WORKING DRAFT Statutory Guidance to Arbitrators about the exercise of their functions under Part 2 of the Commercial Rent (Coronavirus) Act 2022

IMPORTANT NOTICE: This document is a working draft of guidance to be published for arbitrators on the exercise of their functions under the Commercial Rent (Coronavirus) Bill. This draft is incomplete and is being published for the purpose of enabling the Government to engage with stakeholders to further develop the draft. The completed statutory guidance will be published after the Bill receives Royal Assent.

This current draft contains (i) an explanation of the provisions of the Bill relevant to arbitrators and of the Arbitration Act 1996 where pertinent (ii) an initial explanation of the concept of "viability of a tenant's business" in the Bill which will be developed further following input from stakeholders. Since it would form the basis of the completed statutory guidance, it is drafted as if the Bill had been passed by Parliament and reflects the expected position, meaning that, for example, reference is made to "the Act" rather than "the Bill".

The Government welcomes views on this draft guidance, in particular in relation to any areas where it is thought that further clarification may be needed for arbitrators. You can provide your comments by email to jane.chelliah-manning@beis.gov.uk; and jessica.barnaby@beis.gov.uk

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1. INTRODUCTION

1.1 The Commercial Rent (Coronavirus) Act 2022 (the "**Act**") establishes an arbitration system to resolve certain unpaid rent debt attributable to the pandemic, enabling an arbitrator to award particular forms of relief from payment, where the matter has not been resolved by agreement between the parties. Part 2 of the Act sets out the statutory arbitration process that will apply in such circumstances in England and Wales.

1.2 This statutory guidance is produced under section 21(1)(a) of the Commercial Rent (Coronavirus) Act 2022 ("the Act") and is intended to guide arbitrators in relation to the exercise of their functions under Part 2 of the Act.

1.3 The Act provides a specific arbitration procedure to be followed which differs from usual arbitration practice. That is the procedure that the parties must follow and which the arbitrator must uphold. The Arbitration Act 1996 (the "**AA"**) also applies to arbitration under the Act. However, to the extent there is any inconsistency between the Act and the AA, the Act will prevail (see section 94(2) of the AA). Note that Schedule 1 to the Act modifies certain provisions of the AA in relation to arbitration under the Act. Those modifications are without prejudice to the operation of sections 94 to 98 of the AA which make provision in relation to statutory arbitration.

1.4 Part 1 of the Act defines key terms for the purposes of the Act. These underpin the Act's arbitration scheme and are addressed in this guidance. Part 2 of the Act establishes the arbitration process applying to in-scope disputes and provides the functions of arbitrators and approved arbitration bodies. Part 3 of the Act provides for temporary restrictions on the availability of certain remedies and measures in relation to protected rent debt, during the period whilst references can be made to arbitration or arbitration is ongoing. Part 3 is outside of the scope of this guidance, except where it provides for certain debts to be considered within the Act's arbitration.

2. SUMMARY OF THE ARBITRATION PROCESS FROM THE PERSPECTIVE OF AN ARBITRATOR

2.1 Arbitration under the Act is to determine, in the absence of agreement between the parties, whether a tenant should be granted relief from payment of certain rent debts and if so, what relief.

2.2 The arbitration process in the Act can be divided into three stages:

2.2.1 **Stage 1**: the pre-arbitration stage;

2.2.2 **Stage 2**: the arbitrator's assessment of whether the dispute is eligible for arbitration under the Act;

2.2.3 **Stage 3**: the arbitrator's assessment of the matter of relief from payment of a protected rent debt.

2.3 At **Stage 1**, the pre-arbitration stage, before a party can make a reference to arbitration, they must comply with certain requirements, including notifying the other party of their intention to make a reference, allowing the prescribed period of time to elapse before making the reference and ensuring the reference is made to an arbitration body approved by the Secretary of State (a list of the approved arbitration bodies will be published on gov.uk). The reference must be accompanied by a formal proposal for resolving the dispute with supporting evidence. The approved arbitration body has (among others) the functions of maintaining a list of arbitrators that appear suitable by virtue of their qualifications and experience, and of appointing arbitrators to arbitrations under the Act. Stage 1 is intended to give the parties an opportunity to negotiate and potentially settle the dispute before going to arbitration.

2.4 At **Stage 2**, having been appointed by the approved arbitration body, the arbitrator is to determine whether the dispute is eligible for arbitration. In order to be eligible:

2.4.1 The tenancy in question must be a "business tenancy";

2.4.2 The rent debt in dispute must be a "protected rent debt";

2.4.3 The parties must not have reached agreement on the matter of relief from payment of the "protected rent debt"; and

2.4.4 It must be the case that the tenant's business is viable or would be viable if given relief from payment of the protected rent debt.

2.5 The assessment of the viability of the tenant's business at **Stage 2** is to establish whether the tenant's business is viable or would become viable if given relief from payment. The arbitrator will need to consider such information as is provided by the parties and as the arbitrator considers appropriate, to properly assess and determine this point. Detailed guidance on making the viability assessment at **Stage 2** is set out in **section 6** of this document. Note that the viability of the tenant's business is considered again at **Stage 3** (see below). At **Stage 3**, the arbitrator considers both the tenant's viability and the landlord's solvency in order to determine how much the tenant can afford to pay and how quickly, to preserve the tenant's viability whilst preserving the landlord's solvency.

2.5.1 At **Stage 3**, having established that the dispute is eligible for arbitration, the arbitrator is to resolve the matter of relief from payment of protected rent debt. This stage differs from the usual form of arbitral proceedings involving statements of claim and defence etc. Instead, the applicant is required to include with its reference to arbitration (at **Stage**

1) a formal proposal for resolving the matter of relief from payment, with the respondent having the option to submit their own proposal. The formal proposals may be revised. All formal proposals must be accompanied by supporting evidence. Assessment of those formal proposals and supporting evidence is the main way in which the arbitrator is to resolve the dispute between the parties. The arbitrator does this by applying the principles:

(i) that the award should be aimed at preserving or restoring and preserving the viability of the tenant's business so far as that is consistent with preserving the landlord's solvency; and

(ii) that the tenant should, so far as consistent with (i), be required to meet its obligations to pay the protected rent debt in full and without delay.

2.5.2 The principles are applied to the parties' final proposals and the arbitrator must make an award as per the final proposal that is most consistent with the principles. Where only one final proposal is consistent with the principles, or only one final proposal has been received and that proposal is consistent, the award must be as per that proposal. If no final proposal is consistent, then the arbitrator may make whatever award they consider appropriate applying the principles. See section 7 of this document for further details.

2.5.3 Since it is mandated by the Act, the above procedure prevails over the provisions of the AA. However, the AA will apply to the extent not inconsistent with the Act, subject to the modifications made to it by Schedule 1 to the Act (see section 94(2) of the AA).

3. STAGE 1: THE PRE-ARBITRATION STAGE

3.1 Before an arbitrator is appointed to an arbitration under the Act, the parties must first follow the process for making a reference to arbitration. The process is set out in Part 2 of the Act and is summarised below.

3.2 Who can make a reference to arbitration?

3.2.1 Either the landlord or the tenant can refer the matter to arbitration.

3.2.2 A reference may not be made where the tenant is subject to any of the following which relates to protected rent debt:

(a) a company voluntary arrangement that has been approved under section 4 of the Insolvency Act 1986 ('CVA');

(b) an individual voluntary arrangement that has been approved under section 258 of the Insolvency Act 1986 ('IVA'); or

(c) a compromise or arrangement that has been sanctioned under section 899 or 901F of the Companies Act 2006 ('compromise or arrangement').

3.2.3 If the tenant is a debtor under a CVA, IVA, or 'compromise or arrangement' relating to any protected rent which has been proposed or applied for and is awaiting a decision, then the parties are not prevented from making a reference to arbitration, but an arbitrator may not be appointed, and no formal proposal may be made by the respondent, or no revised formal proposal by either party may be made, whilst the decision is pending.

