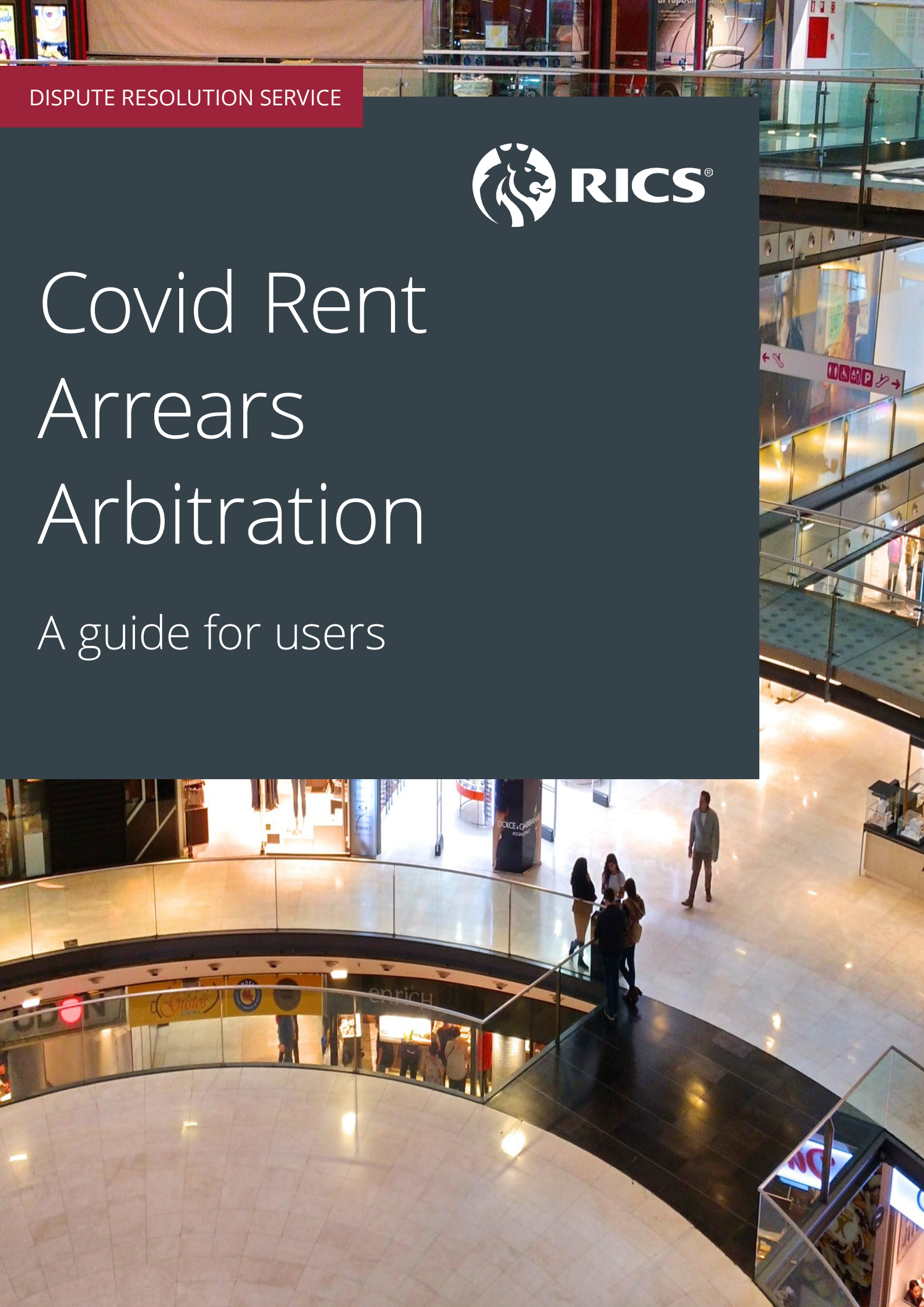
DISPUTE RESOLUTION SERVICE

Covid Rent Arrears Arbitration

A guide for users



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Introduction

On 25 March 2022 the Commercial Rent (Coronavirus) Act 2022 (the Act) came into effect, in England and Wales, to give a legally binding arbitration process to resolve certain outstanding rent debts resulting from the Coronavirus pandemic.

The Government's Code of Practice offers guidance on how business landlords and tenants should resolve disputes over commercial rent arrears accumulated as a result of the COVID-19 pandemic. The code encourages landlords and tenants to negotiate in the first instance, for anyone wishing to negotiate, RICS Dispute Resolution Service offer Business Rent Mediation. If parties cannot come to an agreement, the new binding arbitration process can be used to help businesses as a last resort. Landlords and tenants can initially apply for arbitration up to six months from 25 March 2022.

RICS have been approved by the Secretary of State to appoint arbitrators under the Act and have developed the RICS Covid Rent Arrears Arbitration service. This has been designed to keep costs to a minimum, especially where the parties are individuals or small to medium enterprises (SMEs).

The guide for users of the RICS Covid Rent Arrears Arbitration service

This guide is designed to help support both the applicant and respondent through the arbitration procedure under the Commercial Rent (Coronavirus) Act 2022.

Before beginning, you should read this document in detail and also familiarise yourself with the suite of free template forms RICS has developed to help parties, available on the RICS website.

No need for agreement to arbitrate

Unlike many dispute resolution procedures application under this Act does not have to be agreed to by the parties. Just like one party can make the other to go to court, so under this legislation, one party can push the other to arbitration whether they like it or not.

Either the landlord or tenant can initiate this process. The party that starts the process is called the 'applicant' and the other party, the 'respondent'.

