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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: 04th March, 2022

\+ **O.M.P. (COMM) 349/2021 & I.As. 15549-50/2021**

M/S KANWARJI CONSTRUCTION COMPANY ..... Petitioner

Through: Ms. Kanika Singh, Mr. Abhishek Pande and Mr. Shailendra Haria, Advocates.

versus

GOVERNMENT OF NCT OF DELHI ..... Respondent

Through: Ms. Warisha Farasat and Mr. Shourya Dasgupta, Advocates.

CORAM:
HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

[VIA HYBRID MODE]

SANJEEV NARULA, J. (Oral):

1. The present petition under Section 34 of the Arbitration and Conciliation Act, 1996 [*hereinafter,* ***"the Act"***] assails the arbitral award dated 8th June, 2021 to the limited extent of Claims No. 2(2), 2(3), 4, 6, 8, 11 and 12 – which were rejected by the Arbitral Tribunal.

FACTS

2. The Petitioner – M/s Kanwarji Construction Company was awarded a contract *vide* letter dated 29th December, 2008 – for the work of *'C/o Police Housing at Mandoli, Delhi. Sh: C/o 360 Nos Type III qtrs. with stilted parking and other related development work'* [*hereinafter, the* ***"Contract"***] by the

Respondent – Government of National Capital Territory of Delhi [*hereinafter*, ***"GNCTD"***].

3. The scheduled date of commencing work under the Contract was 20th January, 2009 and the date of completion was 19th September, 2010. However, owing to certain delays statedly on GNCTD's part, there was a prolongation of the Contract and the Petitioner had to remain at the site for six additional years – till 1st October, 2016, and also subsequently, owing to certain pending electrical work which was eventually completed on 5th June, 2017. There was no delay on the Petitioner's part and an extension was granted without levy of compensation by the GNCTD under Clause 2 of the Contract *qua* compensation payable.

4. When disputes arose, pursuant to Petitioner's invocation, GNCTD appointed the Arbitrator. In the ensuing arbitration proceedings, the Petitioner filed several claims – of which some were allowed and some rejected. The scope of the present petition, as already noted above, is confined to the award of claims that have been rejected.

5. The contentions of the parties and analysis thereof, is being dealt claim-wise.

CLAIM NO. 2 [*QUA* EXTRA ITEMS, DULY EXECUTED BUT NOT PAID]

6. Claim No. 2 was for certain extra items that the Petitioner alleged were duly executed, yet, not paid for. The same consists of three parts: (1) Extra for Surface Dressing; (2) Extra for additional lead up to 1.00 Km; and (3) Extra

for additional lift of 1.5 M. Whereas, Claim No. 2(1) has been allowed by the Arbitral Tribunal; Claims No. 2(2) and 2(3) were rejected.

7. Ms. Kanika Singh, counsel for the Petitioner, submits that Claims No. 2(2) and 2(3) have been rejected on the basis of perverse reasoning by the Arbitrator, who has confused the said items with those under Claim No. 2(1) and has rendered findings which were neither the pleaded case of the parties, nor borne out from the terms placed on record.

8. Ms. Singh places reliance upon the letters dated 20th May, 2010 and 10th October, 2011 and contends that Petitioner had carried out extra work and raised a claim against the same with GNCTD. The said communications were never replied to, and ultimately, in 2017, when the final bill was approved, the claims *qua* these extra items were rejected. She emphasises that the Arbitrator has held in her favour on the question of claims being within limitation. However, the findings given in paragraph no. 40 of the impugned Award, are in complete contradiction with the record available on record. The above-noted letters – whereby the Petitioner had raised the claims – were part of the record, yet, never looked into by the Arbitrator. The findings rendered by the Arbitrator, in paragraph 3(a) of the impugned Award, holding that claims for extra items under Claim 2(2) and 2(3) are linked to Claim 2(1) – are incorrect and contrary to the record and pleadings of both parties. In fact, a bare perusal of the letter dated 29th September, 2009 would reveal that there is no indication to such effect, as has been concluded by the Arbitrator.

