COMMERCIAL RENT (CORONAVIRUS) BILL

DELEGATED POWERS MEMORANDUM

BY THE DEPARTMENT FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY

A. INTRODUCTION

1. This Memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the Commercial Rent (Coronavirus) Bill (the "Bill"). This memorandum identifies the provisions of the Bill that confer powers to make delegated legislation. It explains in each case why the power has been taken and explains the nature of, and the reason for, the procedure selected. This memorandum reflects the Bill as brought from the House of Commons on 13 January 2022.

B. CONTEXT AND PURPOSE OF THE BILL

2. To assist businesses struggling to pay rent during the coronavirus pandemic the Government introduced a range of measures. In particular it:

    i. introduced a moratorium on commercial lease evictions under section 82 of the Coronavirus Act 2020;
    ii. restricted the use of the Commercial Rent Arrears Recovery (CRAR) regime (which enables landlords to recover rent arrears through the seizure of tenants' goods, established by the Tribunals, Courts and Enforcement Act 2007 and Taking Control of Goods Regulations 2013/1894)) by amendments, most recently the Taking Control of Goods (Amendment) (Coronavirus) Regulations 2021/300; and
    iii. restricted the service of winding up petitions under Schedule 10 of the Corporate Insolvency and Governance Act 2020 (this measure has been tapered as of 1 October, but still prevents winding up on the basis of unpaid rent).

3. These measures were all intended to be temporary. The moratorium on commercial lease evictions and the measure restricting the use of CRAR are due to end by 25 March 2022, and restriction against winding-up petitions (in certain circumstances) on 31 March 2022. A Code of Practice setting out best practice for commercial property relationships was published in June 2020 and amended in April 2021. The aim of the Code was that landlords and tenants should resolve rent arrears through negotiation. However, rent arrears arising from the pandemic remain unresolved for many businesses.

4. A Call for Evidence for England ran from 6 April to 4 May 2021 to gather information on the state of negotiations between commercial landlords and tenants regarding the rent arrears that have arisen due to the pandemic. It sought evidence from interested parties on a range of options. The preferred option was the introduction of a binding arbitration system to resolve dispute over the rent arrears.

5. The Bill aims to minimise insolvencies arising from rent arrears of businesses particularly affected by government intervention during the pandemic, that are otherwise viable. It establishes a system of binding arbitration to resolve disputes about certain ring-fenced rent arrears. These are arrears under business tenancies where the premises or the tenant business were required to close or cease operating (in whole or part and subject to exceptions) under regulations made under the Public Health (Control of Disease) Act 1984 during the coronavirus pandemic

("protected rent debt"). The ring-fenced period starts on 21 March 2020 (when the first such restrictions came into force in England) and ends for a business when the regulations providing for closure of the business or similar restrictions for the relevant sector were lifted, with the last such date being 18 July for England and 7 August for Wales.

6. The Bill requires parties who enter arbitration to have participated in a pre-arbitration process, which will mean an application for arbitration cannot be made until after a period of at least 28 days has passed. If the parties are unable to reach an agreement, the Bill provides an avenue for either the landlord or the tenant (whose business is in scope) to apply to an arbitration body approved by the Secretary of State and have the case considered by an arbitrator. If either party applies to the Bill's arbitration system, then the tenant may be awarded some relief in respect of the protected rent debt; this could be a reduction in the sum and/or an extension of the period to pay the debt (up to a maximum of 24 months) or cancellation of the debt.

7. The Bill sets out two key principles which the arbitrator must take into account when deciding what award to make under the process. These are to achieve the main aim of protecting viable businesses by potentially giving tenants relief in respect of the protected rent debt. The first principle ensures that the arbitrator should consider the effect of an award on each party, so the viability of the tenant's business should not be at the expense of the solvency of the landlord. The second principle is that any tenant capable of paying the protected rent in full should do so without delay.

8. The Bill applies Part 1 of the Arbitration Act 1996 (with modifications provided for in Schedule 1 to the Bill) and sets out details of more specific requirements for this arbitration process, including requiring applications to be submitted by either landlord or tenant within a six-month period (which may be extended) after the Bill is commenced.

9. To prevent the Bill's objectives from being undermined, the landlord will be prevented from pursuing the legal remedies which would otherwise be available in respect of the ring-fenced debt only, until either i) arbitration has concluded by a decision or withdrawal or ii) the time to apply to arbitration has passed. The remedies subject to this form of moratorium are debt proceedings, forfeiture, insolvency measures such as winding up petitions and bankruptcy, and CRAR. Landlords' use of tenancy deposits and appropriation of rent is also paused.

10. Both parties are also prevented from including ring-fenced debt in restructurings (including company or individual voluntary arrangements; CVAs and IVAs) from the time the arbitrator is appointed until 12 months after an arbitration decision. The aim of this is to prevent either party from seeking to better the outcome of the arbitration whilst recognising that the trading circumstances can change. This is most applicable to restructuring initiated by the tenant and is intended to protect the landlord.

C. TERRITORIAL COVERAGE

11. The Bill extends to England & Wales and, for limited provisions only, Northern Ireland and Scotland. The Bill will apply in England and Wales.