A chance to reconsider

The Act is designed to give the parties every opportunity to reconsider and shape their negotiations before they take the final and irreversible step of having the matter decided by arbitration.

So even before the parties get in contact with an approved arbitration body like RICS, the Act provides a spur to negotiation in the form of the giving of notice procedure and the 28-day period that runs from when it is received.

RICS recommends to parties that the most effective way of ensuring they reach the best settlement possible is to use the bespoke RICS Business Rent Mediation Service.

Saving costs

The government has made it clear to the approved arbitration bodies, that it requires them to devise methods of keeping the costs of arbitration under the Act to a minimum, especially where the parties are individuals or SMEs.

RICS has responded by developing the four arbitration procedures described below.

Applicants should think very carefully about which one to choose, as, if they insist on using a more expensive process than is absolutely necessary, the arbitrator may penalise them in the award when deciding how to apportion responsibility for the costs of the arbitration.

The same applies to respondents, and particularly as they have no choice in the matter, it would be wise for them to suggest or agree to an arbitration process which is designed to limit the costs involved. They too could face a negative costs order if they are found to have failed to do so unreasonably.

The four RICS arbitration procedures

The Commercial Rent (Coronavirus) Act 2022 is designed to assist dealing with challenges caused by the Covid pandemic.

RICS is committed to supporting this objective and has developed four arbitration procedures to accommodate different types of business and the value of protected rent debt involved. The result is cost-effective and affordable procedures for all parties:

- two fixed fee and reduced documentation processes for smaller cases involving mainly small to medium sized businesses or individual parties; and
- in larger, more complex cases, where the arbitrator will need to spend considerable time dealing with evidence, which cannot realistically be estimated before it is collated, RICS has created a procedure that gives the parties an opportunity to agree:
  - the timeframes and structure of the arbitration and
  - the volume of evidence and time needed to deal with it
  - and pay the appropriate fee into trust with RICS prior to the arbitration taking place in line with the Act.

In all cases, the applicant will receive a refund if less time is spent dealing with the matter than initially estimated, thus allowing parties to only pay for time actually used.

Both parties need to think carefully about the most suitable procedure to choose: using a more expensive option than necessary may result in the arbitrator penalising the party that insisted on it when allocating costs in the award.

Parties are protected by three mechanisms that have deliberately been built into the RICS system:

The four arbitration procedures are described below:

Arbitration A	A straightforward fixed fee, documents only process designed to deal with small cases cheaply and effectively. It is targeted at individual and SME landlords and tenants or any cases where the protected rent debt is below £20,000.

- Fixed fee - there is a **fixed arbitrator's fee of £750** and **RICS charges an administration fee of £100.** The fees are paid by the applicant when the reference to arbitration is made, but the general rule is that the arbitrator will direct that the respondent reimburse the applicant half of the fee once the arbitration has taken place, subject to the arbitrator's powers in making the award to penalise a party who has acted unreasonably. Any refunds of fees will be made by RICS after paying the arbitrator for work done charged at an hourly rate of £100 (excluding VAT). This may occur, for instance, where a matter settles very quickly or where the arbitrator decides upon an initial reading of the papers that the matter is not eligible for arbitration under the Act.
- The procedure – this process can be used if both parties agree. The respondent is given the opportunity to agree to this process in their response to the applicant's formal proposal. If the respondent requests that the arbitration proceeds under a different model. The arbitrator, ultimately, will decide whether using one of the more expensive procedures below is reasonably necessary.*
- Written submissions - Both parties are required to submit formal proposals and supporting evidence, including revisions for this process they are limited to **10 pages or 5,000 words.**
- Timings and oral hearings - It's expected that by following this process **no** oral hearing will take place. The arbitrator will aim to decide the matter **within two weeks** of receiving all the parties' written submissions.
- The arbitration will take place before a single arbitrator.

Arbitration B

This fixed-fee process is designed to deal with slightly larger cases on a cost-effective basis. It is, similarly, targeted mostly at individual and small to medium sized businesses, but can be used in any cases where the protected rent debt is below £50,000.

- Fixed fee - There is a **fixed arbitrator's fee of £1,500** and **RICS charges a reduced administration fee of £250**. The fees are paid by the applicant when the reference to arbitration is made, but the general rule is that the arbitrator will direct that the respondent reimburse the applicant half of the fee once the arbitration has taken place, subject to the arbitrator's powers in making the award to penalise a party who has acted unreasonably. Any refunds of fees will be made by RICS after paying the arbitrator for work done charged at an hourly rate of £200 (excluding VAT). This may occur, for instance, where a matter settles very quickly or where the arbitrator decides upon an initial reading of the papers that the matter is not eligible for arbitration under the Act
- The procedure – This process can only be used if both parties agree. The respondent is given the opportunity to agree in their response to the applicant's formal proposal or suggest that the arbitration proceeds under a one of the different models. However, the arbitrator, ultimately, will decide whether using a different model is reasonably necessary*.
- Written submissions - Both parties are required to submit formal proposals and supporting evidence, including revisions, for this process they may be longer to accommodate the need for more complex evidence, but are still limited to **20 pages or 10,000 words.**
- Timings and oral hearings - It's expected that by following this process **no** oral hearing with take place. The arbitrator will aim to decide the matter **within three weeks** of receiving all the parties' written submissions.
- The arbitration will take place before a single arbitrator.

Arbitration C	A more flexible procedure, with a fixed hourly fee and guide total fee, enabling parties to submit more extensive formal proposals and supporting evidence, including one expert report, per party, if needed. Submissions are limited to 100 pages or 50,000 words. The parties consult with the arbitrator to agree how the arbitration will be conducted, including how long it will take the arbitrator to deal with evidence.

