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from the French language

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Brussels Court of Appeal

Arrêt définitif

marques – contrefaçon – transaction – indemnisation

Judgment

9th chamber
civil cases

Présenté le
Non enregistrable

Between:

LEVI STRAUSS & Co., a corporation organized under the laws of the United States of America, having its principal place of business at 94111 SAN FRANCISCO, CALIFORNIA, United States of America, Levi's Plaza, Battery Street 1155,

Appellant,

represented by Mr Tanguy de HAAN, Mr Nathan AZIZOLLAHOFF and Ms Daphné DELVAUX, lawyers, whose office is established in 1000 BRUSSELS, chaussée de La Hulpe 120,

And:

NEW YORKER S.H.K. JEANS GmbH & CO KG, a company incorporated under the laws of Germany with its registered office at 24109 KIEL (Germany), Russeer Weg 101-103,

Defendant,

represented by Mr Paul LEFEBVRE, lawyer at the Court of Cassation, Ms Charlotte FUMIERE and Ms Magali SERVAIS, lawyers, whose office is established at 1050 BRUSSELS, avenue Louise 480 box 9.

* * * *

I. The procedure before the court

Hearing appeal against a judgment of 11 September 2015 of the Brussels French-speaking Commercial Court, the Court of Appeal delivered two interlocutory rulings, on 23 September 2016 and 5 May 2022.

Mr Yves Herinckx, deputy judge, is designated to sit in the case by an order of the first president of November 9, 2022, pursuant to Article 102(1) of the Judicial Code.

The procedure is contradictory.

Article 24 of the Act of 15 June 1935 on the use of languages in judicial matters applies.

The debates are resumed *ab initio*, to the extent of the questions not decided by the interlocutory judgments of 23 September 2016 and 5 May 2022.

II. Case background

1. The background of the dispute has already been explained in the interlocutory judgments and reference is made to them. It is recalled that this dispute is related to the violation of a settlement agreement concluded on 21 July 2006 between New Yorker S.H.K. Jeans GmbH & CO KG (hereinafter referred to as "New Yorker"), a company incorporated under German law, and Levi Strauss & Co. (hereinafter referred to as "Levi Strauss"), a company incorporated under American law, the main provisions of which were reproduced in the interlocutory judgment of 23 September 2016. It is sufficient to recall that the Settlement Agreement provides that:

   - *"New Yorker will cease throughout Europe, as of the date of this agreement, to manufacture, advertise, promote, market, sell or offer to sell either directly or indirectly clothing products, amongst others jeans, pants and shorts, with the indirectly clothing products, amongst others jeans, pantaloons and shorts, with the Litigious Signs or any other sign which is similar or identical to one or more of the above-mentioned trade marks, under the Amisu, Fishbone or Smog brand names or any other brand names* (...)" (Article 2.1) ("Europe" includes the territory of the European Economic Area, Switzerland, the Russian Federation and Croatia);
   - Levi Strauss agrees "by way of exception to Article 2", "*that the existing stock of products bearing the Litigious Signs, estimated at 74,000 pieces, can be sold throughout Europe*" until 31 December 2006 (Article 4);
   - "*As of the date of 1 January 2007, New Yorker will be liable to pay € 50 per infringing garment used in commerce in breach of this agreement, in particular manufactured, advertised, promoted, marketed, sold, offered for sale or possessed for such purpose, be it directly or indirectly*" (Article 6).

The interlocutory judgment of 23 September 2016 appointed an expert, who filed his final report on 26 October 2020. The expert concluded in the following terms:

> "*the parties have not provided any new and convincing elements that would allow me to modify my preliminary conclusion. This one remains unchanged and I reproduce it below:*
> *If I were to stick to a classic expert report, based on documentation, I would have to conclude on the admission of NEW YORKER to indicate that 3507 pants bearing the infringing sign were marketed.*
> *If I have to take into account the many and interesting theses put forward by LEVI STRAUSS, and give an undocumented opinion, I will stick to the last e-mail exchange of Mr VAN INNIS* [former counsel to Levi Strauss] *to fix the number of pants at 600.000 units, taking into account the existing styles, the different sizes and the number of pants to be produced in order to obtain a certain profitability (see report of Mr VAN INNIS, 6 April 2020, p. 18, §3).*
> *My opinion is that the number of 600,000 units seems much more realistic than 3507 units, considering the number of styles, sizes and the number of stores in NEW YORKER."*

The Court issued a second interlocutory ruling on 5 May 2022, in which it ruled that New Yorker's new claims that the transaction was void, or at least broken, were inadmissible.

