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PART I · SETTING THE SCENE

# 1 Commercial trusts in European private law: the interest and scope of the enquiry

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## 1 The interest and scope of the enquiry

The topic to which this book is dedicated is of great interest for anybody concerned with the expanding field of European private law. In several European countries business transactions commonly require the use of trusts. The litigation of trust law issues in a business context is becoming more frequent than in the past. At the European level, legal instruments enacted by the European Community make explicit reference to trusts,<sup>1</sup> or regulate transactions involving both trusts and other investment vehicles.<sup>2</sup> Principles of European Trust Law,<sup>3</sup> drafted by a distinguished group of scholars, are now available to provide guidance on the development of trust law in European jurisdictions. At the international level, the Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition

<sup>1</sup> Council Regulation (EC) No. 44/2001 of 22 December 2000, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, arts. 5(6), 23(4), 23(5), 60(3); *Webb v. Webb* [1994] ECR I-1717 (ECJ); see also: Regulation (EC) No. 805/2004 of 21 April 2004, creating a European enforcement order for uncontested claims; Communication from the Commission on the transfer of small and medium-sized enterprises (98/C 93/02). On Community measures to combat criminal activities which may deploy a number of legal institutions, including trusts, for money laundering purposes, see especially the Council Directive of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering (91/308/EEC), as amended.

<sup>2</sup> See Cases 5 and 9 below, which involve the implementation at the national level of Council Directive 85/611/EEC of 20 December 1985, as amended, on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS).

<sup>3</sup> D.J. Hayton, S.C.J.J. Kortmann, H.L.E. Verhagen, eds., *Principles of European Trust Law* (The Hague, Deventer, 1999).

has entered into force in several countries,<sup>4</sup> providing much-needed solutions to conflicts problems raised by trusts, but also posing fresh questions on its impact and its implementation.

The great practical importance of the subject closely matches its burning academic interest. Trusts straddle the law of property and the law of personal obligations. Located at the intersection of core categories of private law, they pose problems that turn on the proper understanding of fundamental notions of private law. From the academic point of view, trusts also raise essential questions about competing claims to property, as well as about the management of property in the broadest sense. Both sets of questions involve hotly debated subjects.

Last, but not least, trusts are familiar features of the legal landscape of the English-speaking world but, on the other hand, they are less than familiar in most civilian jurisdictions. Today it would be wrong to consider trusts a distinctive feature of the common law world, because mixed legal systems have trusts<sup>5</sup> and several civilian jurisdictions show important developments in this regard.<sup>6</sup> Nonetheless, it is still true that one can hardly imagine how to deal with, for example, English law, without running sooner or later into an issue of trust law. The same is not necessarily true in many other countries, including several major European jurisdictions. This is why, far from being a neglected field among comparative law scholars, the law of trusts has been frequently investigated in comparative perspective.

Within the comparative law field, the present book adopts a new approach to the subject, in terms both of method and of scope of enquiry. The scope of enquiry is limited to trusts operating in the business context. This means that the use of trusts in fields like the

<sup>4</sup> For a full status report on the Convention see the Hague Conference website: <http://www.hcch.net>. The states which have most recently ratified or acceded to the Convention are Luxembourg (2003), Liechtenstein (2004) and San Marino (2005).

<sup>5</sup> Cf. Tony Honoré, 'Trusts: The Inessentials', in Joshua Getzler, ed., *Rationalising Property, Equity and Trusts. Essays in Honour of Edward Burn* (London, 2003), 7 ff.; J. M. Milo and Joan M. Smits, eds., *Trusts in Mixed Legal Systems* (Nijmegen, 2001). Vernon V. Palmer, ed., *Mixed Jurisdictions Worldwide. The Third Legal Family* (Cambridge, New York, 2001), provides a broad view of the field.

