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What is the **Commercial  
Rent (Coronavirus) Act 2022**  
and what is its impact on  
landlords and tenants in the  
post-COVID-19 era?

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## Who does the Guidance affect?

The Commercial Rent (Coronavirus) Bill very recently received Royal Assent on 24th March 2022, formally becoming The Commercial Rent (Coronavirus) Act 2022 ("the Act").

The Act will apply to debts where there is a business tenancy and the premises of the tenant's business was subject to requirements imposed by Coronavirus regulations (most commonly, to close for business). The definition of a 'business tenancy' is set out in the Landlord and Tenant Act 1954.

The Act applies to all rent debts, which have accrued during the protected period (which runs from 21st March 2020 until the last day the premises or business was required to close, including until 18th July 2021 in England). As such, it is clear that the Act will mainly affect commercial landlords and tenants that have been impacted by the Coronavirus pandemic.

## What have the interim measures achieved since Covid-19?

With commercial landlords and tenants being adversely affected by the Coronavirus pandemic, government legislation has helped protect landlords and tenants in various ways including:

- 1) Restricting forfeiture proceedings, which would otherwise be a non-payment of rent. The Coronavirus Act 2020 has helped to provide protection against forfeiture of leases for commercial tenants who are in default with payments under their leases.
- 2) Limitations on insolvency proceedings, which would otherwise result in directors potentially facing personal liability for the financial distress of their companies. The temporary insolvency measures introduced by way of The Corporate Insolvency and Governance Act 2020 came to an end on 31st March 2021.
- 3) Restricting the use of Commercial Rent Arrears Recovery ("CRAR"), whereby the number of days of outstanding rent has been increased before CRAR can be applied.
- 4) Supporting new tenancies, whereby a landlord is unable to rely upon non-payment or late payment of rent to oppose the grant of a new tenancy during the period of suspension of the right to forfeit.

## What has the Act introduced into Law?

The Act has introduced that a range of arrears shall be recoverable. Particularly, if the sum falls within the protected period, it therefore falls to be apportioned.

The term 'protected period' is relevant in relation to recovering arrears. Tenants that fall under a business tenancy, as defined under the Landlord and Tenant Act 1954, are to be covered under the protected period if they are deemed adversely affected by the Coronavirus pandemic.

Retrospective action is also relevant here. It is understood that any debt claims made between 10th November 2021 and the date the Act came into force, can stay on the application for either party in order to help encourage a resolution in line with the Act.

## Practical Steps

The Coronavirus pandemic has seen several cases where landlords have been unable to recover arrears in respect of their properties and tenants have similarly been unable to pay their rent due to the changing landscape and COVID-19 restrictions. Therefore, it is more important than ever in light of this new legislation that landlords take action as soon as possible. It is important to note that one of the main elements of this new legislation is that commercial landlords will no longer be able to recover any rent arrears (and service charge debts inter alia) that have accrued during the "protected period" via previously available methods such as forfeiture, winding up or bankruptcy petitions. There is a full list on the Government's website regarding the "protected rent debts" that this new legislation shall apply to and BTMK urges landlords and tenants to review those in the first instance.



Commercial landlords will now have a period of six months from the date The Commercial Rent (Coronavirus) Act 2022 comes into force to refer their dispute for arbitration. In simple terms, arbitration is the most formal alternative dispute resolution process whereby an arbitrator will determine their dispute regarding any outstanding rent arrears. Arbitration is governed by the Arbitration Act 1996 ("AA 1996") and the purpose is stated as being "to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense" (s.1(a) AA)

### **What is this new arbitration process and when should this be commenced?**

As above, there is a limited period of time (six months) from the date the Act is passed that commercial landlords shall need to refer their outstanding rent arrears disputes to an arbitrator for determination. The Act was first introduced to the House of Commons on 9th November 2021 and has very recently received Royal Assent on 24th March 2022, formally becoming The Commercial Rent (Coronavirus) Act 2022. BTMK can offer current and accurate legal advice to commercial landlords on their options and the implications of the new legislation at any given time.

This bill received Royal Assent on 24th March 2022 as above, the government announced that the Act came into force on 25th March 2022 on England and Wales. Although at the time of writing the full text of this new Act is not available, it is understood that this new mandatory and binding arbitration process will be an alternative to the options that were previously available to commercial landlords (including forfeiture). This process is aimed to assist commercial landlords in reaching an agreement regarding the rent arrears accrued within the "protected period" and deciding how those outstanding arrears should be dealt with moving forward. As with other areas of legislation, this is new territory as part of the changing landscape that we have seen as a result of the Coronavirus pandemic.