3.2.4 If the CVA, IVA, or 'compromise or arrangement' is approved or sanctioned, then the arbitration cannot progress, as an arbitrator may not be appointed and no formal proposals may be made by the respondent, or no revised formal proposal may be made by either party. If the CVA, IVA, or 'compromise or arrangement' is not approved or sanctioned then, once this decision has been made, an arbitrator can be appointed, and respondent can make a formal proposal and either party may make a revised formal proposal, so that the arbitration can proceed.

3.3 By when must a reference to arbitration be made?

3.3.1 The reference must be made within 6 months beginning with (and so including) the day on which the Act is passed. The Secretary of State may make regulations to extend that period.

3.4 To whom must the reference be made?

3.4.1 A reference to arbitration must be made to one of the arbitration bodies approved by the Secretary of State (the 'approved arbitration bodies'). The Secretary of State will maintain and publish a list of these bodies.

3.5 What steps must be taken before a reference is made?

3.5.1 The party intending to make a reference to arbitration must first notify the other party (the 'respondent') of its intention to do so.

3.5.2 Within 14 days of receipt of this notification, the respondent may submit a response.

3.5.3 **If the respondent submits a response:** a reference to arbitration can be made once 14 days (beginning with the day after the day on which the response is received) have expired.

3.5.4 **If the respondent does not submit a response within 14 days:** a reference to arbitration can be made once 28 days (beginning with the day on which the applicant's notice of intention is served) have expired.

3.5.5 See paragraph 11.4 below for further information on the service of notices

3.5.6 See paragraph 11.5 below for further information on the computation of time

3.6 **How is the reference made?**

3.6.1 A reference is made when one party (the 'applicant') gives notice in writing to an approved arbitration body, requesting that that body appoint an arbitrator (or arbitrators) in respect of that matter.[1]

3.6.2 The applicant must pay the arbitration fees (other than any oral hearing fees) in advance of the arbitration taking place and ideally at the time the reference is made (see section 10 of this guidance as to arbitration fees).

3.6.3 The reference must also contain the applicant's formal proposal for resolving the matter of relief from payment of a protected rent debt. See paragraph 7.2 below for further details.

3.7 **Appointment of an arbitrator or tribunal**

3.7.1 The approved arbitration bodies maintain a list of arbitrators who appear to the body to be suitable by virtue of their qualifications and experience and are available to administer arbitrations under Part 2 of the Act.[2]

3.7.2 Once a reference to arbitration has been made, the approved arbitration body will appoint an arbitrator or panel of arbitrators from its list or arbitrators to deal with the matter referred to it and will oversee that arbitration.

3.7.3 An appointment cannot be made where the tenant is the debtor under a CVA, IVA or 'compromise or arrangement' relating to any protected rent debt which has been proposed or applied for and is awaiting a decision, nor where the tenant is subject to an approved or sanctioned CVA, IVA, or 'compromise or arrangement' relating to any protected rent debt (for example if the decision to approve or sanction is made after the reference to arbitration).[3]

3.7.4 The parties are free to agree the number of arbitrators to form the tribunal and whether there is to be a chairman. If the parties agree on an even number of arbitrators, an additional arbitrator shall be appointed as chairman of the tribunal, unless otherwise agreed between the parties.

[1] Section 10(4) of the Act which provides that the reference to arbitration must be made to an approved arbitration body must be read with section 14(5) of the AA which clarifies that the party applying for arbitration should give notice in writing to the approved arbitration body requesting the appointment be made.

[2] A full list of the functions of the approved arbitration bodies are set out in paragraph 8 of the Act and include the replacement and removal of arbitrators (on certain specified grounds) and the setting and collection of fees. The details of these provisions are beyond the scope of this guidance.

[3] Once an arbitrator is appointed, the parties are restricted from making a proposal or application for a CVA, IVA or compromise or arrangement for a certain period – section 24. This is outside of the scope of this guidance.

3.7.5 If there is no agreement between the parties on the number of arbitrators, the tribunal will consist of a sole arbitrator.

4. STAGE 2: THE ELIGIBILITY STAGE – KEY CONCEPTS

4.1 Provided the party making a reference to arbitration has followed the pre-arbitration steps outlined in **Stage 1**, under **Stage 2**, the arbitrator appointed by the approved arbitration body must determine whether the dispute is eligible for arbitration under the Act.

4.2 To determine whether the dispute is eligible for arbitration under the Act, arbitrators must be familiar with the definitions of key terms in Part 1 of the Act. Those establish whether criteria in the Act are met. These definitions apply only for the purposes of the Act and are not intended to have broader application. Put another way, the key terms provide the scope of application of the Act and therefore play a key role in the determination of whether a dispute may be referred to arbitration under the Act. In short, arbitration is only available where the tenant and the landlord under a "business tenancy" are "not in agreement" as to the resolution of "the matter of relief from payment" of a "protected rent debt". These key concepts are as follows and are covered in the sections below:

- what is a "business tenancy";
- what is "protected rent debt";
- what is "the matter of relief from payment";
- have the parties reached an agreement?

4.3 What is a Business Tenancy?[4]

4.3.1 Arbitration under the Act is available for certain rent debts due under "business tenancies". If the tenancy in question is not a business tenancy, the arbitrator must make an award dismissing the reference, (see section 5 below for further details).

4.3.2 A business tenancy is a tenancy to which Part 2 of the Landlord and Tenant Act 1954 (the "**1954 Act**") applies. That is, a tenancy comprised of property which is or includes premises that are occupied by the tenant for business purposes, or business and other purposes (section 23 of the 1954 Act).

4.3.3 A business tenancy for the purposes of the Act includes a tenancy that has been contracted out of the security of tenure provisions in sections 24 to 28 of Part 2 of the 1954 Act.

4.4 What is Protected Rent Debt?[5]

4.4.1 Arbitration is available under the Act to determine whether relief should be given from payment of "protected rent debts". If there is no protected rent debt, the arbitrator must make an award dismissing the reference, (see section 5 below for further details). There are various criteria underpinning 'protected rent debt'. A 'protected rent debt' is a debt for unpaid 'rent' (as defined for the Act), under a business tenancy (see 4.3 above) which was 'adversely affected by coronavirus', and where that rent is attributable to occupation during a 'protected period'.

[4] Section 2(5)
[5] Sections 3 to 5

What is Rent?[6]

4.4.2 'Rent' for the purposes of the Act means an amount consisting of one or more of the following amounts payable by the tenant to the landlord (or a person acting for the landlord, such as a managing agent) under the subject business tenancy:

(a) an amount payable in consideration for possession and use of the premises to which the tenancy relates, whether or not that payment is described as 'rent' in the tenancy);

(b) an amount payable as a service charge (see paragraphs 4.4.3 and 4.4.4 as to what 'service charge' means); or

(c) interest due on any unpaid amount of sub-paragraphs (a) or (b) above.

VAT chargeable on any of the amounts in (a) to (c) above is included in the meaning of 'rent'.

What is Service Charge?[7]

4.4.3 As above, 'Rent' includes an amount payable as a service charge. Service charge under the tenancy means an amount payable (directly or indirectly) for the following chargeable services:

Chargeable services which the service charge can cover are:	
(a)	Services
(b)	Repairs
(c)	Maintenance
(d)	Improvements
(e)	Insurance costs (including costs incurred by the landlord in connection with insuring against loss of rent or in complying with its obligations under the tenancy to insure the premises or common parts of the property in which the premises is situated)
(f)	Insurance costs of a superior landlord which the landlord is required to pay
(f)	The landlord's management costs
(g)	Management costs of a superior landlord which the landlord is required to pay

4.4.4 The 'service charge' can be:

(a) A fixed amount;

(b) An amount which does (or can) vary according to actual or estimated costs (including overheads) incurred, or to be incurred, by or on behalf of the landlord in connection with providing the chargeable services, regardless of when those costs were (or will be) incurred; or

(c) A combination of the above two.

When is 'rent' a 'protected rent debt'[8]*?*

4.4.5 Unpaid rent due under a business tenancy will only be a 'protected rent debt' for the purpose of the Act if the business tenancy under which it became payable was

[6] Section 2(1)
[7] Section 2(2)(c)
[8] Section 3

'adversely affected by coronavirus' and the subject rent is attributable to occupation of the premises during a 'protected period'.

