House of Commons Library

By Ali Shalchi

18 November 2021

Commercial Rent (Coronavirus) Bill 2021-22

Summary
1 Background
2 The Bill
3 Commentary

Image Credits
High Street Again by Duncan Brown (Cradlehall). Licensed under CC BY 2.0 / image cropped.

Disclaimer
The Commons Library does not intend the information in our research publications and briefings to address the specific circumstances of any particular individual. We have published it to support the work of MPs. You should not rely upon it as legal or professional advice, or as a substitute for it. We do not accept any liability whatsoever for any errors, omissions or misstatements contained herein. You should consult a suitably qualified professional if you require specific advice or information. Read our briefing 'Legal help: where to go and how to pay' for further information about sources of legal advice and help. This information is provided subject to the conditions of the Open Parliament Licence.

Feedback
Every effort is made to ensure that the information contained in these publicly available briefings is correct at the time of publication. Readers should be aware however that briefings are not necessarily updated to reflect subsequent changes.

If you have any comments on our briefings please email papers@parliament.uk. Please note that authors are not always able to engage in discussions with members of the public who express opinions about the content of our research, although we will carefully consider and correct any factual errors.

You can read our feedback and complaints policy and our editorial policy at commonslibrary.parliament.uk. If you have general questions about the work of the House of Commons email hcenquiries@parliament.uk.

Contents

1 Background 7

1.1 Government intervention 7

1.2 The June 2020 Code of Practice 8

1.3 The Call for Evidence 9

1.4 Call for Evidence: data 9

1.5 The November 2021 Code of Practice 10

1.6 Commercial rent arrears: the current situation 11

2 The Bill 13

2.1 Part 1: introductory provisions 13

2.2 Part 2: arbitration 14

Choosing the arbitrators – clauses 7 and 8 14

Making a reference to arbitration – clauses 9 and 10 15

Proposals and statements – clauses 11 and 12 15

Arbitration awards – clauses 13 to 16 15

Timing and publication – clauses 17 and 18 16

Fees and hearings – clauses 19 and 20 17

Guidance and modifying the Arbitration Act 1996 – clauses 21 and 22 and Schedule 1 17

2.3 Part 3: moratorium on certain remedies and insolvency arrangements 18

Restrictions on enforcing protected rent debts - clause 23 and Schedule 2 18

Restrictions on initiating insolvency and arbitration proceedings – clauses 24 and 25 18

Restrictions on winding-up petitions and bankruptcy orders – clause 26 and Schedule 3 19

2.4 Part 4: final provisions 19

Future closure requirements – clause 27 19

Northern Ireland – clause 28 20

Clauses 29 and 30 20

3 Commentary 21

3.1 Impact Assessment 21

The other options 21

The preferred option 22

3.2 Stakeholder views 23

Summary

On 9 November 2021, the Government introduced the Commercial Rent (Coronavirus) Bill 2021-22 in the House of Commons. Second Reading is expected on 24 November 2021. The Bill, Explanatory Notes, Impact Assessment and Delegated Powers Memorandum can be found on the Bill page.

The issue

Many non-essential businesses were forced to close as part of measures to control the spread of coronavirus. Losing their source of income meant that many fell behind on their rent.

The Treasury estimates that the total amount of business rent arrears could be around £9 billion by March 2022. Data suggests that pubs and bars, restaurants, clothes retailers and hotels owe the most.

Government action

To allow viable business to survive during the pandemic, the Government brought in three main measures to help businesses falling behind on their rent. These were restrictions on (1) landlords forfeiting business leases; (2) using the statutory Commercial Rent Arrears Recovery procedure; and (3) presenting winding-up petitions. These measures are all due to expire at or near the end of March 2022.

In June 2020 the Government, in consultation with industry bodies, introduced a voluntary UK-wide Code of Practice to help commercial landlords and tenants come together to negotiate on rent arrears. A Call for Evidence was then published in April 2021 seeking views on six options for resolving rent debts built up during the pandemic, including allowing some or all its temporary measures to expire, and introducing binding or non-binding arbitration processes.

In response to the Call for Evidence, on 16 June the Government announced that it would extend its temporary restrictions until March 2022 and introduce legislation to establish a binding arbitration system to resolve disputes, where landlords and tenants could not agree on a solution.