2. Levi Strauss asks the Court to order New Yorker to pay EUR 30,000,000, plus compensatory interest from 18 June 2014 at the statutory rate, and moratory interest from the date of the Court's ruling.

New Yorker concludes that the claim is unfounded.

III. Discussion

A. Claim that New Yorker must be order to pay damages for breach of the settlement agreement

3. Levi Strauss seeks an order that New Yorker pays EUR 30,000,000.00 (*i.e.* EUR 50.00 x 600,000 items) as a penalty for breach of the settlement agreement.

– Reminder of applicable principles on evidence

4. In its capacity of claimant, Levi Strauss bears the burden of proof of the number of pants marketed in violation of the settlement agreement, and for which it is seeking a penalty. The burden of proof and the risk of the consequences of the failure to provide the proof lies with this party.

New Yorker is, however, required to cooperate in the production of evidence, according to an established general principle of law and Article 8.4 of the New Civil Code (effective as of November 2020), even if the consequences of the failure to provide the proof does not lie with it. This obligation to cooperate can be assessed in a more demanding way "when one of the parties has the majority - or even all - of the relevant evidence. In this case, the other party is often materially unable to prove the facts it alleges" (W. VANDENBUSSCHE, "L'incapacité du demandeur à établir le(s) fait(s) fondant sa prétention", in Fr. BALOT (ed.), *Le point sur les défenses en droit judiciaire,* Brussels, Larcier, 2023, p. 276).

In its negative dimension, cooperation in the administration of the proof implies that a party cannot "make itself responsible for obstructing the administration of the proof" by complicating or thwarting that administration (e.g. by destroying evidence) *(idem,* p.277). In its positive dimension, it requires the defendant to produce concrete evidence, without waiting for a decision to do so *(idem).*

The passivity or refusal to cooperate with an inquiry measure by a party, without legitimate reason, may be sanctioned by the judge. Under the terms of Article 972*bis* of the Judicial Code, "[t]he parties are required to cooperate to the judicial expertise. If they fail to do so, the judge may draw any consequence that he or she deems appropriate" and, in particular, may deduce from this failure to cooperate a presumption of fact (*cf.* in particular V. RONNEAU, "Objet, charge et degre de preuve : une nouvelle partie de *Stratego* s'annonce", in D. MOUGENOT (ed.), *La réforme du droit de la preuve,* Anthemis, 2019, CUP, vol.193, p. 24 ; W. VANDENBUSSCHE, "Je t'aime..., moi non plus. Over de loyale medewerking aan de bewijsvoering in het buitencontractueel aansprakelijkheidsrecht" in T. VANSWEEVELT en B. WEYTS, (ed.), *Actuele ontwikkelingen in het aansprakelijkheidsrecht en verzekeringsrecht,* 1st ed., Brussels, Intersentia, 2015, p. 118).

Presumptions of fact are "a mode of proof by which the judge deduces the existence of one or more unknown facts from known facts" (art. 8.1, 9°, of the New Civil Code).

Proof of positive facts by truthfulness or likelihood is admitted only for facts for which, by their very nature, it is not possible or reasonable to require a clear proof (article 8.6 of the same Code).

– Background of the decision ordering an expert report

5. Before the decision ordering the appointment of a judicial expert, New Yorker argued that it was an entity independent of BV New Yorker Nederland, from which Levi Strauss had purchased pants bearing the infringing sign, and that it was not responsible for the marketing. This defense was rejected by the Court. New Yorker then sought to show that there had been no breach of the settlement agreement by the use of the infringing sign, a defense which was also rejected.

Levi Strauss requested a provisional indemnity of EUR 500.000; it argued that the minimum number of pants marketed with the infringing sign was 10,000 since New Yorker had nearly 1,000 stores. New Yorker argued that the number of products marketed varied according to the model concerned and that it had been established by an expert opinion in another case, a fact not disputed by Levi Strauss, that another model marketed in violation of the settlement agreement had been marketed in only 213 units.

