

COVID-19 COMMERCIAL RENT ARREARS ARBITRATION SCHEME

The voluntary Code of Practice for commercial property relationships following the Covid-19 pandemic and draft legislation for the new legally binding Covid-19 Commercial Rent Arrears Arbitration Scheme have been published by the UK Government to address an estimated £7.5bn of commercial rent arrears. In this briefing we set out the key details and takeaways of both the updated Code and proposed new arbitration regime.

Key details

- **Aim:** Updated Code to encourage parties to reach agreement on arrears of rent, service charge and insurance contributions due under commercial leases based on the same principles as the arbitration scheme. Arbitration as a last resort to draw line under the pandemic.
- **Who:** Arbitration for commercial leases where businesses forced to close (including part closure) during pandemic due to Government restrictions e.g. non-essential retail, restaurants, hospitality and leisure. But use of Code encouraged for all commercial leases.
- **Ringfenced arrears:** Arrears from first closures in March 2020 until restrictions on sector lifted (April - July 2021) ringfenced even if allowed to open in interim. Not for reduced trading due to other pandemic related circumstances. Only ringfenced arrears in scope of the arbitration scheme.
- **Existing Agreements:** Any legally binding agreements already reached unaffected and not capable of being reopened under the Code or the arbitration scheme.
- **Key principles:** Tenants who can pay should pay. Decisions to be based on principles of fairness, affordability and viability. Viable tenant businesses should be saved by only paying what is affordable. Landlord's solvency should not be compromised to save tenant. Not fair to require restructuring or additional borrowing on either side.
- **Key features of arbitration:** Either party can start arbitration and make offer. Other party can make counteroffer. Arbitrator chooses proposal closest to principles. Details of award published (except confidential information).

Key issues

- Voluntary code updated to facilitate negotiation of rent arrears
- Commercial Rent (Coronavirus) Bill introduced to Parliament to ring fence rent debts and establish a binding arbitration process
- Bill anticipated to come into effect in March 2022

- **Timing:** Code effective immediately. Arbitration scheme opens on 25 March 2022 for 6 months. Repayment plans not to extend beyond 2 years after the arbitral award.
- **Current enforcement restrictions:** No change to moratorium, CRAR and winding up restrictions in place until March 2022 – NB these apply to all commercial leases not just those within scope of the arbitration scheme. Debt claim proceedings started after 9 Nov to be stayed and new claims prohibited for ringfenced arrears.
- **Future enforcement restrictions:** From 25 March 2022, no forfeiture, CRAR, winding up or use of rent deposits in respect of ringfenced arrears for 6 months.
- **What else:** Debts subject of post 9 November 2021 CCJ remain in scope of arbitration. Compromised rent under arbitration not to be included in any CVA, restructuring plan or scheme of arrangement for 12 months after arbitral award. BEIS to publish list of approved arbitrators. Lenders expected to demonstrate forbearance to their borrowers during the period in which arbitration is being explored. The Code explains that this is to allow landlords and tenants to negotiate constructively, and to avoid adversely impacting the decision of an arbitrator.

Key takeaways

- Legally binding agreements reached to date are outside of the scope of arbitration and remain unaffected.
- Landlords have until now been able to successfully bring Court proceedings in relation to unpaid arrears, despite the other moratoria on enforcement action (e.g. the forfeiture moratorium), but this avenue has now been closed.
- Parties are encouraged to use the Code principles to negotiate with a view to reaching agreement on how arrears will be treated, including the possibility of partial waivers by landlords.
- Arbitration considered to be a last resort if agreement cannot be reached. Expectation is that landlords will seek to reach prior agreements (if not done so already) due to the uncertainty and potential for an unfavourable outcome of the arbitration.
- Likely to be a lot of argument around “fairness, viability and affordability” and the supporting evidence provided by the parties will be key.
- Arbitrators will have a wide discretion to reduce the amounts payable (including in full) or to impose a plan for payment by instalments.
- The legislation is still in draft form and may change before it becomes law. More detailed guidance for arbitrators will also be published.
- Landlords expected to have usual remedies against tenants who do not comply with any repayment plan imposed.

We would be delighted to discuss the new regime in more detail and its implications for your business with you and our contact details are enclosed.

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