The Bill

On 9 November 2021 the Commercial Rent (Coronavirus) Bill was introduced to the House of Commons. It was published alongside an updated Code of Practice which explains the Bill's processes and sets out the principles that should guide the landlord and tenant in negotiating rent debts. In it the Government indicates that it hopes to pass the Bill by 25 March 2022, to allow

the arbitration process to begin afterwards. The Bill consists of thirty clauses and three Schedules divided into four parts:

- **Part 1** gives an overview of the Bill and defines the key terms used in it. It extends to England and Wales only, except for parts of it that interact with Part 3 and so extend to Scotland and Northern Ireland;

- **Part 2** (and Schedule 1) introduces and sets the boundaries of a new binding arbitration process to be used when business landlords and tenants can't agree how to deal with outstanding rent arrears. It extends to England and Wales only;

- **Part 3** (and Schedules 2 and 3) expand existing restrictions on enforcing business rent arrears, to ensure they cannot be used to undermine the arbitration process. It extends to England and Wales, with certain provisions also extending to Scotland and Northern Ireland; and

- **Part 4** deals with the scope and extent of the Bill. It extends to the whole of the UK, except for clause 28 (granting the Northern Ireland Executive power to introduce a similar arbitration scheme) which is only relevant to Northern Ireland.

Our briefing Coronavirus: Support for businesses discusses different Government schemes available to help businesses during the pandemic.

1 Background

The Commercial Rent (Coronavirus) Bill 2021-22 (Bill 189) was introduced in the House of Commons on 9 November 2021. Second Reading is expected on 24 November 2021. The Bill, Explanatory Notes, Impact Assessment and Delegated Powers Memorandum can be found on the Bill page.

The Bill introduces a legally binding arbitration system to support business tenants and landlords in England and Wales to resolve disputes around rent arrears built up during the coronavirus pandemic. The arbitration scheme applies in England and Wales, although other parts of the Bill extend to Scotland and Northern Ireland.

1.1 Government intervention

Many non-essential businesses were forced to close as part of measures to control the spread of coronavirus. Losing their source of income meant that many fell behind on their rent.

The Government's view was that a viable business should not be forced into insolvency proceedings because of the health measures imposed to try and control the spread the coronavirus.[1] Three main temporary restrictions were brought in to help business who had fallen behind on rent:

1. **Forfeiture**. Where a business tenant fails to pay rent, their landlord will usually have a right to terminate their lease early and force the tenant to leave. This is called forfeiture. Section 82 of the Coronavirus Act 2020 provides that that a landlord's right to forfeit a lease for non-payment of rent could not be exercised for three months. The restriction has since been extended on multiple occasions and is now due to expire on 25 March 2022.

2. **Commercial Rent Arrears Recovery** (CRAR). Available from 2014, CRAR is a statutory process which allows business landlords to recover rent owed by seizing a tenant's assets. Before the pandemic, it could be used where there was 7 days' unpaid rent. This was extended to 90 days from March 2021.[2] The period was gradually extended and since June 2021 has stood

[1] Ministry of Housing,Communities & Local Government, Code of Practice for commercial property relationships during the COVID-19 pandemic, June 2020, see Ministerial Foreword

[2] By The taking Control of Goods and Certification of Enforcement Agents (Amendment) (Coronavirus) Regulations 2020 Control of Goods (Amendment) (Coronavirus) Regulations 2021

as 554 days (around 18 months).[3] It is due to return to 7 days on 25 March 2022.

3. **Winding-up petitions.** Before the pandemic, someone owed £750 or more by a business that could not pay could apply to the court for an order to close down (wind up) that business. From March 2020, a court could not make a winding up order where the cause of non-payment of the debt was related to coronavirus. In October 2021 the rules were relaxed, but winding-up orders still cannot be made for commercial rent debts related to coronavirus. This restriction is due to expire on 31 March 2022.[4]

Together, these restrictions made it much harder for landlords to take action to enforce commercial rent debts. This resulted in levels of debt building up.

1.2 The June 2020 Code of Practice

On 19 June 2020 the Government, in consultation with a "steering group" of seven industry bodies,[5] introduced a voluntary UK-wide "Code of Practice for commercial property relationships during the COVID-19 pandemic" to "support businesses to come together to negotiate affordable rental agreements." The Code said the tenants who are able to pay their rent should continue to do so, and those that couldn't should "communicate with their landlord and pay what they can".[6]

It encouraged tenants and landlords to try and agree a fair solution to deal with rent arrears, bearing in mind the circumstances of each. Suggested solutions included rent deferrals and reductions, or lease variations. The suggested principles to be taken account in negotiations were: (1) taking a transparent and collaborative approach; (2) being mutually supportive ("a unified approach"); (3) recognising that Government support is there to help business meet their commitments; and (4) acting reasonably and responsibly.[7]

On 6 April 2021 the Code of Practice was updated to add a template form to be used during negotiations. The form helps tenants set out the impact the pandemic has had on their financial situation, and is intended to act as an aid

