

## CORONAVIRUS COMMERCIAL RENT ARBITRAL SCHEME

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The government has published its long-awaited Commercial Rent (Coronavirus) Bill (“the Bill”), which introduces an arbitration process (“the Arbitral Scheme”) for the resolution of rent arrears for mandated closures and restrictions (“Pandemic Arrears”). It has also issued a code of practice (“the Code”) to provide immediate guidance for the negotiation of a resolution and guidance for the Arbitral Scheme, which is expected to be introduced in March 2022.

### RENT RECOVERY STATISTICS

According to British Chamber of Commerce survey data, by June 2021 77% of Pandemic Arrears had already been resolved via agreements between landlords and tenants. They were no doubt assisted by a voluntary code of practice for commercial property relationships, first issued on 19 June 2020. This figure increased marginally to 80% by November 2021.

14% of tenants refused to engage with landlords and others will have been unintentionally or deliberately dilatory in doing so. In any case, we expect most of those were subject to court proceedings which (unlike forfeitures, CRAR and insolvency action) the government did not legislate against.

Accordingly, the number of landlords and tenants that might need the Code or be subject to the Arbitral Scheme once the Bill passes should not be overstated.

### ARBITRATION

However, those landlords and tenants face a new legal landscape.

The Arbitral Scheme ringfences Pandemic Arrears which have not already been settled. Tenants will essentially have six months from the Act coming into force to instigate the Arbitral Scheme, but landlords are free to commence the process too. Tests of tenant viability, affordability and landlord solvency are applied to decide between formal offers made by the parties or a figure determined by the arbitrator (payable over a maximum of two years) which preserves or restores the tenant’s viability whilst maintaining the landlord’s solvency. The dichotomy of the viability (business health) of the tenant and the solvency (its corporate survival) of the landlord is noteworthy.

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The arbitrators will be concerned with finance-driven considerations of the tenant's business (such as its performance from March 2020), an analysis of its balance sheet and the like. However, wider considerations may also be brought into the equation, such as the insolvency of a major customer or developments in the tenant's wider group.