4.4.6 If there is no protected rent debt, the arbitrator must make an award dismissing the reference (see section 5 below for further details).

Was the tenancy 'adversely affected by coronavirus'?[9]

4.4.7 The business tenancy was 'adversely affected by coronavirus' for the Act's purposes, if the whole or part of the business carried on by the tenant at or from the premises comprised in the tenancy, or if the whole or part of the premises themselves, were subject to a closure requirement under coronavirus regulations[10] during a "relevant period".

4.4.8 The term "closure requirement" means a requirement specified in coronavirus regulations to close either premises (or parts of premises)[11], or businesses (or parts of businesses), of a specified description. For these purposes, it does not matter if certain limited activities were allowed at the premises as an exception to the closure requirement. If businesses required to close their business or premises were still allowed by the regulations to do certain activities, these activities should be disregarded when determining whether a tenancy was adversely affected by coronavirus and therefore within the scope of arbitration. For example, certain retail businesses were required to close during some periods, but could make deliveries or respond to online, telephone or postal orders (without admitting customers). This is a closure requirement, despite the exception.

4.4.9 Where regulations required specified business or premises, or parts of these, to be closed at particular times each day, this counts as a closure requirement. The concept of closure for these purposes is therefore relatively broad.

4.4.10 A "relevant period" is a period within the time from 2pm on 21 March 2020 and 11.55 p.m. on 18 July 2021 (for premises in England) or 6 a.m. on 7 August 2021 (for premises in Wales). This means that if a business was subject to a closure requirement for any period within these times and dates, the tenancy was adversely affected by coronavirus. Many types of business were required to close their business or premises for some periods within these times and dates; in which case they were adversely affected by coronavirus for the purposes of the Act.

Was the rent attributable to all or part of the 'protected period'?[12]

4.4.11 In order for it to be a protected rent debt, the unpaid rent which is due under a business tenancy adversely affected by coronavirus must be attributable to a period of occupation by the tenant for all or part of the 'protected period' beginning on 21 March 2020 and ending with the last day on which all or part of the tenant's business carried on at or from the premises, or the premises itself (or part of the premises), was subject either to a 'closure requirement'[13] or to a 'specific coronavirus restriction'. For premises in England, the last day of the protected period cannot be later than 18 July 2021. For premises in Wales, the last day of the protected period cannot be later than 7 August 2021.

[9] Section 4
[10] 'Coronavirus regulations' means those made under section 45C of the Public Health (Control of Disease) Act 1984, whether or not they were also made under any other power, and expressed to be made in response to the threat to public health posed by the incidence or spread of coronavirus. Section 4(6).
[11] Including a requirement that the premises (or parts thereof) close at a particular time each day.
[12] Section 5
[13] The meaning of "closure requirement" has been explained at paragraph 4.4.8 above.

4.4.12 A "specific coronavirus restriction" is a restriction or requirement, other than a closure requirement (see above) which[14]:

(a) was imposed by coronavirus regulations[15]; and

(b) regulated the way in which a business of a specified description (or part thereof) was to operate, or the way in which premises of a specified description (or part thereof) were to be used.

4.4.13 General restrictions (i.e. those which apply more widely than to specific businesses or premises) are not "specific coronavirus restrictions". A requirement to display or provide information on certain premises would also not amount to a specific coronavirus restriction.

4.4.14 It does not matter what time of day a tenant's occupation started or ended: for the purposes of calculating a tenant's period of occupation, the whole of both the start and end dates are treated as included in full.

4.4.15 Only that rent which can be reasonably attributed to a 'protected period' will be protected rent for the purposes of the Act[16]. For example, if a full quarter's rent is outstanding but only part of that quarter is within the 'protected period', then only the proportion of unpaid rent which is reasonably attributable to the protected period will be protected rent.

4.4.16 Any interest which has accrued in respect of unpaid rent (for possession and use of the premises, under section 2(1)(a)) or service charge (under section 2(1)(b) – see paragraphs 4.4.3 and 4.4.4 above), and any VAT chargeable on those amounts, is treated as being attributable to the same period as the underlying debt. This means that where the underlying debt is attributable to occupation within the protected period and is a 'protected rent debt', any unpaid interest which has accrued in respect of that debt is also attributable to the protected period and is also 'protected rent debt'.

Coverage of certain types of 'rent' and particular situations

4.4.17 Arbitrators will need to be aware of particular provisions for certain types of rent and certain situations.

Rent deposits:

4.4.18 An amount drawn down by the landlord from a tenancy deposit to meet all or part of a rent debt is treated by the Act as unpaid rent, if the tenant has not made good any shortfall in the deposit. In other words, rent is to be treated as remaining due from the tenant, despite the landlord having drawn down against a rent deposit in respect of that rent; and the rent is only treated as paid when the tenant makes good the related shortfall in the deposit. Where a tenancy deposit is used in this way to satisfy a rent debt which would otherwise have been a 'protected rent debt', then the amount drawn down in respect of that debt is treated as a protected rent debt.

4.4.19 This means that an arbitrator can consider and make an award about any part of a protected rent debt which the landlord has drawn down on the tenancy deposit to cover. Depending on the award, the tenant may be relieved from having to make good any shortfall in the deposit, because the Act treats making good the shortfall as paying, in respect of such rent.

[14] Section 5(3)
[15] The meaning of "coronavirus regulations" is explained at footnote 5 above.
[16] Section 3(5)

4.4.20 This would apply where a landlord has lawfully drawn down an amount from a tenancy deposit to meet any protected rent before the Act was passed, and the tenant has not made good any shortfall. A tenant is not required to make good any shortfall in the deposit before the end of the Act's moratorium period. The Act prevents landlords from recovering any protected rent debt from a tenancy deposit during the moratorium period. The moratorium period runs from the day the Act is passed until the end of the period for making a reference to arbitration, or if a reference is made, until the day on which arbitration concludes.

Judgment Debts

4.4.21 Where the landlord has issued a debt claim[17] against the tenant (or its guarantor or a former tenant who remains liable) on or after 10 November 2021 but before the date on which the Act is passed, to recover in civil proceedings a debt which is or includes protected rent debt, an arbitrator may determine the matter of relief from payment of the protected rent debt covered by the claim. This may be an ongoing claim or a decided claim.

4.4.22 Where such a debt claim has not been determined, either party may apply to court to stay the proceedings and the court must stay them. A party may then make a reference to arbitration in respect of the protected rent debt covered.

4.4.23 Where judgment on such a claim has been given in favour of the landlord in that same period (i.e. on or after 10 November 2021, but before the date on which the Act is passed), any judgment debt which remains unpaid and relates to protected rent debt (or any interest on it) is to be treated as a protected rent debt and so the matter of relief from payment of that part of the judgment (and any interest on it) may be determined by an arbitrator .[18] The landlord may not enforce or rely on the judgment debt in so far as it relates to protected rent debt, nor any interest on it, whilst the arbitrator considers the matter during the Act's moratorium period.[19] Should an arbitrator award relief from payment, then the judgment debt would be altered in accordance with that award (likewise if the parties should agree to relief) – that is, the tenant would only owe the amount, and would be required to pay within the time, specified in the award.

Appropriated Rent

4.4.24 If a tenant has paid rent at a time when they owed both protected and unprotected rent debt, the Act provides that the payment should be appropriated to unprotected rent before protected rent. This is so that the protected rent debt benefits from the Act. This applies unless the tenant has appropriated it otherwise. If the landlord has exercised its right to appropriate that rent to a protected rent debt, then their appropriation is effectively undone to the extent of the unprotected rent debt and that rent is to be treated as having been appropriated to the unprotected rent debt first. This applies to payment of rent made in the period beginning with the day following the end of the protected period for the debt, and ending with the day before the Act is passed. Arbitrators need to ensure that this provision is taken into account, to correctly establish the amount of a protected rent debt.

