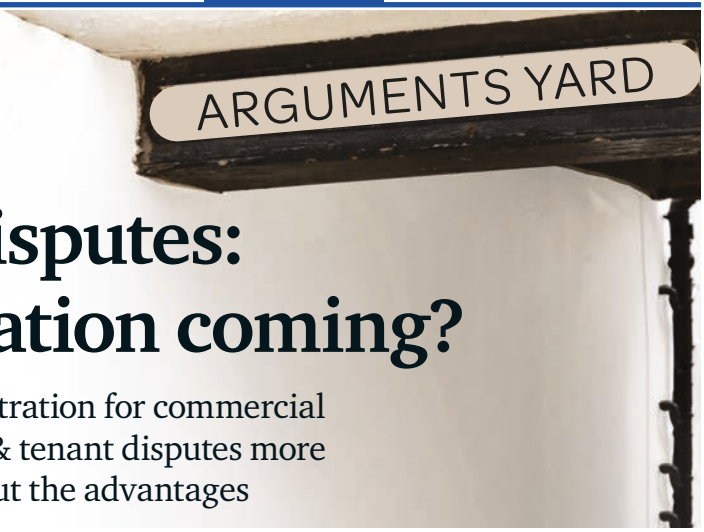

Landlord & tenant disputes: is compulsory arbitration coming?

COVID laid the groundwork for mandatory arbitration for commercial leases: could it now be on the way for landlord & tenant disputes more broadly? Edward Peters KC & Kavish Shah set out the advantages

IN BRIEF

- The mandatory arbitration procedure for commercial leases introduced under the Commercial Rent (Coronavirus) Act 2022 may provide a blueprint for compulsory arbitration for Landlord and Tenant Act 1954 disputes.
- Such a procedure would ensure specialist expertise on the part of the arbitrator, and may reduce strain on the court system and require fewer public resources.

The Commercial Rent (Coronavirus) Act 2022 (CR(C)A 2022) introduced, for the first time in England and Wales, a mandatory arbitration procedure for commercial leases. Mandatory arbitration procedures for resolving various kinds of landlord and tenant disputes under agricultural tenancies have, however, been in place successfully for many decades. Now, there are suggestions that the Law Commission's proposals for reforms to Part II of the Landlord and Tenant Act 1954 (LTA 1954) may also include proposals for a mandatory arbitration procedure in the context of disputes under LTA 1954. It is therefore worth examining whether the COVID arbitration scheme was successful, and whether a similar procedure might help facilitate the efficient, expeditious and cost-effective resolution of business lease renewal disputes.

A success story?

On various metrics, it appears that the COVID arbitration scheme has been a success. The COVID rent arbitrations that have proceeded to substantive awards have been dealt with by specialists in the field, within short timescales, and outside the already overloaded court system. There have been no appeals from awards under the scheme, suggesting that the specialist expertise of the arbitrators has resulted in fair and just awards.

The number of COVID arbitrations has been much lower than the government predicted; it initially estimated there would be 7,500 arbitration cases, which it then revised down to an anticipated 2,500 arbitrations, based on data received from New South Wales in Australia where a similar policy had been in place. However, as at the date of writing, it appears that in England and Wales there have only been 112 awards (including preliminary awards). This suggests a much lower take-up that the government had estimated.

However, when considering why that is, it is worth looking at the analysis in the government's impact assessment (enactment stage) which led to its estimate of the anticipated number of arbitrations. The government relied heavily on a similar scheme in Australia to derive its estimates. Starting with the Australian numbers, it then made adjustments based on the size of the business community, the length of restrictions, the stringency of restrictions, the impact on the economy from restrictions, and scope of the scheme. However, one key difference which does not appear to have been taken into account in the government's analysis was the fact that the Australian scheme involved mediations rather than arbitrations to resolve the disputes. In this jurisdiction, the vast majority of COVID rent disputes were settled by the parties before the deadline to make a reference to arbitration. There is no doubt that the prospect and then enactment of CR(C)A 2022 provided a spur to landlords and tenants to reach such settlements by various forms of alternative dispute resolution (ADR), including mediation, thereby avoiding the need to make a reference to arbitration under CR(C)A 2022. This key difference between the schemes in Australia and England and Wales may explain the large disparity in government estimates and actual take-up.