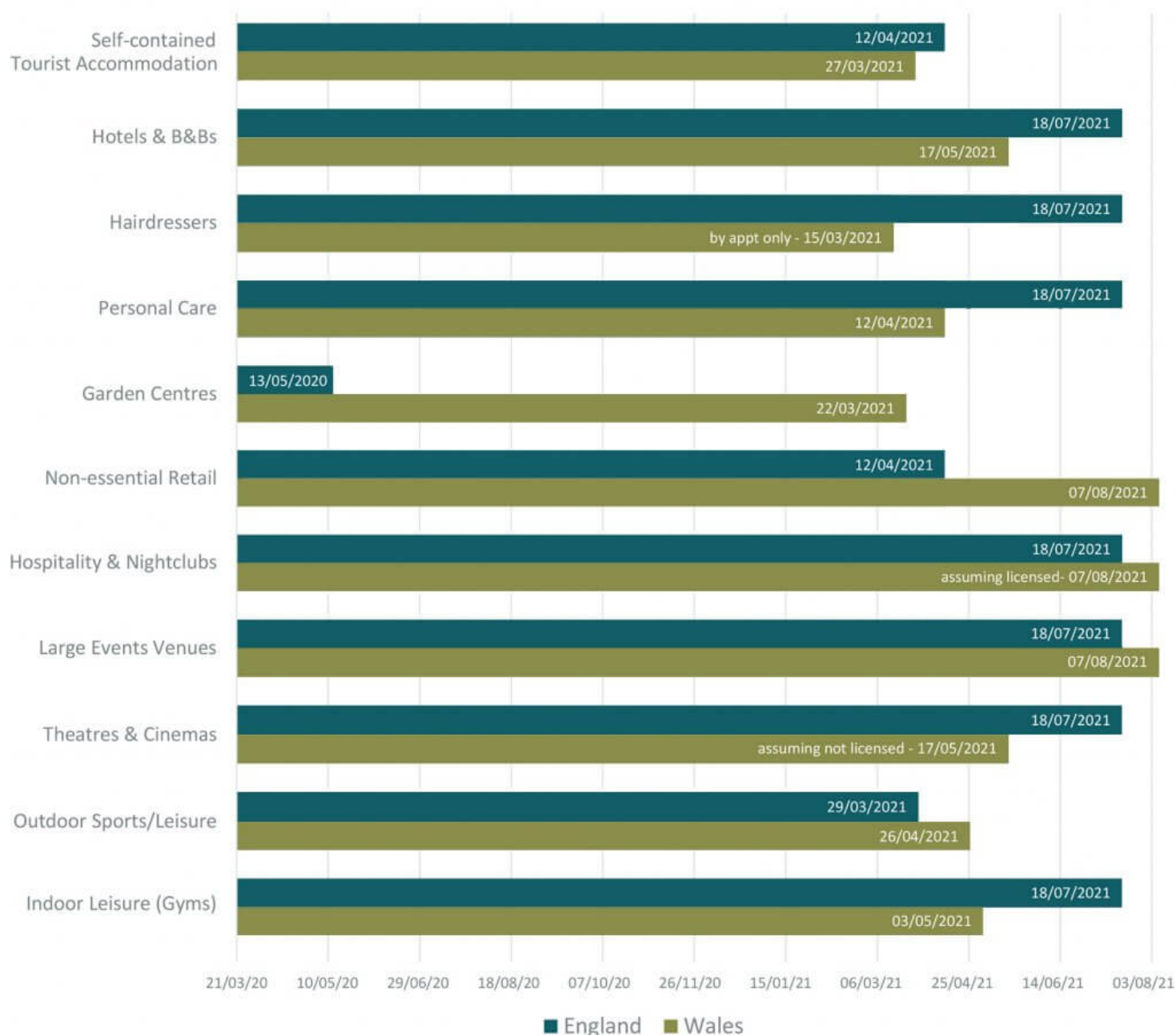
## PANDEMIC ARREARS

The Arbitral Scheme is concerned with Pandemic Arrears of rent, service charges, insurance, interest and VAT on those sums for the period from 21 March 2020 to 18 July 2021 in England and 7 August 2021 in Wales (or such earlier date when

regulatory restrictions were finally lifted for the tenant's business). This is determined on a case-by-case basis but Annex A to the Code contains helpful tables illustrating the likely periods for market sectors. These tables are reproduced below for ease of reference. By way of example, in England, the ring-fenced period for indoor leisure businesses (such as gyms) is taken to be 21 March 2020 to 18 July 2021.

## MANDATED CLOSURES DUE TO COVID-19

Dates presented refer to the first date a sector was mandated to close (in full or in part), until the date relevant restrictions were lifted for that sector.



Source: UK Government's code of practice (Annex A).

The parties will ordinarily share the arbitrators' fees and hearing costs but bear their own legal expenses.

To ensure that the Arbitral Scheme has exclusive jurisdiction for the formal resolution of Pandemic Arrears, landlords are prevented from:

1. Pursuing forfeiture;
2. Using winding-up proceedings;

3. Drawing down on rent deposits;
4. Issuing court proceedings. This extends to provisions to stay ongoing litigation and even staying the enforcement of unpaid judgment debts (so that they can be subjected to the Arbitral Scheme); and
5. Attributing a tenant's payment after the ring-fenced period to Pandemic Arrears unless the tenant stipulates otherwise.

The Bill, once enacted, will also return to landlords the plethora of legal remedies available in relation to rental sums other than Pandemic Arrears (such as forfeiture, CRAR and insolvency proceedings). This will support the normalisation of relations between landlords and tenants, though the Bill does contain provision for the government to extend the Arbitral Scheme to further periods of pandemic disruption.

The Bill also aims to prevent tenants from abusing the Arbitral Scheme via creative insolvency-events. It prevents tenants from compromising or varying ring-fenced debt in a CVA, restructuring plan or scheme of arrangement after an arbitrator has been appointed to the case. Nor may those arrears be included in such a plan/restructuring for 12 months after an Arbitral Scheme award.

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## ARBITRATION TIMEFRAME

As drafted, the Bill envisages that the Arbitral Scheme will be a truncated and expedited process. However, the draftspersons already appear to be alive to the fact that suitable arbitrators may struggle to adhere to these ambitious prescribed deadlines.

A summary of the proposed process is set out below.

## COMMERCIAL RENT (CORONAVIRUS) BILL ANTICIPATED ARBITRATION SCHEME PROCESS

### COMPULSORY PRE-ACTION STAGE

A letter of notification from either party, stating that it wishes to pursue the scheme (with its proposals to settle the ring-fenced arrears) must be sent to the other party, with evidence in support of the proposal. The other party may then respond by accepting the offer or making a counterproposal. Following this, the initiator has 14 days to consider and reply to the counteroffer.