However, the government issued the "Code for practice for commercial property relations following the COVID-19" ("the Code") on 9th November 2021 which provides guidance on how landlords and tenants should approach negotiations regarding rent arrears. The Code focuses on negotiations regarding rent arrears that have accrued as a result of the Coronavirus pandemic. The Code also provides guidance on this new statutory and binding arbitration process and advises landlords and tenants on any relevant evidence that will be considered in the arbitration, along with any principles that may be considered. This binding arbitration, if successful, would eliminate the need for formal Court proceedings.

This binding arbitration system has been introduced by way of the Act and the government intends for this process to assist landlords and tenants in reaching agreement concerning rent payments that have accrued during the "protected period" if they have been unable to reach an agreement between themselves. This is an important aspect as the above-mentioned Code establishes that (where it is affordable to do so), tenants should aim to fulfil the relevant obligations under their Leases (unless an agreement has been reached with the landlord as part of this arbitration process). The Code is therefore clear that if tenants have failed to pay the rent in full as per the provisions within their lease, the parties should attempt to negotiate a solution to their dispute before looking at the arbitration process and considering whether the outstanding debts fall within the scope of the Act. Where such negotiations are successful, landlords and tenants are suggested to explore the use of other forms of alternative dispute resolution including mediation and if these methods are unsuccessful, the parties should refer the dispute to the arbitration process mentioned below.



## Stages of the arbitration process

The proposed arbitration scheme currently has the following stages:

