The Commercial Rent (Coronavirus) Bill: How will the arbitration stage work?

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This article considers the clauses of the Commercial Rent (Coronavirus) Bill which provide for arbitration in relation to the relief which can be granted to some business tenants who owe rent arrears which arose in a defined "protected period".

The position in summary

- The Bill provides for an entirely new legal power to grant relief and uses novel concepts.
- It is inevitable that there will be various disputes of law (as well as detailed disputes of fact) as to the operation of the new law.
- The jurisdiction to be created under the new law only applies to rent which is "due" or "payable". If the tenant says that it has some other defence to the rent claimed, does the arbitrator have power to determine that issue as one going to his jurisdiction?
- The Bill provides for legal (as well as factual) issues arising in this new jurisdiction to be decided by arbitration and not by the courts. Do the courts have a concurrent jurisdiction to determine whether any rent is "due"? In some circumstances, the court can determine an issue as to the jurisdiction of the arbitrator.
- The Bill provides for arbitration bodies to be approved. Their functions extend well beyond appointing an arbitrator or a panel of arbitrators.
- The approved arbitration body may appoint a sole arbitrator or a panel of arbitrators. So it is not necessarily the case that there will be a sole arbitrator.

- There is no guidance as to the type of arbitrator who is to be appointed, such as a lawyer, a valuer or a person with business experience. The Code of Practice, para. 74, stresses the need for experience in business finance and commercial negotiations. Does this indicate that the intention is that the arbitrator will not be a lawyer?
- The parties might disagree as to which approved body should be asked to appoint. There might be an unseemly race for one party to make its reference ahead of the reference of the other party.
- Either party can insist on an oral hearing of the arbitration. An oral hearing must be held in public unless all parties agree otherwise. In that respect, the statutory arbitration will be significantly different from a contractual arbitration, where a party has a right to privacy.
- If the oral hearing is in public, the Bill does not expressly give the arbitrator a power to maintain confidentiality in relation to some of the evidence or submissions; compare the position as to the exclusion of confidential information from the arbitration award.
- The Bill expects the arbitration to be dealt with expeditiously. The Code of Practice states that any oral hearing should not last more than 6 hours. It is easy to see that there will be cases where the time scales which have been suggested will be far too short.
- Arbitration fees are to be shared 50/50 unless the arbitrator directs otherwise. Each party must bear its own legal or other costs. There is no provision for the arbitrator to make an adverse order for costs even where one party has acted unreasonably.
- This Article draws attention to the key features of the statutory arbitration and, in particular, those features which differ from those of a typical contractual arbitration.

The Commercial Rent (Coronavirus) Bill has been eagerly awaited and has already been the subject of considerable legal discussion. The Government plainly hopes that most cases to which the new law will apply will be the subject of negotiation and/or

mediation resulting in settlement which will avoid the need for arbitration. However, any such negotiation or mediation will be against the background of the new law and will take into account what might happen if the matter were to be decided at an arbitration. Even in advance of the Bill becoming law, it is worth giving early consideration as to how such an arbitration might proceed.

The Bill has 30 clauses and 3 schedules, contains a number of key definitions, creates an entirely new legal power to grant relief and uses novel concepts. It is inevitable that there will be various disputes of law (as well as detailed disputes of fact) as to the operation of the new law.

It is worth mentioning one legal issue which may involve an issue of jurisdiction. What if the landlord contends there are rent arrears and refers the matter to a statutory arbitrator and is met by the argument that no rent is "due" because the tenant has a defence quite apart from the new law? If no rent is "due", then there is nothing to refer to the statutory arbitrator. Does the arbitrator have jurisdiction to determine that issue? The AA 1996, ss. 30-32 deal with challenges to the jurisdiction of the arbitrator. An arbitrator can rule on his own jurisdiction. Further, the wording of clause 13(2)(c) might be said to give the arbitrator power to determine that issue. (In other respects, I will not comment on the various legal issues that might arise. If I were to be appointed to conduct an arbitration under the new law I would wish to keep an open mind on any relevant legal issues.)

The arbitration will be a statutory arbitration rather than an arbitration pursuant to an arbitration agreement. Part I of the Arbitration Act 1996 ("AA 1996") applies to a statutory arbitration, subject to certain adaptations and exclusions: AA 1996, ss. 94-98. The Bill contains further modifications to the operation of the AA 1996: clause 22 and schedule 1.

The Bill provides for legal (as well as factual) issues arising in this new jurisdiction to be decided by arbitration. If the arbitrator can rule on whether any rent is "due", it would seem that the courts have concurrent jurisdiction to determine that issue. Further, AA 1996, s. 32 allows the court to determine a question as to the jurisdiction of the

arbitrator. In other respects, any attempt to litigate in court legal issues (which are within the jurisdiction of the arbitrator) and bypass arbitration would be likely to be blocked by the courts pursuant to AA 1996, ss. 9 and 95. An arbitrator once appointed can in some circumstances permit a legal issue to be referred to the courts but that can only happen in limited circumstances: see Arbitration Act 1996, s. 45.

The Bill permits either the landlord or the tenant to refer to arbitration the matter of relief from payment, within 6 months of the Bill being enacted. This period may be extended by regulations made by the Secretary of State. The temporary moratorium on the enforcement of protected rent debts applies during the period within which a reference may be made. The moratorium will continue thereafter until any arbitration concludes.

The Bill provides for either the landlord or the tenant to refer the question of relief from payment to an approved arbitration body. We do not yet know who these bodies will be so we do not know whether they will include the Bar Council, the Law Society, the RICS, the established arbitration bodies or commercial organisations. A landlord or a tenant is given the right to choose, unilaterally, to which approved body it makes a reference.

