDA approval, as Hynds had made multiple batches of the product in the U.K. using the formulation and processes provided by Generica to PBI. n1 On cross-examination PBI sought to challenge Hynds' testimony that the batches produced consistent, uniform tablets, which demonstrates that the formula and processes are reproducible, could be validated, and, thus, are amenable to FDA approval. n2 Specifically, PBI sought to present evidence from Mr. Hynds that, in practice and [*12] despite his best efforts and good manufac-

turing practices, he had been unable to produce uniform tablets using Generica's formula and processes.

n1 In fact, the formula and processes provided by Generica to PBI were obtained from Athlone.

n2 The cross-examination would also challenge Generica's evidence admitted through Dr. Wiseman and Mr. McDermaid, whose testimony was based upon Mr. Hynds' description of Athlone's manufacturing experience.

However, in the words of the arbitrator:

Mr. Hynds' oral testimony ended prematurely before his cross-examination by Mr. Speck had been completed. This came about because it became evident that it was being suggested by PBI that there were important discrepancies between the representations and promises made to the UK authorities in connection with the grant of a product license and the actual manufacture of clomiphene citrate tablets by Athlone under that license. Given the potentially serious implications of such allegations both for Mr. Hynds personally and [*13] his company, the fact that he was merely a witness in the proceedings and the relatively short notice that he had had of such suggestions, it seemed to me quite wrong that he should be obliged to continue to submit himself to cross-examination without the opportunity of obtaining his own legal advice and considering his position and I directed that he should not be cross-examined further until this had happened. After a short adjournment Mr. Hynds made it clear that he was unwilling to continue giving evidence and proposed to return home, which he then did.

PBI now complains that it was denied due process because the arbitrator refused to permit dispositive cross-examination over its objection, refused to strike Generica's untested evidence, and refused to infer that Mr. Hynds' cross-examination testimony would have been adverse to Generica. (Cross-Petition p. 4). The arbitrator's decision belies each of PBI's claims.

PBI argues that the issue it sought to address on cross-examination -- whether the formula and processes were amenable to FDA approval -- was "the central question that had to be decided," "the most crucial factual inquiry in the arbitration." (Cross-Petition [*14] pp. 2 & 41). However, as Generica responds, the arbitrator rejected PBI's defense as a matter of contract interpretation under English law. Specifically, the arbitrator

held that there was no implied term that Generica's formulation and process would be capable after pharmaceutical development by PBI (if necessary) of FDA approval (or any similar term), either as a condition precedent to or as an implied warranty by Generica in the Agreement.

(I.A. p. 70, P 111).

In light of the arbitrator's holding, the evidence sought on cross-examination was immaterial to the liability (i.e., breach of contract) determination. Nevertheless, the issue of whether the product was amenable to FDA approval was central to the damages determination. If the product was not amenable to approval, there could be no lost profit. Likewise, under English law, lost profit based upon a speculative, as opposed to substantial, chance of FDA approval would not be recoverable. (Final Award p. 6 (hereinafter "F.A.")). Accordingly, despite denying PBI's defense, the arbitrator addressed the amenable-to-FDA-approval issue, finding that PBI's reliance on it was "misplaced." (I.A. p. 60, P 95).

PBI [*15] makes much of the arbitrator finding "plainly it was not envisaged that PBI should start from scratch with a complete new formulation and manufacturing process." (I.A. p. 65, P 104). However, that finding must be read in context, namely, the arbitrator finding "it was equally clear that the parties recognised that pharmaceutical development of some kind might be necessary." (Id.). The arbitrator having rejected the implied-term or condition-precedent defense, PBI cannot now defeat liability by arguing that the evidence sought from Hynds might show the need for complete reformulation (i.e., to start again from scratch). The arbitrator held that

one thing is clear beyond argument: it was PBI's job in the first place to consider these matters, to implement such changes to the original formulation and processes as might reasonably be expected to advance the project and if and insofar as there was any real doubt or problem about the viability of any such matters to discuss it straightforwardly and promptly with Generica in accordance with the mutual obligations of co-operation under Clause 4(iii).

(I.A. p. 66, P 105). The arbitrator found that PBI failed in this [*16] respect, thus breaching the agreement. (I.A. p. 73, P 4). In sum, a need for complete reformulation would not excuse that breach. Of course, this conclusion follows inevitably from the arbitrator's rejection of PBI's implied-term defense.

