

REGULATION OF THE RELATIONS IN THE TRANSPORTATION FIELD BASED ON CONVERGENCE OF PRIVATE AND PUBLIC LAW

Borisova, Svetlana V., Russian University of Transport, Moscow, Russia.

ABSTRACT

The research attempts to substantiate a new approach to understanding of coordination and subordination relations in the field of transport. Restructuring processes in Russia have resulted in the expansion of the area regulated by private law, and in the change of the ratio of application of private and public law in favor of private law. The prevailing functional approach to peculiarities of

emerging relations should ensure connection of administration of the transport sector with economic practices, which are now a prevailing object of legal regulations. At the moment, the prerequisites have been created for distinguishing three types of corresponding organizational models: state, economic (for all modes of transport) and corporate (for example, regarding railway and air transport).

Keywords: transport law, public law, private law, transport law concept, public administration, economic management, corporate governance, holding company.

Background. The problem of correlation of public and private law as instruments of legal centralization and decentralization is the cornerstone of jurisprudence throughout the entire period of existence of law, being directly dependent on the content of the political and economic organization of society and its dominant views. According to a fair comment by I. A. Pokrovsky, «throughout the course of history, the boundary between public and private law did not always pass in the same place, the areas of the one and the other changed many times» [1, p. 40].

A similar trend can be seen today at the example of transport. In the context of market reforms and restructuring, organizational and legal prerequisites have been created for development of an «innovative» model of legal regulation of the transport industry. The public legal organization of transport relations is now fundamentally different from the model that functioned in the Soviet period. Since the end of the 90s of the last century, complication of subordination and coordination ties in transport has been explained by total privatization of property, emergence of special business entities, proliferation of business activities, and most importantly it has led to extension of the sphere of private law regulation and to changing ratio in application of private law and public law in favor of private law.

Objective. The objective of the author is to consider transport law concept based on convergence of private and public law dominants.

Methods. The author uses general juridical methods, comparative analysis, evaluation approach.

Results.

Property redistribution – function sharing

Previously, relations in the field of transport were grouped into two main blocks – public administration and transportation, being respectively objects of public law and private law influence. The specificity of modern business in transport, not related to transportation, dictates the need for a new legal model for organizing property relations of business entities (real estate, obligations, corporate governance and ownership, etc.) and incorporating it into a single mechanism for legal regulation of relations in the transport sector.

This is confirmed in the program documents of the executive bodies regulating restructuring processes. Thus, in accordance with the program of structural reform in railway transport, carried out since the late nineties of the last century, at the first stage, the task was set and successfully accomplished to separate the functions of public administration and organization of economic practices while

simultaneously separating competitive activities from the monopoly structure [2].

According to the strategy of development of railway transport until 2030, an effective combination of state regulation and market self-regulation mechanisms is provided. It is noted that the main means of state regulation in the natural monopoly segment of the railway services market are: establishment of fixed tariffs based on the economically justified costs of the regulated entities and the regulatory profit, taking into account the regulatory profitability of its own (invested) capital; setting tariff limits; regulation of non-discriminatory access; pre-trial settlement of disputes regarding application of tariffs; maintaining a register of regulated segments of natural monopoly markets, subjects of natural monopolies, works (services) related to their field, etc. The main mechanisms of state regulation in the competitive segment include: regulation of behavioral conditions of activity of market entities (antimonopoly regulation); maintenance and development of conditions for effective self-regulation of the market for railway transport services in the conditions of price and technological competition, etc. [3].

The difficulty of identifying the object of legal regulation in transport and methods of influencing it has caused and continues to provoke in the scientific field a discussion on the status of legal model governing transport relations in the system of Russian law. Most authors see the optimization of normative regulation of such relations through creation of complex branches of law and adoption of a single codified act – the Transport Code of the Russian Federation.