The Bill gives an approved arbitration body a number of significant functions; its functions are not restricted merely to the appointment of an arbitrator. An approved arbitration body is required to (1) maintain a list of arbitrators, (2) appoint an arbitrator or a panel of arbitrators from its list, and (importantly) (3) set, collect and pay fees, (4) oversee any arbitration where it has made the appointment and (5) remove an arbitrator appointed by it.

The approved arbitration body may appoint a sole arbitrator or a panel of arbitrators. So it is not necessarily the case that there will be a sole arbitrator.

There is no guidance as to the type of arbitrator who is to be appointed, such as a lawyer, a valuer or a person with business experience. The Code of Practice, para. 74, stresses the need for experience in business finance and commercial negotiations. Does this indicate that the intention is that the arbitrator will not be a lawyer? The type

of arbitrator may depend on the approved arbitration body to which the matter is referred and the names included in the list kept by it. The parties might disagree as to which approved body should be asked to appoint. There might be an unseemly race for one party to make its reference ahead of the reference of the other party.

The following question might arise. Could the parties agree on the number of arbitrators and/or the identity of the arbitrator? It seems to me that for there to be a statutory arbitration pursuant to the new law, the arbitrator(s) must be appointed by an approved arbitration body and not consensually by the parties. However, the parties could inform the approved body of their joint wishes and seek to persuade it to give effect to those wishes. However, an approved body can only appoint an individual who is on the list kept by it. No doubt it could add a person put forward by the parties to that list but only if it considered that to be appropriate.

Could the parties agree to have a contractual arbitration governed by the AA 1996 in place of a statutory arbitration? It seems to me that they could, pursuant to clause 1(3)(a), but if they were to go down that route they would have to have a detailed contract which spelt out their agreement as to the jurisdiction and functions of the arbitrator. Also, the extension of the moratorium provided for in the Bill only applies in the case of a statutory arbitration so that question would also have to be addressed in any ad hoc agreement.

In many respects, the statutory arbitration will proceed in the same way as a contractual arbitration. Thus, the following provisions (amongst others) of the AA 1996 apply to the statutory arbitration (albeit with minor modifications in some cases):

- s.33, the general duty of the tribunal;
- s.34, procedural and evidential matters;
- s.35, consolidation of proceedings and concurrent hearings;
- s.36, legal or other representation;
- s.37, power to appoint experts, legal advisers or assessors.

In a typical contractual arbitration, an arbitrator will issue directions at an early stage. The Bill itself gives directions requiring both parties to set out their cases (making "a

formal proposal") together with supporting evidence: clause 11. The formal proposals are given a significant status when it comes to the award which the arbitrator can ultimately make: see clause 14. The arbitrator may nonetheless wish to give early directions as to disclosure and witness statements, expert's reports and other matters (such as consolidation).

The Bill seems to contemplate that an arbitrator will consider the matter in two stages. The first stage, identified in clause 13, concerns whether the reference ought to be dismissed on certain specified grounds (one of which relates to the viability of the tenant's business). The second stage, identified in clause 14, relates to the substantive award on the matter of relief from payment; this second stage will also involve an assessment of the viability of the tenant's business. It remains to be seen whether it will be appropriate to consider questions of viability on two occasions or whether the two stages need to be considered together on the question of viability.

Either party can insist on an oral hearing of the arbitration. An oral hearing must be held in public unless all parties agree otherwise. In that respect, the statutory arbitration will be significantly different from a contractual arbitration, where a party has a right to privacy. If the oral hearing is in public, the Bill does not expressly give the arbitrator a power (on the application of a party) to maintain confidentiality in relation to some of the evidence or submissions; compare the position as to the exclusion of confidential information from the arbitration award.

An arbitrator must "publish" his award. He must give reasons for his award. Obviously, the arbitrator has to make the award available to the parties. Would the arbitrator be obliged to provide a copy to any third party, including the press, who asked for a copy? Would the position be different if there had been an oral hearing which the parties agreed should not be in public? A party is apparently free to provide the award to third parties. Again, would the position be different if there had been a private oral hearing? However, the arbitrator is required to exclude confidential information from the award which is published unless the relevant person consents to the inclusion of that information.

The Bill specifies periods of 14 days or 28 days for various steps to be taken. Some of these periods can be extended. If a party requests an oral hearing, the hearing must take place within 14 days from receipt of the request: clause 20(2). Where an oral hearing is held, the arbitrator must make an award within 14 days from the conclusion of the hearing: clause 17(2). Both of these periods of 14 days can be extended. The Code of Practice, para. 67(e) states that the hearing should not last more than 6 hours (excluding breaks). It is easy to see that there will be cases where these periods will be considered to be far too short.

It is for the arbitration bodies to set fees for the arbitration. The Secretary of State has a power to specify limits on fees. The Code of Practice, para. 73, states that it is to be expected that fees will be variable to reflect the amount of the arrears in question.

The Bill distinguishes between arbitration fees and expenses and the parties' own legal or other costs. As to the arbitration fees and expenses, the default rule is that they are borne 50/50 but the arbitrator can provide otherwise. Each party must bear its own legal or other costs. There is no provision for the arbitrator to make an adverse order for costs even where one party has acted unreasonably.

The award of one arbitrator (or panel) on a point of law is not binding on any other arbitrator (or panel) but may have persuasive force. An award may be challenged in the courts in the ways permitted by the AA 1996, ss. 67 – 69.

These are the key points. Much more could be, and no doubt in due course will be, said on other points.

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