HOUSE OF LORDS Library Briefing

# Commercial Rent (Coronavirus) Bill HL Bill 92 of 2021–22

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Table of Contents



In response to the coronavirus pandemic, the Government has required non-essential businesses to close at various times since March 2020. As a result, many businesses have lost income and experienced problems paying their rent. HM Treasury has estimated that by March 2022 rent arrears could total around £9bn, although it expects the actual figure to be lower. Pubs and bars, restaurants, clothing retailers and hotels are thought to owe the most.

In November 2021, the Government announced new legislation to resolve these remaining commercial rent debts. The subsequent Commercial Rent (Coronavirus) Bill is formed of 29 clauses, split into four parts. It includes provisions that would:

- introduce a new binding arbitration process for tenants and landlords to use when they cannot agree how to settle any outstanding rent arrears accrued during the coronavirus pandemic; and
- expand existing restrictions on enforcing business rent arrears so they cannot be used to undermine the arbitration process set out in the bill.

The bill has completed its passage through the House of Commons. Labour supported the bill but argued the Government should give further support to businesses by, for example, reforming business rates. Labour tabled amendments during both public bill committee stage and report stage. However, none were successful, and only one was pushed to a division.

Government amendments were added to the bill without division at report stage. The majority were minor and technical, however, some removed a clause from the bill which would have given a Northern Ireland department the power to make regulations for purposes corresponding to the bill. The Government explained that it had made these amendments at the request of the Northern Ireland Department of Finance and Department of Economy.

The Commercial Rent (Coronavirus) Bill was introduced in the House of Lords on 13 January 2022. Under a new procedure, should the Government receive approval from the House, the bill will be considered in Grand Committee on 27 January 2022 before it receives its second reading, which will take place without debate.

## Table of Contents

# 1. Background to the bill

## 1.1 Commercial rent arrears

Since March 2020, at various times the Government has required non-essential businesses to close to help stop the spread of Covid-19. As a result, many businesses have lost income and experienced problems paying their rent.

Both the Government and other organisations have looked at the scale of the issue. HM Treasury has estimated that by March 2022 rent arrears could total around £9bn, although it expects the actual figure to be lower.[1] Pubs and bars, restaurants, clothing retailers and hotels are thought to owe the most.[2] Reporting in July 2021, Remit Consulting, an independent European management consultancy specialising in real estate, found that since March 2020 investors and property owners had not received £6.4bn from commercial tenants.[3] This equated to £1 in every £6 of rent going unpaid.

Other studies have focused on hospitality businesses. The trade body UK Hospitality estimated that in June 2021 hospitality businesses had accrued around £2.5bn in rent arrears by that point in the pandemic.[4] A study by the British Property Federation in June 2021, which focused on 16,320 retail, hospitality, and leisure leases across the UK, found that:[5]

- 50% of rent owed from March 2020 has been paid;
- property owners and tenants had reached agreement on a further 27% (agreements include new payment plans, waivers, rent holidays and deferrals);
- 23% of rent owed since March 2020 remained unresolved; and
- 14% of tenants were refusing to speak with property owners about how debt should be managed.

Commenting on the findings, the federation said they showed that commercial property owners and tenants are working collaboratively, with "fears of mass evictions, widespread legal action and aggressive landlord behaviour" unfounded.

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[1] Department for Business, Energy and Industrial Strategy, *Commercial Rents (Coronavirus) Bill: Impact Assessment*, 8 November 2021, p 51 (Annex B).

[2] Ministry of Housing, Communities and Local Government, 'Consultation outcome: Call for evidence on commercial rents: responses and analysis', updated 4 August 2021, section 2.1.

[3] Remit Consulting, 'Remit Consulting reveals a shortfall of £6.4 billion in rent income for investors since start of pandemic, as just half of commercial property rents were collected on June quarter day', 2 July 2021.

[4] UK Hospitality, 'UK Hospitality welcomes new Government measures to solve the rent debt crisis', 16 June 2021.

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

## 1.2 Government action on commercial rent arrears prior to the bill

### Measures to protect viable businesses from Covid-19 related arrears

During the pandemic, the Government has taken the view that viable businesses should be preserved.[6] As a result, it has introduced and subsequently extended several temporary measures to protect tenant businesses from eviction or insolvency because of failure to pay rent while Covid-19 restrictions were in place. The three main measures are:

- **Forfeiture:** normally when a business tenant fails to pay rent, a landlord would have the right to terminate their lease early and force the tenant to leave. This is called forfeiture. However, sections 82 and 83 of the Coronavirus Act 2020 set out that a landlord's right to forfeit a lease for non-payment could not be exercised for three months. This provision has since been extended multiple times and is now due to expire on 25 March 2022.
- **Commercial Rent Arrears Recovery (CRAR):** since 2014, CRAR has allowed landlords to take control of a tenant's goods and sell them to recover rent arrears.[7] Prior to the pandemic, it could be used where there were seven days of unpaid rent. In March 2021, this was extended to 90 days.[8] Over time this period was extended further to restrict the use of CRAR while section 82 of the Coronavirus Act 2020 was in force.[9] However, on 25 March 2022, it is due to return to seven days.
- **Winding-up petitions:** before the pandemic, someone owed more than £750 by a business could apply to the court for an order to close down (wind up) that business if they could prove that the company could not pay.[10] From March 2020, courts were unable to make a winding up order where the cause of non-payment of the debt was related to coronavirus.[11] In October 2021, the Government started to phase out this measure, however, winding-up orders can still not be made for