---

[3] By The Taking Control of Goods (Amendment) (Coronavirus) Regulations 2021

[4] See section 3 of our briefing on the Corporate Insolvency and Governance Act 2020

[5] Comprising the British Chambers of Commerce, British Property Federation, British Retail Consortium, Commercial Real EstateFinance Council Europe, Reco, Royal Institution for Chartered Surveyors, and UKHospitality

[6] See Code of Practice, Ministerial Foreword

[7] Ministry of Housing, Communities & Local Government, Code of Practice for commercial property relationships during the COVID-19 pandemic, June 2020 (updated April 2021)

to negotiations or (if court action is required) to facilitate a prompt outcome of the case.[8]

This Code of Practice was withdrawn and replaced with another Code of Practice in November 2021 (see section 1.5 below).

1.3 The Call for Evidence

Alongside the updated Code of Practice, and in recognition of the threat of accumulated rent debts to the future survival of many tenant businesses, in April 2021 the Government launched a Call for Evidence asking how and when it should withdraw its temporary measures restricting forfeiture and CRAR to best preserve businesses and jobs.[9] At the time, both measures were due to expire on 30 June 2021.

The Call for Evidence sought views on six options:

1. Allowing current measures to expire at the end of June 2021 without replacing them;
2. Allowing the forfeiture measure to expire but retaining the measures on CRAR and winding-up petitions;
3. Tailoring existing measures depending on how big an impact Covid restrictions had had on their businesses;
4. Encouraging more formal mediation between landlords and tenants;
5. Introducing a non-binding arbitration process to resolve disputes; or
6. Introducing a binding arbitration process.

On 16 June, after reviewing the responses, then Chief Secretary to the Treasury, Steve Barclay, announced to the House of Commons that the Government would extend the forfeiture and CRAR restrictions until March 2022 and introduce legislation "to establish a backstop so that where commercial negotiations between tenants and landlords are not successful, tenants and landlords go into binding arbitration".[10] This is Option 6.

1.4 Call for Evidence: data

Data on the Call for Evidence responses was published by the Government on 4 August 2021.[11] The Call for Evidence attracted 508 responses: 60% from

[8] See Department for Levelling Up, Housing and Communities and Ministry of Housing, Communities & Local Government, Guidance: Code of practice for the commercial property sector, updated 6 April 2021

[9] Ministry of Housing, Communities & Local Government, Commercial rents and COVID-19: call for evidence, April 2021

[10] HC Deb 16 June 2021, vol 697, col 308

[11] Ministry of Housing, Communities and Local Government, Consultation outcome: Call for evidence on commercial rents: responses and analysis, updated 4 August 2021

tenants (77% of whom had under 250 employees), 26% from landlords, and 14% from others (such as trade bodies and lawyers).

The most preferred option for landlords by far (chosen by 79%) was Option 1 (allowing the current measures to expire) whereas most tenants (57%) opted for Option 6 (binding arbitration) followed by Option 3 (tailoring existing measures) which was chosen by around 27%.

A slight majority (52.9%) of tenants believed that no or very few landlords (0-20%) were engaging with the Code of Practice. A significant group of tenants stated that they had commonly experienced landlords refusing to negotiate. Landlords said a small majority of their tenants (56.5%) were engaging with the Code. Where negotiations did happen, the most common outcomes were more time to pay arrears, writing-off some rent arrears, and reducing their rent going forwards.

The total rent tenant respondents claimed to owe was £571 million. The total rent landlords claimed they are owed was £1.7 billion. For tenant respondents, the highest levels of rent owed was by those who operated pubs and bars, followed by restaurants and clothes retailers, as shown in the chart below.

About half of tenants (46.7%) said they would not be able to fully repay their rent arrears.

Note: rent arrears are those that tenants say they owe.
Source: MHCLG, Call for evidence on commercial rents: responses and analysis, Table 3, 4 August 2021.

1.5 The November 2021 Code of Practice

The Government is implementing its commitment to introduce a binding arbitration process through the Bill. On the day the Bill was introduced to the House of Commons, the Government also withdrew the June 2020 Code of Practice and replaced it with a new "Code of practice for commercial property relationships following the COVID-19 pandemic" (the new Code) which aligns its guidance with the Bill and advises landlords and tenants on how to negotiate.[12]

The binding arbitration process being introduced under the Bill applies only to England and Wales (and grants Northern Ireland a power to make similar legislation) but sections of the new Code are "expected to be adhered to" in Scotland. [13]

The new Code repeats what was stated in the June 2020 Code about landlords and tenants negotiating with transparency and collaboration, taking a unified approach, and acting reasonably and responsibly. It adds that parties should negotiate with the aim of achieving a "swift resolution" to avoid costly or burdensome processes.

