National Research University

Higher School of Economics

Obukhova Evgeniya Vladimirovna

CIVIL LAW REGULATION OF NON-DOCUMENTARY SECURITIES HOLDING

EXTENDED ABSTRACT OF DISSERTATION

submitted for the degree of Candidate of Science in Law

Scientific Supervisor

Ivanov Anton Alexandrovich

Ph.D. in Law, Professor

Moscow - 2018

The thesis was completed at the Department of Civil and Business Law of the Faculty of Law of the Federal State Autonomous Educational Institution for Higher Education National Research University ‘Higher School of Economics’

The text of the thesis is available on the website of the Higher School of Economics: https://www.hse.ru/sci/diss/218776836

Academic Secretary

Dissertation Council on Law

Doctor of Law, assistant professor Iryna Alexandrovna Emelkina

GENERAL CHARACTERISTICS OF THE RESEARCH[1]

Relevance of the research theme

The present dissertation is devoted to the regularities and peculiarities of the legal regulation of non-documentary securities holding[2]. The scope of the research is differences and shifts in titles[3] to and upon a security of the 'holding chain' participants in different holding systems around the world. The correlation between the titles of participants of the holding chain is examined altogether with the influence that the holding system exerts on the title to securities of persons in the holding model. The mentioned problem seems not to be evaluated in the domestic literature yet. Current reforms in this sphere (the introduction of central depository[4], corporate actions reform[5]) also require careful analysis.

The correlation between the titles of the holding chain participants is examined in the present research in connection with the influence that the holding system

---

[1] I sincerely thank my science leader at the HSE, Prof. A. Ivanov for the patience and invaluable insight that significantly improved the final work. I'm grateful for my supervisor at FSU Jena, Germany, Prof. C. Ohler for his guidance, knowledge and patience. Special thanks to my family, friends and colleagues for the encouragement and support. All mistakes in the research remain my own.

[2] It should be noted that terminology of the Russian legislation essentially differs from that of foreign countries. The present thesis is intended to develop the idea of securities holding models and its' legal consequences. The general notion of holding (and book-keeping, accounting for securities) in Russian law is described by a single term associated with a system containing information about securities or transactions in respect of those as well as the process of systematization of such information. Such definition may be found in para. 2 art.1 of the Federal Law of 06 December 2011 N 402-FZ On Accounting. In foreign literature bookkeeping process in respect of non-documentary securities is described by terms holding and disposition. In the present study 'holding' is considered as describing a process of holding (proprietary or merely control over the asset) and at the same time distribution of the of rights 'to security and 'upon security' (the latter as a bundle of rights incorporated in security) among all participants of the holding chain.

[3] In this study, the term 'title' is used as a complex description of a bundle of rights to a non-documentary security and entitlement to the rights incorporated in a non-documentary security. In the existing Russian legal terminology 'title' is usually defined as a set of property rights – e.g. Sukhanov E.A., 2017 'Property law: a scientific and educational essay', Moscow: Statute / Legal Reference System 'Consultant Plus'.

[4] Federal Law of 7 December 2011 No 414-FZ On the central depository; Federal Law of 7 December 2011 415-FZ On Amendments to Certain Legislative Acts of the Russian Federation Related to the Adoption of the Federal Law On the Central Securities Depository.

[5] E.g. Federal Law of 29 June 2015 N 210-FZ On Amendments to Certain Legislative Acts of the Russian Federation. Available at: http://www.corpactions.ru/ru/reform/

exerts on the titles to securities of persons in the holding scheme. It is revealed that the current Russian legislation contains very broad rules for determining the person entitled upon a security and such rules vary depending on the form of securities holding (indirect or direct). Domestic jurisprudence demonstrates the solution of the problem of different title to a non-documentary security by the following way. The lack of formal entitlement (legitimation) to a non-documentary security of the ultimate holder is compensated by an expansive interpretation of the 'corporate status' of a person (e.g. a shareholder) using the concept of protected interest (in the title upon a non-documentary security).