[6] Ministry of Housing, Communities and Local Government, 'Consultation outcome: Call for evidence on commercial rents: responses and analysis', updated 4 August 2021.
[7] Section 72 of the Tribunals, Courts and Enforcement Act 2007; and Taking Control of Goods Regulations 2013.
[8] Taking Control of Goods and Certification of Enforcement Agents (Amendment) (Coronavirus) Regulations 2020.
[9] Taking Control of Goods (Amendment) (Coronavirus) Regulations 2021.
[10] Gov.uk, 'Wind up a company that owes you money', accessed 13 January 2022.
[11] Schedule 10, Corporate Insolvency and Governance Act 2020.

commercial rent debts related to Covid-19.[12] This will end on 31 March 2022.

## Code of Practice: June 2020

In June 2020, the Government—in consultation with a steering group of industry bodies[13]—introduced a voluntary UK-wide *Code of Practice for Commercial Property Relationships during the Covid-19 Pandemic*.[14] The code supported "businesses to come together to negotiate affordable rental agreements".

The code said that tenants who were able to pay their rent should continue to do so, while those who were unable should "communicate with their landlord and pay what they can". It also suggested the following principles to guide negotiations:

- Transparency and collaboration: to act reasonably, swiftly, transparently and in good faith in all dealings.
- A unified approach: to help and support each other in all dealings with other stakeholders.
- Government support: to recognise that government support is to help businesses meet their commitments.
- Acting reasonably and responsibly: to operate reasonably and responsibly, recognising the impact of Covid-19, to identify mutual solutions.

In April 2021, the code was updated to include a template form for use in negotiations.[15] The form aimed to help tenants set out the impact of the pandemic on their financial situation and aid negotiations, or where court action was needed, facilitate a prompt outcome of the case.

## Call for evidence

Alongside updating the code, in April 2021, the Government launched a call

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[12] The Insolvency Service, 'End of temporary insolvency measures', 9 September 2021; and Corporate Insolvency and Governance Act 2020 (Coronavirus) (Amendment of Schedule 10) Regulations 2021.

[13] The steering group was formed of: the British Chambers of Commerce, the British Property Federation, the British Retail Consortium, Commercial Real Estate Finance Council Europe, Revo, Royal Institution of Chartered Surveyors, and UK Hospitality.

[14] Department for Levelling Up, Housing and Communities and Ministry of Housing, Communities and Local Government, 'Code of Practice for commercial property relationships during the Covid-19 pandemic', updated 6 April 2021.

[15] Department for Levelling Up, Housing and Communities and Ministry of Housing, Communities and Local Government, 'Code of practice for the commercial property section', last updated 6 April 2021 (Annex to the Code of Practice).

for evidence which asked for views on the best way to withdraw or replace temporary measures on forfeiture and CRAR "while preserving tenant businesses and the millions of jobs that they support".[16] It set out six options:

1) allow current tenant protection measures to expire;
2) allow the moratorium on commercial lease forfeiture to lapse but retain the insolvency measures and restrictions on the use of CRAR;
3) target existing measures to businesses based on the impact that Covid restrictions have had on their businesses;
4) encourage formal mediation between landlords and tenants;
5) non-binding arbitration; and
6) binding arbitration.[17]

On 16 June 2021, prior to the publication of the call for evidence outcome, Chief Secretary to the Treasury Steven Barclay told the House of Commons that the Government would introduce legislation to "establish a backstop so that where commercial negotiations between tenants and landlords are not successful, tenants and landlords go into binding arbitration". Mr Barclay also explained that until that legislation was on the statute book, existing measures would remain in place, including extending the current moratorium to protect commercial tenants from eviction to 25 March 2022.[18]

In August 2021, the Government published the consultation outcome of its call for evidence on commercial rents.[19] It provided information on the responses received, including the ranking of preferred options. It showed that 49.2% of respondents were in favour of binding arbitration (option six) compared to 27.36% who were actively against it.

Of those respondents, binding arbitration was found to be the option least preferred by landlords, yet was the most popular with tenants. The predominant reason given by tenants for supporting it was because it forced negotiation [with landlords]. Other reasons for support included the belief that it would help stop the abuse of power in negotiations and that the framework it provided would bring clarity. Arguing against the option, landlords said that they believed it would be costly, time consuming and/or management intensive. A small group of respondents also suggested it would undermine existing legislation.

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[16] Ministry of Housing, Communities and Local Government, 'Consultation outcome: commercial rents and Covid-19: call for evidence', updated 4 August 2021.
[17] Ministry of Housing, Communities and Local Government, 'Consultation outcome: call for evidence on commercial rents: responses and analysis: 3. Options', updated 4 August 2021.
[18] HC *Hansard*, 16 June 2021, col 308.
[19] Ministry of Housing, Communities and Local Government, 'Consultation outcome: commercial rents and Covid-19: call for evidence', updated 4 August 2021.