The idea of an integrated approach to regulation of relations in the field of transport is supported by many researchers. At the core of their reasoning is the thesis that a feature of legal norms governing transport relations is that, on the one hand, they regulate the power-organisation relations, traditionally being the subject of administrative law (vertical relations), and on the other, property relations (for example, in the field of transportation) that constitute the subject of civil law (horizontal relations). Thus, according to A. G. Kalpin, Russian transport law is a complex branch of law governing social relations arising in connection with transportation and other transport activities regarding performance of its functions [4].

According to A. I. Bobylev transport relations are heterogeneous in their legal nature, content, and subject composition. He quoted: relations in creation of transport organizations of various organizational and legal forms; transportation related relations; labour relations; relations linked to the rational use of natural



resources; relations in the field of public administration of the transport complex, etc. [5].

The author of the textbook on transport law, V. A. Egiazarov, notes that the common goal of uniting the norms of various branches of law (civil, administrative, labour, land, etc.) in a single complex of transport law is to regulate the activities of each mode of transport as a single transport system of the country. The scientist proposes to single out the general (concluding long-term contracts, vehicles supply, liability for failure to fulfill obligations, tariffs, claims and lawsuits, etc.) and special parts (railway, inland water, air, sea and automobile law) within the transport law as an integrated branch of law. The special part of the transport law would regulate relations within each transport mode taking into account its specifics, for example, registration of transport documents, the procedure for licensing transport activities, etc. [6, pp. 8–9].

In civil science, there were also opinions on recognition of both transport law as a whole and its individual parts, for example, maritime law as independent branches of law [7].

Convergence as a balance of relations

In my opinion, search for an optimal model of systemic impact on transport relations lies outside the traditional concept of structuring the system of Russian law, that is, dividing it into clearly defined branches in accordance with the subject of legal regulation.

In the field of law to reveal the object of regulation in the transport sphere, the study of one's own approaches to understanding the constantly evolving category of public relationship should precede. The essential content of public and private law, as well as their relationship in the legal systems of the pre-revolutionary, Soviet and modern periods of development of statehood is very different. The emergence of new spheres of social relations, complication of existing, including transport-linked relations, indicate a change in the ways in which public and private law is manifested in a single matter of transport law. This is confirmed by creation of single business entities with public goals in transport; conclusion of contracts by participants of holding companies on interaction in the public law sphere, for example, in the field of transport security; corporate (private) management of organizations in the holding groups of persons in transport, etc.

Therefore, a simple statement of complexity of transport law as a set of norms of various industries must give way to the latest legal methodology of scientific knowledge of objective reality (in our case, the transport sphere), namely, convergence of private and public law. At the heart of this concept is the principle of systematization of social interests, which makes it possible at the level of the mechanism of legal regulation to identify general models of relationship between private and public principles [8, p. 47]. Only such an approach meets the modern requirements of the legal regulation of the reformed transport complex of the country. According to the fair point of M. Gredinger, one of the most important and difficult tasks of jurisprudence is to bring into unity the harmonic connection of various phenomena of legal life [9].

If public administration in transport traditionally remains the subject of public law regulation, the use of universal legal means of private law regulation in this industry is distinguished by unconditional specificity. Acknowledging the multiplicity of private law spheres in transport, the use of such means «in its pure form» as classical instruments of refraining from direct and

power enforced influence seems to be problematic. The presence in the private-law sphere, directly or indirectly, of state-governmental beginnings, is obviously due to the requirements of ensuring public (public and state) interests in transport. This may include compliance with transport safety requirements for transportation, licensing of certain types of transportation activities, implementation of state policy in transport and property affairs through the corporate management mechanism of legal entities (participants in holding structures), compulsory insurance in transportation field, etc. These cases are examples of entry of public legal tools (public law) into private law matter.

The study of the forms of convergence of public and private law concerns not only the property side of transport, but also organization of the entire industry, including the mechanism of state management of it, since the newest (functional) approach to studying the specifics of transport relations should provide, it seems, a link between industry leadership and economic practice as an object of regulating action.