<sup>6</sup> For a comprehensive collection of texts: Maurizio Lupoi, ed., *Trusts Laws of the world*, 3rd edn (Rome, 2000). After the publication of this collection, Luxembourg amended its law on *la fiducie* in 2003: see Paul Matthews, 'Fiducie and the Hague Trusts Convention: The New Luxembourg Law', (2003) *Trust L. Int.* 188. Several recent developments in civil law or mixed legal systems are discussed in Maurizio Lupoi, *Trusts: A Comparative Study* (Cambridge, 2000), 267 ff.; see also Alon Kaplan, ed., *Trusts in Prime Jurisdictions* (The Hague, 2000); John Glasson, ed., *International Trust Laws* (London, New York, 1992).

law of non-profit organisations, matrimonial property and succession is not covered in this book. Here the focus is on inter vivos transactions that in many European legal systems are the province of contract law, or that require the use of investment vehicles usually established under company law, but that would be characterised as trusts in other European countries like England, Wales, Ireland or Scotland.<sup>7</sup> The decision to investigate trusts in the setting of inter vivos transactions conducted for commercial purposes reflects the current state of the European private law debate and its concentration on the role of party autonomy in market integration.<sup>8</sup> This is also the reason why the subject is, for the first time, covered for fifteen Member States of the European Community.

This volume does not offer a general comparative treatment of the law of trusts as that subject is commonly understood in anglophone countries. Yet, our terminological choice is less arbitrary than it may appear at first sight, considering also that the English term has no special status in a work covering the laws of several European countries.<sup>9</sup>

In setting the scene for the comparative discussion of the national laws, part I of the volume introduces the reader to the subject by providing a critical overview of the comparative literature on trusts, and by expanding on common core methodology as applied to this field. The main issues of traditional divergence among legal systems about trusts are thus surveyed with the intent of examining the state of the art about trusts in comparative perspective, thereby providing the general background of the present work.

<sup>7</sup> In this volume, even where Wales is not separately mentioned, references to 'England' and 'English law' refer to England and Wales and the law of England and Wales.

<sup>8</sup> Wills and succession rules, just like matrimonial property regimes, on the other hand, pose problems related to the free circulation of persons in Europe. On the first topic see the study prepared in 2002 by the Deutsche Notarinstitut for the European Commission, *Étude de droit comparé sur les règles de conflits de juridictions et de conflits de lois relatives aux testaments et aux successions dans les Etats membres de l'Union Européenne* (scientific coordination by Paul Lagarde and Heinrich Dörner). The document is available at the following website: [http://europa.eu.int/comm/justice\\_home/news/events/document/rapport\\_synthese\\_etude\\_fr.pdf](http://europa.eu.int/comm/justice_home/news/events/document/rapport_synthese_etude_fr.pdf).

<sup>9</sup> Even under English law, 'trust' is a protean word: *Tito v. Waddell* (No. 2) [1977] Ch. 106, at 227, per Megarry VC: 'the first question is the sense in which that protean word has been used. The word, indeed, is one that may be found by the unwary to invite the comment *Qui haeret in litera haeret in cortice*.'

## 2 A brief survey of comparative literature and problems

### 2.1 History, concepts and functional analysis

Comparative law literature on trusts is about a century old. Its focus has changed over time. This section will provide a short account of the transformation. The following survey breaks down into four parts. The first explores the beginnings of academic interest in the topic and the development of functional approaches to the comparative study of trust law; the second covers comparative work conducted to solve conflict of laws issues before national courts; the third deals with comparisons of trust laws to advance unification projects; and the fourth deals with the emergence of a comparative literature dedicated to trusts in the financial context.

Academic interest in the comparative treatment of trusts developed a little more than a century ago, when the history of English law was for the first time investigated by scholars who, at about the same time, established legal history as an academic discipline. In that intellectual climate, while the historical origins of English law were investigated on both sides of the Channel by the first generation of professional legal historians, trusts became a test case to appraise the originality of English law vis-à-vis both the Roman law legacy and the Germanic roots of continental legal systems. The story has been told in more detail elsewhere:<sup>10</sup> whereas previous accounts of the history of trusts in England advanced the thesis that English law was largely indebted to ideas and institutions of Roman origins, like *fideicommissa*, or to the Germanic world, being in substance a local variety of Germanic institutions, like the *Salman*, no less a scholar than Frederic William Maitland chose trusts as one of the best examples of the need to study English law and legal history on their own terms. Maitland collected the English sources available at that time on the history of uses and trusts and concluded that they did not univocally point in one direction, namely the European continent. He observed that in continental Europe no legal institution possessed quite the same features as English trusts.<sup>11</sup>

We do not know what conclusions Maitland would have reached if he had known the law of *confidentia* and *fiducia* of several areas of

<sup>10</sup> Michele Graziadei, 'Changing Images of the Law in Nineteenth Century English Legal Thought (the Continental Impulse)', in Matthias Reimann, ed., *The Reception of Continental Ideas in the Common Law World* (Berlin, 1993), 115, esp. at 159 ff.