The call for evidence also reported that option six had the least expected insolvencies and the largest number of individual respondents predicting that it would enable employment. Many respondents also reported feeling that it would increase their ability to invest in the future.

In addition, the call for evidence found that both landlords and tenants agreed that the voluntary nature of the code of practice made it less effective.

## 2. New legislation and an updated code of practice

### 2.1 Commercial Rent (Coronavirus) Bill

In November 2021, the Government introduced the Commercial Rent (Coronavirus) Bill in the House of Commons.[20] The bill has 29 clauses, split into four parts. It also has three schedules.

#### Part 1: introductory provisions

Part 1 (clauses 1 to 6) would set out the overall purpose and structure of the bill as well as supply definitions for key terms used within it.

- Clause 1 would explain the purpose of the bill as to establish a binding arbitration process to resolve disputes about certain rent debts. It would also outline its structure and clarify that its provisions would not interfere with tenants' and landlords' ability to reach their own separate agreement outside the scope of the bill and have this enforced.
- Clause 2 would establish definitions for 'rent' and 'business tenancy' for the purposes of the bill. It would mean that rent would include any service charges and interest due on unpaid amounts. A business tenancy would be a tenancy to which part 2 of the Landlord and Tenant Act 1954 would apply.
- Clause 3 would set out what is meant by 'protected rent debt' in the context of the bill. It would enable the arbitration process to be used only by business tenants who were adversely affected by Covid-19 restrictions.
- Clause 4 would define a business tenancy 'adversely affected by coronavirus' as businesses or premises forced to partly or fully close by regulations for any part of the 'relevant period' (defined by the clause as 21 March 2020 to 18 July 2021 (England) or 7 August 2021 (Wales)).
- Clause 5 would explain what is meant by 'protected period' and 'specific coronavirus restriction'. It would mean that any debts

[20] HC *Hansard*, 9 November 2021, col 211.

accrued outside of the protected period (defined by the clause as from 21 March 2020 to either 18 July 2021 in England or 7 August 2021 in Wales, or an earlier date if restrictions on a particular type of business were lifted earlier) would not be eligible for arbitration under the bill. Landlords would therefore be able to pursue these debts via the ordinary channels once the Government's temporary measures are withdrawn.

- Clause 6 would relate to 'the matter of relief from payment'. It would mean that arbitrators would be able to decide if a tenant should be: given relief from payment on any or all protected rent debt; allowed more time to pay the debt; or have any interest owed either reduced or removed.

## Part 2: arbitration

Part 2 (clauses 7 to 22 and schedule 1) would introduce a new binding arbitration process for tenants and landlords to use when they cannot agree how to settle any outstanding rent arrears.

### *Clauses 7 and 8 (approved arbitration bodies)*

- Clause 7 would enable the secretary of state to approve bodies to carry out the functions of an 'approved arbitration body'. It would also set out a process to enable the secretary of state to withdraw their approval and mean that they must publish any approved bodies in a list.
- Clause 8 would set out what functions an 'approved arbitration body' would have, including: keeping a list of approved arbitrators; overseeing cases; managing any resignations, deaths, and new appointments of arbitrators; publishing information on its fees; removing an arbitrator if certain grounds are met; and reporting to the secretary of state on its work when required.

### *Clauses 9 and 10 (references to arbitration by tenant or landlord)*

- Clause 9 would set out the process for referring a dispute about relief from payment to arbitration under the bill. It would require either the landlord or tenant to refer the dispute (make reference to arbitration) within six months of the act passing. The secretary of state would have power to extend this time limit by a statutory instrument which would be subject to the negative resolution procedure.[21]

[21] A statutory instrument laid under the negative procedure becomes law on the day the minister signs it and automatically remains law unless a motion, or a 'prayer', to reject it is agreed by either House of Parliament within 40 sitting days. However, certain financial matters can only be considered by the House of Commons (UK Parliament website, 'Negative procedure', accessed 17 January 2022).

- Clause 10 would outline the steps to be taken by either landlord or tenant before making a reference to arbitration. It would also set out when reference to arbitration cannot be made.

***Clauses 11 and 12 (proposals for resolving the matter of relief from payment)***

- Clause 11 would require those making the reference for arbitration to submit a 'formal proposal' for resolving the dispute along with supporting evidence. The other party would have 14 days to submit its own proposal with evidence. Both parties would have the opportunity to put forward revised proposals for 28 days from their original submission. If the parties and arbitrator agree, these deadlines could be extended.
- Clause 12 would apply to any written statement provided to the arbitrator by either party. It would state that they must be verified by a statement of truth and disregarded if they are not.