In this sense, of particular interest is the question of the study of the legal nature, types and regulation of organizational and managerial relations in transport.

Disagreeing with the position of administrators about the exclusive «belonging» of management (subordination) relations to the subject of administrative law regulation, it is worth pointing out the universal nature of coordination and subordination relations between subjects, law-ordered through creation and use of appropriate legal tools, where the choice of the method of legal influence (public or private) depends on the purpose of their application by the subject of rule-making. Management in public law, carried out for public purposes, has a subordination character, and management in private law is of coordination character.

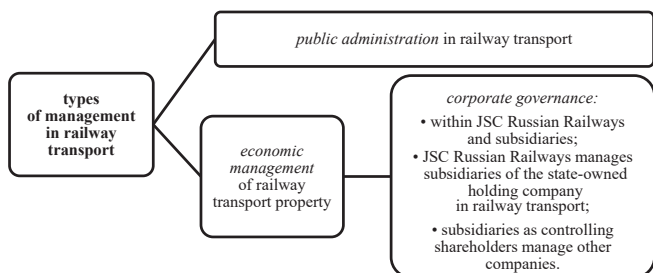
In the Explanatory Dictionary of the Living Great Russian Language, V. Dahl gives several meanings to the concept of «management»: firstly, «to manage is to control something, to rule, to give course, direction»; secondly, «to dispose – to manage, to be the owner, the manager of something, to tidy up» [10]. Applying this interpretation of management in the transport and legal sphere, we note that the first value is more applicable to public administration in transport, the second is the essence of management in the property sphere. So based on the nature of the legal powers of JSC Russian Railways, we note that the management that it exercises should be viewed from the standpoint of private law, since the very nature of power here is a particular one: it is the power of the owner, the economic owner, built no longer on subordination, but on coordination, the main purpose of which is to provide the country with rail transportation, railway services, as well as with profit.

Three organizational models

There are prerequisites for identifying three types of transport management – organizational models: state, economic (for all modes of transport) and corporate (at the level of holding companies, but only within certain transport modes, for example, within JSC Russian Railways for railways (Pic. 1), public JSC Aeroflot for air transport).

In public and private law, the subject and object of management are the main system-forming elements.

Public administration in transport is a form of administration in public law. It is carried out in order to meet the needs of the state and society for transportation through implementation of state policy in the transport sector. The subjects of public



Pic. 1. Types of management in railway transport.

administration in transport are the executive authorities exercising their authority in this area on behalf of the state. They have the status of legal entities – non-profit unitary organizations with authority in the field of public administration of the transport industry (public legal entities). These include: the Ministry of Transport of the Russian Federation, the Federal Service for Supervision in the Field of Transport, the Ministry of Internal Affairs of the Russian Federation, etc.

Economic management in transport, carried out by corporations, including those with state participation, is provided primarily by private law instruments. It represents the ordering effect on the process of economic activity of economic entities (conclusion of civil law contracts on insurance of transport infrastructure facilities, disposal of property, management of intellectual property, etc.). This is an external aspect focused on third parties. In addition, economic management provides organization (coordination) of economic activities in the field of transport. Thus, in the regulation on the property management department of JSC Russian Railways, its functions imply organization of accounting and registration, as well as management of property (transactions with property that do not contradict the law) [11]. Transport management is characterized by both static and dynamic relationships. On the one hand, this is the process of streamlining relations on the ownership of property to an economic entity (property accounting), on the other, interaction with other participants in civil turnover through conclusion of civil law transactions.

Special objects of economic management are property complexes, for example, a railway station as an element of railway infrastructure. It refers to a complex real estate object – part of the station complex and railway station (passenger stopping point), building or complex of buildings and structures located on land plots that are federal property, consisting of premises intended for passenger service and other users of railway services, placement of staff [12].

Commercial use of intellectual property in the system of JSC Russian Railways is ensured, in particular, by the standard STO RZD 1.08.011-2010 «Innovative activity in JSC Russian Railways. Rules for commercial use of intellectual property» [13], in which it is determined that the management of intellectual property is a set of measures aimed at the optimal use of this resource to achieve the objectives of the right holder.