<sup>11</sup> Frederic William Maitland, *The Origin of Uses*; Maitland, *Moral Personality and Legal Personality*; Maitland, *The Unincorporate Body*, all reprinted in H. A. L. Fisher, ed., *The Collected Papers of Frederic William Maitland* (Cambridge, 1911), vol. II, 403 ff.; vol. III, 304 ff., 271 ff.

continental Europe flourishing from the sixteenth century to the eighteenth century, as well as its earlier manifestations.<sup>12</sup> By now it is clear, however, that much of the actual historical experience in this neglected field, and its relevance to the comparative study of the English law of trusts, eluded his attention. In any case, Maitland's research on trusts quickly became the twentieth-century cornerstone of influential comparative work. That work assumed that the English law of trusts was unique. Hence, the correct way to address the topic from a comparative stance was to look for institutions that on continental Europe performed some of the tasks which under English law were performed by trusts. In this context, the focus was mostly on trusts created by valid expressions of the settlor's will, as opposed to trusts serving the purposes of an emerging law of restitution and unjust enrichment.

Looking back to the early days of the comparative study of trusts, it is easy to underestimate the task facing comparative lawyers approaching trusts for the first time. In common law jurisdictions, the topic is vast. The sheer number of precedents on trusts constitutes a formidable challenge even for many dedicated researchers. The language of those precedents and of the relevant legislation is less than familiar to scholars trained in the general jurisprudence of continental legal systems, where the distinction between law and equity plays an altogether different role and is not rooted in the jurisdictional divide between courts of law and courts of equity.<sup>13</sup> Furthermore, the lively doctrinal controversy over the

<sup>12</sup> For analysis of several of the relevant *jus commune* sources: Michele Graziadei, 'The Development of Fiducia in Italian and French Law from the 14th Century to the End of the Ancien Régime', in Richard Helmholz and Reinhard Zimmermann, eds., *Itinera Fiduciae. Trust and Treuhand in Historical Perspective* (Berlin, 1998), 237; Maurizio Lupoi, 'The Civil Law Trust', 32 *Vand. J. Trans. L.* 967 (1998); Ferdinando Treggiari, *Minister ultimae voluntatis*, I (Naples, 2002), devotes to the examination of these sources an entire book (in Italian) from the standpoint of the legal historian. Sergio Cámara Lapuente, *La fiducia sucesoria secreta* (Madrid, 1996), covers several important sources related to the topic as well. Maurizio Lupoi, *I trust nel diritto civile* (Turin, 2004), devotes over 200 pages to the comparative study of English and continental sources, which shed yet more light on the history of trusts on both sides of the Channel. The essays by George Gretton, Richard Helmholz, Shael Herman and Michael McNair in the volume edited by Helmholz and Zimmermann greatly undermine as well any insular view of the history of the subject. In the same vein, see Patrick Glenn, 'The Historical Origins of the Trust', in Mordechai Rabello, ed., *Aequitas and Equity: Equity in Civil Law and Mixed Jurisdictions* (Jerusalem, 1997), 749 ff.

<sup>13</sup> For a rich set of studies on equity and the law in several legal systems: Rabello, ed., *Aequitas and Equity*; with specific regard to France: Vernon V. Palmer, 'From Embrace to Banishment: A Study of Judicial Equity in France', 47 *AJCL* 227 (1999).