***Clauses 13 to 18 (arbitration awards)***

- Clause 13 would set out the awards that an arbitrator can make when deciding on the outcome of a dispute. It would also mean that an arbitrator must dismiss the reference if: the matter had already been resolved by agreement before the reference was made; the tenancy is not a business tenancy; there is no protected debt; or the business is not viable and would not be even if given relief.
- Clause 14 would require the arbitrator to consider against the principles outlined in clause 15 any final proposals put forward by either party before deciding what award to make. If the arbitrator gives the tenant time to pay an amount, the payment date must be within 24 months of the day the award was made.
- Clause 15 would outline the principles an arbitrator must follow when making an award. It would require any award to be aimed at preserving the tenant's business if viable, or restoring and preserving it, if it is not currently viable but could be with the right amount of relief as long as the landlord's solvency is preserved.
- Clause 16 would outline the factors the arbitrator must consider when assessing the viability of a tenant's business or the solvency of a landlord. For the business, it would include considering: the assets and liabilities of the tenant; any other tenancies to which they are party; previous rental payments made under the tenancy; and the impact of coronavirus. For the landlord, it would include assessing assets and liabilities alongside any other information the arbitrator believes appropriate. Any possibility of the landlord or tenant borrowing money or restructuring its business must be disregarded.

- Clause 17 would set out the timings of the arbitrator's award as "as soon as reasonably practicable" after final proposals either have or could be made. For oral hearings, they must make an award within 14 days of the hearing finishing. These deadlines can be extended with agreement from the parties or where the arbitrator considers it reasonable.
- Clause 18 would make the arbitrator publish the award alongside reasons for making it. It would also mean the arbitrator must exclude any confidential information unless they have permission to publish it.

***Clauses 19 and 20 (arbitration fees and oral hearings)***

- Clause 19 would give the secretary of state power to make regulations—which would be subject to the negative resolution procedure—setting out limits on arbitration fees. It would also require the party making the reference (the applicant) to pay fees in advance. However, it would allow arbitrators to reimburse the party as they consider appropriate when making an award.
- Clause 20 would mean an oral hearing must be held within 14 days of a request for one by either party. However, this can be extended. The clause would also provide for similar rules on fees as set out in clause 19, and require any hearings to be held in public unless the parties agree otherwise.

***Clause 21 (guidance)***

- Clause 21 would give the secretary of state the power to issue and revise guidance to arbitrators, landlords and tenants in relation to the bill. Any guidance issued must be published.

***Clause 22 (modification of part 1 of the Arbitration Act 1996)***

- Clause 22 would introduce schedule 1, which would amend the application of the Arbitration Act 1996 to make it consistent with processes set out in the bill. For example, it would omit sections 16 to 19 of the 1996 Act (appointment of arbitrators) as this is already provided for in the bill (clauses 7 and 8).

## Part 3: moratorium on certain remedies and insolvency arrangements

Part 3 (clauses 23 to 26 and schedules 2 and 3) would expand existing restrictions on enforcing business rent arrears so they cannot be used to undermine the arbitration process set out in the bill.

- Clause 23 would introduce schedule 2, which would establish several measures to prevent a landlord who is owed protected rent debt from using other certain remedies[22] during the 'moratorium period'. This period would begin on the day the act was passed and end the day that the arbitration under part 2 of the bill concluded, or where it had not been referred for arbitration, on the last day it could have been.
- Clause 24 would prevent a landlord or tenant from entering into certain insolvency arrangements[23] during the 'relevant period'. The period would begin with the day on which an arbitrator was appointed and would end 12 months after the arbitrator made an award; the day of dismissal where the arbitrator dismissed the reference; the day of the appeal decision where the arbitrator made an award but it was dismissed on appeal; or the day the arbitration was abandoned or withdrawn.
- Clause 25 would prevent either party from using any other process other than under part 2 of the bill during the moratorium period without agreement from the other party.
- Clause 26 would introduce schedule 3 which would restrict a landlord's ability to apply for winding-up petitions and petitions for bankruptcy orders during the moratorium period.

### Part 4: final provisions

Part 4 (clauses 27 to 29) would set out the scope and extent of the bill.

- Clause 27 would enable the secretary of state to apply the provisions of the bill to business tenancies whose premises were forced to close by any future coronavirus restrictions. These regulations would be subject to the affirmative procedure.[24]
- Clause 28 would bind the crown, meaning that it would apply to the crown estate, a large landowner.[25]
- Clause 29 would set out the territorial extent of the bill, its commencement and short title. Parts 1 to 3 would apply mainly to England and Wales (exceptions are set out in subsections 2

[22] These would include: making a debt claim in civil proceedings; using the CRAR; enforcing a right of re-entry or forfeiture; or using a tenant's deposit.
[23] These insolvency arrangements include a company voluntary arrangement under section 1 of the Insolvency Act 1986; an individual voluntary arrangement also under the 1986 Act; and applications for a Companies Act 2006 insolvency compromise.
[24] A statutory instrument made under the affirmative procedure must be actively approved by both Houses of Parliament. However, certain statutory instruments on financial matters are only considered by the Commons (UK Parliament website, 'Affirmative procedure', accessed 17 January 2022).
[25] The Crown Estate, 'About us', accessed 17 January 2022.

and 3), while part 4 would extend to the whole of the United Kingdom.[26]

## 2.2 Updated code of practice

The Government also published an updated code of practice which aligns with the bill. The code sets out the arbitration process established by the bill and the principles which should guide landlords and tenants in negotiating rent debts.[27] It repeats the original code's provisions about transparency and collaboration, taking a unified approach and acting reasonably and responsibly. However, it also said parties should reach a swift resolution "to avoid costly and burdensome processes".