- Formal submissions - RICS has a high level of experience in appointing arbitrators to deal with landlord and tenant matters and is fully aware that the issues involved can be complex. In our experience, it is unusual, with the exercise of reasonable discipline and common sense, for the evidence needed to set out a party's case to need more than 100 pages or 50,000 words. Therefore, under this procedure both parties can submit more extensive formal proposals and supporting evidence, including one expert report if needed, but this is limited to 100 pages or 50,000 words for each party.
- Pre-arbitration discussion - Much time is wasted in court and in arbitration dealing with unnecessary documentation. This also increases costs. Therefore, a sensible approach, is for a pragmatic conversation between the arbitrator and the parties to take place, with the objective to agree how the arbitration will be conducted, and crucially how long it will take the arbitrator to deal with evidence.
- Types of cases and fees - RICS has consulted with its arbitrators and expects that a broad band of "middle-sized" cases are likely to involve a protected rent debt of between £50,000 and £350,000 outside the M25 and between £50,000 and £500,000 inside the M25. These cases ought generally to be determinable for a fee of between £4,000 and £6,000, although the complexity of the evidence in some, especially when it consists of lengthy financial spreadsheets and similar, may push fees above this band.

  In the pre-arbitration discussion, the arbitrator will agree with the parties:

  - the expected total fee for conducting the arbitration, including time spent reading the papers and in the pre-arbitration discussion
  - the hourly fee, to a maximum of the published £300 level
  - how the hourly fee will also be used for the purpose of calculating any refunds due for time not used

  The agreed estimated arbitrator's fee calculated at the published maximum rate of £300 per hour will be paid by the applicant immediately after the pre-arbitration meeting and before the arbitration takes place.

  RICS will charge its standard administration fee of £450 which is payable by the applicant when the reference to arbitration is made. The arbitrator's fees will be held in trust by RICS, and refunds calculated on the agreed hourly rate for time not used.

  The general rule is that the arbitrator will direct that half the appointment and arbitrator's fees be reimbursed once the arbitration has taken place, subject to the arbitrator's powers in making the award to penalise a party who has acted unreasonably.

- Oral hearing - It is not anticipated that an oral hearing will be required under this procedure, but if it is, the parties and the arbitrator will agree the details of how it will be conducted. A further administration fee and additional arbitrator's fees (and expenses, if any) will be payable to RICS before the oral hearing takes place.

  The oral hearing will be conducted on a private and confidential basis.

- By Agreement - This procedure, can only be used if both parties agree. The respondent will be given the opportunity to agree in their response to the applicant's formal proposal, or to suggest that the arbitration proceed under a different procedure. If the respondent suggests a different procedure, RICS will check with the applicant whether that is acceptable, failing that the parties will progress under Procedure D by default. The arbitrator, ultimately, will decide to allocate fees under section 19(6), whether using a more expensive model process was reasonably necessary and will reflect this in their award of costs.

- The arbitration will take place before a single arbitrator.

Arbitration D	A flexible procedure with a fixed hourly fee and agreed total fee. Designed for large matters, where the quantum in dispute is over £500,000, under this more traditional procedure, parties are free to decide how much or what evidence they submit and to agree the shape of the arbitration.

- Formal submissions - RICS is conscious that in large matters, parties will be concerned that they should not have limits imposed on them about how much or what evidence they should be permitted to submit. Even so, considerable savings can be achieved by exercising common sense and discipline in this regard, and RICS arbitrators will discuss how to ensure that this happens in their – pre-arbitration discussion with the parties before the arbitration takes place.
- Pre-arbitration discussion and fees - The parties will consult with the arbitrator to agree how the arbitration will be conducted, and crucially how long it will take the arbitrator to deal with evidence. During the course of the pre-arbitration discussion, the arbitrator will agree with the parties:
  - the expected total fee for conducting the arbitration, including time spent reading the papers and in the pre-arbitration discussion
  - the hourly fee, to a maximum of the published £400 level, with the parties
  - that this hourly fee will also be used for the purpose of calculating any refunds due for time not used.

  The agreed estimated arbitrator's fee calculated at the published maximum rate of £400 per hour together with any agreed arbitrator's expenses will be paid by the applicant immediately after the pre-arbitration meeting and before the arbitration takes place.

  RICS will charge its standard administration fee of £450 which is payable by the applicant when the reference to arbitration is made.

  The arbitrator's fees will be held in trust by RICS, and refunds calculated on the agreed hourly rate for time not used.

  The general rule is that the arbitrator will direct that half the appointment and arbitrator's fees be reimbursed once the arbitration has taken place, subject to the arbitrator's powers in making the award to penalise a party who has acted unreasonably.
- Oral hearing - If an oral hearing is required, the parties and the arbitrator will agree the details of how it will be conducted. A further administration fee and additional arbitrator's fees (and expenses, if any) will be payable to RICS before the oral hearing takes place.

  The oral hearing will be conducted on a private and confidential basis unless a party requests otherwise.

- Composition of the tribunal - The arbitration will take place before a single arbitrator, unless the parties agree otherwise, in which case additional administration fees will become payable to RICS, and all arbitrators will be entitled to be paid individually. Agreement as to the identity of the chairman of the arbitral panel and the need for an arbitrator to appoint experts, legal advisers or assessors where appropriate will also be agreed at the pre-arbitration discussion and the expenses required in respect of doing so established.