The new Code also sets out three key principles to be considered when considering rent arrears built up due to coronavirus-related restrictions. If the dispute ends up being resolved through binding arbitration under the Bill, these principles should also be followed. They are:

- that the aim should be to preserve viable tenant businesses;
- but preserving the viability of the tenant's business shouldn't be at the expense of the landlord's solvency; and
- where it's affordable for a tenant to fully meet its rent payments, it should do so without delay; and any rent relief should be no greater than is necessary for the tenant business to afford the payment.[14]

1.6 Commercial rent arrears: the current situation

There are no Government statistics on levels of commercial rent debt.

Property trade body the British Property Federation published a study in June 2021 of 16,320 businesses in the retail, hospitality and leisure sectors. It found that:

---

[12] Department for Levelling Up, Housing & Communities, Code of practice for commercial property relationships following the COVID-19 pandemic, 9 November 2021

[13] Ibid, para 19

[14] Department for Levelling Up, Housing & Communities, Code of practice for commercial property relationships following the COVID-19 pandemic, 9 November 2021

- Commercial rent arrears of £7.5 billion were accrued between March 2020 and June 2021;
- 50% of business rents since March 2020 had been paid;
- Property owners and tenants had reached agreement on a further 27% of this debt - these agreements included new payments plans, waivers, rent holidays and deferrals;
- 23% of rent owed since March 2020 remained unresolved; and
- 14% of tenants were refusing to speak with landlords on rent debt arrears.[15]

Another study published by management consultants Remit Consulting estimated that as at 30 June 2021, £6.4 billion of commercial rents arising since March 2020 were unpaid, equating to around £1 in every £6 of rent due. Levels of rent collection were 50.8% in the retail sector and only 24.1% in the leisure sector (e.g. gyms).[16] This figure - £6.4 billion – is cited by the Government in its Impact Assessment for the Bill.[17] The Impact Assessment also notes Treasury analysis that the total amount of deferred rent liabilities (business rent arrears) could be around £9 billion by March 2022, although it expects the actual figure to be lower.[18]

Hospitality trade body UKHospitality estimated in June 2021 that hospitality businesses had accrued around £2.5 billion in rent arrears during the course of the coronavirus pandemic.[19]

[15] British Property Federation, British Property Federation: Government must lift moratoriums on commercial property owner rights, 11 June 2021

[16] Remit Consulting, Remit Consulting reveals a shortfall of £6.4 billion in rent income for investors since start of the pandemic, as just half of commercial property rents were collected on June Quarter Day, 2 July 2021

[17] Impact Assessment, see for example paragraph 6

[18] Impact Assessment, Annex B and para 198

[19] UKHospitality, UKHospitality welcomes new Government measures to solve the rent debt crisis, 16 June 2021

2 The Bill

The Bill consists of thirty clauses and three Schedules divided into four parts:

- **Part 1** gives an overview of the Bill and defines the key terms used in it. It extends to England and Wales only, except for parts of it that interact with Part 3 and so extend to Scotland and Northern Ireland;
- **Part 2** (and Schedule 1) introduces and sets the boundaries of a new binding arbitration process to be used where business landlords and tenants can't agree how to deal with outstanding rent arrears. It extends to England and Wales only;
- **Part 3** (and Schedules 2 and 3) expand existing restrictions on enforcing business rent arrears, to ensure they cannot be used to undermine the arbitration process. It extends to England and Wales, with certain provisions also extending to Scotland and Northern Ireland; and
- **Part 4** deals with the scope and extent of the Bill. It extends to the whole of the UK, except for clause 28 which is only relevant to Northern Ireland.

2.1 Part 1: introductory provisions

Part 1 defines the key terms used in the Bill. **Clause 1** makes clear that the Bill's new binding arbitration process doesn't affect the ability of the landlord and tenant to come to their own separate agreement on rent arrears and have it enforced.

The rest of Part 1 explains the kind of rent debts which can be referred to arbitration under the Bill.

Only debts of "rent" under "business tenancies" can be referred. "Rent" includes both services charges and interest on unpaid amounts, and "business tenancies" are leases of property occupied by the tenant at least partly for business purposes.[20] An obvious example is a shop.