Again, however, contrary to Generica's argument, the evidence sought on cross-examination was of a "central" issue, namely, whether lost profit damages were recov-

erable. Thus, the arbitrator's rejection of PBI's defense does not dispose of PBI's due process defense to enforcement of the arbitral award. Nevertheless, PBI's due process argument fails. First, the arbitrator stated:

it is most unlikely that cross-examination of Mr. Hynds in this area could have accomplished much in helping to resolve the real issues in this arbitration. The prominence sought by PBI to be given to this aspect of the case (the Athlone batch records) was, in my view, misplaced. . . . And, in any event it is unrealistic to suppose that one could have discovered the cause and the significance of the apparent variations shown in the batch records without far more evidence and a much fuller opportunity to enquire into the matter than was warranted by the true issues [*17] or consistent with the timetable and general procedure of these proceedings. It would have taken far more than anything that might have emerged in further cross-examination of Mr. Hynds to persuade me that Generica's formulation and manufacturing processes were inherently incapable of being adopted [] by PBI so as to be amenable to FDA approval . . . .

(I.A. p. 60-61, P 95). The arbitrator's statement illustrates the precise difficulty in divorcing substance from procedure that led the Supreme Court to hold that a court may not endeavor to do so in *United Paperworkers, 484 U.S. at 40* (citing *John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 557, 11 L. Ed. 2d 898, 84 S. Ct. 909 (1964)*). In other words, the Court finds that PBI's argument amounts to an impermissible request that this Court review the arbitrator's factfinding.

Second, were it appropriate for the Court to review the arbitrator's exclusion of evidence on cross-examination, the Court finds that it did not deprive PBI of a fair hearing. As explained above, the right to cross-examine is not absolute and the due process defense to enforcement of arbitral awards must be narrowly construed. The proper inquiry [*18] is whether PBI had an adequate opportunity to present its case. The Court finds that the limited cross-examination did not deprive PBI of such an opportunity. As Generica aptly explains, Hynds was Generica's witness and PBI had no authority to compel him to give testimony except to cross-examine his direct testimony. However, the arbitrator disclaimed reliance upon Hynds' direct testimony, thus eliminating any right of PBI to elicit further evidence from Hynds. Specifically, the arbitrator found that "the consequence, however, [of limiting the cross-examination] is that in assessing the weight to be given to his own evidence and to certain aspects of Generica's case, I have to take full account, as I do, of the fact that PBI did not have the opportunity to cross-examine Mr. Hynds in certain areas that they would otherwise have done . . . . However, the fact that Athlone has, evidently, manufactured substantial numbers of tablets over a period of several years now is, of itself, something to which I cannot -- and do not -- in the circumstances attach the weight that it would otherwise deserve." (I.A. p. 61, P 95)(emphasis added). The arbitrator's finding is evidenced by his opinion, [*19] where, in great detail, the arbitrator explained why he rejected PBI's contention that Generica's formulation and processes were not amenable to FDA approval even with pharmaceutical development: the arbitrator does not rely upon Hynds having manufactured tablets. (I.A. p. 66-68, P 106). Likewise, the arbitrator's finding disposes of PBI's attack based upon failure to strike Hynds' testimony or draw a negative inference; the arbitrator did strike the testimony, thus obviating the need to draw a negative inference.

2. Letter

PBI similarly argues that it was unable to present its case -- that Generica's formula and processes were not amenable to FDA approval -- due to the arbitrator's: (1) failure to require Generica to produce a letter from the U.K.'s Department of Health and Social Security ("DHSS") regarding the data it submitted in an application for a U.K. clomiphene citrate product license and (2) subsequent refusal to draw a negative inference from Generica's failure to produce the letter. The application was produced to PBI. The discovery request came about because another letter produced by Generica responded to the DHSS letter, stating "We are now in a position to answer [*20] the points raised in your letter of 27th February on the chemistry and pharmacy aspects of the PL Application." (Pet.'s Post-Hearing Mem., Ex. 3). The second letter goes on to respond point by point to the letter at issue, with topic headings included (i.e., "Dissolution Tests"). PBI contends that the letter was necessary to present its case because it apparently questioned disparities in the data submitted in the application as to dissolution rates of tablets made by Athlone using Generica's formulation and processes.

PBI's argument is untenable as the arbitrator gave PBI an adequate opportunity to present its case through: (1) the application that is the subject of the letters; (2) the second letter that responded to the DHSS letter in a manner that made the contents of the DHSS letter obvious; (3) expert testimony as to the implications of the disparity; and (4) argument based upon the evidence described. Further, as the DHSS letter was based entirely upon the application, the extent that one could draw a negative inference would be a negative evaluation by DHSS of the application; such an inference, standing alone, could not control whether the product was amenable to FDA [*21]

approval. Indeed, the U.K. product license application being granted did not preclude PBI from arguing that the product was not amenable to FDA approval. Thus, any negative inference that could be drawn would merely corroborate the evidence produced to, and presented by, PBI. Its absence, therefore, did not render PBI unable to present its case.