Under these circumstances - the existence of a breach of the agreement being established but not its extent - the court awarded Levi Strauss a provisional indemnity of EUR 12,500 assessed *ex aequo et bono* and ordered a judicial expert report on the number of pants marketed under the Smog trade mark and bearing the infringing sign, between 1 January 2007 and the date of the judgment.

– As to the conduct of the expert's mission

6. The judicial expert's findings show that New Yorker's cooperation was limited and that the transmitted documents, particularly accounting documents, were only partial, under various pretexts.

According to the factual background as set forth by the expert and his correspondence with the parties, counsel to New Yorker first stated that the number of Smog pants marketed with the infringing sign amounted to 3,507 (model 06.04.032.0169) and undertook to send the relevant invoices to the expert, the documents being archived; he then informed the expert that his client had difficulties in locating the relevant documentation, that they did not have any sales invoices, and that the extracts from her stock management system and from the invoices did not make it possible to verify the number of products refused and sold; he then proposed to have the number of products sold certified by a company auditor. Although it was unable to provide proof that it had not used the infringing sign on other pants, New Yorker claimed that "according to its verifications, the infringing sign had only been used on product no. 05-169 (AXAPTA no. 06.04.032.0169)" (expert report, p.5).

In October 2017, New Yorker provided the expert with an auditor's certificate issued on 26 September 2017, certifying that after analysis of New Yorker's accounts (invoices, delivery notes, inventory control system) between 1 January 2007 and 30 September 2016, 3,507 pieces of item 05-169 bearing the infringing sign had been offered for sale or distributed.

Challenging the figure put forth by New Yorker, Levi Strauss then informed the expert that it had purchased numerous pairs of Smog pants bearing the infringing sign on the second-hand clothing market. Photographs of these jeans were provided to the expert and New Yorker's counsel on 5 December 2017.

Invited by the expert to proceed with verifications for the other styles identified by the aforementioned photographs (about sixty). New Yorker finally indicated that the evolution of its computer system did not allow it and that the only way to determine with certainty and without any reasonable doubt the exact appearance of a product was to check the purchase orders sent to suppliers, which were archived. While withholding the documents on which the auditor relied, and after discouraging the expert from viewing its books on site and hiding behind a business secret, New Yorker then informed the expert that it was not legally required to retain the accounting records beyond a certain period.

When confronted with Levi Strauss' evidence according to which there was a much larger amount of pants bearing the infringing sign sold by New Yorker, New Yorker prepared an internal report on 31 August 2018, reporting on the verifications carried out in its accounting system. On 31 August 2018, New Yorker prepared an internal report on its accounting system, in which it suggested that the pants purchased by Levi Strauss were sold prior to 1 January 2007, that they had been sold in countries outside the scope of the transaction, and that their producers had not authorized the distribution of excess production. Finally, the company confirmed that the auditor's finding regarding the 3,507 pairs of pants was based on the verification of "existing invoices, existing delivery notes and existing goods receipt lists".

In March 2019, Levi Strauss provided the expert with an assessment made by its vice president and an updated version of its report on the dating of the jeans (taking into account new purchases of second-hand jeans made from May 2018 through February 2019).

In January 2020, the new counsel to New Yorker requested a copy of the GFK report on which the findings of the Levi Strauss vice president's report were based. This report has not been communicated.

On 6 March 2020, New Yorker finally sent to the expert – almost three years after the first meeting in the context of the expertise – a report from another auditor (BDO) that invalidates the finding made by the previous auditor.

Although it claims that it was Levi Strauss' fault that the expert's visit to their office could not take place and that the expert seemed only interested in Levi Strauss' theories and that he was somehow manipulated by them, New Yorker never found it necessary to bring any incident before the Court.

– As for the expert's findings

7. The information provided by Levi Strauss, which attempted to make up for the lack of accounting documents produced and the lack of collaboration on the part of New Yorker, was contradictorily submitted and examined by the expert, who established the number of counterfeit pants at 600,000, "taking into account the existing styles, the different heights and the number of pants to be produced in order to obtain a certain profitability". This figure, which the expert described as much more realistic than the 3,507 copies that New Yorker initially believed to exist, is the product of multiplying 121 styles by 5,000 (the estimated number of pants bearing the litigious sign on the market).

8. New Yorker asks the court not to follow the expert's conclusions, to conclude that there is no marketing of pants bearing the litigious sign, and not to grant Levi Strauss' request.