The model of corporate governance of the holding company has been created on the railway transport. Issues of corporate governance in Russia, including in the field of transport, do not have the necessary legislative regulation and continue to be the most debatable in the modern domestic doctrine of private law. The definition of corporate governance is not contained either in the Civil Code of the Russian Federation or in special laws regulating the activities of corporations.

The subjects of local rulemaking, economic entities, are trying to fill the legislative gap. Thus, corporate governance codes and similar local acts were adopted in large transport business entities with state participation: the corporate conduct code of PJSC Aeroflot – Russian Airlines (approved by the annual general meeting of shareholders, Minutes No. 40 of June 28, 2017), code of business ethics of JSC Russian Railways (approved by the decision of the board of directors dated March 30, 2015, Minutes No. 3), the procedure for corporate governance by JSC Russian Railways of business entities whose shares it owns (approved by the board of directors of JSC RZD on June 30, 2004), and others.

Corporate transport governance, being a type of private law management, arises within the framework of corporate relations and provides:

- a) organizational unity within transport corporations created in the form of business societies (management within corporations);
- b) coordination of their activities within non-entity associations and holding companies (corporate management).

Holding company

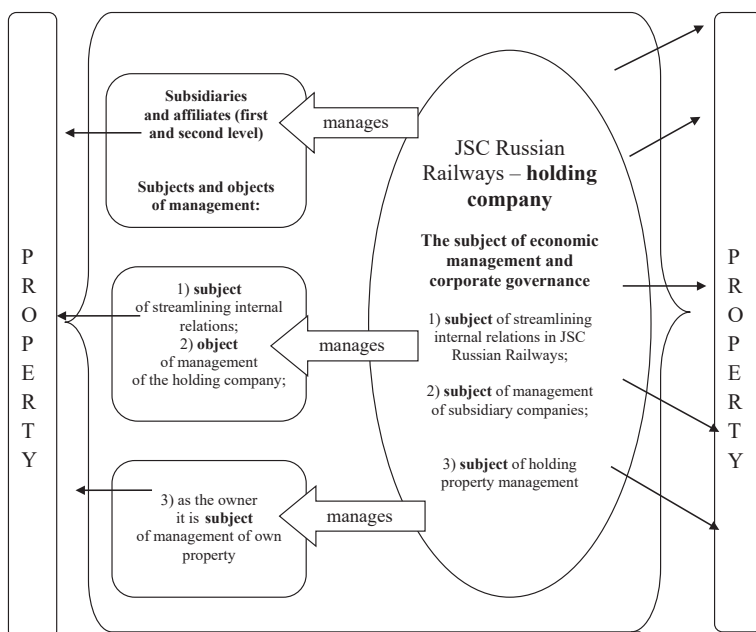
Corporate transport management is regulated by law at two levels. Firstly, there is the level of federal laws and subordination regulatory acts (first of all – the law on joint stock companies [15], the law on limited liability companies [16]). Secondly, these relations, as already noted, are an area of local rulemaking.

The institute of corporate governance in Russia, in addition to the federal laws on corporations, is supported by special bylaws that update the specifics of participation of public law entities in them: Order of the Federal Property Management Agency No. 330 of September 3, 2014 «On Approval of the Methodological Recommendations for Building the Internal Audit Function in Holding Structures with Participation of the Russian Federation» [20]; Order of the Federal Property Management Agency No. 253 of July 9, 2014 «On Approval of the Methodological Recommendations on Formation of the Regulation on Remuneration and Compensation of Members of the Audit Commission of the Joint-Stock Company with Participation of the Russian Federation» [21]; Order of the Federal Property Management Agency No. 306 dated August 22, 2014 «On Approval of the Methodology for Self-Assessment of Quality of Corporate Governance in Companies with State Participation» [22]; Order of the Federal Property Management Agency No. 94 of March 27, 2014, «On Approving Guidelines for Organizing the Work of the Corporate Secretary in Joint-Stock Companies with State Participation» [23], etc.