4.4.25 By way of example, assume a payment of £2000 was made, when there was a £1500 protected rent debt owed and also a £1500 unprotected rent debt. Under the Act, £1500 should pay off the unprotected rent debt first, leaving £500 to be removed from the protected rent debt, which reduces to £1000. But if the landlord has done the opposite (i.e. has instead sought to pay off the protected debt first), the protected rent debt was purportedly paid first, so the unprotected debt would become £1000. The Act addresses

[17] It does not matter how that claim has been made (and so includes, for example, a counterclaim).
[18] Schedule 2, paragraph 3
[19] See paragraph 4.5.5 above in respect of the moratorium period.

this by providing that the allocation of £1500 to the protected debt is undone, and then treats this amount as having been applied to the unprotected debt, leaving £500 to reduce the protected debt.

4.5 **What is 'the matter of relief from payment'?**

4.5.1 References in the Act and in this guidance to the 'matter of relief from payment' of a protected rent debt are to all issues relating to the following questions:

(a) Whether there is a protected rent debt (of any amount); and, if so

(b) Whether the tenant should be given 'relief from payment' of that debt; and, if so

(c) What that relief should be.

Relief from payment

4.5.2 In relation to a protected rent debt, relief from payment can be any one or more of:

(a) Writing off the debt (in whole or in part);

(b) Giving the tenant time to pay the debt (in whole or in part), including by way of instalments; and

(c) Reducing or writing off any interest payable by the tenant under the terms of the tenancy in relation to all or part of the debt.

4.6 **Have the parties already reached an agreement?**

4.6.1 The Act does not affect the capacity of the parties to reach agreement as to the matter of relief from payment of a protected rent debt nor does it prevent agreements from having effect or being enforced.

4.6.2 If the parties have by agreement resolved the matter of relief from payment of a protected rent debt before the reference to an arbitrator is made, the arbitrator must make an award dismissing the reference (see section 5 below for further details).

5. STAGE 2 (CONTD.): THE ELIGIBILITY STAGE – ARBITRAL AWARDS AVAILABLE

5.1 Introduction

5.1.1 Awards can be issued by the arbitrator at two stages. First, at the eligibility stage following a reference to arbitration. Second, if the matter is eligible for arbitration under the Act, the arbitrator must make an award on the matter of relief from payment of protected rent debt. This section deals with awards at the eligibility stage.

5.2 Awards on eligibility

5.2.1 An arbitrator must make an award dismissing the reference if:

(a) The parties have by agreement resolved the matter of relief before the reference to arbitration was made (see paragraph 4.6 of this guidance);

(b) The tenancy in question is not a 'business tenancy' (see paragraph 4.3 of this guidance as to what is a business tenancy);

(c) There is no 'protected rent debt' (see paragraph 4.4 of this guidance as to what is a protected rent debt); or

(d) Following an assessment of the viability of the tenant's business, the arbitrator determinates that (at the time of assessment) the tenant's business is not viable and also *would not be* viable even if the tenant were given relief from payment, of any kind. Section 6 of this guidance provides further detail on how to make the assessment of the tenant's viability at **stage 2**.

5.2.2 An arbitrator must go on to **stage 3** and resolve the matter of relief from payment of a protected rent debt, if following an assessment of the viability of the tenant's business, the arbitrator determines that (at the time of assessment):

(a) the tenant's business is viable (see section 6 of this guidance as to the assessment of the tenant's viability); or

(b) the tenant's business is not viable but that it *would become* viable if the tenant were to be given relief from payment, of any kind (see section 7 of this guidance as to the matter of relief from payment of protected debt).

5.2.3 It should be noted that the viability of the tenant's business is considered at both **stage 2** and **stage 3**:

(a) At **stage 2**, the arbitrator assesses whether the tenant's business is viable or would become viable if given relief from payment;

(b) At **stage 3**, as set out in paragraph 7.3 below. The arbitrator considers both the tenant's viability and the landlord's solvency in order to determine how much the tenant can afford to pay and how quickly, to preserve the tenant's viability whilst preserving the landlord's solvency.

5.2.4 Section 6 below concerns the assessment of the tenant's viability at **stage 2** (the eligibility stage).

6. STAGE 2 (CONTD.): THE ELIGIBILITY STAGE – ASSESSMENT OF THE TENANT'S VIABILITY

6.1 Overview

6.1.1 Unless an award is made dismissing a reference on the basis that the parties have by agreement resolved the matter of relief before the reference was made, the tenancy is not a business tenancy, or there is no protected rent debt, the arbitrator will need to make an assessment of the viability of the tenant's business. It is only if (at the time of that assessment) the business is viable, or would become viable (if the tenant were given relief from payment of any kind) that the arbitrator must then go on to determine whether the tenant should receive relief and, if so, what relief should be awarded (see section 7 of this guidance).

6.1.2 Tenants are required to demonstrate viability of their business (disregarding the protected rent debt), as the Government seeks to ensure that viable businesses are able to continue to operate.

6.1.3 Viability is deliberately not specifically defined, in order to take into account the vast array of different business models both within and between sectors. The Code of Practice for commercial property relationships states that "when referring to viability, parties should consider whether ring-fenced debt aside the business has, or will in the foreseeable future have, the means and ability to meet its obligations and to continue trading".[20]

6.1.4 The Act aims to support landlords and tenants who cannot otherwise agree, in resolving disputes relating to the protected rent owed, and to facilitate a return to normal market operation. To do this, the Act aims to preserve the viability of the tenant's business. But this should only be to the extent that it allows the landlord to meet their ongoing obligations.

6.1.5 Viable business models will differ from party to party and across sectors. For example, the arbitrator may wish to be mindful that profit margins can vary significantly between industries and sectors. The Act and this guidance therefore do not provide a set definition of viability. However, guidance is provided on a range of tools and processes that will be useful for arbitrators to consider in assessing viability at the appropriate time.

6.2 Requirements in the Act for assessing viability

6.2.1 In assessing the ***viability of the business of the tenant***, the arbitrator must, so far as known, have regard to the following[21]:-

(a) the assets and liabilities of the tenant, including any other tenancies to which the tenant is a party;

(b) the previous rental payments made under the business tenancy from the tenant to the landlord;

(c) the impact of coronavirus on the business of the tenant; and

(d) any other information relating to the financial position of the tenant that the arbitrator considers appropriate.

[20] This updated code was published on 9 November 2021 and aligns with the Act. It is available at https://www.gov.uk/government/publications/commercial-rents-code-of-practice-november-2021/code-of-practice-for-commercial-property-relationships-following-the-covid-19-pandemic.
[21] Section 16(1)

6.2.2 In making this assessment, the arbitrator must disregard the possibility of the tenant borrowing money or restructuring their business. [22] If a business took on more debt to become viable for the purposes of arbitration under the Act, they would likely be delaying the problem and risking their long-term viability.

6.3 **Non-exhaustive list of evidence to demonstrate viability**

6.3.1 When considering tenant viability, the arbitrator may wish to consider – and if not provided, consider requesting from the tenant – the following information:

(a) Bank account information, including savings accounts, current accounts and loan accounts from each financial year after March 2019

(b) Financial accounts for each financial year after March 2019

(c) Management accounts for each financial year after March 2019

(d) Gross profit margin and net profit margin. (This information may be found in the business' financial or management accounts or, where such accounts are not available, may be calculated from other financial records).

(e) Details of dividends paid to shareholders for each financial year after March 2019

(f) Evidence of any financial grants and/or loans obtained for each financial year from March 2019 onwards

(g) Evidence of prior refusal of further credit, funding, or lending.

(h) Evidence of overdue invoices of tax demands, unpaid or returned cheques or electronic payments, exceeding overdraft limits, creditor demands, money judgements

(i) Liquidity Ratio

(j) Gearing Ratio

(k) Current Ratio

(l) Profit forecasting

6.3.2 This is a non-exhaustive list which provides an indication of possible relevant information, and which should be applied flexibly on a case-by-case basis. Arbitrators do not need to request all of the information in this list and may consider that some items above are not relevant in a particular case. However, if such information is provided by the parties the arbitrator should consider it. Arbitrators may use the power to decide on procedural and evidential matters in section 34(1) of the AA[23] to ask for additional information, including for items not featured in this list, if that would be helpful in determining viability.