   In essence, it complains that the expert made contradictory considerations and gave an undocumented opinion based on the evaluation made by Levi Strauss, without any rational or scientific analysis and justification.

9. As the expert pointed out, it was not possible to rely on the most obvious and reliable way of verifying the number of pants marketed because New Yorker's accounting records were not available. The expert assessed the merits of the extrapolations proposed by Levi Strauss based on the number of languages used on the washing instruction labels, and those based on minimum production, sales volumes and the number of stores. It considered that the number of languages did not allow to establish that the pants with more than 21 languages on the labels were marketed after 1 January 2007. His conclusion is therefore based on the report of the vice-president of Levi Strauss and in particular on his considerations about the need to produce a certain

number of pants per model in different heights in order to supply all stores. However, in order to arrive at the figure of 600,000 pairs of pants, it appears that the expert relies on the assumption that the 121 styles purchased by Levi Strauss on the second-hand market after 2017 were marketed after 1 January 2007; however, this premise is based on extrapolations that are not validated by the expert, since they are based on their dating through the number of languages in which the labels are translated.

In view of this contradiction, noted by the New Yorker, the expert's conclusion cannot be accepted as it stands.

– Determination of the number of pants

10. It is necessary to determine the number of pants bearing the infringing sign which, according to the terms of the transaction, were used for commercial purposes and in violation thereof by New Yorker, in "Europe" (or, according to the terms used by New Yorker, in "the relevant geographical area").

11. The New Yorker-branded Smog jeans bearing the infringing sign, which Levi Strauss acquired on the German and later European second-hand market, are marked with labels identifying a style number; 121 different styles were identified by Levi Strauss, purchased in one or more versions (see the table listing the various styles, pp. 52-61 of Levi Strauss' submissions - e.g., model 05-003 or model 05-122).

In order to date and establish a breach of the transaction after 1 January 2007, Levi Strauss relies on several elements, including the change in the number of languages into which the washing instructions on the labels on the pants were translated (233 units out of the total number of jeans listed in the above table), the territorial expansion of the New Yorker stores and the change of the name of its website.

12. As far as the European Union Member States are concerned, since the entry into force in May 2012 of the Regulation (EU) 1007/2011 of the European Parliament and of the Council of 27 September 2011 on textile fibre names and related labelling and marking

of the fibre composition of textile products and repealing Council Directive 73/44/EEC and Directives 96/73/EC and 2008/121/EC of the European Parliament and of the Council, labelling "*shall be provided in the official language or languages of the Member State on the territory of which the textile products are made available to the consumer, unless the Member State concerned provides otherwise*" (Art. 16(3)). This obligation is imposed on manufacturers of textile products operating in the European Union, *i.e.* on any company which manufactures or has designed or manufactured textile products with a view to marketing them under their name or trademark; a distributor is treated as a manufacturer if he markets a product under his name or trademark, affixes the label himself or modifies its content. Before this regulation came into force, there was a practice along the same lines (see study on the labelling of textile products commissioned by the European Parliament – Levi Strauss' Exhibit VII.3a), and Article 8(4) of Directive 2008/121/EC of 14 January 2009 on textile names provided that "Member States may require that, when textile products are offered for sale or are sold to the end consumer in their territory, their national languages should also be used for the labelling and marking required by this Article". New Yorker does not dispute this.

Levi Strauss' exhibits show that four new New Yorker jeans, purchased successively before 2007 (an Amisu style), on 21 May 2008 (a Smog style), on 20 July 2010 (an Ann-Christine style) and on 28 February 2014 (a Smog style), have washing labels translated into 13, 21, 25 and 29 languages, respectively. This finding is not disputed by New Yorker.

Nor is it disputed that between 2007 and 2014, New Yorker nearly doubled its number of stores (from 500 to 1,000) and the number of countries (in Europe, the Middle East and North Africa) in which it operates (from 20 to 39), so it is likely, as Levi Strauss argues, that New Yorker adapted the number of languages into which its wash instruction labels were translated as it expanded into new countries.