Further, the Court rejects PBI's argument that the arbitrator was bound to draw a negative inference, having ruled prior to the hearing that "it will of course be open to me in due time to draw such inferences as seem to me to be justified in the event that it appears that documents that one might reasonably expect to have been produced . . . have not been put forward." (Cross-Petition, App. B, p. 130). First, the arbitrator qualified his ruling with the phrase "as seem to me to be justified," thus leaving the determination to his discretion. This ruling is consistent with the practice followed in federal court. See, e.g., *BASF Corp. v. Old World Trading Co., 41 F.3d 1081, 1098 (7th Cir. 1994)*. Second, the above analysis distinguishes the instant case from *Iran Aircraft Industries v. Avco Corp., 980 F.2d 141, 146 (2d Cir. 1992)*, [*22] upon which PBI relies, as the arbitrator's ruling in Avco prevented a party from presenting any evidence on an issue.

3. Affidavits

PBI further complains that it was unable to present its case by virtue of the arbitrator's exclusion of rebuttal evidence in the form of affidavits to corroborate the testimony of its witness, Mr. Barbieri, whose veracity Generica attacked on cross-examination. The parties argue whether the evidence PBI sought to rebut was really a surprise to PBI such that its late submission of the affidavits was excusable. The arbitrator based his ruling upon the finding that Generica's evidence was not a surprise. (Cross-Petition, App. B, pp. 181-83). In so arguing, the parties impermissibly ask this Court to review the arbitrator's factfinding; as explained above, the arbitrator's findings of fact are not subject to review by this Court. Therefore, the inquiry becomes whether, assuming that the evidence PBI sought to rebut via the affidavits was not a surprise, the arbitrator prevented PBI from presenting its case by excluding late evidence. In other words, PBI asks the Court to review the arbitrator's rule that late evidence is inadmissible. The Court [*23] easily finds that such a rule did not, and could not, deprive PBI of due process.

4. Mitigation Efforts

Finally, PBI asserts that the arbitrator deprived it of due process when he refused to require Generica to disclose information about its alleged mitigation efforts. The arbitrator denied PBI's request based upon his finding that the evidence was irrelevant. The First Circuit has explained that "absent exceptional circumstances . . . a reviewing court may not overturn an arbitration award based on the arbitrator's determination of the relevancy or persuasiveness of the evidence submitted by the parties." *Hoteles, 763 F.2d at 39-40.* The Hoteles court found that exceptional circumstances existed where an arbitrator's ruling "effectively denied [a party] an opportunity to present any evidence in the arbitration proceeding," as "no other evidence was available." *Id. at 40.* The present case is easily distinguishable; indeed, despite the arbitrator's ruling, PBI obtained evidence on cross-examination as to the mitigation efforts at issue. Thus, finding that PBI has failed to present exceptional circumstances, this Court will not engage in a review of the arbitrator's [*24] relevancy determination.

II. Motion to Dismiss of Rosemont and Akzo

In addition to PBI, Generica names Rosemont Pharmaceutical Corporation ("Rosemont") and Akzo Nobel, Inc. ("Akzo"), alleging that Rosemont is PBI's successor and alter ego and that PBI is the alter ego and/or agent of Akzo. The agreement provides that it "shall be binding upon . . . the parties hereto and their respective successors." (Agreement P 14). Rosemont and Akzo move the Court to dismiss the Petition to Confirm as to them pursuant to Fed. R. Civ. P. 12(b)(6), based upon *Orion Shipping & Trading Co. v. Eastern States Petroleum Corp., 312 F.2d 299, 301* (2d Cir.), cert. denied, *373 U.S. 949, 10 L. Ed. 2d 705, 83 S. Ct. 1679 (1963)*, where the Second Circuit held that a Court may not pierce the corporate veil in a confirmation proceeding. The Orion court explained that:

The usual office of the confirmation action under *9 U.S.C. § 9* is simply to determine whether the arbitrator's final award falls within the four corners of the dispute as submitted to him. This action is one where the judge's powers are narrowly circumscribed and best exercised with expedition. It would unduly complicate [*25] and protract the proceeding were the court to be confronted with a potentially voluminous record setting out details of the corporate relationship between a party bound by an arbitration award and its purported "alter ego".

Id. Generica's contention that Orion is no longer persuasive, having been brushed aside in its own circuit, is belied by *Productos Mercantiles E Industriales, S.A. v. Faberge USA, Inc., 23 F.3d 41 (2d Cir. 1994)*, where the Second Circuit implicitly recognized the continuing vitality of Orion. Moreover, as the Orion court explained,

its "conclusion does not in any way impugn the soundness of the reasoning in . . . cases which arise in the quite distinguishable context of an action to compel arbitration under *9 U.S.C. § 4*, rather than to confirm." *312 F.2d at 301*. Conversely, Generica's reliance on such cases is unavailing.