9. Ms. Warisha Farasat, counsel appearing on behalf of GNCTD, at the

outset, objects to the maintainability of the present petition on the ground of limited scope of interference of this Court under Section 34 of the Act and places reliance on several judgments of the Supreme Court on this aspect, including ***MMTC Limited v. Vedanta Limited***[1] and ***Ssangyong Engineering and Construction v. National Highways Authority of India***.[2] With respect to merits of Claim No. 2, she submits that the Arbitrator's findings are based on the material placed on record. Since there was no evidence placed on record by the Petitioner in respect of Claims No. 2(2) and 2(3), there was no question of admissibility thereof. She further submits that there was never any approval or authorisation from GNCTD with respect to the said claims raised before the Arbitral Tribunal.

10. In respect of the afore-noted Claim, the findings of the learned Arbitrator read as under:

> *"3. Having gone thru all the pleadings made by the parties and documents placed on record, it is observed and held as under:*
>
> *a. The claim of extra items under claims parts 2(2) and 2(3) are admittedly linked to claimed item 2(1), already adjudicated herein above in preceding part of this award.*
>
> *b. Surface dressing had been originally carried out by the claimants at start of work in Jan/ Feb 2009, which had definitely involved the earthwork involving lead & lift. The measurements and payment thereof including lead and lift considering condition no. 11 on page 145 of agreement, if any, have not at all been disputed by the parties.*
>
> *c. With the onset of monsoon during the intervening period between Feb 2009 and Jul/Oct 2009, admittedly only vegetation had cropped up. The evidence of vegetation was provided to the respondents at the relevant time with photographs. Therefore, Claimant were directed to remove it. the claim of surface dressing has been admitted by the arbitral tribunal herein above*

[1] (2019) 4 SCC 163 [*See* paragraphs no. 11-13].
[2] (2019) 15 SCC 10 [*See* paragraphs no. 37-40].

accordingly.

d. ***The claim relates to items of lead & lift involving earthwork. Without placing on record any details of measurements involving lead and lift, the arbitral tribunal fails to comprehend by any stretch of imagination, any major item of earthwork, excepting the claim 2(1) admitted herein above by the arbitral tribunal for removal of vegetation, wild grass, shrubs, etc, which cropped during the intervening period****.*

e. The claim relates to execution of measurable items of contracted work on the format laid down by the department. All such interim payments are advances against final bill in terms of Clause 7 of agreement. Hence the claim not held as time barred.

f. Despite refusal to pay any extra item vide R-8 dated 29-09-2009, the claimants went ahead with infructuous submissions vide C-21 dated 20-05-2010 and C-22 dated 10-10-2011 but without any supporting measurements. These did not require specific rejection. Under these circumstances the judgment 'Narain Das Israni v DDA 2005(85) DRJ 476(CJ2)' is not applicable in this mater."

[Emphasis Supplied]

11. The rejected Claim relates to *items of lead & lift involving earthwork.* The reasoning supplied by the arbitrator is not solely resting on the observations made by GNCTD in their letter dated 29th September, 2009. In paragraph no. 3(d) above, the Arbitrator observed that no details of 'measurements involving lead and lift' were placed before him. Thus, the Arbitrator has adjudicated this claim on merits and returned a finding of fact that there is no such material placed on record justifying the said claim. Although Ms. Kanika Singh is correct in pointing out that communications dated 20th May, 2010 and 10th October, 2011, issued by Petitioner to GNCTD, have been placed on record, however, whether such communications would meet the requirements of the award of extra items, was something that had to be demonstrated in arbitration.

12. In fact, GNCTD in their defence took categorical objection regarding admissibility of the claim on the ground that it had never been approved. GNCTD had also taken an objection regarding Clause 6A of the Contract – which stipulates for the measurements for the extra work had to be submitted along with the requisite approval. In absence of any such details being made available before the Arbitral Tribunal or the Court (with the exception of the two communications dated 20th May, 2010 and 10th October, 2011), the Court does not find any ground to interfere with the findings of the Arbitrator *qua* Claims 2(2) and 2(3), and thus, the challenge on this set of claims cannot succeed.