* Default procedure

  Procedure D is also the default procedure where the parties have failed to agree to use one of the more cost-effective alternatives. In this case, once all the papers have been submitted, the parties will work with the arbitrator to agree the issues described above. The arbitrator will agree an appropriate fixed fee or hourly fee with the parties taking into consideration whether the matter ought properly to have proceeded under a more cost-effective process, and the hourly fee for the purpose of calculating any refunds for time not used.

  Parties should bear in mind that under the Act both parties do not need to consent to the arbitration taking place. It is open to the applicant, even where the respondent does not agree, to accept the arbitrator's fee proposal and to make payment of it to RICS. The arbitration will then take place. It remains open for the respondent, once the award has been given, to seek an order from the court under the Arbitration Act 1996 to determine what reasonable fees and expenses are appropriate in the circumstances.

Arbitration procedure summary table

RICS Arbitration Procedure All the processes listed here involve the appointment of a single arbitrator only. Parties seeking a larger tribunal should approach RICS direct		When applicable	Amount of protected rent debt stated in the applicant's reference to arbitration	Arbitrator's fee (excluding VAT) (Any arbitrator's expenses will be calculated separately)	Any refunds of fees will be made by RICS after paying the arbitrator for work done charged at the following hourly rates (excluding VAT)	RICS administration fee (excluding VAT)	Maximum pages of submissions per party and maximum word count of documents summitted	Number of permitted submissions	Oral Hearings: RICS administration fee and arbitrator's fee (excluding VAT) (Any arbitrator's expenses will be calculated separately)
Arbitration A	Fixed fee and limited documentation	Available by agreement between the landlord and tenant only	<£20,000	£750	£100	£100	10 pages 5,000 words	Proposal and response and revisions if any under section 11. No expert reports may be included	N/A Process A is a documents-only process
Arbitration B	Fixed fee and limited documentation	Available by agreement between the landlord and tenant only	<£50,000	£1,500	£200	£250	20 pages 10,000 words	Proposal and response and revisions if any under section 11. No expert reports may be included.	N/A Process B is a documents-only process
Arbitration C	Reduced fee and limited documentation	Available by agreement between the landlord and tenant only	Outside M25 <£350,000 Inside M25 <£500,000	Hourly fee up to £300 per hour and anticipated maximum total fee agreed with the arbitrator prior to the arbitration taking place.	As advised by the arbitrator to a maximum of £300 per hour	£450	100 pages 50,000 words	Proposal and response and revisions if any under section 11, including one expert report per party if needed	£450 The parties will be advised by the arbitrator of the fee required and of the hourly rate (where applicable) to be used for determining any refunds due. The oral hearing will be private and confidential.
Arbitration D	Fees determined prior to arbitration taking place and documentation as directed by the arbitrator	Available by agreement between the landlord and tenant OR on application by one party	Outside M25 >£350,000 Inside M25 >£500,000 OR All other cases where the landlord and tenant have not agreed to use procedure A, B or C	Hourly fee up to £400 per hour and anticipated maximum total fee agreed with the arbitrator prior to the arbitration taking place.	As advised by the arbitrator to a maximum of £400 per hour	£450	As directed by the arbitrator	Proposal and response and revisions if any under section 11, including expert reports as directed by the arbitrator	£450 The parties will be advised by the arbitrator of the fee required and of the hourly rate (where applicable) to be used for determining any refunds due. The oral hearing will be private and confidential unless a party requests otherwise.

Benefits of the RICS Arbitration Process

Adaptable - the service is designed for both SME and individual landlords and tenants and large corporate parties

Reputation - RICS Dispute Resolution Service has nearly half a century of experience of appointing arbitrators, dealing with landlord and tenant issues

Transparency of fees – the fixed and maximum hourly fees charged by arbitrators are posted on the RICS website and are paid before the arbitration takes place.