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nature of the beneficiary's interest,<sup>14</sup> which engaged some of the most brilliant common law minds while comparative research on trusts was taking off, inevitably stimulated some conceptual responses to basic questions such as: what is a trust? who owns trust property? In the light of that controversy, it is hardly surprising that the first wave of comparative literature on trusts looked for order and clarity by proceeding first to answer the conceptual question concerning the nature of trusts and of the beneficiary's interest, then to research the functional equivalents and the mechanics of trusts. The search for conceptual clarity was, however, often frustrated by the poor quality of the tools deployed in the analysis. In the trust context, basic jurisprudential notions like 'ownership' or 'obligation' have unexpected meanings. Working on trusts, comparative lawyers have learned that familiar words can easily become traps for the unwary. Refined conceptual analysis of trusts requires a thorough search for the complex denotation of each notion employed to describe trust relationships – it is no coincidence that analytical thinkers like Hohfeld first tested their skills on trusts.<sup>15</sup> But such analysis was never developed by the first comparative lawyers who approached the subject. Instead, they relied on the analysis of the nature of the beneficiary's interest in terms of property or obligation, hardly questioning the meaning of those concepts in the context of the law of trusts,<sup>16</sup> or they proposed to fit the notion within the framework of other general concepts (like legal personality) familiar to lawyers based in continental Europe as well. The first trend of comparative thought thus spread the idea that trusts were a special form of ownership, whereby the same asset was owned by two or more owners.<sup>17</sup> On the other hand, the possibility to resort to 'obligation' as the best category to analyse the trust concept did not receive wide acceptance in comparative

<sup>14</sup> Of lasting value on that controversy: Donovan M. Waters, 'The Nature of the Trust Beneficiary's Interest', 45 *Canadian Bar Rev.* 217 (1967).

<sup>15</sup> Wesley N. Hohfeld, 'The Relations Between Equity and Law', 9 *Michigan L. Rev.* 537 (1913); Hohfeld, 'The Conflict of Law and Equity', 26 *Yale LJ* 767 (1917).

<sup>16</sup> For critical reactions to the limitations of that approach see now: Antonio Gambaro, 'I trusts e l'evoluzione del diritto di proprietà', in Ilaria Beneventi, ed., *I trusts in Italia oggi* (Milan, 1996), 57 ff.; Lupoi, *Trusts: A Comparative Study*, fn. 6, pp. 187 ff.

<sup>17</sup> See, e.g., Remo Franceschelli, *Il 'trust' nel diritto inglese* (Padua, 1935). Some proposals to introduce trusts in civilian jurisdiction argue that this special form of ownership could become a new type of real right: Matthias E. Storme, 'La confiance est bonne, mais un dual ownership est préférable', in Jacques Herbots and Denise Philippe, eds., *Le trust et la fiducie. Implications pratiques* (Brussels, 1997), 267 ff. Countless works by common law authors provide prima facie support for a view of trusts which relies on double ownership as a key feature of trusts. See, e.g., Kevin J. Grey and Susan Grey, *Elements of Land Law*, 3rd edn (London, 2001), 81 ff.

literature on trusts, possibly because it ran contrary to the (by then) prevailing common sense among leading trust law scholars in England and in the US.<sup>18</sup> The second main trend of thought considered trusts as an example of ‘segregation of assets from the patrimonium of individuals, and a devotion of such assets to a certain function, a certain end’.<sup>19</sup> This analysis ultimately evolved into the idea that trusts were legal persons,<sup>20</sup> though, of course, the prevailing view of the institution in common law jurisdictions avoids collapsing trusts into legal personality. Meanwhile, on the European continent, the perception that trusts posed intractable conceptual problems slowly shifted academic interest in the subject from jurisprudential debates over the proper doctrinal definition of trust

<sup>18</sup> Like Geoffrey Cavalier Cheshire and Austin Wakemann Scott. See now, however, Lupoi, *Trusts: A Comparative Study*, fn. 6, pp. 2–3, 187 ff., and Stefan Grundmann, ‘Trust and Treuhänder at the End of the 20th Century. Key Problems and Shift of Interests’, 47 *AJCL* 401 (1999). Both comparative studies advance the obligational approach to trusts. Note that academics, from James Bar Ames, ‘Purchase for Value without Notice’, 1 *Harvard L. Rev.* 1 (1887–8) at 9, to David J. Hayton, *Underhill and Hayton: Law of Trusts and Trustees*, 16th edn (London, 2003), 3 ff., 36 ff. have either argued that the obligational approach is to be preferred, or that it cannot be marginalised. What if continental lawyers approaching trusts considered them as examples of split ownership for no other reason than the desire to ‘exoticise’ the object of their study?