CLAIM NO. 4 [REIMBURSEMENT OF SERVICE TAX]

13. Claim No. 4 pertained to the reimbursement of service tax duly paid by the Petitioner. To support this claim, Ms. Singh places reliance upon Clause 37 of the Contract, which reads as follows:

> *"CLAUSE 37*
>
> *(i) Sales Tax/ VAT or any other tax on materials in respect of this contract shall be payable le by the contractor and Government shall not entertain any claim whatsoever in this respect.*
> *(ii) The contractor shall deposit royalty and obtain necessary permit for supply of the red bajri, stone, kankar, etc. from local authorities.*
> *(iii) If pursuant to or under any law, notification or order any royalty, cess or the like becomes payable by the Government of India and does not any lime become payable by the contractor to the State Government. Local authorities in respect of any material used by the contractor in the works then in such a case, it shall be lawful to the Government of India and it will have the right and be entitled to recover the amount paid in the circumstances as aforesaid from dues of the contractor."*

14. The Arbitrator denied this claim by placing reliance upon another clause which forms part of the 'Instructions to Contractor' as contained in the

Tender Document, which has been extracted in paragraph no. 3(v) of the impugned Award under Claim No. 4 and reads as follows:

> *"v. The relevant extracts pertaining to this claim extracted from "Instruction to Contractor" at 1st page of Tender Document (i.e. P- 105 of contract agreement) issued to claimant are reproduced parawise as under:*
>
> *1st para: "……The tenderer should also read the General Conditions of Contract for CPWD Works 2008 with up-to-date amendments/ correction slips, which is available as Government of India Publications,* ***however provisions in the tender document shall prevail over the provisions contained in the standard form****.*
>
> *2nd - 4th para: "……"*
>
> *5th para: "Sales Tax/VAT, Excise Duty, Purchase tax, turn over tax, Service Tax etc or any other tax on material shall be borne by the contractor himself.* ***The contractor shall quote his rates considering all such taxes.****"*
>
> *6th para: "……""*
>
> [Emphasis Supplied]

15. The Arbitrator held that in view of the explicit rider in the afore-noted clause under the 'Instructions to Contractor', the Petitioner's claim for reimbursement of service tax cannot sustain for reasons disclosed in paragraphs no. 3(c) and (d) of the impugned Award, which read as follows:

> *"c. It is observed from the foregoing that:*
>
> ***i. Not only Service Tax but also other taxes like Excise duty, Purchase Tax, Turnover Tax, etc., were also to be included by claimants in their quoted rates, which otherwise are not covered in the standard Clauses 37 and 38 of Contract of Govt of India publication at pages 1-100 of contract agreement.***
>
> ***ii. Claimants were duly instructed even before they quoted the rates that they shall consider all such taxes in the rates to be quoted by them.***
>
> *d. In view of the explicit rider, as aforesaid, provided in 1st and 5th para of Instructions to Contractor, over and above "General Conditions of Contract for CPWD Works 2008 with up-to-date amendments/ correction slips", all the arguments of claimants except related to limitation, fail to justify their claim."*
>
> [Emphasis Supplied]

16. Ms. Singh has argued that 'Instructions to Contractor' cannot prevail over the General Conditions of the Contract ("GCC"). The Arbitrator failed to consider that GNCTD acknowledged the said claim by conduct. Petitioner changed its position to its own detriment, giving rise to legitimate expectations as also principles of estoppel and acquiescence, that the amount paid as service tax would be reimbursed. The Arbitrator has completely overlooked vital evidence that reimbursement of service tax was acknowledged and entered into measurement books for payment in 2015 and a Hand Receipt for payment was passed and *challan* was prepared for payment in 2017. When GNCTD was fixing the rates of extra items, Petitioner was led to believe that it would be reimbursed for the service tax component, and therefore, it was induced not to include the same in the rates for extra items. These critical issues have not been considered and there is no finding on the same. On this submission, she places reliance upon the judgment of the Supreme Court in ***Bentwood Seating System P. Ltd. v. Airports Authority of India***[3] to submit that if vital issues and/ or contentions are not adjudicated upon by the Arbitral Tribunal, the Award is liable to be set-aside.

17. The Court has considered the afore-noted contentions; however, no merit is found in the same. The construction of terms of the Contract falls exclusively within the domain of the Arbitrator. The interpretation given to the conditions contained in the 'Instructions to Contractor', forming part of the Tender document, cannot be said to be unreasonable or *ex facie* perverse. The aforenoted clause in the 'Instructions to Contractor' provides that

[3] 2021 SCC OnLine Del 3989.

provisions of the Tender document would prevail over the GCC provisions contained in the Contract. It is also provided that the Contractor *i.e.*, Petitioner shall quote its rates, after due consideration of all taxes. The service tax is thus, deemed to be included in the rates offered. The Petitioner cannot now be permitted to turn around and contend that the component of service tax did not form part of the quoted rates. The interpretation of the Arbitrator is in consonance with the language of the clause.