The new code outlined that if under the provisions of the bill a dispute ends up being resolved through binding arbitration, the following principles should be adhered to:

- the aim should be to preserve viable tenant businesses;
- this preservation should not be at the expense of the landlord's solvency; and
- where it is affordable for a tenant to fully meet their rent payments, they should do so without delay and any rent relief should be no greater than is necessary for the tenant business to afford the payment.

## 2.3 Government impact assessment of the bill

The Government's impact assessment for the bill set out three options for consideration:[28]

- do nothing (option 1);
- introduce a non-binding arbitration process (option 2); or
- introduce a binding arbitration process which would be open to tenants who were forced to close (option 3a) or would be open to all businesses which closed forcibly or voluntarily (option 3b).

The bill represents option 3a, which was the 'preferred option'. The impact assessment claimed these measures would create more certainty for

[26] The table in annex A of the Explanatory Notes to the bill sets out further detail on its territorial extent (p 25).
[27] Department for Levelling Up, Housing and Communities, 'Code of practice for commercial property relationships following the Covid-19 pandemic', 9 November 2021.
[28] Department for Business, Energy and Industrial Strategy, *Commercial Rents (Coronavirus) Bill: Impact Assessment*, 8 November 2021, p 1.

businesses and referred to the findings of the call for evidence.[29] It also found that compared to option 1, such a process would avoid 200 business insolvencies and 1,650 job redundancies.[30] In addition, the impact assessment contended that other benefits included avoiding the costs of court proceedings, and preserving payments to other business creditors as a result of businesses avoiding insolvency.

Focusing on the costs of option 3a, the impact assessment said that they would include lost working time (£1.6m), legal representation (£9.2m) and arbitration costs (£24.4m).[31] It also said that there would be familiarisation costs for businesses and arbitrators.

The impact assessment estimated that 15,500 businesses would be eligible under option 3a, with around 7,500 going to arbitration taking between three to fifteen months to resolve.[32]

### 2.4 External commentary on the bill

The Government's announcement of the bill and the new code of practice included comments from relevant trade bodies, for example, the British Property Federation and the British Independent Retailers Association[33] Overall, the bill and updated code of practice were welcomed. However, Helen Dickinson, chief executive of the British Retail Consortium, said that while she supported the principle of compulsory arbitration, "the devil will be in the detail on issues around what tenant viability really means in practice and the power of arbitrators".

In addition, Kate Nicholls, chief executive officer of UK Hospitality, said that the process "must take into account the exceptional and existential level of pain that hospitality businesses have faced over the last 18 months". She argued that tenants and landlords should share the burden of the impact of lockdowns.

In oral evidence to the public bill committee, chief executive of the British Property Federation Melanie Leech raised concerns that the process set up by the bill could be inaccessible to "larger players": a tenant with multiple landlords or a landlord with multiple tenants.[34] Assistant director for policy

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[29] Department for Business, Energy and Industrial Strategy, *Commercial Rents (Coronavirus) Bill: Impact Assessment*, 8 November 2021, pp 9 and 12.
[30] ibid, p 34.
[31] ibid, p 32.
[32] ibid, pp 30 and 32.
[33] Department for Business, Energy and Industrial Strategy and Department for Levelling Up, Housing and Communities, 'New laws and code to resolve remaining Covid-19 commercial rent debts', 9 November 2021.
[34] HC *Hansard*, 7 December 2021, col 18.

and external affairs at the Chartered Institute of Arbitrators Lewis Johnston also raised concerns that due to the emphasis on simplicity, accessibility and the management of costs, the scheme could struggle to accommodate "intricate, large-scale cases".[35]

## 3. Consideration of the bill in the House of Commons

The Government introduced the bill in the House of Commons on 9 November 2021.[36] In the updated code of practice, the Government said that it would aim to pass the bill by 25 March 2022.[37]

### 3.1 Second reading

The bill's second reading took place in the House of Commons on 24 November 2021.[38] Introducing the bill, the Parliamentary Under Secretary of State for Business, Energy and Industrial Strategy, Paul Scully, said that "we need to begin the work of preparing for a new economy post Covid".[39] He explained that the bill would end the temporary restrictions put in place to support businesses and implement "a simple, binding arbitration system" to resolve the outstanding unpaid rent debt.

Responding for the Labour Party, the then Shadow Minister for Housing, Communities and Local Government, Ruth Cadbury, welcomed the bill.[40] However, Ms Cadbury outlined four areas where she argued further scrutiny was needed:[41]

- The level of arbitration fees: to ensure they are not "excessive".
- The assessment of viability: to ensure the process is fair and reasonable.
- Transparency and consistency in the arbitration and appeals process: to ensure a fair balance between landlords and tenants.
- Timing: to ensure that the process can be in place by March 2022.