6.3.3 It is the tenant's responsibility to provide evidence to support their proposal and to enable the arbitrator to determine the viability of the tenant's business.

[22] Section 16(3)
[23] Note that section 34(1) of the AA is modified by paragraph 2(c) of Schedule 1 to the Act.

6.3.4 When determining viability arbitrators may find that bank account information, the gross profit margin and/or net profit margin may be the most useful indicators as to whether the tenant's business is viable.

6.3.5 A consideration of the net profit margin or gross profit margin prior to the protected period, compared to after closure requirements or specific restrictions ended for the business in question, may be helpful to provide a clearer picture of viability. This may in particular be helpful to assess how Covid has impacted the tenant's business as required by clause 16(1)(c) (see paragraph 6.2.1(c) above). However, the arbitrator may need to be aware that some businesses may not return to the same level of pre-Covid profitability quickly. An arbitrator may request additional information to ensure they have sufficient information to consider how the business performed prior to, during, and after the mandated closure period. Different pieces of evidence may be needed to achieve an overview of historical and current performance.

6.3.6 Arbitrators may need to be aware that readily available information may be different depending on the type and size of the business. For example, a liquidity ratio may be something larger businesses, or larger businesses with multiple premises accounts, can more easily produce.

6.3.7 Smaller businesses may find it challenging to provide predictions on their future profitability or may not have detailed financial records as compared to a larger business. As a result, as well as their bank account information, an arbitrator may want to request their management accounts if available, their profit forecasting, as well as their gross profit margin, as this may be more relevant to them.

6.3.8 Where profit forecasting is provided, the arbitrator should consider the extent to which the future profit forecast is reliable, taking into account the context in which the business operates and whether current or expected market factors might make it difficult to predict future profitability. As an example, the inflation rate may be a factor to consider.

6.3.9 When reviewing the evidence provided, the arbitrator may take into account whether any financial information or accounts have been audited by an independent third party or are verifiable by other means. However, audited accounts are not a requirement for entering arbitration.

6.3.10 Arbitrators need to be aware that some businesses are not required to have audited or comprehensive financial accounts, therefore may wish to consider requesting, for this reason, bank account information including any saving accounts, loan accounts and current accounts.

6.3.11 As outlined in paragraph 6.2.1(a) above, under clause 16(1)(a), the arbitrator must have regard to the assets and liabilities of the tenant, including any other tenancies to which the tenant is a party. Arbitrators may wish to examine either the balance sheet in financial accounts or more recent management accounts. However, the balance sheet may appear to show that a business is in a position to meet their obligations, but it may not necessarily show that the business is profitable. Therefore, the gross profit margin and net profit margin are likely to be more informative as a measure of profitability in determining viability.

6.3.12 The determination of viability is specifically for the purposes of this Act and is not intended to have broader application. This test of viability is distinct from an assessment as to whether the business is solvent. Nonetheless, arbitrators should be mindful that a determination of non-viability may have other implications for a tenant business. Arbitrators should ensure that any determination of non-viability is justifiable and the reasonings for such must be set out in the award dismissing the reference to arbitration.

7. STAGE 3 - RESOLVING THE MATTER OF RELIEF FROM PAYMENT

7.1 The arbitrator's functions with regard to the matter of relief from payment

7.1.1 If the arbitrator:

(a) has not made an award dismissing a reference for the reasons stated in paragraph 5.2.1 of this guidance; and

(b) following an assessment of the viability of the tenant's business, determines that (at the time of the assessment) the business is viable or would become viable if the tenant were to be given relief from payment of any kind

the arbitrator **must** resolve the matter of relief from payment of a protected rent debt[24]. The arbitrator will do so by:

(c) Deciding whether the tenant should be given any relief from payment of that debt and, if so, what relief[25]; and

(d) If applicable, making an award on the matter of relief from payment.

7.2 Considering whether to give relief from payment

7.2.1 Rather than the usual form of arbitration proceedings in which statements of claim and defence etc. are submitted, the parties submit formal proposals for resolving the matter of relief from payment of protected rent debt accompanied by supporting evidence. Those formal proposals form the basis on which the arbitrator resolves the matter of relief from payment, applying the principles in section 15.

7.2.2 Under the Act, a formal proposal is a proposal which is:

(a) made on the assumption that the arbitrator is required to resolve the matter of relief from payment of a protected rent debt;

(b) expressed to be made for the purposes of section 11 of the Act;

(c) given to the other party and to the arbitrator;

(d) accompanied by supporting evidence;

(e) verified by a statement of truth (a formal proposal is a 'written statement' – see paragraph 11.6 of this guidance).

7.2.3 As stated in paragraph 3.6.3 above, the party making a reference to arbitration ("the applicant") must include its formal proposal with the reference.

7.2.4 The other party ("the respondent") has the option to (but is not required to) within 14 days (beginning with the day on which the applicant's proposal is received), put forward its formal proposal (complying with the requirements in paragraph 7.2.2 above). The period for the respondent to put forward its formal proposal may be extended by agreement of the parties, or if the arbitrator considers an extension would be reasonable in all the circumstances.

7.2.5 Within 28 days beginning with the day on which it gave its formal proposal to the other party, the applicant and respondent may submit revised proposals complying with the

[24] Section 13(4)
[25] Section 13(5)(a))

requirements in paragraph 7.2.2 above and accompanied by further supporting evidence. The period of time for making a revised proposal may be extended by agreement of the parties, or if the arbitrator considers an extension would be reasonable in all the circumstances.

7.2.6 As stated in paragraphs 3.2.3 and 3.2.4 above:

(a) If the tenant is a debtor under a CVA, IVA, or 'compromise or arrangement' relating to any protected rent which has been proposed or applied for and is awaiting a decision, then the parties are not prevented from making a reference to arbitration, but an arbitrator may not be appointed, and no formal proposal may be made by the respondent or no revised formal proposal by either party, whilst the decision is pending.

(b) If the CVA, IVA, or 'compromise or arrangement' is approved or sanctioned, then the arbitration cannot progress, as an arbitrator may not be appointed and those formal proposals set out in (a) above may not be made. If the CVA, IVA, or 'compromise or arrangement' is not approved or sanctioned then, once this decision has been made, an arbitrator can be appointed and the parties may make formal proposals as above, so that the arbitration can proceed.

7.2.7 In considering whether the tenant should receive any relief from payment and, if so, what relief and before determining what award to make, the arbitrator must first consider any 'final proposal' put forward by either party[26]. The 'final proposal' will, depending on the circumstances, be either the revised formal proposal put forward by a party, or if no revised formal proposal has been put forward by a party, the original formal proposal put forward by that party[27].

7.2.8 The arbitrator must consider the final proposal or proposals, as appropriate, by reference to the arbitrator's principles in section 15 (see paragraph 7.3 below).

7.2.9 How the arbitrator does so will vary according to the circumstances, as follows:-

(a) **Where both parties have put forward final proposals:-**

(i) If the arbitrator considers both proposals to be consistent with the principles in section 15, the arbitrator must make the award set out in whichever of them is the *most consistent* with the principles[28]

(ii) If the arbitrator considers only one proposal is consistent with the principles in section 15, the arbitrator must make the award set out in that proposal[29]; or

(iii) Otherwise, the arbitrator must make whatever award the arbitrator considers appropriate, applying the principles in section 15.[30]

(b) **If only the party making the reference to arbitration puts forward a final proposal, the arbitrator must :-**

(i) make the award set out in the proposal, if the arbitrator considers it to be consistent with the principles in section 15[31]; or

[26] Section 14(2)
[27] Section 14(9)
[28] Section 14(3)(a)
[29] Section 14(3)(b)
[30] Section 14(5)
[31] Section 14(4)

(ii) otherwise, the arbitrator must make whatever award the arbitrator considers appropriate, applying the principles in section 15[32].