18. Further, Petitioner's contention – that since GNCTD had processed and passed the bills, their conduct would amount to admission of claim – is an incorrect submission. The terms and conditions of the Contract cannot be novated by the conduct of the parties in the manner as suggested by Petitioner. The processing of invoices by GNCTD cannot be contrary to the conditions under the Tender document. In any event, no payment was made thereunder and the administrative steps for processing cannot amount to admission of liability. The Petitioner, with open eyes and having read the conditions under the Tender document, made its bid and quoted its rates. There was consensus between the parties regarding the rates, and at this stage, Petitioner cannot be permitted to wriggle out of the same.

CLAIM NO. 6 [REIMBURSEMENT OF AMOUNT WITHHELD *QUA* HANDING OVER OF THE BUILDING]

19. Petitioner claimed reimbursement of the amounts, which according to them, were arbitrarily withheld on account of handing over the building.

20. Ms. Singh contends that despite completion of the work in 2016, GNCTD withheld an amount of Rs. 20 lakhs in the final bill. The Arbitrator has allowed this claim only to the extent of Rs. 3 lakhs and rejected the remaining claim of Rs. 17 lakhs. She submits that the findings are patently illegal and contrary to the terms of the Contract. The finding of the Arbitrator – that the date of completion of the work is to be considered as 5th July, 2019, since the Petitioner continued to hold possession of the site until then – is contrary to the contractual terms and evidence placed in arbitration. The Contract only considers completion with regards to completion of work and makes no reference to handing over. Completion of the work had been duly recorded on 1st October, 2016 and the delay in handing over, was in fact, attributable to GNCTD. On this aspect, she places reliance on the Petitioner's letter dated 23rd November, 2017. Ms. Singh points out that during cross-examination, RW-1 admitted that 'defect liability period' was one year from the date of completion of the work, *i.e.*, 1st October, 2016. No letter was written highlighting defects during this period, and thus, the finding of the Arbitrator is entirely contrary to the evidence of GNCTD's own witness. The Arbitrator fell in error in saying that 'defect liability period' under Clause 17 of the Contract would not be applicable. This holding would amount to rewriting the terms of the Contract. It is a settled position that the liability of a contractor to carry out repairs is only during the 'defect liability period'; GNCTD's own witness admits that no defect was pointed out during this period. Thus, the Arbitrator fell in error in relying upon the letters written after

the expiry of the defect liability period. Reliance is placed upon ***M/s Associated Builders v. Delhi Development Authority and Anr.***[4]

21. On this Claim, the final conclusion of the Arbitral Tribunal under this Claim, is as follows:

> *m. Under the circumstances, pleadings of the parties and observations made as above, it is held that:*
>
> *i. For the purpose of this claim, the date of completion of the work to be considered as 05-07-2019, being the date of handing over of the flats.*
>
> *ii. Rs 17 lacs being the estimate for rectification of defects intimated to claimants vide R-88 dated 04-12-2019 is allowed to be deducted from the withheld amount of Rs 20 lacs.*
>
> *iii. Balance Rs 3 lacs are allowed in favour claimants.*

The Arbitrator has allowed 17,00,000/- to be deducted being the estimate for rectification of defects by relying upon the communication dated 4th December, 2019. The said communication, from GNCTD to the Petitioner, reads as follows:

> *To*
> *M/S Kanwarji Construction Company,*
> *702/58, Sahyog Building, Nehru Place,*
> *New Delhi-110019.*
> *DATED: 04/12/2019*
>
> *Subject – construction of Police Housing Complex for Delhi Police at Mandoli, Delhi-93.*
> *(Sub: C/O 360 nos. Type-Ill Quarters and its related development work.*
> *Reference: This offices letter no. 54(47)/ Police Housing (Phase-1)/ PWD/EEOPD-2/2019-20/351 dated 04-09-2019*
>
> *This is with reference to above mentioned letter. The department intimated you that C/o 360 nos. Type III quarters have some defects and directed you to immediately rectify the defects and intimate the department but till today no rectification has been done by you. Thus, for rectifying fresh tenders will be allotted wherein an estimated sum of Rs. 1,00,000 will be spend.* ***The***