The new arbitration process should only be used for business tenants who are behind on their rent because of coronavirus-related restrictions (**Clause 3**).[21] This means tenancies which are "adversely impacted by coronavirus" because the tenant was forced by coronavirus-related laws to fully or partly close their

[20] See Clause 2(5) and section 23 of the Landlord and Tenant Act 1954

[21] Clause 3 – "Protected rent debt"

business or premises between 21 March 2020 (the date of the first lockdown in England and Wales), and 18 July 2021 in England or 7 August 2021 in Wales (when restrictions were lifted) (**Clause 4**).[22]

Clause 5 provides that to be eligible for arbitration the rent debt must relate to this period. If closure requirements or specific coronavirus-related restrictions on a particular business were lifted earlier than 18 July (in England) or 7 August (in Wales), the rent debt must relate to the period before the restrictions were lifted.[23] Any rent debts accrued outside of this period could not be referred to arbitration under the Bill (they would not be not "protected rent debts") – landlords will be able to enforce these debts using the ordinary channels once the Government's temporary measures are withdrawn (which is currently scheduled for the end of March 2022).

Clause 6 provides that any arbitration relating to protected rent debts will determine whether the tenant should be given "relief from payment" of that debt. This could include any one or more of: writing-off some or all of the debt, giving more time to pay the debt, or reducing or removing the interest payable on the debt.[24]

2.2 Part 2: arbitration

Choosing the arbitrators – clauses 7 and 8

The Secretary of State[25] is given the power to approve the arbitration bodies they consider suitable to administer the new process. **Clause 7** provides that a list of approved arbitration bodies must be published.[26]

Clause 8 sets out requirements for the arbitration bodies. The arbitration body must have suitable arbitrators they can appoint to deal with cases on protected rent debts. The body must oversee ongoing cases and (if necessary) deal with any resignations, deaths and new appointments of arbitrators, or removals during a case if the grounds for removal are met (such as a lack of impartiality or independence).[27]

The arbitration body will also set and collect fees for administering the arbitrations – details on its fees must be published on its website.[28]

[22] See Clause 4 – "Adversely affected by coronavirus"
[23] See Clause 5 – "Protected period"
[24] See Clause 6 – "The matter of relief from payment"
[25] Currently the Secretary of State for Business, Energy and Industrial Strategy
[26] Clause 7
[27] Clause 8
[28] Ibid

Making a reference to arbitration – clauses 9 and 10

Clause 9 provides that where a business landlord and tenant can't agree on how to deal with protected rent debts, either of them will be permitted to refer the matter to arbitration by a body approved by the Secretary of State within 6 months of the passing of the Bill. The Secretary of State can extend the 6 month period by secondary legislation, using the negative parliamentary procedure.[29]

Clause 10 states thatbefore making a reference to arbitration, the tenant or landlord must notify the other of their intention to make a reference, and give them 14 days to respond. If no response is received, they can make a reference 28 days after giving the notification.[30]

But a reference to arbitration cannot be made (or, if already made, cannot be progressed) if the tenant is going through certain insolvency proceedings (a company voluntary arrangement, individual voluntary arrangement, or a Companies Act 2006 insolvency compromise or arrangement) which relate to the protected rent debt. If the tenant comes out of those proceedings without an arrangement or compromise being made, the arbitration can proceed.[31]

Proposals and statements – clauses 11 and 12

Clause 11 provides that the person (landlord or tenant) making a reference to arbitration must send with the reference a formal proposal for dealing with the protected rent debts (such as a payment plan or proposal to write some debt off), along with supporting evidence. This must be sent to the arbitrator and the other party. The other party then has 14 days to submit its own formal proposal. Each then has 28 days after making their proposal to put forward revised proposals. These 14 and 28-day deadline are extendable if both parties agree or by the arbitrator if they think it reasonable to do so.[32]

Clause 12 requires that written statements provided by the parties during the arbitration must be verified by a statement confirming that the facts stated within the document are true.[33]

Arbitration awards – clauses 13 to 16

Clause 13 states that if the appointed arbitrator finds that the parties had agreed on how to deal with the protected rent debt before the reference to arbitration, they must dismiss the case. They must also do so if they find that the case does not relate to a business tenancy or a protected rent debt.[34]

---

[29] Clause 9
[30] Clause 10
[31] Ibid, subsections (3) and (5)
[32] Clause 11
[33] Clause 12
[34] Clause 13

Under clause 13, the arbitrator would also be required to dismiss the case if they found that the tenant's business was not viable, and would remain unviable regardless of any award they make. If, however, the business was viable (or could become viable if given appropriate relief from rent), the arbitrator should consider whether to make an award on relief from payment.[35]

Clauses 15 and 16 provide further detail on how decisions should be made. In deciding what award to make, the arbitrator must apply two clear principles. The first principle is that the award they make should be aimed at preserving the tenant's business (if it is viable) or restoring and preserving it (if it is not currently viable, but could be if given the right amount of relief from payment). This must be done so far as it is consistent with preserving the landlord's solvency (meaning able to pay their debts).[36]

