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United States District Court, N.D. Illinois, Eastern Division.

Michael LIESCHKE and Robert Jackson, individually and on behalf of all others similarly situated, Plaintiffs,
v.
REALNETWORKS, INC., Defendant.
Todd SIMON, individually and on behalf of all others similarly situated,
Plaintiff,
v.
REALNETWORKS, INC., Defendant.

No. 99 C 7274, 99 C 7380.

Feb. 11, 2000.

MEMORANDUM OPINION

KOCORAS, District J.

***1** This matter comes before the Court on Defendant RealNetworks, Inc .'s motion to stay proceedings pending arbitration and to require all future court proceedings to take place in the State of Washington. For the reasons set forth below, the motion to stay is granted. The motion to require all future judicial proceedings to be in Washington is denied without prejudice.

BACKGROUND

The Court has been requested to analyze a licensing agreement between a software company and its users to determine whether an arbitration clause in the licensing agreement binds the parties to settle their disputes through arbitration, and whether any future judicial proceedings must take place in the State of Washington.

The genesis of this case is a software company using the Internet to allegedly communicate with computers equipped with its software products to obtain information about the usage patterns of the computer operator. Plaintiffs Michael Lieschke, Robert Jackson, and Todd Simon ("Plaintiffs") are three individuals who uneventfully used the software products of Defendant RealNetworks, Inc. ("RealNetworks" or "the Company"), a software company based in the State of Washington, until November 1, 1999, when the *New York Times* published an article claiming that RealNetworks was monitoring the usage habits of individuals using its software.

RealNetworks offers free basic versions of two products, RealPlayer and RealJukebox, for users to download from RealNetworks' site on the World-Wide Web. These products allow users to see and hear audio and video available on the Internet and to download, record, and play music.

Before a user can install either of these software packages, they must accept the terms of RealNetworks' End User License Agreement ("the Agreement"). Paragraph 10 of the Agreement includes the following clause:

> This License Agreement shall be governed by the laws of the State of Washington, without regard to conflicts of law provisions, and you hereby consent to the exclusive jurisdiction of the state and federal courts sitting in the State of Washington. Any and all unresolved disputes arising under this License Agreement shall be submitted to arbitration in the State of Washington.

Defendant cites this clause as binding authority for its assertions that arbitration is required, and any judicial proceedings are not required to take place in Washington.

Plaintiffs are three users of RealNetworks' products, who received their products from the Company after accepting the Agreement and consenting to its terms. Plaintiffs filed their claims in the wake of the New York Times article, which stated that RealNetworks' products collected personal information about users' listening habits and places users had visited on the World-Wide Web and sent the information back to RealNetworks via the Internet.

With regard to the software's periodic communication with servers at RealNetworks, the Agreement made the following disclosure in paragraph 4:

> ***2** The autoupdate function in the Software automatically communicates with RN's servers on the Internet to check for updates to the Software, such as bug fixes, patches, enhanced functions, and new versions. Autoupdate will notify you when updates are available. You agree that RN may, through the autoupdate function, upload updates and install them as part of your Software when you decide to update.

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The Agreement makes no mention of the software communicating with RealNetworks for any other purpose than to perform the autoupdates.

In November of 1999, Plaintiffs filed suit in this Court, contending that because the alleged communications were not disclosed in the Agreement, they are not required to submit their claim to arbitration. RealNetworks subsequently moved to stay the proceedings before us pending arbitration, and also sought an order that the State of Washington is the proper forum for all future court proceedings.

DISCUSSION

Defendants assert that under the Agreement Plaintiffs must submit their claims to arbitration. In 1947, Congress passed the Federal Arbitration Act ("FAA"), 9 U.S.C.A. § 1, et seq., which provides that an arbitration clause in a "contract evidencing a transaction involving commerce ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. 9 U.S.C. § 2 (1999). It is well- settled that arbitration is a favored means of dispute resolution, and the FAA established a clear policy favoring arbitration. *See* *Kiefer Speciality Flooring, Inc. v. Tarkett, Inc.*, 174 F.3d 907, 909 (7th Cir.1999). To effect this policy, we must liberally construe any contractual language pertaining to arbitration and resolve doubts in favor of arbitrability. *See* *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24-25 (1983).

A party contesting the submission of the claim to arbitration must clearly show that the presumption of arbitrability does not apply. *See* *International Union of Operating Engineers, Local Union 103 v. Indiana Const. Corp.*, 13 F.3d 253, 255-56 (7th Cir.1994). "Whether a particular issue is arbitrable is a matter of contract interpretation, because 'a party cannot be required to submit to arbitration any dispute which he has not agree so to submit." *Kiefer*, 174 F.3d at 909 (quoting *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 80 S.Ct. 1347 (1960)). A claim will be deemed arbitrable if an arbitration clause is capable of any interpretation that a claim is covered. *See* *International Union of Operating Engineers, Local Union 103 v. Indiana Const. Corp.*, 13 F.3d 253, 255-56 (7th Cir.1994). If parties have a contract providing for arbitration of some issues, questions concerning the scope of issues subject to arbitration should be resolved in favor of arbitration. *See* *Miller v. Flume*, 139 F.3d 1130, 1136 (7th Cir.1998).

In this case, Plaintiffs assert that the presumption in favor of arbitrability is overcome because the Agreement refers to claims "arising under" its terms rather than using broader language "arising out of" or "relating to." This difference in terminology is not the kind that overcomes the heavy presumption in favor of arbitrability. The reach of phrases like "arising under" and "arising out of" are limited by enumerating specific claims that are subject to arbitration, not by choosing one phrase or the other. *See* *Sweet Dreams v. Unlimited, Inc. v. Dial-A-Mattress Int'l., Ltd.*, 1 F.3d 639 (7th Cir.1993). Basing arbitrability on choice of prepositions would neither satisfy the required liberal construction of arbitration agreements, nor support the federal presumption in favor of arbitrability, and thus Plaintiffs' argument must fail.

***3** Plaintiffs make two subsidiary arguments. First, they contend their claims are inappropriate for arbitration because of their nature. Arbitrable claims are not limited to those stemming from the law of contracts; courts have deemed claims with bases from RICO to common-law tort claims to federal securities laws arbitrable. *See* e.g., *Hill v. Gateway 2000*, 105 F.3d 1147, 1151 (7th Cir.1997); *Kroll v. Doctor's Associates, Inc.*, 3 F.3d 1167, 1170 (7th Cir.1993); *Bonny v. Society of Lloyd's*, 3 F.3d 156, 159 (7th Cir.1993); *Sweet Dreams*, 1 F.3d at 643. Second, Plaintiffs' claim that the cost of individually arbitrating the claims of all the potential plaintiffs undermines the purpose behind the FAA. The United States Supreme Court, however, has stated that the FAA requires district courts to compel arbitration "even where the result would be the possibly inefficient maintenance of separate proceedings in different forums." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217 (1985). Accordingly, we find that under the terms of the Agreement, Plaintiffs must submit their claims to arbitration.

In light of the decision to stay proceedings pending arbitration, it is unnecessary and premature to address the motion with respect to future court proceedings. Accordingly, that motion will be denied without prejudice.

CONCLUSION

For the foregoing reasons, RealNetworks' motion to stay proceedings pending arbitration is granted. The motion to require all future judicial proceedings to be held in Washington is denied without prejudice.

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