7.2.10 The awards which the arbitrator may make are either[33]:

(a) To give the tenant relief from payment of the protected rent debt; or

(b) To state that the tenant is to be given no relief from payment.[34]

7.2.11 Where the arbitrator's award gives the tenant time to pay an amount (including an instalment), the payment date (i.e. the date specified in the award as the day on which the amount, or amounts, concerned falls due for payment) must be within period of 24 months beginning with the day after the date of the award[35].

7.3 **The arbitrator's principles**

7.3.1 The principles to be applied when considering the award on the matter of relief from payment are as follows[36]:-

(a) Any award should be aimed at preserving or, as the case may be, restoring and preserving the ***viability of the business of the tenant***, so far as that it consistent with preserving the ***landlord's solvency***; and

(b) The tenant should, so far as it is consistent with the first principle to do so, be required to meet its obligations as regards the payment of protected rent in full and without delay.

7.3.2 Having already assessed the tenant's viability at **stage 2**, in resolving the matter of relief from payment at **stage 3**, the arbitrator is required to consider the tenant's viability again, albeit in a different context. As clarified in paragraph 5.3(a) above, the assessment at **stage 2** considers whether the tenant's business is viable, or would be viable if given relief from payment of the protected rent debt. At **stage 3**, the focus is on the extent to which a tenant can pay a protected rent debt considering, on the one hand, the viability of the tenant's business, and on the other hand, and the solvency of the landlord.

7.4 **The assessment of "viability" and "solvency" when resolving the matter of relief from payment**

7.4.1 The Act sets certain requirements regarding the arbitrator's assessment of the ***viability of the business of the tenant*** and the ***landlord's solvency***:

7.4.2 As also set out in paragraph 6.2.1 above, in assessing the ***viability of the business of the tenant*** the arbitrator must, so far as known, have regard to the following:[37]

(a) the assets and liabilities of the tenant, including any other tenancies to which the tenant is a party;

[32] Section 14(5)
[33] Section 14(6)
[34] Relief from payment in relation to a protected rent debt means any one or more of (i) writing off the debt; (ii) giving time to pay the whole or part of the debt (including by instalments); (iii) reducing (including to zero) any interest otherwise payable by the tenant under the terms of the tenancy in relation to the whole or part of the debt (see section 6(2)).
[35] Sections 14(7) and (8)
[36] Section 15(1)
[37] Section 16(1)

(b) the previous rental payments made under the business tenancy from the tenant to the landlord;

(c) the impact of coronavirus on the business of the tenant; and

(d) any other information relating to the financial position of the tenant that the arbitrator considers appropriate.

7.4.3 For the purpose of assessing the ***landlord's solvency***, a landlord is "solvent" unless the landlord is, or is likely to become, unable to pay their debts as they fall due[38]. In assessing this, the arbitrator must, so far as known, have regard to: [39]

(a) the assets and liabilities of the landlord, including any other tenancies to which the landlord is a party; and

(b) any other information relating to the financial position of the landlord that the arbitrator considers appropriate.

7.4.4 The items set out in paragraphs 7.4.2 and 7.4.3 are known to the arbitrator if a party provides evidence of them to the arbitrator, including in response to a request of the arbitrator, or if generally known. The arbitrator is not required to seek out information. The tenant and landlord are responsible for providing the evidence to enable viability and solvency, respectively, to be assessed.

7.4.5 However, landlords do not have to provide evidence of their solvency. A landlord's solvency may not be in question, and evidence of solvency may therefore not be relevant, if the landlord considers that any relief from payment that could be granted, would not pose a risk to its solvency.

7.4.6 When considering the ***viability of the business of the tenant*** and the ***landlord's solvency***, the arbitrator must disregard anything that the landlord or tenant has done with a view to manipulating their financial affairs so as to improve their position regarding an award for relief from payment of protected rent.[40] "Manipulating" has its usual meaning for this purpose.

7.4.7 The arbitrator must disregard the possibility of either of the parties borrowing money or restructuring their business. [41] If a business or landlord took on more debt to become viable or solvent for the purposes of arbitration under the Act, they would likely be delaying the problem and risking their long-term viability or solvency.

[38] Section 15(3)
[39] Section 16(2)
[40] Section 15(2)
[41] Section 16(3)

8. MAKING THE AWARD

8.1 Timing of the award

8.1.1 The timing of the award will differ based on whether the matter of relief from payment is considered with or without an oral hearing (see paragraph 11.7 for further information on oral hearings).

8.1.2 **Without an oral hearing:** the arbitrator must make an award on the matter of relief from payment **as soon as reasonably practicable after**[42]:-

(a) where both parties have put forward a final proposal (being the formal proposal or, where revised, the revised formal proposal) (see paragraph 7.2.7), the day on which the latest final proposal is received; or

(b) otherwise, the last day on which a party may put forward a revised formal proposal (being 28 days beginning with the day on which the party gives a formal proposal to the other) (see paragraph 7.2.5).

8.1.3 **With an oral hearing (see section 9 of this guidance):** the arbitrator must make an award within 14 days beginning on the day on which the hearing concludes[43]. That period may be extended by agreement between the parties, or by the arbitrator where the arbitrator considers it reasonable in all the circumstances[44].

8.2 Publication of the award

8.2.1 The award, which shall be in writing and must be signed by the arbitrator(s), must be published together with the reasons for making it. The published award must, however, exclude ***confidential information***, unless the person to whom that information relates consents to its publication[45].

8.2.2 ***Confidential information*** means[46]:-

(a) Commercial information relating to a party or any other person which, if disclosed, would or might significantly harm the legitimate business interests of that person; or

(b) Information concerning an individual's private affairs whose disclosure would or might significantly harm that individual's interests

8.3 Award is final and binding

8.3.1 An award made under the Act is final and binding on both of the parties and on any parties claiming through or under them[47].

8.3.2 This does not affect the right to challenge the award (see section 13 of this guidance).

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[42] Section 17(1)
[43] Section 17(2)
[44] Section 17(3)
[45] Section 18(3)
[46] Section 18(4)(a)
[47] Section 58(1) Arbitration Act 1996; there are modifications to the provision meaning the parties are not able to agree that an award is not final and binding.

8.4 **Enforcement of the award**

8.4.1 The award may be enforced in accordance with section 66(1) of the Arbitration Act 1996. That provides that an award may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect. Where leave is given, judgment may be entered in terms of the award.

8.4.2 Leave to enforce an award will not be given where, or to the extent that, the person against whom it is sought to be enforced shows that the tribunal lacked substantive jurisdiction to make the award (provided the right to raise such an objection has not been lost).

9. APPEALS, CORRECTIONS AND ADDITIONAL AWARDS

9.1 Challenges and Appeals

9.1.1 Awards made under the Act may be challenged or appealed via sections 67 to 71 of the AA (subject to the modifications made by the Act to section 68). As such, within 28 days of the date of the award and upon notice to the other party and to the arbitrator, a party can:

(a) apply to the Court challenging an award as to its substantive jurisdiction or for an order declaring an award made on the merits to be of no effect, in whole or part, because the arbitrator did not have substantive jurisdiction;

(b) apply to the Court challenging an award on the grounds of serious irregularity affecting the tribunal, the proceedings or the award (for example failure by the tribunal to conduct the proceedings in accordance with the procedure in the Act or failure by the tribunal to deal with all the issues that were put to it); and

(c) appeal to the Court on a question of law arising out of any award made in the proceedings.

9.1.2 The supplementary provisions of section 70 apply to an application or appeal, including the following:

(a) an application or appeal may not be brought if the applicant/appellant has not first exhausted any available arbitral process of appeal or review and any available recourse under section 57 of the AA (correction of award or additional award – see paragraphs 9.2 and 9.3 below);

(b) Any application or appeal must be brought within 28 days of the date of the award **or, if there has been any arbitral process of appeal or review, of the date when the applicant or appellant was notified of the result of that process;**

(c) If on an application or appeal it appears to the court that the award: (a)does not contain the tribunal'**s reasons, or (b)does not set out the tribunal's reasons in sufficient detail to enable the court properly to consider the application or appeal, the court may order the tribunal to state the reasons for its award in sufficient detail for that purpose.**

9.1.3 Where an order of the Court varies an award, that variation has effect as part of the arbitrator's award (section 71(2) of the AA).