When assessing whether the tenant's business is viable, the arbitrator should consider the tenant's assets and liabilities, previous rental payments made, the impact of coronavirus on its business, and any other information on the tenant's financial position they consider appropriate. In assessing the landlord's solvency, the arbitrator must consider the landlord's assets and liabilities and any other information on the landlord's financial position they consider appropriate (**Clause 16**).[37]

The second principle the arbitrator is that, so far as it is consistent with the first principle, the tenant should be required to pay its rent debt in full and without delay.[38]

Clause 14 sets out that the arbitrator's job is to consider the proposals put forward by both parties, and to make the award set out in the proposal that is more consistent with these two principles. If neither are consistent, the arbitrator must make the award they consider appropriate by applying the principles. Any award giving the tenant time to pay an amount must have a payment deadline within 24 months from the day on which the award is made.[39]

Timing and publication – clauses 17 and 18

Clause 17 provides that the arbitrator must make their award (decision) "as soon as reasonably practicable" after both parties have put forward (or could have put forward) their revised proposals. If an oral hearing is held, the award must be made within 14 days.[40]

---

[35] Ibid
[36] Clause 15(1)(a) and (3)
[37] Clause 16
[38] Clause 15(1)(b)
[39] Clause 14(3) to (8)
[40] Clause 17(1) and (2)

This can be extended if both parties agree or the arbitrator thinks it would be reasonable to do so.[41] Once made, the arbitrator must publish details of the award together with their reasons for making it, excluding any confidential information (**Clause 18**).[42]

Fees and hearings – clauses 19 and 20

Clause 19 provides the Secretary of State with the power to make secondary legislation specifying limits on the fees of arbitrators and arbitration bodies, under the negative parliamentary procedure.[43]

Generally, the person making the reference (the applicant) must pay these fees in advance. When making an award, the arbitrator can require the other party to reimburse the applicant for half of these fees, or such other amount they consider appropriate. Otherwise, each party must meet its own legal and other costs.[44]

If one party requests an oral hearing, it must be held within 14 days of the arbitrator receiving the request (or such other period as the parties agree or the arbitrators considers appropriate). The party requesting the hearing must pay the costs of the hearing in advance, but the arbitrator can require them to be reimbursed by the other party for half of these fees (or whatever amount they consider appropriate) when making their award. Where both parties have requested the oral hearing, they are both responsible for paying its cost in advance. The hearing must be in public unless both parties agree otherwise (**Clause 20**).[45]

Guidance and modifying the Arbitration Act 1996 – clauses 21 and 22 and Schedule 1

The Secretary of State has the power to issue (and revise) guidance to arbitrators on how to exercise their functions, or to tenants and landlords on how to make a reference. Any such guidance must be published (**Clause 21**).[46]

The process for arbitrations (such as on procedural or evidential matters, on enforcing awards and appeals) would be governed by the Arbitration Act 1996. **Clause 22** of the Bill incorporates Schedule 1, which would amend the application of the 1996 Act to make it consistent with the process set out in the Bill. For example, the process for appointing arbitrators is excluded since the Bill already includes provisions for appointing them (in clauses 7 and 8).[47]

[41] Clause 17(3)
[42] Clause 18
[43] Clause 19(1) to (3)
[44] Ibid, (4) to (6)
[45] Clause 20
[46] Clause 21
[47] See clause 22, and the Explanatory Notes, paras 137 and 138

2.3 Part 3: moratorium on certain remedies and insolvency arrangements

Restrictions on enforcing protected rent debts - clause 23 and Schedule 2

From the day the Bill receives Royal Assent until the day that the arbitration under Part 2 concludes (or if the debt has not been referred to arbitration, the last day when it could have been referred) the landlord would be restricted from taking certain steps to try and recover the protected rent debt. This period is known as the "moratorium period".

The restrictions are that during the moratorium period the landlord cannot:

- go to court to get a judgement requiring the tenant to pay it the protected rent debt. This restriction applies retrospectively, so as soon as the Act is passed, any existing claims already going through the courts from 10 November 2021 can be paused. Any court judgements already issued relating to claims made from 10 November 2021 cannot be enforced until the end of the moratorium period;
- use CRAR;
- forfeit the lease; or
- draw down on any available tenancy deposit to recover the rent debt. If they have already done so before the moratorium period, the tenant is not required top-up any shortfall in the deposit until the moratorium period ends.