The features of corporate governance are quite visible at the example of a holding association in railway transport [24].

Under the «Russian Railways» holding, in acts of local rule-making, we mean a group of legal entities,





Pic. 2. Economic management and corporate governance in railway transport.

including the parent company – JSC Russian Railways – and its subsidiaries that carry out core activities, as well as legal entities that carry out core activities in which subsidiaries Russian Railways themselves act as a controlling shareholder [25].

Corporate governance in railway transport follows the following scheme:

a) management within the holding company of JSC Russian Railways and subsidiaries of the first and second levels as corporations;

b) management of the holding as a whole, including: 1) management by the holding company – JSC Russian Railways of the activities of first-level subsidiaries and 2) management by first-level subsidiaries in the status of controlling shareholders of the activities of second-level subsidiaries.

That is, in this scenario, JSC Russian Railways, as a single economic entity and a holding company leading the group of persons, is a subject of economic and corporate management in railway transport (Pic. 2).

The objects of the streamlining impact (control) on transport, therefore, in the sphere of private law are:

a) intra-organizational activity of the economic company as a member of the holding company;

b) conduct of business entities within the holding structures, ensuring their coordinated functioning;

c) property belonging to the holding participants. It should be noted that the feature of transport management is that legal entities are both objects and subjects of management relations.

A confirmation of this position is the modern concept of management in private law, according to which (Yu. S. Kharitonova) management activities include three groups of relations: management of a person, management of a collective body (entity) and management of property [26].

Conclusion. It should be noted that at present there is a need to create a single balanced mechanism for public law and private law regulation of «vertical» and «horizontal» relations in the field of transport based

on the current legal methodology which is convergence of private and public law.

REFERENCES

1. Pokrovsky, I. A. Basic problems of civil law [Osnovnye problemy grazhdanskogo prava]. Moscow, Statut publ., 1998, 353 p.
2. Decree of the Government of the Russian Federation No. 384 dated May 18, 2001 «On the Program for the Structural Reform of the Railway Transport» [Postanovlenie pravitelstva RF ot 18.05.2001 No. 384 «O Programme strukturnoi reformy na zheleznodorozhnom transporte»]. Sobranie zakonodatelstva RF, 2001, No. 23, Art. 2366.
3. Order of the Government of the Russian Federation of June 17, 2008 No. 877-p «On the Strategy for Development of Railway Transport in the Russian Federation until 2030» [Rasporyazhenie pravitelstva RF ot 17.06.2008 No. 877-r «O Strategii razvitiya zheleznodorozhnogo transporta v Rossiiskoi Federatsii do 2030 goda»]. Sobranie zakonodatelstva RF, 2008, No. 29 (part 2), Art. 3537.
4. Kalpin, A. G. The concept of transport law and its place in the system of Russian law [Ponyatie transportnogo prava i ego mesto v sisteme rossiiskogo prava]. Gosudarstvo i pravo, 2006, Iss. 8, p. 73.
5. Bobylev, A. I. Place of transport law in the system of Russian law [Mesto transportnogo prava v sisteme rossiiskogo prava]. Gosudarstvo i pravo, 2005, Iss. 1, pp. 11–14.
6. Egiazarov, V. A. Textbook on transport law [Uchebnik po transportnomu pravu]. 7th ed., enl. and rev. Moscow, Yustitsinform, 2011, 608 p.
7. Zhudro, A. K. Legal regulation of operation of the Soviet maritime transport. Abstract of Ph.D. (Law) thesis [Pravovoe regulirovanie ekspluatatsii sovetskogo morskogo transporta. Avtoref. dis... kand. yur. nauk]. Moscow, 1953, 15 p.
8. Korshunov, N. M. Convergence of private and public law: problems of theory and practice. Monograph [Konvergentsiya chastnogo i publichnogo prava: problemy

teorii i praktiki. Monografiya]. Moscow, Norma, Infra-M, 2011, 240 p.

