Brabners
we make the difference

Covid Commercial Rent Arrears: Arbitration Scheme Timetable

Introduction

Our first bulletin in December considered the background to the new Commercial Rent (Coronavirus) Bill.

By way of reminder, the Bill is being introduced by the government in an attempt to resolve ongoing commercial rent arrears disputes between landlords and tenants in the wake of the coronavirus pandemic. It is expected to become law in March 2022 and will "ringfence" certain commercial rent arrears built up during the pandemic.

The new law will also introduce a Statutory Arbitration Scheme to resolve outstanding commercial rent arrears disputes where parties have been unable to reach an agreement.

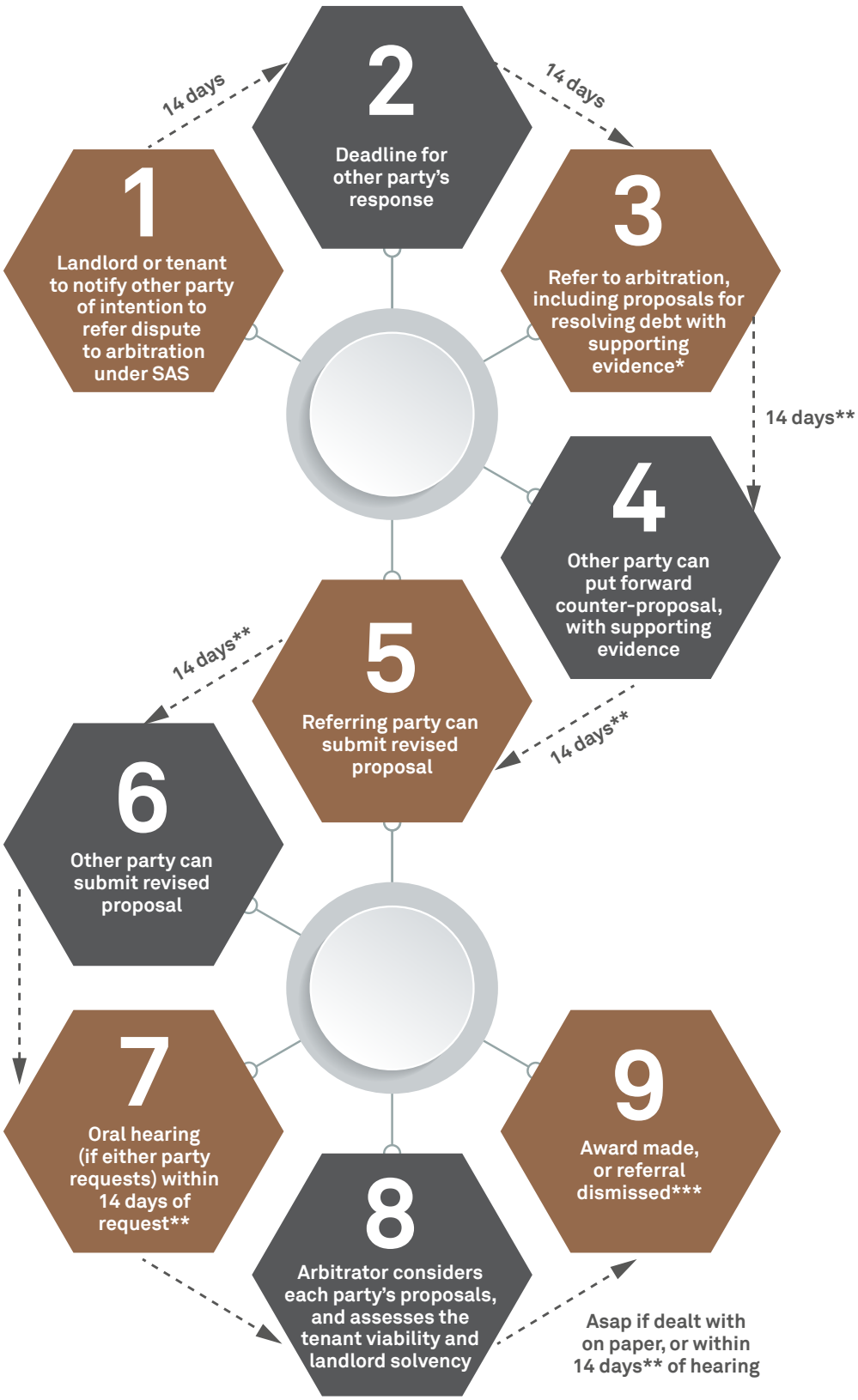
If you missed our last update, click **HERE** to read all about it and work through our handy flowchart to determine whether the new scheme will apply to your arrears.

If your arrears are caught by the Scheme, whether you are a landlord or tenant, you will need to be aware of the procedure under the Scheme so you understand what steps will need to be taken and when.

In this update, we discuss the timetable under the Statutory Arbitration Scheme and try to answer some of the questions you may have in relation to the process.

Guiding you through the process

Statutory Arbitration Scheme ("SAS") referral procedure timeline



*A reference to arbitration can't be made until 14 days have elapsed since the response was received under step 2. If no response under step 2 is received, a reference to arbitration can't be made until 28 days after the notice was served under step 1.

**Subject to extension by agreement between the parties or by the arbitrator

***An award should be aimed at preserving the viability of the tenant, provided that is consistent with the landlord's solvency.** If a tenant's business is considered viable, or would become viable if relief was given, an award can be made (provided this is consistent with preserving the landlord's solvency). If, however, a tenant's business is not considered viable and would not be viable even if the tenant was granted relief, no award can be made, and the referral must be dismissed. Look out for our next update where we will discuss what the viability assessment means in practice.