In this respect, New Yorker limits itself to asserting that there is no correlation between the number of languages on the washing labels and the number of countries where it is present and that the mentions on the labels of its products do not obey any precise policy. It also argues that the theory developed by Levi Strauss is not verified in practice, but the criticisms it makes are systematically rebutted by Levi Strauss:

- The Italian translation on a label of a pair of pants sold in 2007, while New Yorker objects to having opened a store in Italy only in 2009, is explained by the fact that Italian is also one of the official languages of Switzerland, the country in which New Yorker was established before 2007;
- the Ukrainian translation on a label of a pair of pants sold in 2010 while New Yorker objects to having opened a store in Ukraine only in 2011 is explained by the proximity between these two dates and the probable anticipation of this opening;
- The translation into Greek on a label of two styles of pants, while New Yorker objects that it has never opened a store in Greece, can be explained by the fact that New Yorker had planned to open stores in Greece but gave up in 2010, given the economic crisis in that country.

The New Yorker's claim that the use of multiple languages is intended to satisfy consumers from other countries is not documented by it.

13. Levi Strauss' examination of 188 New Yorker jeans bearing the infringing sign (see piece 111.25, p. 8, point 21), purchased second-hand, and always provided with their washing instructions label shows furthermore that the copies whose labels were translated into less than 22 languages were marked, with the exception of four of them (translated into 21 languages), with the address of the website www.ny-kiel.de, while the other styles were marked with www.newyorker.de or -be (including the jeans purchased on 29 February 2014). Yet, Levi Strauss shows that on 16 July 2006, one of the pages of the New Yorker website www.ny-kiel.de showed only 13 country flags - a sign of a limited presence in thirteen countries; from 20 November 2009, this url redirected to www.newyorker.de or -be and would not have been accessible afterwards. These findings, documented by Levi Strauss, support his assertion that the number of languages used on the labels has evolved over time and is linked to the geographical expansion of New Yorker. They are not challenged by the fact that the domain name www.newyorker.de was registered before www.ny-kiel.de, the date of registration of these names being unrelated to their use.

These elements combined (the language of the labels, New Yorker's geographical development and the name of the website) make it possible to consider that there is a strong presumption that New Yorker violated the transaction by selling Smog jeans bearing the infringing sign after 31 December 2006.

These findings are supported by the report of the auditor BDO, which was commissioned by New Yorker in 2020 and to which we will come back later. This report acknowledges that an order for jeans bearing the infringing sign was placed on 5 September 2006 by New Yorker and delivered to its stores on 5 December 2006, and that there is a risk that these pants were sold after 31 December 2006. The reference to New Yorker's commercial policy and to the end-of-the-year period does not make it possible to minimize this finding, contrary to what the report suggests, and to maintain that the commercialization risk would only concern a "relatively limited" quantity, without any other precision. Moreover, the transaction also prohibits, from the moment it was signed, New Yorker from manufacturing pants bearing the litigious sign (see Article 2.1 of the agreement). It is only exempted from this prohibition for "*the existing stock of products bearing the Infringing signs, estimated at 74,000 pieces",* which can *"be sold throughout Europe"* until 31 December 2006. The order placed on 5 September 2006, was therefore a violation of the agreement.

Nor does New Yorker's assertion of "human error" to justify the presence in one of its stores of the pants purchased on 28 February 2014 by Levi Strauss elude the finding of a breach of the settlement agreement.

14. In order to demonstrate the extent of the alleged breach of the settlement agreement, Levi Strauss also argues that the indication of a season number on certain styles (season 1, season 2, …, season 9) makes it possible to presume that they were manufactured and marketed on more than one occasion. For example, two disputed 05-720 styles purchased by Levi Strauss are labeled "season 1" for one and "season 9" for the other. New Yorker asserts that the term "season" refers to a particular sales policy; for example, "for the year 2014, the term 'season: 9' meant that the item in question was sold on a continuous basis without discount until the end of a particular season of the year. These assertions by New Yorker are not supported by any evidence and, more importantly, do not contradict the finding that certain styles, since they bear labels with different statements, were at least manufactured and marketed on multiple occasions.