9. Gredinger, M. O. Experience of researching nameless contracts [Opyt issledovaniya bezymyannykh dogovorov]. Riga, 1893, 129 p. [Electronic resource]: <http://www.biblioclub.ru/index.php?page=book&id=89771>. Last accessed 22.10.2018.

10. Dahl, V. I. Explanatory Dictionary of the Living Great Russian Language: 4 volumes [Tolkoviy slovar' zhivogo velikorusskogo yazyka: In 4 t. T. IV]. Moscow, Rus. yaz., 1980, 683 p.

11. Regulation «On the Department of Property Management of the Open Joint-Stock Company Russian Railways». Approved by OJSC Russian Railways on May 19, 2009 No. 38 [Polozhenie «O Departamente upravleniya imushchestvom otkrytogo aktsionernogo obshchestva «Rossiiskie zheleznye dorogi». Urv. OAO «RZD» ot 19 maya 2009 No. 38].

12. STO RZD 08.018-2013. Management of railway station complexes. Approved by Order of JSC Russian Railways dated 05.08.2013, No. 1694r [STO RZD 08.018-2013. Upravlenie zheleznodorozhnymi vokzalnymi kompleksami. Urv. rasporyazheniem OAO «RZD» ot 05.08.2013 No. 1694r].

13. STO RZD 1.08.011-2010. Innovation activity in JSC Russian Railways. Rules of commercial use of intellectual property. Approved by Order of JSC Russian Railways dated 27.12.2010 No. 2722r [STO RZD 1.08.011-2010. Innovatsionnaya deyatel'nost' v OAO «RZD». Pravila kommercheskogo ispolzovaniya rezultatov intellektualnoi deyatel'nosti. Urv. rasporyazheniem OAO «RZD» ot 27.12.2010 No. 2722r].

14. Letter of the Bank of Russia of 10.04.2014 No. 06-522463 «On the Corporate Governance Code» [Pis'mo Banka Rossii ot 10.04.2014 No. 06-522463 O Kodekse korporativnogo upravleniya]. Vestnik Banka Rossii, 2014, No. 40.

15. Federal Law «On Joint-Stock Companies» dated 26.12.1995 No. 208-FZ [Federal'niy zakon «Ob aktsionnykh obshchestvakh» ot 26.12.1995 No. 208-FZ]. Sobranie zakonodatelstva RF, 1996, No. 1, Art. 1.

16. Federal Law «On Limited Liability Companies» dated 08.02.1998, No. 14-FZ [Federal'niy zakon «Ob obshchestvakh s ogranichennoi otvetstvennost'yu» ot 08.02.1998 № 14-FZ]. Sobranie zakonodatelstva RF, 1998, No. 7, Art. 785.

17. The procedure for corporate governance by JSC Russian Railways of business companies whose shares (shares) are owned by JSC Russian Railways. Approved by Board of Directors of JSC Russian Railways on June 30, 2004 [Poryadok korporativnogo upravleniya OAO RZD khozyaistvennymi obshchestvami, aktsiyami (dolyami) kotorykh vladeet OAO RZD. Urv. sovetom direktorov OAO «RZD» 30 iyunya 2004].

18. About the Code of Business Ethics of Open Joint-Stock Company Russian Railways. Approved by Order of OJSC Russian Railways dated 06.05.2015 No. 1143r [O Kodekse delovoi etiki otkrytogo aktsionernogo obshchestva Rossiiskie zheleznye dorogi. Urv. rasporyazheniem OAO RZD ot 06.05.2015 No. 1143r]. [Electronic resource]: <http://rulaws.ru/acts/Rasporyazhenie-OAO-RZHD-ot-06.05.2015-N-1143r/>. Last accessed 22.10.2018.