9.1.4 If following an appeal to the court, the award is remitted to the arbitrator, in whole or in part, for reconsideration, the arbitrator must make a fresh of award in respect of the remitted matters within three months from the date of the order of remission or by the end of the period directed by the court (if different) (section 71(3) Arbitration Act 1996).

9.2 Corrections

9.2.1 The arbitrator can, either on their own initiative or on the application of a party, and provided the parties have first been afforded a reasonable opportunity to make further representations to the arbitrator, correct an award to remove any clerical mistake or

error arising from an accidental slip or omission or clarify or remove any ambiguity in the award[48]. Any correction of an award shall form part of the of the award.

9.2.2 An application for a correction must be made within 28 days of the date of the award (or such longer period as agreed by the parties)[49].

9.2.3 A correction must be made[50]:-

(a) If following an application, within 28 days of the date the application is received by the arbitrator;

(b) If the correction is made on the arbitrator's own initiative, within 28 days of the date of the award; or

(c) Otherwise, following such longer period as the parties may agree.

9.2.4 Any correction will form part of the award (section 57(7) of the AA).

9.3 **Additional awards**

9.3.1 The arbitrator can, either on its own initiative or on the application of a party (and provided the parties have first been afforded a reasonable opportunity to make further representations to the arbitrator) make an additional award in respect of any claim which was presented to the arbitrator but was not dealt with in the award[51].

9.3.2 An application for an additional award must be made within 28 days of the date of the award (or such longer period as agreed by the parties)[52].

9.3.3 Any additional award must be made within 56 days of the date of the original award or such longer period as the parties may agree[53].

[48] Section 57(3)) Arbitration Act 1996
[49] Section 57(4) Arbitration Act 1996
[50] Section 57(5) Arbitration Act 1996
[51] Section 57(3) Arbitration Act 1996
[52] Section 57(4) Arbitration Act 1996
[53] Section 57(6) Arbitration Act 1996

10. ARBITRATION FEES AND EXPENSES

10.1 Introduction

10.1.1 For the purposes of the Act, ***arbitration fees*** means the arbitrators' fees and expenses (including oral hearing fees) and the fees and expenses of any approved arbitration body concerned[54].

10.1.2 Approved arbitration bodies have the function of setting arbitration fees. The Secretary of State has a power to cap arbitration fees, which may be differ depending on the amount of protected rent debt in question but that power has not been exercised.

10.2 Payment of arbitration fees upon commencement of arbitration

10.2.1 The party who makes the reference to arbitration (the 'applicant') must pay the arbitration fees (other than any oral hearing fees) in advance of the arbitration taking place (see paragraph 3.6.2 of this guidance). The expectation is that the arbitration fees should generally be paid at the time the reference is made.

10.3 Payment on making an application for an oral hearing

10.3.1 Where one of the parties requests an oral hearing, that party must pay the hearing fees in advance. If both parties request an oral hearing, they are jointly and severally liable to pay the hearing fees in advance[55] (see paragraph 11.7 of this guidance).

10.4 Dealing with arbitration fees (including hearing fees) on making an award

10.4.1 When making an award (either dismissing the reference or as to the matter of relief from payment), the *general rule* is that the arbitrator must also make an award requiring the other party to reimburse the applicant for:

(a) half of the arbitration fees[56]; and

(b) (where there was an oral hearing) half of the hearing fees[57].

10.4.2 However, if the arbitrator considers it more appropriate in all the circumstances, they may deviate from the general rule and require the other party to reimburse a different proportion of the arbitration fees (including oral hearing fees) of anything between 0% and 100% of the fees. For example, where the respondent has been obstructive, the arbitrator may decide that it should reimburse the applicant for over 50% of the fees[58].

10.4.3 Otherwise, the Act provides that:-

(a) the parties must meet their own legal or other costs in connection with the arbitration[59]; and

(b) No term of the relevant business tenancy may be enforced for the purpose of recovering the legal or other costs in connection with the arbitration (including arbitration fees)[60].

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[54] Section 19(1)
[55] Sections 20(4) and (5)
[56] Section 19(5)
[57] Section 20(6)
[58] Sections 19(6) and 20(7)
[59] Section 19(7)
[60] Section 19(8)

11. GENERAL PROVISIONS CONCERNING THE CONDUCT OF PROCEEDINGS

11.1 Arbitrator's jurisdiction

Determining Jurisdiction

11.1.1 The arbitral tribunal (which may consist of a sole arbitrator appointed by an approved arbitration body under the Act) may rule on its 'substantive jurisdiction', namely:

(a) Whether the Act applies to the dispute or matter in question;

(b) Whether the tribunal is properly constituted; and

(c) What matters have been submitted to arbitration in accordance with the Act.

Objection

11.1.2 A party may raise an objection that the arbitral tribunal lacks or is exceeding its substantive jurisdiction. Any objection:

(a) **That the tribunal lacks substantive jurisdiction at the outset of proceedings:** must be made on or before that party takes its first step in the proceedings to contest the merits of any matter in relation to which it challenges the tribunal's jurisdiction; or

(b) **During the proceedings that the arbitrator is exceeding its substantive jurisdiction:** must be made as soon as possible after the matter alleged to be beyond the tribunal's jurisdiction is raised.

11.1.3 If a party takes part, or continues to take part, in the arbitration without making an objection as set out in paragraph 11.1.2 it will lose the right to raise that objection later in the proceedings unless either:

(a) it can show that the grounds for objection were not known to that party (and could not with reasonable diligence have been discovered) at time it took part or continued to take part in the proceedings; or

(b) the tribunal chooses to admit the objection (which it may do if it considers that the delay in making the objection is justified).

11.1.4 A party may also ask the Court (under section 32 of the AA) to determine any question as to the substantive jurisdiction of the tribunal. Permission of the tribunal will be required to make this application to Court in the absence of written agreement from all the other parties to the proceedings.

11.1.5 The arbitration may continue, and the tribunal may make an award, whilst an application to the Court under section 32 of the AA is pending, unless:

(a) The parties otherwise agree; or

(b) The tribunal stays the proceedings (which it *may* do of its own volition, but *must* do if agreed by the parties).

Ruling on jurisdiction

11.1.6 Where an objection is made to the tribunal's jurisdiction, the tribunal may deal with the matter either in a stand-alone award (as to jurisdiction), or as part of an award under

the Act. If the parties agree which of these courses the tribunal should take, the tribunal shall proceed accordingly.

Challenge to ruling on jurisdiction

11.1.7 Any such ruling may be challenged in accordance with the provisions of the Arbitration Act 1996 (see section 13 of this guidance below).

11.1.8 If a party who could have challenged a ruling of the arbitral tribunal on its substantive jurisdiction but does not do so within the allowed time, that party may not later object to the tribunal's substantive jurisdiction on any ground covered by the tribunal's ruling.

Contested jurisdiction and temporary moratorium on remedies and measures

11.1.9 Arbitrators should be aware of the Act's temporary moratorium on certain remedies and measures, during the period for making references to arbitration and until arbitration concludes by the proceedings being abandoned or withdrawn by the parties, the time period for appeal expiring without an appeal being brought, or an appeal being finally determined, abandoned or withdrawn – see Part 3 of the Act. There are also restrictions on initiating a CVA, IVA or compromise or arrangement which relates to all or part of the protected rent debt, from the day on which an arbitrator is appointed until 12 months after an award is made (or until the day an award is made dismissing a reference, the day a decision is made to set aside an award on appeal, the day of abandonment or withdrawal of proceedings).

11.1.10 If a party takes action precluded by the moratorium, then it would be for the forum in which such action is brought to decide that the measure is unavailable during the applicable period, Should a claim be brought for a remedy covered by the moratorium, on the basis that the claimant landlord considers the Act's arbitration process to be inapplicable, the tenant may choose to make a reference to arbitration if they consider the Act does apply. The arbitrator may pause or extend the arbitration timetable whilst the other claim is considered, under their power to extend time periods where it would be reasonable in all the circumstances.