Where a tenant owes both protected and unprotected rent debts to the landlord, any payments made during the moratorium period (or between the lifting of coronavirus restrictions on that business and the start of the moratorium period) should be treated as payments towards the unprotected debt.[48]

Restrictions on initiating insolvency and arbitration proceedings – clauses 24 and 25

Where a protected rent debt dispute has been referred to arbitration, no proposals for a company voluntary arrangement, individual voluntary arrangement, or applications for a Companies Act 2006 insolvency compromise or arrangement can be made during the "relevant period" (**Clause 24**). These restrictions mostly apply in Scotland and Northern Ireland as well as England and Wales.[49]

[48] Clause 23 and Schedule 2

[49] See the table in the Explanatory Notes Annex, p26 for specific details

The “relevant period” is the period between the arbitrator being appointed and ending with:

- when the arbitrator makes an award dealing with the protected rent debt, 12 months after the award is made;
- where the arbitrator dismisses the reference to arbitration, the day of the dismissal;
- where the arbitrator makes an award but it is set aside (dismissed) on appeal, the day of the appeal decision; or
- the day arbitration proceedings or abandoned or withdrawn.

Neither the landlord not tenant can refer a dispute about protected rent debt to arbitration using any process other than under Part 2 of the Bill during the “moratorium period”, unless both parties agree (**Clause 25**).

Restrictions on winding-up petitions and bankruptcy orders – clause 26 and Schedule 3

During the “moratorium period”, landlords cannot apply for winding-up petitions against tenant companies. As this restriction is already in place until the end of March 2022 for commercial rent debts, this provision would extend the restriction until the end of the moratorium period (for protected rent debts only).[50] The restriction on winding-up petitions applies in Scotland as well as England and Wales (**Clause 26**).

Where the tenant is an individual, the landlord will not be able to apply for a bankruptcy order against them relating to protected rent debts (or court judgements relating to protected rent debts). This will apply retrospectively from 10 November 2021, so any such order made between 10 November and the day the provision comes into force is deemed void.[51]

2.4 Part 4: final provisions

Future closure requirements – clause 27

The Bill recognises the possibility that future restrictions on businesses are possible.

The Secretary of State is empowered to make secondary legislation to allow the provisions of the Bill to apply to business tenancies whose premises is forced to close by any coronavirus restrictions in the future. Any such restrictions would be made by statutory instrument under the affirmative parliamentary procedure (**Clause 27**).

[50] Schedule 3, para 1
[51] Ibid, paras 2 and 3

Northern Ireland – clause 28

The arbitration procedure under Part 2 of the Bill doesn't apply in Northern Ireland, but **clause 28** empowers the Northern Ireland executive to make regulations for similar purposes. This would allow the Northern Ireland government to tailor its own system to the situation there. The consent of the Northern Ireland Assembly is required for any legislation made under this clause.

A legislative consent motion is being sought from the Northern Ireland Assembly to allow for this clause to expand the areas on which it can legislate.[52]

Clauses 29 and 30

Clause 29 clarifies that the Act applies to the Crown (the Crown Estate is a large landlowner and will for example be a landlord in many tenancies).

Clause 30 sets out the territorial extent of the Bill, as described in the beginning of this section. It also provides that the Bill comes into force on the day it receives Royal Assent, except for paragraph 1 of Schedule 3, as described in clause 26 (on winding-up orders) which have effect from 1 April 2022, after the expiry of the current restrictions on winding-up orders.

[52] See the table in the Explanatory Notes Annex

3 Commentary

3.1 Impact Assessment

The Government's Impact Assessment for the Bill notes that it considered three main options: (1) do nothing and simply allowing current measures to expire in March 2022; (2) introduce a voluntary non-binding arbitration process; and (3) introduce an arbitration process with a binding outcome which in enforceable by the courts. Within option 3, two sub-options were considered: either (a) making the binding arbitration process available only to tenants who were forced to close during the pandemic; or (b) opening up the process to all businesses which closed (whether forcibly or voluntarily). The Bill reflects Option 3a.

The other options

The Government's concern about the first option is that it could create a "wave of unnecessary insolvencies and job-losses"[53]. Most respondents to the Call for Evidence – being mostly tenants - were against this option.[54] Other costs of Option 1 include are strain on the court system once restrictions end, reduced investment (e.g. fewer rent payments to landlords if they evict their business tenants), reduced footfall in high streets or shopping centres (due to tenant evictions), and reduced demand on suppliers (if tenant businesses are forced to close).