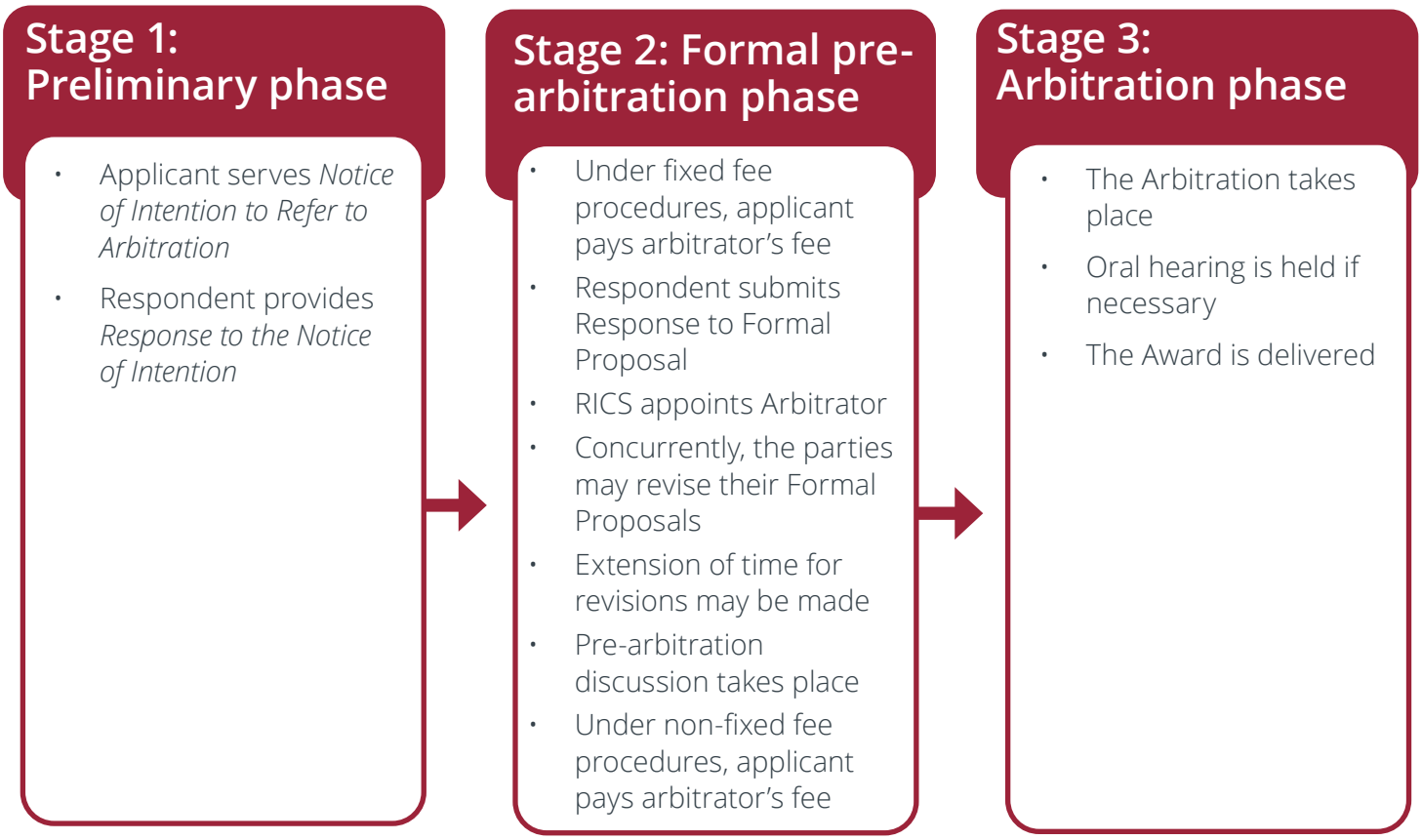
Limited cost – RICS offers: two bespoke, low fee, documents-only procedures for cases where the protected rent debt is below £50,000, a further bespoke service for medium sized cases; and a more traditional arbitration process as agreed between the parties in large cases

Specialist expertise - RICS commercial arbitrators are expert in assessing the viability and profitability of businesses and have a detailed knowledge of the sector, and so are well qualified to decide the issues of tenant viability and landlord solvency at the heart of the Act.

Cost effective – all fees are held in trust by RICS, and refunds are calculated on an hourly rate for time not used.

Simplicity - RICS provides a free and comprehensive set of downloadable templates to support the process.

The process



Stage 1 - Preliminary phase

The applicant's *Notice of Intention* to refer the matter to arbitration

The process begins when the applicant sends the respondent a Notice of Intention to refer the protected rent debt to arbitration. The Notice of Intention informs the respondent that failing any negotiation or mediation, the matter will go to arbitration.

Where the applicant intends ultimately to refer the matter to RICS to appoint an arbitrator, the applicant is encouraged to tell the respondent at this stage which of the RICS cost-saving arbitration procedures they intend to use (A, B, C or D).

The respondent **must respond within 14 days of** receiving the *Notice of Intention*.

The respondent's *Response to the Notice of intention* to refer

Under the Act, the respondent cannot refuse to go to arbitration, but can in their *Response* place on record that they would prefer to negotiate or mediate first.

They should also state whether they agree to use the RICS procedure suggested by the applicant or wish to propose another.

The respondent should also place on record whether they believe that the matter is not suitable for arbitration at all, and so will argue this point in respect to costs should the matter proceed, and their grounds for doing so.

Stage 2 - Formal pre-arbitration phase

If the matter does not settle within the maximum 28-day period, the formal pre-arbitration process will begin.

Reference to Arbitration

The first step is for the applicant to refer the matter to RICS for arbitration by submitting a *Reference to Arbitration* to an approved arbitration body.

The Reference to Arbitration must be accompanied by:

Formal Proposal

The formal proposal is the applicant's pivotal opportunity to set out the grounds for why the arbitrator should grant them relief for the payment of the protected rent debt. The success of the formal proposal will depend on how well it supports the principles set out in Section 15 of the Act – tenant business viability and landlord solvency.

Supporting Evidence

The applicant must include all the evidence it intends to rely on to support its formal proposal - which addresses the specific issues which the arbitrator must consider as listed in Section 16 of the Act

Fees

Under Procedures A, B, C and D, the RICS administration fee must be paid by the applicant to RICS at the same time as making the Reference to Arbitration.

Under Procedures A and B, the arbitrator's fee must be paid by the applicant to RICS at the same time as making the Reference to Arbitration.

Under Procedures C and D, the arbitrator's fee (and expenses, if any) must be paid by the applicant to RICS immediately after the pre-arbitration meeting and before the arbitration takes place

Generally, the arbitrator will direct that the respondent reimburse the applicant half of all the above fees (and expenses, if any) once the arbitration has taken place. This is subject to the arbitrator's discretion to allocate fees differently under section 19(6) where, for instance, a party has acted unreasonably.

Please Note:

The applicant will be required to make a formal declaration in the *Reference to Arbitration* confirming that the tenant that owes a protected rent debt is not subject to any of the circumstances listed section 10(3) of the Act

RICS is entitled to rely on this declaration in the discharge of the obligations placed on it under the Act.

The formal proposal should cover the outcome the applicant is seeking, including what proportion of the rent debt they envisage should be repaid, and what schedule the payments could take place on.

Section 13 of the Act sets out the issues that the arbitrator must decide and the order in which they need to be decided. The formal proposal needs to address these issues. They are dealt with under the heading **Principles to be applied** in the **Arbitration Phase** section below.

What is written there is not meant to provide comprehensive guidance on what needs to be included in a formal proposal, but to alert parties to:

- the extent and possible complexity of the evidence that needs to be assembled, and
- the reasoning process which the Act requires the arbitrator to adopt

The formal proposal is each party's pivotal opportunity to provide all the evidence that supports their case.

Given the critical importance attached in getting these formal, proposals right, consider whether taking professional advice on them may be worthwhile. Parties do not need to be professionally represented, by property or legal professionals, to take a matter to arbitration and can opt to manage the process themselves. The process can be straightforward, but this isn't always the case. Parties should consider whether engaging a suitable property professional to assist with the process and provide expert advice and guidance would be wise under the circumstances.

Section 11(7)(c) requires that formal proposals together with all evidence attached to them, must be given to the arbitrator and other party.

Section 12(2) requires that all written statements included in these submissions must be verified by a statement of truth.

Here is an example of appropriate wording:

Statement of Truth

Full name: _____

Position held: _____

(if on behalf of the company)

"*I affirm that the information set out in this document and any accompanying material is to the best of my knowledge true and correct*"

Signed: _____

Date: _____

[Please note, if this referral is on behalf of the company, a director must sign this statement.]

Appointment of an arbitrator by RICS

RICS will process the reference, allocate it a case number and send a copy of the applicant's *Reference to Arbitration* together with their formal proposal and annexures to the respondent using the contact details supplied by the applicant, and will commence the process of appointing an arbitrator.

RICS will aim to appoint the arbitrator within two weeks of receiving the applicant's *Referral to Arbitration* and will inform the parties of the appointment.

From that point on, the arbitrator will assume responsibility for the conduct of the pre-arbitration process and will deal with such matters as applications for extensions of time and the conduct of a pre-arbitration meeting.

Respondent's *Response to Reference to Arbitration*

The respondent has an opportunity to submit a *Formal Proposal in Response* to the applicant's *Formal Proposal* within 14 days of having received it.

The respondent's *Response to Reference to Arbitration* must be accompanied by:

Formal Proposal in Response

The *Formal Proposal* in Response is the respondent's pivotal opportunity to set out the grounds for why the arbitrator should find in their favour. The success of the *Formal Proposal in Response* will depend on how well it supports the principles set out in Section 15 of the Act – tenant business viability and landlord solvency.

Supporting Evidence

The respondent must include all the evidence they intend to rely on to support their *Formal Proposal in Response* - which addresses the specific issues which the arbitrator must consider as listed in Section 16 of the Act

In the *Response to Reference to Arbitration*, the respondent will be given an opportunity to agree to use a cost-saving arbitration procedure. Respondents should bear in mind that failing to agree to do so unreasonably could result in a negative costs order being made against them.

The guidance relating to

- the extent and possible complexity of the evidence that needs to be assembled, and
- the reasoning process which the Act requires the arbitrator to adopt

set out in the Reference to Arbitration section above and **Arbitration Phase** section below applies equally here.

Revision of formal proposals

It is encouraged in line with the code of practice that the parties are given every opportunity to negotiate or mediate a settlement between them, and so Section 11(4) of the Act allows each party a further opportunity to **revise their formal proposals** within 28 days of first submitting it.

Extension of time for revisions

The Act also provides that the periods for putting in the response and revised proposals can be extended by the parties by agreement or by the arbitrator where they consider this reasonable. RICS have produced a **formal extension of time request form** to help the parties with this process.

Pre-arbitration discussion

Under RICS arbitration procedures C and D, once all the papers have been submitted, the parties will meet with the arbitrator for a pre-arbitration discussion. This meeting is to agree how the arbitration will progress further and, crucially, how long it will take the arbitrator to deal with evidence.

Under procedure C the arbitrator will agree with the parties	Under procedure D the arbitrator will agree with the parties or direct in the event of no agreement:
• the expected total fee for conducting the arbitration • an hourly fee, to a maximum of the published £300 level, which hourly fee will also be used for the purpose of calculating any refunds due for time not used • whether an oral hearing should take place	• the expected total fee for conducting the arbitration • an hourly fee, to a maximum of the published £400 level which hourly fee will also be used for the purpose of calculating any refunds due for time not used • whether an oral hearing should take place and whether it will take place in private • the composition of the tribunal • the identity of the chairman of the arbitral panel and if applicable • the need for an arbitrator to appoint experts, legal advisers or assessors • the expenses required in respect of doing so

Stage 3 - The arbitration phase

Only once all these time periods have expired, and the parties have decided not to settle, and the pre-arbitration meeting has been held under procedures C or D, will the arbitration itself take place.

The RICS Arbitration procedures all operate by agreement between the parties, except where procedure D is used in default of such agreement.

Documents only procedure

Unless under procedures C or D, the parties seek an oral hearing, the arbitrator will decide the matter by reference to the parties' Formal Proposals and supporting evidence only.

Principles to be applied

Section 13 of the Act sets out the issues that the arbitrator must decide and the order in which they need to be decided. The main questions are:

1. Is the tenancy a business tenancy and is there a protected rent debt as defined by the Act?
2. Is the tenant's business viable, or would it be viable if rent relief were given?
3. If so, should the tenant be given relief and, if so, what form should it take?

The structure of the arbitration under the Commercial Rent (Coronavirus) Act is different to conventional arbitration under the Arbitration Act where the arbitrator has a wide discretion in dealing with the evidence.

Under the Commercial Rent (Coronavirus) Act, the arbitrator has to consider the applicant and the respondent's formal proposals individually and decide which of them is more consistent with the principles set out in section 15. Only in the exceptional circumstance of neither proposal being consistent at all, can the arbitrator formulate their own award. This is designed to force the parties to think about their proposals very carefully and to be as reasonable as possible in what they put forward.

The section 15 principles are deceptively simple:

- the proposal should preserve or restore the viability of the tenant's business whilst safeguarding the landlord's solvency; and
- the tenant should be required to pay as much of the rent debt with as little delay as these principles allow.

Threshold considerations

As regards the first question above, "is the tenancy a business tenancy and is there a protected rent debt as defined by the Act", the applicant needs to establish that:

- ☐ The rent falls withing the definition of 'rent' provided in section 2 of the Commercial Rent (coronavirus) Act 2022
- ☐ The rent debt is a 'protected rent debt' as defined by section 3 of the Act
- ☐ Part 2 of the Landlord and Tenant Act 1954 applies to the tenancy
- ☐ The tenancy was 'adversely affected by coronavirus' as defined by section 4 of the Act
- ☐ The rent is attributable to a period of occupation by the tenant for, or for a period within, the protected period applying to the tenancy as defined by section 5 of the Act
- ☐ The section 10(3),(5) and (6) circumstances do not exist.

Substantive issues

As regards the second and third questions, section 16 sets out the issues that the arbitrator needs to consider as below. The wording is clear and parties and their advisors should consider it very carefully.

(1) In assessing the **viability of the business** of the tenant, the arbitrator must, so far as known, have regard to:
  (a) the assets and liabilities of the tenant, including any other tenancies to which the tenant is a party,
  (b) the previous rental payments made under the business tenancy from the tenant to the landlord,
  (c) the impact of coronavirus on the business of the tenant, and
  (d) any other information relating to the financial position of the tenant that the arbitrator considers appropriate.

(2) In assessing the **solvency of the landlord**, the arbitrator must, so far as known, have regard to:
  (a) the assets and liabilities of the landlord, including any other tenancies to which the landlord is a party, and
  (b) any other information relating to the financial position of the landlord that the arbitrator considers appropriate

(3) In **making an assessment** under subsection (1) or (2), the arbitrator must disregard the possibility of the tenant or the landlord (as the case may be):
  (a) borrowing money, or
  (a) restructuring its business.

Oral hearings

By agreeing to use arbitration procedure A or B, the parties agree that the arbitration will take place on paper (documents only) it is anticipated that that there would be no requirement for an oral hearing.

Under arbitration procedures C or D, an oral hearing is possible where necessary. This will be agreed as part of the pre-arbitration discussion between the parties and the arbitrator.

Under the Act, an oral hearing must be held within 14 days of a request being made to the arbitrator to do so by either party. Parties should be aware that if an oral hearing is not considered necessary by the arbitrator, this could lead to the party that insisted on it being penalised in costs in the award.

Fees for an oral hearing

RICS will charge an additional administration fee for the oral hearing and the arbitrator is also entitled to further fees (and expenses, if any). These fees need to be paid by the party seeking the oral hearing before it takes place, the arbitrators fee for the oral hearing will be held in trust by RICS, and refunds calculated on the agreed hourly rate for time not used.

Generally, the arbitrator will again direct that the respondent reimburses the applicant half of the fee once the arbitration has taken place.

Privacy of oral hearing

Where the parties have agreed to use arbitration procedure C or D, they will have agreed that the oral hearing will be conducted on a private and confidential basis.

Where procedure D is being used in the absence of agreement, the oral hearing will be conducted on a private and confidential basis unless a party requests otherwise.

Size of tribunal

- Under procedure A, B and C, the arbitration will take place before a single arbitrator.
- Under procedure D, the arbitration will take place before a single arbitrator unless the parties agree otherwise, in which case additional administration fees will become payable to RICS, and all arbitrators will be entitled to be paid individually.

The Award

The Award including reasons will be given in full to both parties. In accordance with Section 18 of the Act, the award will also be published on the RICS website. This will be an anonymised version, i.e. all confidential information will be removed by the arbitrator, unless the party to whom it relates gives permission for this information to be published.

Request to RICS to remove an arbitrator

Section 8(1)(f) as read with 8(2) of the Act empowers RICS to remove the appointed arbitrator upon application by a party. In providing for this, Parliament, has transferred to RICS as an approved arbitration body a function until now exercised only by the courts under section 24 of the Arbitration Act 1996. This is a significant responsibility.

The removal of an arbitrator can have a significant impact on the arbitration itself, and on the other party, as well as on the professional reputation of the arbitrator, and is not something that RICS will entertain lightly.

Just as is the case in court, an application will need to be supported with full reasons and evidence, including, where appropriate, expert evidence. The application may be opposed by the other party or the arbitrator or both.

Any request to remove an arbitrator, will be considered by a panel constituted by the independent RICS Dispute Resolution Appointments Board acting under powers delegated to it by RICS Governing Council and overseen by the RICS Standards and Regulation Board.

Given the complexity and associated administration in with dealing with the application, and it is equivalent of an application to court under section 24 of the Arbitration Act, **RICS will charge an administrative fee of £2, 500** for the provision of this service.

Note for parties and party representatives

Section 8(2) of the Act lists the grounds upon which the removal of the arbitrator may be sought. It is an almost exact copy of section 24 of the Arbitration Act 1996, but with one important change regarding the qualifications of the arbitrator. The Arbitration Act empowers a court to remove an arbitrator if "he does not possess the qualifications required by the arbitration agreement". By contrast, the present Act empowers RICS as an approved arbitration body to remove an arbitrator who "does not possess the qualifications required for the arbitration."

This is a very important distinction, particularly for parties accustomed to rent review arbitrations, where the parties may have agreed to a rent review clause requiring the arbitrator to have certain qualifications. Arbitrations under the present Act are not rent review arbitrations, and RICS's authority to appoint an arbitrator arises from its being an approved arbitration body, not from what may have been agreed between the parties in the lease. It follows that its selection of an arbitrator is not circumscribed by the provisions of any rent review clause in the lease.

Mediation

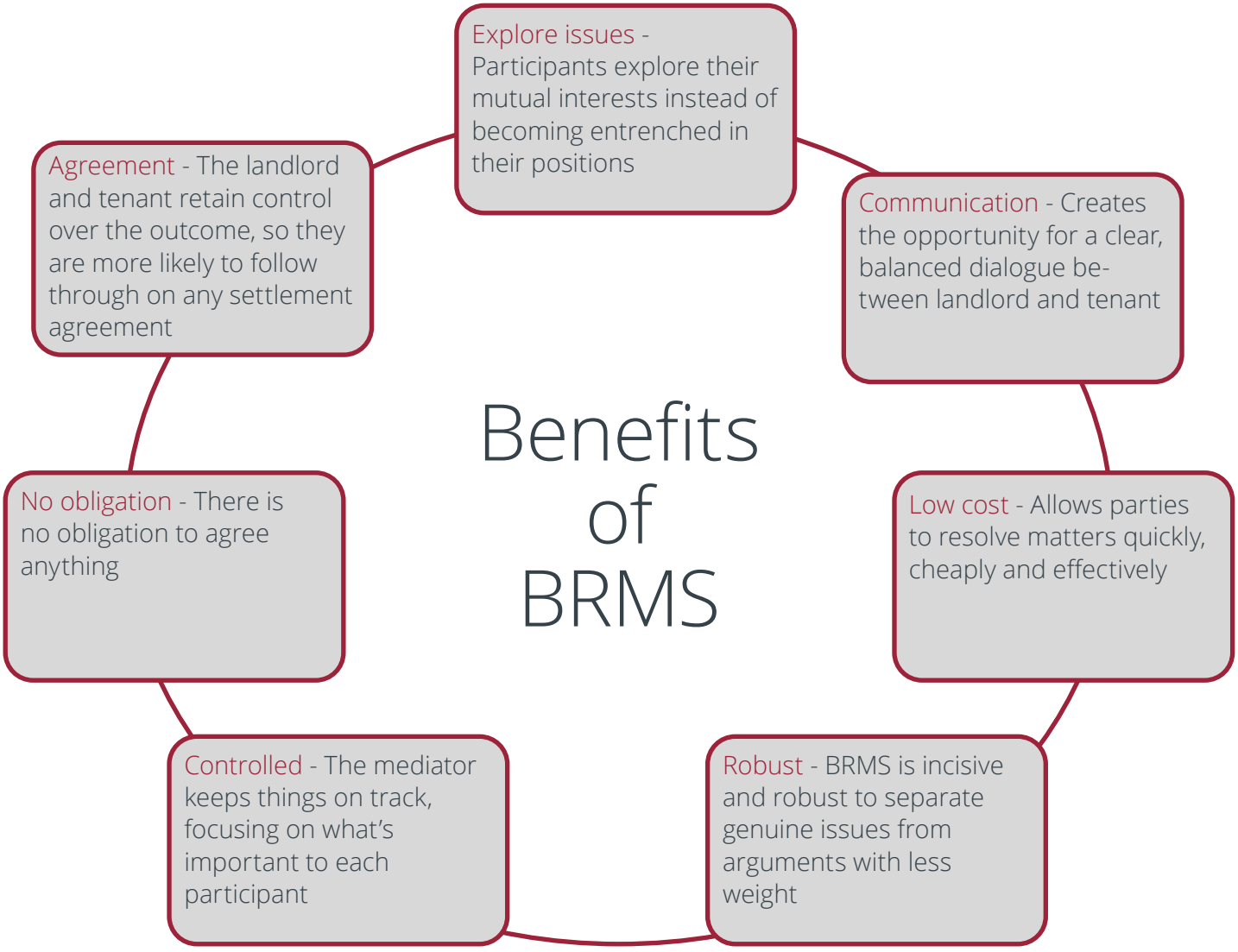
Government published a Code of Practice in November 2021 which encourages landlords and tenants to settle the issue of Covid rent arrears by mediation. The government encourages disputes over business rent arrears to be resolved by mediation.

The code gives guidance on how parties should approach negotiation, with the intention that where possible they should resolve rent disputes before the Commercial Rent Coronavirus Act comes into force.

The code will continue to be used by any business to help them negotiate and resolve rent disputes even if they fall outside of scope for arbitration.

Before proceeding to arbitration, RICS would encourage you to consider carefully whether trying mediation may not be a better route for you to follow. To help with this RICS have developed Business Rent Mediation Service (BRMS) to support this approach.

BRMS is conducted by an independent, skilled mediator who will help the landlord and tenant agree a way forward.



Delivering confidence

We are RICS. Everything we do is designed to effect positive change in the built and natural environments. Through our respected global standards, leading professional progression and our trusted data and insight, we promote and enforce the highest professional standards in the development and management of land, real estate, construction and infrastructure. Our work with others provides a foundation for confident markets, pioneers better places to live and work and is a force for positive social impact.

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