15. Levi Strauss also put forward a number of elements, of which the court retained the following as relevant:

- The jeans in the pending dispute are not unique styles; they are necessarily manufactured in China, Bangladesh or Turkey in a number that meets or exceeds a certain minimum quantity (taking into account, among other things, transportation costs and profitability requirements).
  New Yorker merely asserts that it does not have a minimum quantity of units per order and that it regularly orders less than 5,000 units, but does not produce any evidence to support this assertion. Moreover, it is incorrect to claim that Levi Strauss did not dispute this and that the judgment of 23 September 2016 has admitted it. The unchallenged assertion made by Levi Strauss in that judgment relates to the fact that "it was established by another expert report that only 213 units of another style deemed to be contrary to the transaction were marketed".
  The statement that New Yorker obeys the rules of fast fashion does not disprove the previous observation.
- The jeans in the pending dispute are typically offered for sale in multiple sizes/lengths. While Levi Strauss' business model cannot be transposed to New Yorker (which is not limited to jeans), the fact remains that the labels on the Smog pants purchased by Levi Strauss in secondhand stores are of different sizes/lengths (for example, size 28/32 for a style 05/200, lengths 31/34 and 34/32 for a style 05/720, size 30/32 for a style 05/412, etc.).
  New Yorker still claims to focus on the "most commonly used sizes" but refrains from giving any indication on the figures.
  New Yorker also argues that "*even in larger New Yorker stores, the denim section can be extremely limited, and so can the range of styles and sizes offered"* or that "*the number of sizes and styles available, especially in the men's line, is not homogeneous from one market to another, and has changed dramatically over the last decade".*
  Apart from the fact that this statement is not supported by any evidence, it contains the acknowledgement of the multiplicity of copies by the use of the terms "range" of sizes and styles and "number" of available sizes and styles.
  It should also be assumed that a style offered for sale in a New Yorker store will be available in at least five different sizes/lengths.
- Several styles purchased second hand by Levi Strauss carry washing instruction labels translated into different numbers of languages, which

makes it possible to deduce that these styles have been produced several times; thus, styles “05-720” bear washing labels translated into 23, 25, 26 and 27 languages, styles “05-169” bear labels translated into 20, 24, 25, 26, 27, and 28 languages.

- In 2008, two websites - Polish and Russian - presented New Yorker’s winter Smog collection with a photograph of the jeans bearing the infringing sign, identified by Levi Strauss as style 05-481. Between 2017 and 2018, Levi Strauss purchased three copies of this model second-hand, which were provided with a washing instruction label translated into 21 languages, which further supports the link between the number of languages and the date of manufacture and marketing of the jeans styles. New Yorker unsuccessfully attempted to undermine these findings by asserting that the pictures posted on these two websites were part of a campaign to communicate on the image of New Yorker and not the products in particular.
- Levi Strauss also produces declarations from sellers in six different countries from whom it acquired the jeans bearing the infringing sign in 2020 and 2021: eight of these sellers state that they purchased these jeans after 2007 in stores located in the relevant geographical area.

  New Yorker vainly denies any value to these statements, claiming, among other things, but without establishing it, a risk of lies or a loss of meaning of the statements due to their translation; it also tries to decredibilize the testimonies of several vendors on the hand of multiple undocumented statements.

The other elements put forward by Levi Strauss are not convincing to the court or are not sufficiently substantiated. This is notably the case regarding the report by the Vice President of Levi Strauss, which is based on a GFK report that was never disclosed. It is also not sufficiently proven that all New Yorker stores are supplied in the same way and that they receive the same number of pants.

16. For its part, New Yorker unsuccessfully disputes any breach of the transaction, referring primarily to the findings of the auditor’s report (BDO), which was submitted to the court expert in March 2020.

This unilateral report came at the end of the expert’s work and after New Yorker had only minimally cooperated with it (and not, as New Yorker maintains, as a result of the

expert's decision not to visit New Yorker's premises). Regardless of the rules to which the aforementioned auditor claims to be subject, it is not acceptable for a party to deliberately place itself outside the scope of a court-ordered expert report and attempt to substitute a report based on the deficient information it has provided. This is evidenced by the numerous reservations expressed in the report about New Yorker's computer system (including the fact that the computer system overwrites certain data), or the fact that it is based on a summary table of orders provided by New Yorker.

New Yorker cannot simply assert that it made available to its auditor all the relevant documents to the determination of the styles marketed after 2012 in order to rely on the findings according to which no pants bearing the infringing sign were ordered nor marketed between 2012 and 2016, since these documents were never provided to the expert. No reliable conclusion as to the absence of a breach of the transaction can be found for the period prior to 2012, as the documents relating to this period were destroyed by New Yorker. In this regard, the Court notes that since the action was filed in 2014, there is at least a culpable liability for New Yorker in continuing to dispose of its accounting, up to that relating to 2012. It is not without nerve that it legitimizes this destruction until that date by the fact that it would have realized only in early 2018 that solely the purchase orders were able to determine with absolute certainty the appearance of the products.