However, the Second Circuit held that Orion does not preclude a court from enforcing an arbitration award against the successor of a party subject to the award where the agreement is binding upon all successors. Rather than repudiating Orion, the court distinguished it, reasoning that the determination does [*26] not "require the court to engage in extensive factfinding." Notably, as in the present case, the alleged successor status in Productos Mercantiles was disputed. Accordingly, this Court applies Productos Mercantiles and denies Rosemont's Motion to Dismiss as to the Petition to Confirm based upon its alleged successor status.

Generica argues that, the Orion principle notwithstanding, the Motion to Dismiss should be denied because the Petition to Confirm includes a separate action against Rosemont and Akzo, invoking the alter ego theory and the Court's diversity jurisdiction under *28 U.S.C. § 1332*. (Petition P 8). Indeed, the Orion court explained that its holding does not preclude a separate action to enforce the award, "but an action to confirm the arbitrator's award cannot be employed as a substitute for either of these two quite distinct causes of action." *Orion, 312 F.2d at 301*. One court has relied upon the above language from Orion in concluding that, where the complaint specifies both the Federal Arbitration Act and *29 U.S.C. § 1332* as grounds for jurisdiction, the action is not merely one to confirm an arbitration award, but rather "could thus be construed [*27] as a separate action to enforce the arbitration award against nonparties to the arbitration." Sea Eagle Maritime, Ltd. v. Hanan Int'l Inc., No. 84 C 3210, 1985 WL 3828, at *2 (S.D.N.Y. Nov. 14, 1985).

Rosemont and Akzo reply that a diversity action may not be maintained against them because there is no case or controversy, as required by Article III of the United States Constitution. U.S. Const. art. III, § 2. Without referring the court to any authority on point, Rosemont and Akzo argue that no case or controversy can exist because the case is not ripe until PBI fails to satisfy any judgment in favor of Generica. n3 The Court deems this argument to be a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction, see, e.g., *Lewis v. Continental Bank Corp., 494 U.S. 472, 108 L. Ed. 2d 400, 110 S. Ct. 1249 (1990)*; the argument is rejected and the Motion to Dismiss is denied. The Court notes that, despite the Motion's Rule 12(b)(6) characterization, Rosemont and Akzo have not argued that the diversity action fails to state a claim. Accordingly, lacking an adversarial presentation of the issue, this Memorandum Opinion and Order does not [*28] address whether the separate action against Rosemont and Akzo states a claim.

n3 The Court's confirmation of the award moots Rosemont's and Akzo's argument that no case or controversy exists absent a confirmed arbitration award against PBI.

III. Motion for Final Judgment Pursuant to Rule 54(b)

Generica moves the Court for entry of a final judgment in favor of Generica and against PBI based upon the Court's confirmation of the arbitral award. Because the above ruling confirming the arbitral award resolves all claims relating to PBI that have been presented to the Court in this action and because entry of final judgment against PBI will result in the conservation of judicial resources and will not prejudice any party, the Court finds that the judgment is final and there is no just reason for delay and grants Generica final judgment in its favor against PBI pursuant to Rule 54(b). See *United States v. Ettrick Wood Prod., Inc., 916 F.2d 1211, 1217 (7th Cir. 1990)*(judgment is final when it resolves [*29] all claims against a particular party); *Curtiss-Wright Corp. v. General Elec. Co., 446 U.S. 1, 8, 64 L. Ed. 2d 1, 100 S. Ct. 1460 (1980)*(Rule 54(b) determination based upon "judicial administrative interests as well as the equities involved").

IV. Motion for Registration Pursuant to *28 U.S.C. § 1963*

Generica also moves the Court for an order authorizing registration of the final judgment in accordance with *28 U.S.C. § 1963*. Section 1963 allows registration of a judgment before the appeal has become final or the appeal time has expired only "when ordered by the court that entered judgment for good cause shown." The Seventh Circuit has held that good cause is shown when an appeal has been filed for which no supersedeas bond has been posted. *Pacific Reinsurance Management Corp. v. Fabe, 929 F.2d 1215, 1218 (7th Cir. 1991)*. As PBI aptly responds, at the time of briefing, no judgment had been entered and, accordingly, no appeal taken without a supersedeas bond. Until that event the motion is premature and, accordingly, is denied. Indeed, Generica notes in its Motion that it would not need to register the judgment if PBI posts a sufficient supersedeas bond.

CONCLUSION [*30]

For the reasons given, the Court GRANTS Generica's Petition for Order Confirming Arbitral Award; DENIES PBI's Cross-Petition to Vacate Arbitral Award; DENIES the Motion to Dismiss of Rosemont and Akzo; GRANTS Generica final judgment as to PBI pursuant to Rule 54(b); and DENIES Generica's Motion for Registration of Judgment Pursuant to *28 U.S.C. § 1963*.

ENTER:

JOHN A. NORDBERG

United States District Judge

DATED: September 16, 1996