Ms Cadbury said that further to the bill, the Government needed to take additional action to support businesses.[42] For example, she called for reform of the business rates system. Also representing Labour, Seema Malhotra,

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[35] HC *Hansard*, 7 December 2021, col 27.
[36] HC *Hansard*, 9 November 2021, col 211.
[37] Department for Levelling Up, Housing and Communities, 'Code of practice for commercial property relationships following the Covid-19 pandemic', 9 November 2021.
[38] HC *Hansard*, 24 November 2021, cols 383–401.
[39] ibid, col 383.
[40] ibid, col 387.
[41] ibid, col 389.
[42] ibid, col 388.

Shadow Minister for Business, Energy and Industrial Strategy, asked the Government how they would communicate with businesses to ensure they were aware of the opportunities provided by the legislation.[43] Ms Malhotra also asked if the plan would be reviewed to decide if a six-month extension was needed.

For the Liberal Democrats, Sarah Olney, spokesperson for business, energy and industrial strategy, welcomed the bill but said she was disappointed it has not been passed sooner.[44] Ms Olney raised similar concerns about how arbitrators would assess a business's viability and called on the Government to do more to support high street businesses, focusing on reforming business rates and scrapping upward-only rent reviews.[45]

Addressing some of the concerns raised, Mr Scully said that the legislation was not passed earlier "so that we could get the bill right".[46] He also explained that the Government had worked with arbitration services in recent months to ensure that the expertise and capacity needed would be available [to deal with the cases].

On the issue of informing businesses of the plans, Mr Scully said that the Government would have direct communication with business-representative organisations, banks, and accountants. He also said that he hoped the bill's passage through Parliament would help raise its profile.

Focusing on arbitrations fees, Mr Scully said that arbitration bodies would set the price, but that the secretary of state would have delegated powers to place a cap. However, he did not confirm if these powers would be used.

On assessment of viability, Mr Scully explained that there was no specific definition because business models "vary hugely". However, he highlighted provisions in clause 16 of the bill and a "non-exhaustive list of evidence" in the code of practice which can be used to help decide viability.

### 3.2 Committee stage

A House of Commons public bill committee sat four times to examine the bill between 7 and 14 December 2021.[47] No changes were made to the bill during these sittings.

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[43] HC *Hansard*, 24 November 2021, col 397.
[44] ibid, col 392.
[45] ibid, cols 393–4.
[46] ibid, col 398.
[47] UK Parliament website, 'Commercial Rent (Coronavirus) Bill: Committee stage', accessed 12 January 2022.

### *Evidence from expert witnesses*

The committee took evidence from expert witnesses for the first two sittings.[48] These witnesses included:

- UK Hospitality;
- The British Retail Consortium;
- The British Property Federation;
- Lightstone Properties;
- Chartered Institute of Arbitrators;
- UK Active;
- The Federation of Small Businesses; and
- The British Independent Retailers Association.

Highlighting the evidence heard from these organisations during the fourth sitting of the public bill committee, Labour's Ruth Cadbury noted that in some submissions witnesses "with significant legal and other professional expertise in the area of landlord and tenant law, arbitration and settlements still express significant concerns about the detail of the way the bill is drafted"[49]. Responding, Mr Scully said that the Government would not rush the legislation and beyond the bill would "continue to engage with stakeholders, including arbitration services, landlords and tenants to ensure we get it right".

Between 8 and 15 December 2021, a number of organisations also submitted written evidence on the bill.[50]

### *Division on limiting arbitration fees*

During the third and fourth sittings, Labour tabled eight amendments and one new clause. However, no amendments were made to the bill and only one was pushed to a division (amendment 4).

Amendment 4 would have required the secretary of state to set limits on arbitration fees by making regulations. Speaking to the amendment, Seema Malhotra said that arbitration fees and expenses "should be proportionate to the arrears that are the subject of the dispute" and should not be too costly for either landlords or tenants.[51]

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[48] Public Bill Committee, *Commercial Rent (Coronavirus) Bill*, 7 December 2021, session 2019–22, 1st sitting, cols 1–42.
[49] Public Bill Committee, *Commercial Rent (Coronavirus) Bill*, 14 December 2021, session 2019–22, 4th sitting, col 81.
[50] UK Parliament website, 'Commercial Rent (Coronavirus) Bill: publications: written evidence', accessed 14 January 2022.
[51] Public Bill Committee, *Commercial Rent (Coronavirus) Bill*, 14 December 2021, session 2019–22, 4th sitting, col 70.

Responding, Mr Scully argued that the amendment was unnecessary as the Government had designed the scheme to be affordable and was "working with arbitrators to agree the cost schedules".[52] He also argued that:

> A market-based approach is the optimum way to ensure that, on the one hand, there is enough capacity in the system to deal with the case load and that, on the other hand, fees are affordable.[53]

Amendment 4 was defeated on division by 10 votes to 7.[54]

### 3.3 Report stage

Report stage was held in the House of Commons on 12 January 2022, where both the Government and the Labour party tabled amendments to the bill. A number of Government amendments were made without division. However, no Labour amendments were divided upon or added to the bill.