17. New Yorker's attempt to create doubt on the place of marketing of the jeans bearing the infringing sign is also pointless. The claim that some of these jeans were marketed by manufacturers without its knowledge is unfounded.

Nor can Levi Strauss be blamed for failing to provide any other evidence, even though, according to the New Yorker, it had a veritable "army" of investigators at its disposal, nor can it be concluded that there was no breach of the transaction.

18. In the light of the detailed and concordant items of evidence put forward by Levi Strauss and retained above, the Court evaluates the number of pants bearing the infringing sign sold after 31 December 2006 and in the relevant geographical area at 600,000.

New Yorker is therefore ordered to pay Levi Strauss an indemnity of EUR 30,000,000 (600,000 x EUR 50,00), plus, as this is a debt of sum, default interest at the legal rate. The default interest is in principle due from the day of the summons to pay (art. 1153(3) of the former Civil Code). However, insofar as part of the compensation is awarded for pants marketed between the date of the summons and the date of the interlocutory ruling ordering the expert's report, the debt was not yet fully due on the date of the summons. Taking into account the proportion between the pants marketed before and after the date of the summons, which can be fixed *ex aequo et bono, in* the absence of other elements of appreciation, at 90/10%, the default interest will be allocated on a first part of the indemnity from the date of the summons and on the second part from the average date of 6 August 2015.

B. <u>Abuse of rights</u>

19. New Yorker argues that in any event it would not be liable for any penalty because a finding of breach of the settlement agreement would be contrary to the intent of the parties and Levi Strauss would not have performed the agreement in good faith.

It argues that if the number of pants bearing the infringing sign marketed during the period in question is as high as Levi Strauss claims, the latter should necessarily have been aware of it before the initiation of the proceedings. It therefore complains that Levi Strauss delayed the start of the proceedings in order to increase the amount of damages claimed and submits that Levi Strauss should be sanctioned by declaring its claim unfounded.

It follows from the foregoing that Levi Strauss did not have proof of a major breach of the settlement agreement when it instituted the proceedings; it did not therefore voluntarily delay its action in order to obtain a higher compensation. Furthermore, it does not appear that the application of the agreed penalty, under the agreed conditions, would be contrary to good faith.

C. Costs

20. New Yorker being the unsuccessful party, it is ordered to pay the costs of the proceedings, both in first instance and at appellate level, including the costs of the expert, which it has fully funded.

The complexity of the case on appeal justifies raising the amount of the procedural fee for the appeal to the maximum amount, as requested by Levi Strauss. However, this request for an increase is not justified for the first instance, as Levi Strauss had at that time requested a procedural fee of EUR 15,000.

IV. Order

For these reasons, the Brussels Court of Appeal, reforming the judgment,

Orders the German company New Yorker S.H.K. Jeans GmbH & CO KG to pay the American company Levi Strauss & Co. EUR 30,000,000.00, plus interest at the legal rate on the amount of EUR 27,000,000.00 since 18 June 2014, and on EUR 3,000,000.00 since 6 August 2015, until full payment, minus the EUR 12,500.00 already awarded by the judgment of 23 September 2016.

Orders the German company New Yorker S.H.K. Jeans GmbH & CO KG to pay the costs of the two proceedings, liquidated for the American company Levi Strauss & Co., of EUR 15,000.00 in court and EUR 45,000.00 at appellate level, and the appeal filing fee of EUR 186.00.

Determines that the balance of the advance on costs recorded in the court registry, after assessment of the costs and fees of the legal expert, *i.e.* EUR 35.57, shall be paid to company New Yorker S.H.K. Jeans GmbH & Co KG under German law.

This judgment was rendered by the 9th chamber of the Brussels Court of Appeal, composed of:

Ms Marie-Françoise CARLIER, president of the chamber,
Ms Françoise CUSTERS, judge,
Mr Yves HERINCKX, deputy judge,
who attended all the hearings and deliberated on the case.

It was pronounced in public hearing by Ms Marie-Françoise CARLIER, president of the chamber, assisted by Ms Patricia DELGUSTE, clerk, on 23 February 2023.

[signature]	*[signature]*
Patricia DELGUSTE	**Yves HERINCKX**
[signature]	*[signature]*
Françoise CUSTERS	**Marie-Françoise CARLIER**