[4] (2012) 194 DLT 14 [*See* paragraphs no. 14-15]

rectification in the subject work will be done at your risk and cost and the same will be recovered from the amount withheld by the department in the final bill. *This transmitted for your information.*

EXECUTIVE ENGINEER
OTHER PROJECT DIVISION-2
TRANSLATED COPY"

22. Ms. Farasat, on instructions, has very candidly stated that although the communication dated 4th December, 2019 was filed before the Arbitral Tribunal; however, the annexure thereto, which contains the Schedule of Quantities – giving a breakup of the estimates regarding the defects – was not filed. In view of the above, it transpires that the Arbitrator did not have any material(s) to conclude that GNCTD suffered any damages or were entitled to adjust the amount towards defect liability. It must also be noted that, in fact, GNCTD never pressed that they incurred expenditure for carrying out the defects. This renders the Award without evidence and entirely notional as there is no proof of any actual amount spent in the communications relied upon. It is settled law that there can be no notional claim for reimbursement/ rectification/ damages. In light thereof, the findings of the Arbitrator *qua* Claim No. 6 are set aside.

23. Both counsels, on instructions, state that they would have no objection in case the matter is referred back to the same Arbitral Tribunal for adjudication on the afore-noted issue. Since the parties have jointly consented to the matter being referred back to the same Tribunal, the request is allowed. Claim No. 6 shall therefore be examined *de novo* by the Tribunal after hearing both the parties.

CLAIM NO. 8 [CLAIM FOR ESCALATION UP TO DATE OF COMPLETION]

24. Claim No. 8 was made *qua* the actual price escalation upto date of completion of civil and electrical work.

25. Ms. Kanika Singh argues that Petitioner had to stay on site for nearly 7 years beyond the stipulated time, despite no delay being found attributable to it and no compensation/ penalty being levied. Petitioner had to execute the work much beyond the originally stipulated period, during which, the cost for raw materials and labour increased. Therefore, the Petitioner claimed payment as per the indices prevailing at the time when it actually executed the work. These indices are admitted even by GNCTD, as it has noted the same in the final bill and raised no dispute *qua* them. It is an admitted fact that Petitioner had to incur an additional amount of Rs. 8,66,93,854/-, as calculated on the basis of these indices, due to execution of work in the extended period. Thus, in equity, Petitioner is liable to be compensated for this amount. Ms. Singh also submits that the Escalation Clause – which fixes indices on the scheduled date of completion – cannot be applied in such a case of inordinate delay. She places reliance upon the judgments in ***Deconar Services Pvt. Ltd. v. National Thermal Power Corporation Limited***[5] and ***K.N. Sathyapalan (dead) by Lrs. v. State of Kerala and Ors.***,[6] to state that even if not provided in a contract, escalation can nonetheless be paid as compensation under the Indian Contract Act, 1872.

26. On this aspect, the Arbitrator observed as follows:

[5] 2009 SCC Online Del 4109 [*See* paragraph no. 7].
[6] 2006 (4) Arb LR 275 (SC) [*See* paragraph no. 13-15].

"3. Having gone thru all the pleadings made by the parties, documents, citations and record of witnesses on record, it is held that:

a. The claim has emanated from the contract agreement and is settleable based on:

i. Recorded measurements of work actually executed from time to time and paid thereof based on interim RA bills, which was settleable up to the date of finalization of bill.

ii. An existing escalation clause according to which escalation was payable even during the extended period of completion in terms of clause 5 of contract but without any action under clause 2 of the contract.