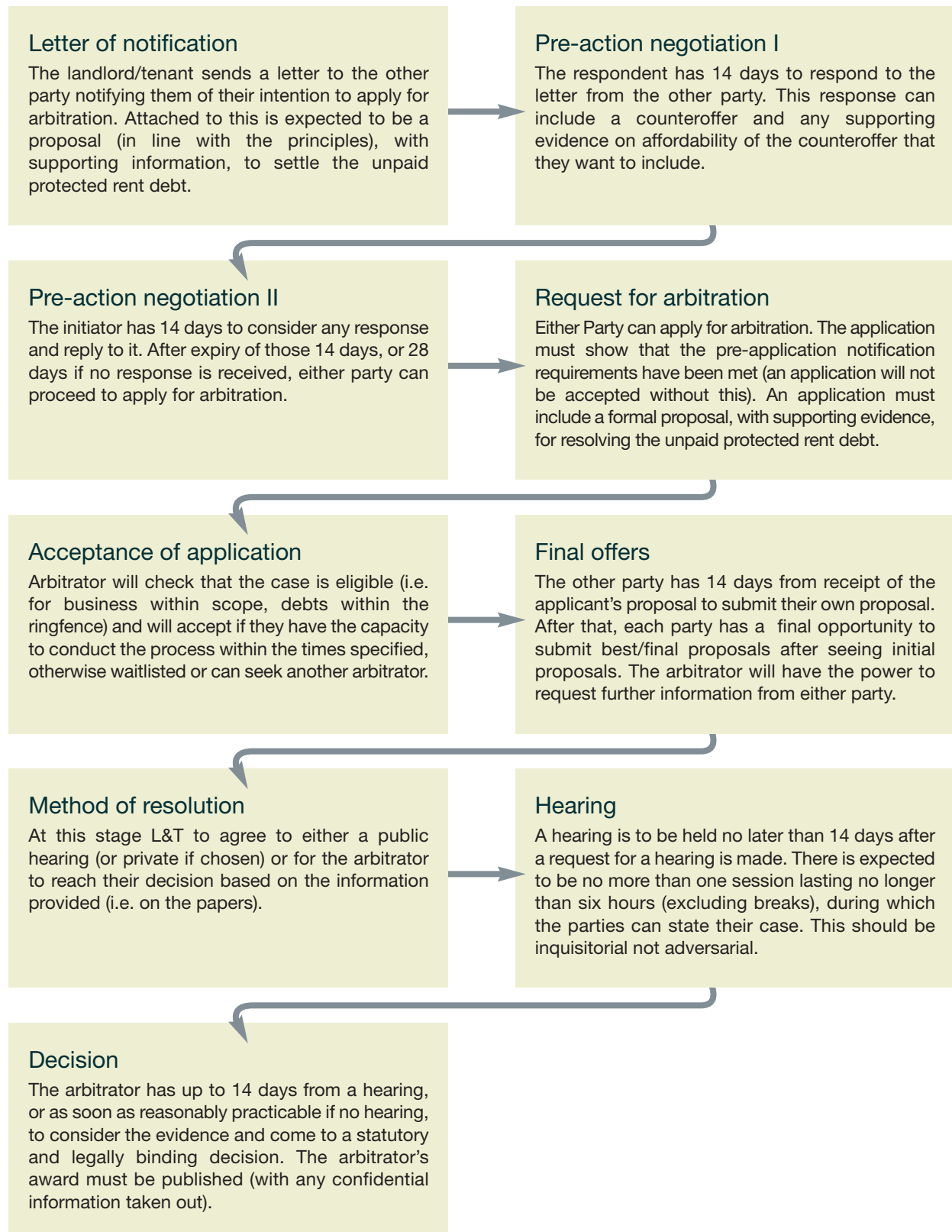


Diagram Source:

Gov.uk website - [www.gov.uk/government/publications/commercial-rents-code-of-practice-november-2021/code-of-practice-for-commercial-property-relationships-following-the-covid-19-pandemic](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)



### **What is the arbitrator required to resolve and what will the arbitrator take into consideration?**

In determining the dispute, the arbitrator shall consider that any award imposed should still preserve the viability of the tenant's business but also consider the solvency and financial position of the landlord. It is therefore important that the arbitrator is fully aware of the facts and resolves the question of whether there is a protected rent debt. If this is the case, the arbitrator will ultimately consider various options including determining whether any/all of the debt should be written off, whether the tenant should be provided with a specific period of time to pay the arrears, whether instalments shall be offered to provide accessibility to the tenant and also consistency to the landlord. Another option that the arbitrator may consider is whether to reduce any interest payable on the outstanding debt.

The arbitrator shall also be required to assess the viability of a business and in doing so, consider the assets of the tenant, the tenant's previous rent history, information on the financial position of the tenant and the impact of the Coronavirus pandemic on the tenant's business. The arbitrator shall also be required to make a similar assessment of the landlord, regarding the landlord's solvency.

### **Enforcing the arbitration award**

However, as with other forms of judgment/arbitration, it is important that landlords are able to enforce an arbitrator's award. It seems that any award under this arbitration scheme will be similar to enforce as with any other arbitrator's award, pursuant to section 66 of the AA 1996. However, there is very little information surrounding this at present and there are therefore several uncertainties. For example, it is unclear whether in the event that a tenant fails to make payment in accordance with the award, that a landlord will be required to apply to Court to restore existing proceedings (that were stayed to allow the arbitration process to happen) to enforce this award or whether the landlord would need to incur further expense in issuing fresh Court proceedings.

However, one of the most substantial uncertainties is the legal standing of the arbitrator's award in relation to any potential forfeiture proceedings that the landlord may wish to issue. For example, it is unclear whether a landlord will still retain the right to forfeit the lease for non-payment of any part of the arbitrator's award. Although it is clear that any restrictions that the landlord has in relation to forfeiture will immediately cease when the arbitration process has concluded, it is arguable that the provision whereby no conduct by the landlord during the moratorium period (excluding an express written waiver) is regarded as the landlord waiving their right to forfeit. Although there have been some arguments that the usual rules pertaining to waiver would be immediately restored once the arbitration process has concluded, it is questionable whether a landlord may lose the right to forfeit.



## How BTMK can help

Ultimately, this new legislation serves to assist commercial landlords in reaching an agreement as to the outstanding rent arrears that have accrued during the Coronavirus pandemic. This process also acknowledges how the Coronavirus pandemic has impacted on commercial tenants and has impacted their ability to trade, with several commercial shops being required to shut and cease trading during the protected period. It is important to note that the Act and arbitration process applies regardless of whether the business was able to continue trading during the protected period by offering a takeaway service for example.

However, this Act hopefully provides commercial landlords a viable option to recover rent arrears in a climate whereby there has been limitations on actions landlords can take to recover rent arrears. During the pandemic, commercial landlords have had limited options with commercial tenants withholding rent and arguing for early terminations and have only been able to threaten further action including winding up petitions and forfeiture (both of which have had moratoriums (and several extensions) during the pandemic preventing landlords from such action).

If you are a landlord and have any outstanding arrears that you wish to recover, please do not hesitate to contact BTMK for expert guidance and sound legal advice. We have an expert litigation and dispute resolution team together with specialist commercial landlord and tenant solicitors who will be able to guide you through this arbitration process and ever-changing area of law in the post-Covid-19 pandemic.

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