Option 2 would likely avert some insolvencies and redundancies, but fewer than if the third option was chosen.[55] The main reason given in the Call for Evidence for opposing this option is that it would not be effective unless it was binding.[56] The costs of this policy (which are shared with Option 3) would be the cost of appointing an arbitrator, lost working time spent on arbitration, the costs of legal representation, and one-off familiarisation costs.[57] Wider costs which the Government recognises are rent payments lost by landlords as a result of the arbitration, potentially reduced investment by landlords as a result, and the fact that the policy arguably rewards "less productive" firms by helping them avoid some of their rent debts (because a more productive or

[53] Impact Assessment, para 13
[54] Ibid, para 28
[55] Ibid, para 20
[56] Ibid, para 37
[57] Ibid, paras 79-93

profitable firm may not have fallen behind on rent debts as much or needed the arbitration process).[58]

The preferred option

Option 3 was also considered to create more certainty for businesses[59] and it was the option most preferred by 57% tenant respondents to the Call for Evidence. 63% of respondents said this option would enable trade by building certainty and helping to resolve conflicts and re-establish cash-flows.[60]

The Government estimates 50,000 businesses to be within the scope of Option 3a (and therefore the Bill's arbitration procedure).[61] Around 7,500 cases would be expected to go to arbitration, and it would take between 3 and 15 months to resolve all arbitration cases.[62] Option 3b would significantly widen the scope of the regime and so the estimate is that it would have taken 6 to 35 months to deal with all cases under option 3b.[63]

Other costs of Option 3a (the Government's preferred option) include lost working time, legal representation (£9.2 million), and arbitration costs (£24.4 million). The average cost of an arbitration case (including lost hours and legal costs) is expected be around £3,250.[64] There would also be familiarisation costs to businesses and arbitrators.

The Government estimates that Option 3a (when compared with Option 1) would avoid 200 business insolvencies and 1,650 job redundancies.[65] Other benefits include avoiding the costs of court proceedings and preserving payments to other business creditors (as a result of businesses avoiding insolvency.

In England, the Impact Assessment estimates that there are around 1,200 arbitrators who are currently skilled enough to oversee arbitration cases under the Bill, and that the average arbitrator can take on 1 to 3 cases at one time. A desire to avoid overwhelming the arbitration system is one of the reasons that the wider Option 3b was not selected.[66]

---

[58] Ibid, para 94
[59] Ibid, para 23
[60] Ibid, para 42
[61] Ibid, para 152
[62] Ibid, para 159
[63] Ibid, para 23
[64] 24.4 million divided by 7,500. See also Impact Assessment, para 163
[65] Impact Assessment, paras 171 and 176
[66] Ibid, paras 193 to 197

3.2 Stakeholder views

The Government press release announcing the Bill contained comments from four trade bodies.[67]

UKHospitality said it “welcome[d]” the November 2021 Code of Conduct introduced alongside the Bill and “share [the] government’s view that arbitration should be a last resort”. The new Code was also welcomed by the British Property Federation and the British Independent Retailers Association.[68]

The British Retail Consortium said they “support the principle of compulsory arbitration” but warned that “the devil will be in the detail on issues around what tenant viability really means in practice and the power of arbitrators”.[69]

In the Government’s Call for Evidence, two thirds of landlord respondents were against binding arbitration. The main reasons they gave were that it would be costly, time consuming and/or management intensive. Some suggested it would undermine existing legislation. Landlords’ preferred option was to simply end existing temporary restrictions on enforcement, which would allow them to pursue rental debts more easily.[70]

Some landlords argue that a binding arbitration scheme could unfairly favour tenants over landlords - when the measures were extended in June 2021 and proposals for binding arbitration were announced, real estate disputes partner at law firm CMS Danielle Drummond-Bassington told Reuters that “Nothing is done here to address or recognise the financial pressure landlords are facing, or that there are tenants out there who can pay but have been taking advantage of the government's measures”.[71]

“Magic Circle” law firm Freshfields Bruckhaus Deringer have described the Bill as a “a good way to resolve the problem of the pandemic rent arrears overhang”.[72]

[67] Department for Business, Energy and Industrial Strategy and Department for Levelling Up, Housing and Communities, New measures in Bill to assist commercial landlords and tenants in resolving rent debts resulting from the COVID-19 pandemic, 9 November 2021

[68] Ibid

[69] Ibid

[70] Ministry of Housing, Communities and Local Government, Consultation outcome: Call for evidence on commercial rents: responses and analysis, updated 4 August 2021, para 3.6

[71] Reuters, UK extends COVID ban on business evictions until 2022, 16 June 2021

[72] Freshfields Bruckhaus Deringer, The Commercial Rent (Coronavirus) Bill: resolving remaining COVID-19 commercial rent debts? 12 November 2021

The House of Commons Library is a research and information service based in the UK Parliament. Our impartial analysis, statistical research and resources help MPs and their staff scrutinise legislation, develop policy, and support constituents.

Our published material is available to everyone on commonslibrary.parliament.uk.

Get our latest research delivered straight to your inbox. Subscribe at commonslibrary.parliament.uk/subscribe or scan the code below: