

How Wales can influence the future of Brexit negotiations

As the Welsh Government continues to seek assurances from Westminster about a potential role in post-Brexit trade negotiations, Tod Davies from Cardiff-based law firm Capital Law discusses how Welsh ministers can take the initiative to protect Wales' interests



SINCE June 23, 2016 – the date of the infamous referendum – we have all been part, willing or unwilling, in the most riveting yet tiresome political soap opera of our time.

The meandering machinations of Westminster towards a Brexit (or not), which despite being more than three years old has not yet begun, seems to have led us to this point; another looming no-deal deadline, seemingly final this time, with Boris Johnson at the helm.

What this will mean for the UK and Europe will be the subject of heated debate for years to come, but within the UK, what impact might it have on its constituent nations which, with the exception of Northern Ireland, have been in the margins throughout the entire process?

Scotland, with its nationalist fervour manifesting in its opposition to Brexit and Boris, gets some attention due to the ever-present threat of independence and the break-up of the UK, but a noticeable disinterest seems to apply to Wales, which has almost gone unnoticed – perhaps because Wales, like England, voted by a majority to leave the EU.

There are therefore doubts that Wales will have a significant voice in future Brexit negotiations, or indeed negotiations with other countries post-Brexit.

However, there are things the Welsh Government may do in order to hold some sway over future deci-

sions made in Westminster.

Whether Wales (or Scotland and Northern Ireland) is able to legally prevent Westminster from taking a particular course of action is a settled question – it can't.

However, since devolution the Sewel convention – bear with me – is an understanding between Westminster and the devolved parliaments/assemblies that Westminster will not pass laws which overlap with any areas which have been devolved.

Taking education as an example, which is a fully devolved area in which Wales can make its own decisions, such as curriculum (Welsh

language), structure (no academy schools in Wales), and funding.

The arrangement is that Westminster cannot legislate nationally on an education issue that encroaches on Wales' right to make its own decision (unless Wales gives its permission).

However, this convention of obtaining permission is just that, a convention, and is not a legal requirement so Wales cannot go to the courts to uphold it.

This was set out quite clearly by the Supreme Court in the famous Gina Miller case, which ruled that the Government had to obtain Parliament's permission before triggering Article 50 back in 2017.

As well as ruling on that, the Supreme Court also ruled on the limits of the Sewel convention, stating that it was merely a political understanding – not a legal obliga-

tion.

Politics though, is another matter entirely.

By-passing a devolved body's permission effectively overrules them and this is done very rarely – usually the threat of not providing consent is enough to force Westminster to amend the offending legislation.

This is where Wales may be able to make its voice heard, and we saw this in Wales' objection to the EU Withdrawal Bill.

The former First Minister called the Bill "a naked power grab" and refused to provide Welsh consent.

While refusal to provide consent is not a veto, and Westminster could have simply overruled Wales, the Welsh Government's stance was enough to force Westminster to compromise and agree to change the Bill.

This episode was a successful demonstration of Wales' ability to effect change despite not having the legal upper hand; and could be a way in which Wales could play a role in trade deals post-Brexit.

International trade is of course an area not devolved to Wales.

If the Welsh Government wants to hold any sway over British trade talks, it may have to demonstrate to Westminster how any potential trade deal will affect a devolved area, and consequently will need Welsh consent before it passes into law.

Westminster may temper a partic-

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ular aspect of a trade deal to Welsh demands rather than go through the awkwardness of passing a law affecting Wales without Welsh consent (and the political ramifications which would follow).

Playing this political game of toeing the line between refusing to give consent, but ultimately working with Westminster to ensure they take account of Welsh interests, could well be a successful blueprint for Wales to continue to lobby Westminster to take account of the Welsh position.

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