Hence, the claim is not time barred.

b. The subject contract agreement already had an agreed formula for compensating the claimant, based on which the claimant had amicably been compensated.

c. But the claimant's subject claim is for additional compensation based on their own arguments, which is not acceptable being beyond the terms of contract agreement.

d. The three citations relied by the claimants are found not relevant to the subject contract as under:

i. CJ -18 Deconar Services Pvt. Ltd. Vs National Thermal Power Corporation Limited MANU/ DE/ 3364/ 2009 and Judgment of K.N. Sathyapalan (Dead) by Lrs. Vs. State of Kerala and Ors.(CJ 10- Para 20 and 22):These related to a firm price contract and did not have any clause related to compensation on account of escalation during the extended period of completion.

ii. Delhi Development Authority vs. N.N. Buildcon Pvt. Ltd. (CJ -30 Para 9,11): This related to a contract, wherein there was an escalation clause for compensation but only up to the contracted date of completion. There was no provision for compensation on account of escalation during the extended period of completion under clause 5 but without any action under clause 2 of contract."

Essentially, the Arbitrator has relied upon the escalation clause – which is applicable to the extended period of completion. Once having agreed to the fact that for the extended period – the indices, as fixed in the Contract between the parties would be applicable, the Petitioner cannot be permitted to raise contrary to the same. The Petitioner's contention, if accepted, would amount

to rewriting the terms of the Contract. Accordingly, the challenge to this extent cannot succeed.

CLAIM NO. 11 [CLAIM FOR INTEREST ON MILESTONES WITHHELD]

27. This Claim is for interest on milestone that was allegedly withheld by the GNCTD from October, 2010 to April, 2014.

28. Ms. Singh submits that certain amounts were withheld by GNCTD as Petitioner was not able to catch up with the milestones fixed under the Contract. Subsequently, GNCTD revised the milestone(s) and in terms thereof, the payments withheld by GNCTD were released to the Petitioner. She submits that since the amount withheld by GNCTD was subsequently released on interest, Petitioner is entitled to be compensated by Award of interest on the said amount. She further submits that Clause 2 of the Contract, which has been relied upon by the Arbitrator is not applicable, as the said clause would be attracted only if the Contractor catches up with the promised work of specific milestones. She submits that in the instant case, the milestone itself was changed by the GNCTD, therefore this Clause is not attracted.

29. On this aspect, the learned Arbitrator has observed as under:

> *"3. Having gone thru all the pleadings made by the parties, documents and citation related to the claim, it is observed and held as under:*
> *a. Claim is not time barred.*
> *b. The contention of claimant of mixing the clause 2 and Clause 5 is rejected with clarification as under:*
> *i. Clause 5 relates only to Time and Progress Chart or its revision in extended time for each specified/ rescheduled milestone(s). There is no mention therein either on withholding amounts or interest thereon for not achieving milestone(s).*

ii. Withholding of amount for not achieving a milestone is mentioned not in clause 5, but in Clause 2. This withheld amount is to be finally adjusted against levy of compensation, if any, at final extension of time. Interest has been specifically barred in this clause on withheld amounts, if any.

c. Other than on limitation, the arguments of respondents are upheld."

30. Admittedly, there was no catching up of milestones as envisaged under Clause 2. The instant case is *qua* of rescheduling of milestones and extension of time under Clause 5. The amounts were withheld by GNCTD on account of Petitioner not meeting the milestones in terms of Clause 2 in the first instance. However, subsequently, the amount was released as the milestones were rescheduled. Although, it might not strictly be a case of catching up with the milestones as stipulated in the Contract, nevertheless, clause 2 of the Contract provides: "*however, no interest, whatsoever, shall be payable on such withheld amount".* In that light, Petitioner's claim for interest would be contrary to the agreed upon terms of the Contract. Therefore, the view taken by the Arbitrator, being a plausible one, based on interpretation of the terms of the Contract, cannot be faulted with. Accordingly, the challenge to this extent cannot sustain.

CLAIM NO. 12 [ELECTRICITY GENERATION CHARGES]

31. Claim No. 12 pertains to electricity generation charges during the extended period. The Arbitrator allowed this claim only in part to the extent of Rs. 2,61,333/- for amounts incurred by the Petitioner.

32. Ms. Singh, on instructions, very fairly states that the challenge *qua* this claim, to the limited extent assailed, is no longer being pressed.

33. For the forgoing reasons, the petition is dismissed; except for the challenge to Claim No. 6 – which stands disposed of in terms of the afore-noted directions.

34. All pending application(s), if any, be disposed of.

SANJEEV NARULA, J

MARCH 4, 2022
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(Corrected and released on 11th April, 2022)