19. Regulations on the Information Policy of JSC Russian Railways. Approved by JSC Russian Railways on

February 21, 2017 [Polozhenie ob informatsionnoi politike OAO «RZD». Urv. OAO «RZD» 21 fevralya 2017]. [Electronic resource]: http://doc.rzd.ru/doc/public/ru?STRUCTURE_ID=704&layer_id=5104&id=6817. Last accessed 22.10.2018.

20. Order of the Federal Property Management Agency No. 330 of September 3, 2014 «On Approval of the Methodological Recommendations for Building the Internal Audit Function in Holding Structures with Participation of the Russian Federation» [Prikaz Rosimushchestva ot 03.09.2014 No. 330 «Ob utverzhdenii Metodicheskikh rekomendatsii po postroeniyu funktsii vnutrennego audita v kholdingovykh strukturakh s uchastieem RF»]. [Electronic resource]: <https://bazanpa.ru/rosimushchestvo-prikaz-n330-ot03092014-h2360975/>. Last accessed 22.10.2018.

21. Order of the Federal Property Management Agency No. 253 of July 9, 2014 «On Approval of the Methodological Recommendations on Formation of the Regulation on Remuneration and Compensation of Members of the Audit Commission of the Joint-Stock Company with Participation of the Russian Federation» [Prikaz Rosimushchestva ot 09.07.2014 No. 253 «Ob utverzhdenii Metodicheskikh rekomendatsii po formirovaniyu Polozheniya o vozmagrazhdeniyakh i kompensatsiyakh chlenov revizionnoi komissii aktsionernogo obshchestva s uchastieem RF»]. [Electronic resource]: <https://tkrfkod.ru/zakonodatelstvo/prikaz-rosimushchestva-ot-09072014-n-253/>. Last accessed 22.10.2018.

22. Order of the Federal Property Management Agency No. 306 dated August 22, 2014 «On Approval of the Methodology for Self-Assessment of Quality of Corporate Governance in Companies with State Participation» [Prikaz Rosimushchestva ot 22.08.2014 No. 306 «Ob utverzhdenii Metodiki samoootsenki kachestva korporativnogo upravleniya v kompaniyakh s gosudarstvennym uchastieem»]. [Electronic resource]: <http://www.garant.ru/products/ipo/prime/doc/70627396/>. Last accessed 22.10.2018.

23. Order of the Federal Property Management Agency No. 94 of March 27, 2014, «On Approving Guidelines for Organizing the Work of the Corporate Secretary in Joint-Stock Companies with State Participation» [Prikaz Rosimushchestva ot 27.03.2014 No. 94 «Ob utverzhdenii Metodicheskikh rekomendatsii po organizatsii raboty korporativnogo sekretarya v aktsionnykh obshchestvakh s gosudarstvennym uchastieem»]. [Electronic resource]: <http://legalacts.ru/doc/prikaz-rosimushchestva-ot-27032014-n-94-ob/>. Last accessed 22.10.2018.

24. Sukhanov, E. A. Comparative Corporate Law [Sravnitel'noe korporativnoe pravo]. Moscow, Statut, 2014, 456 p.

25. On approval of documents regulating work with the brands of the holding company Russian Railways. Approved by Order of JSC Russian Railways of March 12, 2015 No. 608r [Ob utverzhdenii dokumentov, reglamentiruyushchikh rabotu s brendami kholdinga «RZD». Urv. rasporyazheniem OAO «RZD» ot 12 marta 2015 No. 608r].

26. Kharitonova, Yu. S. Management in civil law: problems of theory and practice [Upravlenie v grazhdanskom prave: problem teorii i praktiki]. Moscow, Norma, Infra-M, 2011, 304 p. ●

Information about the author:

Borisova, Svetlana V. – Ph.D. (Law), associate professor of the department of Civil law, international private law and civil process of Law Institute of Russian University of Transport, Moscow, Russia, borisovamiit@mail.ru.

Article received 22.10.2018, accepted 30.01.2019.