11.2 General Duty

11.2.1 To the extent not inconsistent with the Act, when conducting the arbitration, the arbitrator shall, when making decisions on matters of procedure and evidence, and when exercising any of its other powers:

(a) act fairly and impartially as between the parties, giving each a reasonable opportunity to put forward its case and deal with the other party's case; and

(b) adopt procedures suitable to the circumstances of the particular case, which avoid unnecessary delay or expense and provide a fair means of resolving the matters to be determined.

11.3 Procedural and Evidential Matters

11.3.1 Under the Act, rather than the usual form of arbitral proceedings involving statements of claim and defence etc, formal proposals for resolving the matter of relief from payment of protected rent debt are submitted by the applicant, with the respondent having the option to submit their own proposal. Proposals must be accompanied by supporting evidence. Assessment of those formal proposals and supporting evidence is the main way in which the arbitrator is to resolve the dispute between the parties. Assessments are made at two stages: (i) the eligibility stage following a reference to arbitration, during which the arbitrator considers whether the dispute is eligible for arbitration under the Act

(see sections 4, 5 and 6 of this guidance for further details); and (ii) if the matter is eligible for arbitration under the Act, the arbitrator must go on to consider the matter of relief from payment of protected rent debt (see section 7 of this guidance for further details).

11.3.2 In addition, the Act's approach of the parties submitting formal proposals (rather than providing for the usual form of arbitral proceedings) is intended to limit the amount of document disclosure to ensure the process is efficient and cost-effective (especially since the parties must meet their own legal or other costs).

11.3.3 That said, the arbitrator retains the broad discretion pursuant to section 34 of the AA to decide, save where they are inconsistent with the provisions of the Act, all procedural and evidential matters in the arbitration, including as to whether further written statements must be provided, further documents disclosed and/or any further questions should be put to and answered by the respective parties and when and in what form this should be done.

11.4 Service of notices

11.4.1 Section 76 of the AA makes provision for service of notices. A notice or other document may be served on a person by any effective means[61]. A notice or other document shall be treated as effectively served if it is addressed, pre-paid and delivered by post—

(a) to the addressee's last known principal residence or, if the addressee is or has been carrying on a trade, profession or business, it's last known principal business address, or

(b) where the addressee is a body corporate, to the body's registered or principal office.

11.5 Computation of time

11.5.1 Section 78 of the AA makes provision for the computation of time. Where the Act requires something to be done within a specified period after or from a specified date, the period begins immediately after that date, unless the Act specifies otherwise[62].

11.5.2 If the Act requires something to be done a specified number of clear days after a specified date, at least that number of days must intervene between the day on which the act is done and that date[63].

11.5.3 Where the period is a period of seven days or less which would include a Saturday, Sunday or a public holiday in the place where anything which has to be done within the period falls to be done, that day shall be excluded.[64]

11.6 Written Statements[65]

11.6.1 Any written statement provided to the arbitrator by a party which relates to a matter relevant to the arbitration must be verified by a statement of truth. If a written statement is not verified by a statement of truth, it may be disregarded by the arbitrator.

[61] Section 76(3) Arbitration Act 1996
[62] Section 78(3) Arbitration Act 1996
[63] Section 78(4) Arbitration Act 1996
[64] Section 78(5) Arbitration Act 1996. This subsection also provides that in relation to England and Wales or Northern Ireland, a "public holiday" means Christmas Day, Good Friday or a day which under the Banking and Financial Dealings Act 1971 is a bank holiday.
[65] Section 12

11.6.2 The arbitrator's general powers[66] include the power to direct that a witness shall be examined on oath or affirmation (and made for that purpose administer any oath of take any necessary affirmation).

11.7 **Oral hearings**

11.7.1 Under the Act the parties have the right to request an oral hearing[67]. The arbitrator does not have discretion to deny that request.

11.7.2 If either or both of the parties submits a request for an oral hearing to the arbitrator, an oral hearing must be held within 14 days beginning on the date the arbitrator receives the request[68]. That 14-day period may be extended either:-

(a) By the agreement of the parties; or

(b) By the arbitrator if they consider it would be reasonable in all the circumstances[69].

11.7.3 The party requesting the oral hearing must pay the hearing fees in advance. Where both parties make the request, they are jointly and severally liable[70].

11.7.4 The oral hearing must take place in public unless the parties agree otherwise[71].

11.7.5 The arbitrator shall decide all procedural and evidential matters in relation to oral hearings held in public [72] , including whether any appointed expert, legal advisor or assessor shall be in attendance.

11.7.6 Modifications made by paragraph 2(c) of Schedule 1 to the Act to section 34(1) of the AA make it clear that the arbitrator retains the power to sit in private when hearing evidence on confidential and/or sensitive matters[73].

11.8 **Settlement**

11.8.1 If during the course of the arbitration the parties settle the matter of relief, the tribunal must record the settlement in an agreed award and then terminate the arbitration.

11.8.2 The agreed award should state that it is an award of the tribunal. An agreed award has the same status and effect as any other award under the Act: it shall be binding upon the parties.

11.8.3 Sections 52 to 58 of the AA apply to an agreed award.

11.9 **Power to appoint experts, legal advisors or assessors**

11.9.1 The tribunal may, (whether or not the parties agree)[74]:

[66] Section 39 Arbitration Act 1996
[67] Section 20(1)
[68] Section 20(2)
[69] Section 20(3) (see also section 34 of the Arbitration Act 1996)
[70] Sections 20(4) and (5)
[71] Section 20(8)
[72] Section 34 of the Arbitration Act 1996, as amended by paragraph 2(c) of Schedule 1 of the Act
[73] The modification made by paragraph 2(c) of Schedule 1 to the Act is to insert the words "including in relation to oral hearings held in public" after "[i]t shall be for the tribunal to decide all procedural and evidential matters,". That clarifies that specific provision in the Act in relation to oral hearings does not have the effect of diluting the power in section 34(1) of the AA.
[74] See modifications to section 31(1) of the AA made by paragraph 1(k) of Schedule 1 to the Act.

(a) Appoint experts or legal advisors to report to it and the parties, or

(b) Appoint assessors to assist it on technical matters

11.9.2 The parties shall be given a reasonable opportunity to comment on any information, opinion or advice offered by any such person.

11.10 **Consolidation of Proceedings and concurrent hearings**

11.11 The tribunal has the power to order that separate arbitral proceedings under the Act be consolidated or be heard concurrently.

11.12 The parties can also agree that the arbitration proceedings (to which they are a party) be consolidated with other arbitration proceedings under the Act, or that concurrent hearings in those proceedings be held, on such terms as they see fit.

11.13 **Peremptory orders**

11.13.1 If a party fails to comply with an order or direction of the tribunal, and is unable to show sufficient cause for this, the tribunal may make a peremptory order. The peremptory order must be to the same effect as the order or direction which has been disobeyed and state the time for compliance with it (being such time as the tribunal considers is appropriate).

11.13.2 If a party fails to comply with a peremptory order, the tribunal may[75]:

(a) direct that the defaulting party shall not be entitled to rely on any allegation or material that was the subject of the order;

(b) draw such adverse inferences from that party's non-compliance as is justified in the circumstances;

(c) proceed to an award on the basis of the materials that have been properly provided to it; or

(d) make such order as it thinks fit as to the payment of any costs of the arbitration that have been incurred as a result of that party's non-compliance;

(e) make an application, upon notice to the parties, to the Court for an order requiring compliance with its peremptory order, or give permission to a party to make an application to Court for such an order, unless the parties have agreed that the Court may make no such order.[76]

[75] Note that section 41 of the AA 96 makes different provision where the peremptory order concerns security for costs and other peremptory orders. That provision is not relevant in relation to arbitration under the Act since the party making a reference to arbitration is required by the Act to pay the arbitration fees in advance, to be reimbursed by the other party in accordance with an award on arbitration fees, and the parties are otherwise required to meet their own legal or other costs.

[76] Note: the Court will not act unless it is satisfied that the applicant has exhausted any available arbitral process in respect of failure to comply with the tribunal's order (section 42(3) AA).