D. PROVISIONS WHICH CONFER DELEGATED POWERS

12. This Bill provides for the following delegated powers:

- a power for the Secretary of State to extend the period for making a reference to arbitration;
- a power for the Secretary of State to specify limits on arbitration fees;
- a power for the Secretary of State to issue guidance to: (a) arbitrators about the exercise of their functions under this Act; and (b) tenants and landlords about making a reference to arbitration under the Bill;
- a power is to enable the Bill's provisions to be applied in the event of a further wave of coronavirus which gives rise to further business closures.

Clause 9: Period for making a reference to arbitration

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Negative resolution procedure

Purpose of the power

13. Clause 9 provides for the tenant or landlord to make a reference to arbitration within six months from the Bill being passed. The power would enable the Secretary of State to extend the period for making a reference to arbitration.

Justification for taking the power

14. Clause 9 reflects the intended timescale for making references. The period for making references is intended to be short, as the Bill is intended to provide a temporary measure to transition parties back to their normal contractual relations. It is intended that an arbitrator will be appointed soon after the reference is made, and that the arbitration process will be completed promptly. However, in the event of limits in availability of arbitrators causing delay in appointing arbitrators, it would be preferable to extend the application period to allow for some spreading of further references. The matter is left to delegated legislation because a change to the period is intended to be available only in case needed.

Justification for the procedure

15. The proposed power addresses a procedural point. It may need to be exercised in relatively short order before the current period for making references expires, in order to respond to any concern that a longer period for applications is appropriate. The negative resolution procedure is therefore considered appropriate.

Clause 19: Arbitration fees and expenses

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Negative resolution procedure

Purpose of the power

16. Clause 19 gives the Secretary of State the power by regulations to specify limits on arbitration fees. Arbitration fees are the arbitrators' fees and expenses and the fees and expenses of any approved arbitration body. This power includes the ability to specify different limits depending on the amount of protected rent debt in question.

Justification for taking the power

17. The arbitration system will be delivered by leading arbitration bodies with minimal government input. Allowing arbitration bodies to set their own fees, as is done for existing schemes, will enable competition to result in reasonable fees without disincentivising arbitrators from taking on cases. However, in the event that fees are prohibitive and claimants, particularly SMEs, are struggling to access the system, this power will allow the government to cap the fees to ensure that the arbitration system is accessible for vulnerable businesses and landlords.

Justification for the procedure

18. The negative procedure is consistent with powers in relation to setting court fees. For example, the power of the Lord Chancellor to set court fees under section 92 of the Courts Act 2003 is subject to the negative procedure (see section 108 of that Act (rules, regulations and orders)).

Clause 21: Guidance

Power conferred on: Secretary of State

Power exercisable by: Guidance

Parliamentary procedure: None

Purpose of the power

19. Clause 21 gives the Secretary of State a power to issue guidance to: (a) arbitrators about the exercise of their functions under this Act; and (b) tenants and landlords about making a reference to arbitration under the Bill. This would enable the Secretary of State to provide arbitrators with guidance on the process laid down in the Bill and in the exercise of the general discretion they will have on procedural and other matters, to help ensure that the process works as effectively as possible. It would also enable guidance to be given to tenants and landlords to help them to understand more easily the arbitration process.

Justification for taking the power

20. The Bill will apply Part 1 of the Arbitration Act 1996 to these statutory arbitrations, which lays down general rules about the conduct of arbitrations and gives arbitrators a general discretion on procedural and other matters, although this is sometimes subject to the agreement of the parties on particular issues. There will be a number of areas, such as what evidence the parties should provide and attendance at any oral hearings, where there is a risk of being overly prescriptive as

what is relevant may differ between cases. Guidance on these areas would help arbitration cases run more efficiently and consistently.

21. Guidance for tenants and landlords would also help to guide them through what could be an otherwise legalistic process. It would be able to help them through the different stages of the process, setting out the steps that would need to be taken and information to be provided, without overly prescriptive rules.

Justification for the procedure

22. In accordance with the usual practice for statutory guidance, no Parliamentary procedure is proposed for adoption of the guidance.

Clause 27: Power to apply Act in relation to future periods of coronavirus control

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Affirmative resolution procedure

Purpose of the power

23. The Bill makes provision in respect of unpaid rent which relates to periods in which businesses have been required to close their premises or business (in whole or part). The power is to enable the Bill's provisions to be applied in the event of a further wave of coronavirus giving rise to further business closures. The power would enable different provision for different purposes, so that some of the Bill's provisions can be applied in certain cases or, say, to England only: this might be needed where a particular part of the process, or pausing of a particular remedy, is not considered appropriate in the circumstances of a particular area. The power would enable incidental, supplemental, consequential, saving or transitional provision to be made. This includes amending primary legislation.

Justification for taking the power

24. Whilst the Bill provides for resolution of rent debt in order to restore normal contractual relations, the future of the coronavirus pandemic is uncertain. The power enables the provisions of the Bill to be applied to future periods, provided there are business closure requirements which are also a response to coronavirus. The power enables specification of the provisions to apply, so that only those aspects necessary need be applied, and with modifications to work in the context of the future situation.

Justification for the procedure

25. The affirmative procedure is considered appropriate because the power would enable application of the Bill (that is, primary legislation), with modifications; and also because amendment of other primary legislation may be made. It is considered appropriate for Parliament to scrutinise the ways in which the Bill may be applied to another period of business closures or restrictions.