<sup>19</sup> Pierre Lepaulle, ‘An Outsider’s View Point of the Nature of Trusts’, 14 *Cornell LQ* 52 (1928), 55. Donovan M. Waters, ‘Unification or Harmonization? Experience with the Trust Concept’, in *Conflicts et Harmonisation – Mélanges en l’Honneur d’Alfred E. von Overbeck* (Fribourg, 1990), 591, 600–601, notes that Lepaulle’s opinion inspired the drafters of the Civil Code of Québec arts. 1261–1262, on *la fiducie / the trust*. Under those articles *la fiducie / the trust* is ‘un patrimoine d’affectation autonome et distinct’, that is made up of ‘biens qu’il [le constituant] affecte à un fin particulière’ / ‘a patrimony by appropriation, autonomous and distinct’, that is made up of ‘property ... which he [the settlor] appropriates to a particular purpose’.

<sup>20</sup> Pierre Lepaulle, ‘La notion de trust et ses applications dans les divers systèmes juridiques’, in *Actes du Congrès international de droit privé, II, L’unification du droit*, Unidroit (Rome, 1951), 197, 206 ff.; Lepaulle, ‘Débats’, in J.-D. Bredin, ‘L’évolution du trust dans la jurisprudence française’, in *Travaux du comité français de droit international privé, 1973–1975* (Paris, 1977), 137, at 153. This conception lurks behind the notion of ‘domicile of a trust’, first introduced into English law in 1978, upon the accession of the UK to the Brussels Convention on Jurisdiction and Enforcement of Judgments of 1968. Interestingly, making trusts into legal persons was one of the possibilities considered during the works for the new Québec Civil Code: Waters, ‘Unification or Harmonization?’, 600–601; see now Madeleine Cantin Cumyn, ‘La fiducie, un nouveau sujet de droit?’, in Jacques Beaulne, ed., *Mélanges Ernest Caparros* (Montreal, 2002), 131. The same idea is now discussed in common law circles: cf. Sara Worthington, ‘The Commercial Utility of the Trust Vehicle’, in David J. Hayton, ed., *Extending the Boundaries of Trusts and Similar Ring-Fenced Funds* (The Hague, London, New York, 2002), 135 ff., 152 ff.; for critical observations on this point: Donovan M. Waters, ‘The Institution of the Trust in Civil and Common Law’, in *Collected Courses of the Hague Academy of International Law*, 252 (1995), 113 ff., 421 ff.



relationships to public policy and functional analysis. The roots of these approaches were already present in Maitland's essays on trusts,<sup>21</sup> which examined, inter alia, the relationship between trusts and legal personality. Others looked in this direction as well. Lepaulle provided a rich illustration of the various functions performed by trusts in different contexts.<sup>22</sup> He compared the role played by civilian institutions in similar settings, pointing to the shortcomings of the civilian solutions. The list of civil law substitutes of trusts analysed by Lepaulle is by now familiar to all comparative lawyers who take an interest in trusts. It comprises general powers of attorney, foundations, associations, gifts *sub modo*, etc.<sup>23</sup> The discussion of functional substitutes of trusts became prominent in the second half of the twentieth century with Hein Kötz's *Trust und Treuhand*.<sup>24</sup> After that, a number of publications explored the same theme, which now features also in very recent contributions on trusts in comparative perspective.<sup>25</sup> Mentioning these developments, one could incidentally note that reflections on the common law experience with trusts did at times inspire solutions which were incorporated into the law of civilian jurisdiction without much trouble, thanks to the role played by legal authors as hidden legislators.<sup>26</sup> In any case, functional analysis of trusts called for open discussion of the policy issues involved in recognising the legal form. These discussions, however, quickly bifurcated into conflicting views of the policy considerations in favour or against trusts. On one side, the

<sup>21</sup> Maitland was the first to note that trusts had historically provided an alternative to incorporation in England (above, note 11). For an in-depth study of an important chapter of that history: Bernard Rudden, *The New River: A Legal History* (Oxford, 1985). Note that trusts can be treated as subjects for fiscal purposes.