Arbitration advantages

Would there be any advantage in business lease renewal disputes being resolved by similar arbitration procedures? One potential advantage would be ensuring specialist expertise on the part of the arbitrators who could be appointed to resolve such disputes. Thus the arbitrators in agricultural arbitrations under the Agricultural Holdings Act 1986 (AHA 1986) can be appointed by one of three specialist bodies—the Agricultural Law Association, the Royal Institution of Chartered Surveyors (RICS) or the Central Association for Agricultural Valuers—ensuring that the person who is deciding such disputes comes to the dispute with an existing body of specialist knowledge. There is no doubt this can help facilitate the efficient, expeditious, cost-effective and just resolution of such disputes. And when considering the possibility of arbitration in the context of LTA 1954, it is worth noting that the agricultural landlord and tenant disputes under AHA 1986 that are resolvable by arbitration (or, if the parties agree, by third-party determination in the alternative) include disputes as to:

a) what the terms of a written tenancy should be;
b) the amount of rent that should be payable on periodic reviews (or following the landlord's improvements); and
c) whether the landlord should be permitted to terminate tenancies in certain circumstances.

Another possible advantage is that the awards could potentially be published, as s 18, CR(C)A 2022 provides for. Currently, most LTA 1954 cases proceed through the county courts, rather than the High Court or tribunals, and are very often determined by oral judgments, so there is a real scarcity of reported decisions. Seeing how other similar cases have been determined can be an important aid to lawyers and valuers giving accurate advice, and potentially crucial to achieving consistency in approach by those deciding the cases.

Another potential advantage of arbitration that is likely to appeal to a cash-strapped government is the fact that outsourcing justice to arbitration would be likely to reduce the strain on the court system and require fewer public resources. The government may well be keen to stress this value for the taxpayer and reduction in court listing times for other types of case, in circumstances where (unopposed) business lease renewals are fundamentally about finalising commercial arrangements

between commercial parties. However, from the parties' perspective too, resolution by an experienced specialist arbitrator may also result in their dispute being resolved in a shorter time and at lower cost. The difficulties in progressing litigation in certain county courts, with their chronically overloaded and consequently inaccessible administration staff, have in some cases become notorious, whereas an arbitrator is directly accessible to the parties via email.

Of course, voluntary reference to arbitration as a means of resolving business lease renewal cases already exists. Parties are entitled to agree to take their dispute to arbitration rather than through the courts. Furthermore, some organisations have already set up bespoke schemes for business lease renewal claims, in particular the PACT scheme (Professional Arbitration on Court Terms), set up jointly by RICS and the Law Society. Under PACT, parties can choose whether to have a lawyer or surveyor acting as the arbitrator—in a similar manner to the agricultural landlord and tenant disputes referred to above. However, these voluntary arbitrations have significant differences to the COVID rent arrears arbitrations: for example, one party alone cannot require resolution by arbitration rather than in court, and awards do not have to be publicly published (which can, of course, suit the commercial parties in many cases). Consequently, any mandatory arbitration scheme would be more about creating a new system, rather than simply about encouraging ADR.

A modern legal framework

So could arbitration in the context of the proposed LTA 1954 reforms help achieve the government's aims? The Law Commission's review has been commissioned by the Department for Levelling Up, Housing and Communities, forming part of the government's new Anti-Social Behaviour Action Plan. The government has suggested that it believes that Part II, LTA 1954 as it currently stands prevents space in high streets and other commercial centres from being occupied quickly and efficiently (albeit its reasons for thinking that are not entirely clear). The Law Commission has stated that its review 'will explore problems with the existing law with a view to developing a modern legal framework that is widely used rather than opted out of, and that helps businesses to grow and communities to thrive', and that it 'will also seek to support the long-term resilience of high streets, by making sure current legislation is fit for today's commercial market, while also considering government priorities, including net zero and levelling up'. The potential advantages of arbitration by specialist arbitrators in helping achieve a 'modern legal framework' and a form of dispute resolution that is 'fit for today's commercial market' are clear. It could also help the government's wider aim of helping to reduce the demands on the court system.

Until CR(C)A 2022 came into force, this jurisdiction had never had mandatory, statutory arbitration for commercial leases; although such a system has long existed, generally very satisfactorily, in the agricultural landlord and tenant context. In an article in the *Estates Gazette* back in 2021, entitled 'Arbitrating Rent Arrears' (EG 2021, 2127, 47), Guy Fetherstonhaugh KC and Kavish Shah stated that the government's proposal to bring in arbitration for COVID rent arrears disputes would 'be a major change in the way in which landlord and tenant disputes are resolved, and could be the harbinger of more wide-ranging legislative intervention'. If legislation is indeed enacted to bring arbitration into the sphere of Part II, LTA 1954, it would seem that prediction would be fulfilled. NLJ

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