#### *Government amendments*

All of the following Government technical amendments were agreed without division at report stage:

- Amendments 1 and 2 amended the definition of 'service charge' in clause 2 to cover fixed and variable costs as well as costs incurred by the landlord for insuring against loss of rent.
- Amendments 3 and 8 amended clauses 10 and 24 so that the provisions relating to company voluntary arrangements or certain restructurings apply to companies as well as limited liability partnerships.
- Amendments 4 and 7 amended clauses 19 and 20 to clarify that there is a general rule that the party that has paid the fees should be reimbursed half the amount unless the arbitrator decides it should be a different proportion (which could be zero).
- Amendment 5 amended clause 19 to clarify that apart from any reimbursement of arbitration fees (as set out above), parties are responsible for their own legal or other costs.
- Amendment 6 amended clause 19 by stating that any costs incurred in connection with arbitration cannot be recovered under any existing clause in the lease.

At the request of the Northern Ireland Department of Finance and Department of Economy, which make up part of the Northern Ireland

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[52] Public Bill Committee, *Commercial Rent (Coronavirus) Bill*, 14 December 2021, session 2019–22, 4th sitting, col 71.
[53] ibid.
[54] ibid, cols 71–2.

Executive[55], the Government also tabled amendments 18 and 19 to remove clause 28 from the bill. The clause would have given a Northern Ireland department the power to make regulations for purposes corresponding to the bill. Commenting on the decision, Mr Scully said that it was taken for several reasons, including:

> [T]he availability of existing dispute resolution facilities, plus a lack of compelling evidence that rent debt in Northern Ireland is on a scale to require additional measures.[56]

He also said that the removal of clause 28 meant that amending the extent provision in clause 30 (2) (now clause 29) was necessary. Amendments 20 and 21 made these amendments.

***Labour amendments***

During report stage, the Opposition tabled 10 amendments. None were pushed to a division or added to the bill. Speaking during the debate, Seema Malhotra explained that her party had taken "a constructive approach to scrutinising this legislation" and said that she hoped the minister would "respond favourably on the points we have raised".[57] The amendments tabled are discussed in greater detail below:

- **Three-month review of arbitration principles**

  Labour's new clause 1 would have required the secretary of state to review whether sections 15 and 16 of the bill (which outline the principles an arbitrator must follow when making an award and when assessing the viability of a tenant's business or the solvency of a landlord) had been consistently interpreted by approved arbitration bodies within three months of the act becoming law and publish or amend guidance following this review.

  Speaking to the amendment, Ms Malhotra said that her party thought such a review would be "welcomed by landlords, tenants and arbitrators and would ensure that the system is well understood".[58]

  Responding for the Government, Mr Scully said that a review of the process could slow it down and that the secretary of state already had powers to request a report from approved arbitration bodies covering their work under the bill.[59] He also

[55] Northern Ireland Executive, 'Government departments', accessed 19 January 2022.
[56] HC *Hansard*, 12 January 2022, col 618.
[57] ibid, col 614.
[58] ibid, col 611.
[59] ibid, col 614.

argued the existing requirement for arbitrators to publish the detail of their awards would show how they have applied the principles.

- **Definition of business tenancy**

  Amendment 9 would have broadened the definition of a business tenancy to include those situations where the property was not occupied by the tenant.

  During the debate, Ms Malhotra explained that only tenancies in which the tenant was in occupation of the property were covered by the process set out in the bill.[60] She gave examples of why this could be problematic, highlighting the situation of a head lease and a sub-lease franchising arrangement, where the franchisee is the sub-tenant. In this case, the head lease would not be the occupier and would not have access to the process.

  On this issue, Mr Scully explained that the bill defined a business tenancy as those which part 2 of the Landlord and Tenant Act 1954 applied.[61] He said that "the Government intend such property to be considered occupied even if it has mandated to close for some time in full or in part", and that "a tenant will still be in occupation if they are operating their business remotely and intend to return".[62]

- **Number of arbitrators**

  Amendment 13 would have placed a duty on the secretary of state to ensure that approved arbitration bodies have enough arbitrators.

  Seema Malhotra argued that it would give the secretary of state an "explicit and ongoing duty" to ensure that there are enough arbitrators available.[63]

  Responding, Paul Scully said that the Government's engagement with arbitration bodies has suggested that its market-based approach was the right one and that arbitrators can take on

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[60] HC *Hansard*, 12 January 2022, col 611.

[61] "[T]his part of this act applies to any tenancy where the property comprised in the tenancy is or includes premises which are occupied by the tenant and are so occupied for the purposes of a business carried on by him or for those and other purposes" (section 23, Landlord and Tenant Act 1954).

[62] HC *Hansard*, 12 January 2022, col 615.

[63] ibid, col 613.

more than one case at a time.[64]

- **Date referrals for arbitration can be made from**

  Amendment 10 would have changed the date referrals could be made to the arbitration process from the day the act is passed to 25 March 2022.