<sup>22</sup> Pierre Lepaulle, *Traité théorique et pratique des trusts en droit interne, en droit fiscal et en droit international* (Paris, 1932), ch. 2.

<sup>23</sup> See Jeffrey A. Schoenblum, *Multistate and Multinational Estate Planning*, I, 2nd edn (Gaithersburg, NY, 1999), 1247 ff., paras. 18.03 ff.; Rudolf B. Schlesinger et al., *Comparative Law*, 6th edn (Mineola, New York, 1998), 868 ff. William F. Fratcher, 'Trust', in *International Encyclopedia of Comparative Law*, VI (Tübingen, The Hague, Paris, 1973) ch. 11, paras. 124 ff.; see also W. A. Wilson, ed., *Trusts and Trustlike Devices* (London, 1981).

<sup>24</sup> Hein Kötz, *Trust und Treuhand: Eine Rechtsvergleichende Darstellung des anglo-amerikanischen Trust und funktionsverwandter Institute des deutschen Rechts* (Göttingen, 1964).

<sup>25</sup> See e.g. the contributions collected in Hayton et al., *Principles of European Trust Law*; Madeleine Cantin Cumyn, ed., *La fiducie face au trust dans les rapports d'affaires* (Brussels, 1999).

<sup>26</sup> Thus, for example, both German and Italian authors studied the English law of trusts to develop their own law on *Treuhand* and *fiducia*. Among the influential works of the twentieth century see, e.g., Wolfgang Siebert, *Das rechtsgeschäftliche Treuhandverhältnis: ein dogmatischer und rechtsvergleichender Beitrag zum allgemeinen Treuhandproblem* (Marburg, 1933); Piergiusto Jaeger, *La separazione del patrimonio fiduciario nel fallimento* (Milan, 1968).

compatibility of trusts with basic rules enacted by the civil codes was defended on the basis of the existence of various civil law substitutes for trusts. Surely trusts – like contracts – could be contrary to mandatory provisions of law in some cases, but the number of trust substitutes existing in civil law countries abundantly proved that the trust form *per se* did not violate fundamental principles of law of those systems.<sup>27</sup> On the other side, it was argued that the trust form *per se* contravened those principles.<sup>28</sup> Trusts were thus held to be contrary to principles like the unitary nature of ownership, the unity of the patrimony, the *numerus clausus* of real rights, etc. The policy arguments backing these principles were essentially the necessity of preserving marketability of titles and safeguarding creditors from the effects of conveyances upon trusts.

With hindsight, it is all too easy to spot the blind corner of these different approaches. Is it correct to assume that common law jurisdictions have not developed a policy in favour of marketability of titles? Is the *numerus clausus* of real rights unknown in England, or in other common law jurisdictions? Are creditors liable to be defeated by hidden dispositions of property in England, or in other common law jurisdictions? Is it correct to assume that creditors are not protected under English law, or in other common law jurisdictions? Quite obviously, the answer to these questions is a plain ‘no’! True, the answer often comes with explanations framed in terms that are alien to civilian minds. The source of the trouble does not lie here, however. The problem is that the comparative literature on trusts has rarely addressed these simple questions. If the same passion that was spent on studying technical aspects of trust law had been devoted to questions like these we would have a more reliable overall comparative picture of the field of enquiry. We could then more easily concentrate on statutory innovations that in the offshore world, as well as in some other jurisdictions, pose some serious policy problems.<sup>29</sup>

<sup>27</sup> This was basically the point first advanced by Lepaulle in his various writings.

<sup>28</sup> See e.g. Henri Batiffol, ‘Trusts – The Trust Problem as Seen by a French Lawyer’, (1951) 33 J. Comp. Leg. and Int. L., parts III and IV, 18.

<sup>29</sup> Several offshore jurisdictions (starting with the Cook Islands in 1989), and some jurisdictions not belonging to the offshore world, severely restrict the possibility of reaching assets transferred to trustees. Trustees (and, possibly, beneficiaries) based in those jurisdictions are thus effectively shielded from the claims of the transferor’s creditors. On the risks involved in such transfers, see Duncan E. Osborne and Elisabeth M. Schurig, eds., *Asset Protection: Domestic and International Law Tactics* (St. Paul, Minn., 1993). For other concerns regarding more generally the transparency of activities based