What Next?

We have prepared a Q&A covering some of the key questions you may have about the arbitration process.

1. **What is arbitration?** Arbitration is a form of alternative dispute resolution which involves the appointment of an independent arbitrator who considers a case and makes a binding decision.

   This differs to litigation where a matter is resolved by a Judge in Court proceedings, or mediation where an appointed mediator helps parties to try to settle their dispute but has no power to order them to do anything.

2. **Who will the arbitrator be? Will they be a lawyer?** There is no requirement that the arbitrator must be a lawyer, despite the arbitrator having to decide upon legal questions, such as whether the arrears in question are caught by the Statutory Arbitration Scheme. The Code of Practice (published in November 2021 and which supports the Bill) states that arbitration bodies will have to demonstrate that they are competent in order to supply arbitration dispute resolution services, which will be assessed by the Department for Business, Energy and Industrial Strategy (BEIS).

   Arbitration bodies will have to demonstrate impartiality, monitoring and training of arbitrators, an appeals system for complaints against arbitrators, as well as being familiar with business finances and commercial negotiations. Arbitration bodies will publish a list of approved arbitrators and landlords and tenants will be able to apply directly to an approved body.

3. **How long do I have to make a proposal?** A referral to arbitration must be made within six months of the Bill becoming law (expected to be March 2022), although this deadline may be extended by the Secretary of State. Crucially, before making a referral to arbitration, a party must notify the other party of their **intention** to make a reference (see step 1 in the flowchart).

   Practically, to allow time for the response, this means that a party will need to notify the other party of their intention to make a referral to arbitration within five months of the date of the Act being passed (i.e. by August 2022, assuming that the Act will become law in March 2022).

4. **Who pays the arbitration fees?** The party who refers the matter to arbitration must pay the arbitration fees before the arbitration takes place. If one party has requested an oral hearing, that party must pay the hearing fees in advance. Where both parties request an oral hearing, they are jointly and severally liable to pay the hearing fees in advance. Where the referring party has paid the arbitration fees upfront, the general rule is that the arbitrator must make an award requiring the other party to reimburse half of the arbitration fees.

   However, the arbitrator can allocate some other contribution (including zero) if it considers it more appropriate, depending on the facts of the case. Crucially, as drafted, there is no provision in the Bill for recovery of legal and other costs (e.g., accountants' fees) and parties are required to bear their own costs. It also expressly prevents the recovery of the costs via the business tenancy (if there is some separate provision in the lease).

   There have been submissions lodged by Real Estate professionals addressing the lack of a provision allowing the arbitrator to make a costs award where one party has acted unreasonably – particularly as the matters
   which reach arbitration are likely to be those where the relations between parties have become the most fraught. It remains to be seen whether the costs provisions will be amended when the Act comes into force.

5. **A party's referral to arbitration and the other party's counterproposal both require "supporting evidence". What is supporting evidence in this context?** Annex B to the Code of Practice provides examples of the kinds of documents the parties and the arbitrators may want to take into account, and which may form the basis of evidence in support of a reference to arbitration. Examples include: existing and anticipated credit / debit balance, business performance history since March 2020, details of assets, details of government assistance received by the tenant, other creditor demands, expert evidence regarding the tenant's current trading position (e.g., from the tenant's accountant).

   As currently drafted, there is no obligation on either party to disclose all relevant evidence (including evidence which may be adverse to that party's proposal) – only "supporting" evidence so it will be interesting to see how the arbitrator will assess the evidence, during the viability assessment.

6. **I am a guarantor under a lease – how will the new arbitration scheme affect me?** As currently drafted, only landlords or tenants are able to refer a matter to arbitration and participate in the arbitration proceedings. It is not currently clear whether the making of an award will prevent a landlord from pursuing a guarantor under a lease.

   The Bill protects guarantors from certain debt recovery enforcement options to allow time for covid arrears debts to be resolved under the new scheme. Although it is not clear what would happen to the debt if the relevant tenant would have grounds to apply for an arbitration award but fails to do so. The failure to specifically address the position of guarantors in the Bill is another point which has been addressed in commentary following the publication of the Bill but again, it remains to be seen whether this will be addressed when the Act comes into force.

How we can help

We can assess what the arbitration timetable means for you in practice and help you navigate your options, whether that be considering timings and strategy, advising on risk or helping you reach an agreement about your arrears to avoid the time and cost of the arbitration process altogether.

Want to know more?

Look out for future updates on the nature of the viability assessment undertaken by the arbitrator, case study examples and options if you can't use the new scheme but still have an unresolved rent arrears dispute.

Contact the team if you would like to discuss.

This note is based on the Bill as it's currently drafted, although it's possible there will be some changes before it becomes law.

Get in touch

Jessica Parry,
Partner
E: jessica.parry@brabners.com
T: 0151 600 3118
M: 07342 998 175

Helena Davies,
Partner
E: helena.davies@brabners.com
T: 0161 836 8925
M: 07557 238 915

Jessica Crowther,
Solicitor
E: jessica.crowther@brabners.com
T: 0161 836 8948
M: 07557 238 913

Andrew Rogers,
Partner
E: andrew.rogers@brabners.com
T: 0151 600 3428
M: 07505 846 454