  Speaking to the amendment, Ms Malhotra voiced concerns that depending on the timing of the bill receiving parliamentary approval, applicants may not get the full six months to access its provisions.[65]

  Commenting on the issue, Mr Scully restated that the Government's aim was that the bill, and the arbitration system it established, come into force as soon as possible.[66] He also said that the Government intended to keep the temporary measures to protect tenant businesses from evictions or insolvency in place until the bill was passed.

- **Evidence accompanying formal proposals**

  Amendment 14 would have revised clause 11 to require a formal proposal submitted by either party to the arbitrator to be accompanied by all relevant evidence.

  Ms Malhotra highlighted that clause 11 would require a reference to arbitration to include a formal proposal accompanied by supporting evidence.[67] However, she argued that "a requirement to submit supporting evidence is not the same as full disclosure on an open book basis" and this "lack of obligation to make full disclosure prevents the other party from making an informed counter-proposal".

  Responding, Mr Scully said that arbitrators would have the discretion to call for further evidence where it was considered necessary. He also argued that widening the clause could "lead the paper-based arbitration process to become lengthy, inefficient and costly for the parties".[68]

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[64] HC *Hansard*, 12 January 2022, col 615.
[65] ibid, col 611.
[66] ibid, col 615.
[67] ibid, col 613.
[68] Ibid, col 616.

- **Deadline for awards**

  Amendment 15 would have meant that awards must be given within 14 days whether there was an oral hearing or not.

  Speaking on the amendment, Ms Malhotra highlighted the difference in deadline for award between where there is an oral hearing (14 days) and where there is not (as soon as reasonably practicable).

  On the issue, Mr Scully said that he expects most cases to be resolved quickly, but that clause 17 provides arbitrators with "the necessary flexibility to take additional time to make decisions on more complicated cases".[69]

- **Limit on arbitration fees**

  Amendment 16 would have required the secretary of state to place a limit on arbitration fees.

  Seema Malhotra argued that "given the concerns of stakeholders and the financial pressures they are facing", the Government should set a limit on fees.

  However, Paul Scully said that setting a limit could reduce the number of arbitrators able to act and could "undermine the arbitration mechanism in the bill".[70] He also argued that there was no evidence that a limit is needed, and that the secretary of state has the power to act if required.

- **Adverse cost award**

  Amendments 11 and 12 would have enabled an arbitrator to make an award where they consider that the conduct of a party before or during the arbitration proceedings was unreasonable or improper and had caused the other party to incur costs.[71]

  Ms Malhotra argued that the bill should "go further" to incentivise tenants and landlords to approach the process "fairly and in the spirit of resolution".[72]

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[69] HC *Hansard*, 12 January 2022, col 616.
[70] ibid.
[71] ibid, col 613.
[72] ibid.

Mr Scully responded that the amendments could result in "prolonged arguments on costs, appeals and enforcement" and encourage the use of legal and other support where it was not needed.[73] He argued that it could slow the process down and increase costs.

- **Restrictions on county court and high court judgments**

The temporary measures introduced to protect tenants at the start of the pandemic did not include restrictions on county court and high court judgments. As drafted, the bill would place a restriction on these remedies which is retrospective: schedule 2 would put a stay on any debt proceedings made after 10 November 2021. Amendment 17 would remove the date and mean that a party could apply to a court to put a stay on any debt claim that relates to protected rent debt.

Ms Malhotra said that this amendment was "an issue of basic fairness" and said that the date set in the bill meant that a landlord who started proceedings before 10 November 2021 was "arguably in a better position than those who held off and pursued negotiations with their tenant".[74]

In response, Mr Scully said that the date included was not arbitrary and explained that it was linked to the introduction of the bill and the Government's announcement of its policy.[75]

### 3.4 Third reading

Third reading took place immediately after report stage on 12 January 2022. The minister, Paul Scully, thanked members for their contributions during the debates. He said that the bill is "purposefully narrow and focused" and "demonstrates the Government's commitment to supporting the orderly resolution of commercial debt accrued during the pandemic".[76]

For Labour, Seema Malhotra set out her party's continued support of the bill.[77] However, she also argued that it could be improved and said that she hoped the arguments made by Labour during its Commons stages would be helpful as the bill progresses through the House of Lords.

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[73] HC *Hansard*, 12 January 2022, col 616.
[74] ibid, col 612.
[75] ibid, col 617.
[76] ibid, cols 620–1.
[77] ibid, col 621.

## 4. Procedure in the House of Lords: second reading

The House of Lords recently approved a report from the Procedure and Privileges Committee which set out a new procedure to allow uncontroversial bills to be debated before second reading in Grand Committee.[78] Second reading would then be taken without debate. However, this new procedure can only be used with the agreement of the House.

The Government has tabled a motion for 20 January 2022 to seek agreement from the House to deal with the Commercial Rent (Coronavirus) Bill via this new procedure.[79] If agreed to, the bill will be debated in Grand Committee on 27 January 2022.

[78] House of Lords Procedure and Privileges Committee, *5th Report of Session 2021–22*, 3 December 2021, HL Paper 122 of session 2021–22, p 1; and HL *Hansard*, 10 January 2022, cols 810–15.

[79] UK Parliament website, 'House of Lords business: order paper for 20 January 2022', accessed 19 January 2022.

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