### APPLICATION FOR ARBITRATION

Either party may then make an application to the scheme, together with a fee and copies of the documentation it intends to rely on (to include evidence that the pre-action stage was followed).

### TRIAGE

The arbitrator will review the application, to confirm that the matter is eligible for determination under the rules of the scheme. Matters that are out of scope (for instance, arrears owed by a pharmacy tenant), will be rejected. If the arbitrator lacks capacity to deal with the matter within the intended timescales, the parties may decide to refer it to an alternative arbitrator. Alternatively, the case will be waitlisted.

### RESPONSE

Within 14 days, the other party must submit its response and relevant evidence to justify its position.

### BEST OFFERS OPPORTUNITY

After the application proposal and response, each party will be afforded an opportunity to submit their final offer (if different). The arbitrator may also request additional information from the parties if necessary.

## FORUM

If desired by either party, a hearing to determine the matter will be arranged. Otherwise, the arbitrator may make an award based on the papers submitted. Any hearing should be conducted within 14 days of a party's request. It is likely to be based on submissions by the parties, instead of providing an opportunity for in-depth cross-examination of witnesses and key personnel.

## DECISION

The arbitrator's award will be made within (a) 14 days of the hearing or (b) as soon as is reasonably practicable if there is no hearing. The decision will be published (with confidential information removed). Appeals will be available, but these will be on limited grounds.

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## FIRST IMPRESSIONS

If landlords and tenants have failed thus far to reach an agreement on Pandemic Arrears, it seems improbable that they would now do so without litigation, even with the assistance of the Code. Recent cases<sup>1</sup> demonstrate that such litigation will invariably lead to judgment in favour of the landlord with tenants being given little time to pay (as well as a CCJ against them). It is feared that this could lead to the closure or insolvency of businesses that are otherwise viable. Therefore, it is inevitable that the government would introduce something akin to the Arbitral Scheme to resolve the ongoing stalemate.

The Code and Bill, in principle, appear to be viable methods for resolving Pandemic Arrears in a measured and prompt fashion. However, the Arbitral Scheme is, in various ways, unfair to both landlords and tenants. Making solvency the primary measure when assessing impact on the landlord may lead to draconian reductions in Pandemic Arrears payable to landlords who have carefully managed their financial affairs whilst maintaining patience and solicitude to their defaulting tenants. Conversely, tenants that have cynically refused to pay in anticipation of the Arbitral Scheme and otherwise mismanaged their businesses may, perversely, secure the best results through the Arbitral Scheme.

Equally, the Arbitral Scheme takes a narrow and commercially naïve view of the impact of the pandemic on tenant businesses. By artificially ring-fencing Pandemic Arrears to fixed periods, it fails to truly reflect the actual impact of Covid-19 on a tenant's business operations. Take, for example, businesses in shopping centres which are heavily reliant on trade created by the footfall attracted by neighbouring enterprises that were forced to close for periods. Even if the former suffered substantial losses during periods that it was able to operate without restrictions (due to its neighbour being forced to shut), there will be no jurisdiction to consider and determine such sums within the planned Arbitral Scheme.



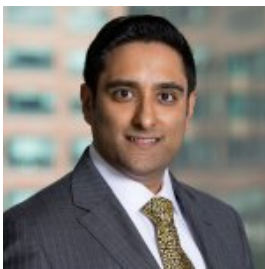
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Further, based on the evidence that the Bill encourages arbitrators to consider, parties will need to call on substantial accountancy and economic expertise in addition to legal assistance through the Arbitral Scheme. It is designed as an inquisitorial process which parties used to the adversarial approach of litigation in the UK, USA and other common law jurisdictions may find challenging.

Accordingly, the government's aspiration to simplify and streamline resolutions to enable the parties to return to "*business as usual*" seems ambitious. However, the challenges of the Arbitral Scheme may be just the encouragement that the last remaining intransigent landlords and tenants need to achieve settlements using the Code. Only time will tell.

[1] Bank of New York Mellon (International) Ltd v Cine-UK Ltd and others [2021] EWHC 1013 (QB);  
London Trocadero (2015) LLP v Picturehouse Cinemas Ltd [2021] EWHC 2591 (Ch).

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