A corrective interpretation for such legal terminological inaccuracy is not proposed in practice. Practical or doctrinal studies of this phenomenon in domestic literature are rare. At the same time, the draft law[6] introduced and considered in the first reading (as of March 2018) in the State Duma of the Russian Federation does not introduce the necessary clarity into the issue of the distribution of titles to non-documentary securities in indirect (depository) and other forms of holding.

It is also assumed that the general approach to the definition of non-documentary security as an object of rights[7] predetermines the securities holding system. The latter in turn determines the volume and features of the exercising of the rights upon a security. Analysis of the international legal problems of non-documentary securities holding shows some unique legal problems (or sufficient only for transnational transactions) and are not yet found in domestic practice[8]. At the same time its examination provides an opportunity to analyze the key concepts

[6] The draft Federal Law On Amendments to the Federal Law On the Securities Market and Certain Legislative Acts of the Russian Federation Regarding the Improvement of the Legal Regulation of the Securities Emission N 319413-7 (version as adopted by the State Duma in the first reading on 24.01.2018), hereinafter – Draft Law N 319413-7.

[7] The definition of the nature of the object predetermines all other methods of regulation. Such approach is discovered also in the Explanatory note to the draft Federal Law On Amendments to the First, Second and the Fourth Part of the Civil Code of the Russian Federation No. 424632-7 Available at: http://asozd2c.duma.gov.ru/addwork/scans.nsf/ID/B91DEDFBCF19B4E04325825C0032641E/$FILE/424632-7_26032018_424632-7.PDF?OpenElement (in Russian)

[8] For example, the Writ of the Supreme Court of the Russian Federation of 09.06.2015 N 11-KG15-12 / Legal Reference System 'Consultant Plus'.

of the theory of securities and securities holding and thus to identify certain effective ways of its regulation.

The present thesis is intended to supplement the literature on this theme. The study presents current securities holding models (indirect, transparent, direct holding), as well as problems of the correlation of titles of participants of holding systems and the related legal problems.

The special emphasis is made on the forms of non-documentary securities holding. Russian researchers usually concentrate either on methods of non-documentary securities holding in the context of the risks of the owner / holder of securities (the right 'upon securities) or on the essence of securities as a legal concept (categorization of the right 'to securities'). The complex studies of the mentioned problems as a complex and interconnected matter are quite rare in domestic but are familiar in foreign literature. This study offers a comprehensive analysis of those two interrelated problems from the position of Russian law, with the involvement of foreign legislative and practical experience.

It is assumed that the study of the above mentioned problems is relevant and applicable and has both theoretical and practical value.

The degree of scientific elaboration

Much attention of domestic scientists during the last 15 years is paid to the determination of the legal nature of non-documentary securities as an object of law as well as the specifics of the transactions with it. Most of the discussions on that problem refer to the period 2000-2010 when securities were introduced in the market. In the period of 2005-2012 many fundamental researches of the legal nature of non-documentary securities were published: by V.A. Belov[9], a series of

[9] Belov V.A., 2012. 'Non-documentary securities' [Bezdokumentarnye cennye bumagi], Moscow, Yurinfor. Belov V.A., 2007. 'Securities in Russian civil law' [Cennye bumagi v rossijskom grazhdanskom prave], In 2 vol. Moscow, Yurinfor.

doctrinal works and a doctoral thesis by A.V. Gabov[10], numerous papers of doctrinal and practical nature by D.I. Stepanov[11], L.R. Yuldashbaeva[12], theoretical studies of the concept and the nature of non-documentary securities by E. A. Sukhanov[13], G.N. Shevchenko[14] and other authors. The focus of the research of the period 2012-2017 in general is rather narrow[15]. At the same time, some aspects of the current securities accounting and holding system reform (introduction of the central depository institution) and reform of corporate actions are discussed in special and economic literature.

At the same time the issues of legal nature and securities holding systems have been developed to a much greater extent in foreign literature. The legal regulation

[10] Gabov A.V., 2009. 'Securities in Russian law: some chapters of history of its definition creation' [Cennaja bumaga v rossijskom prave: nekotorye stranicy istorii pojavlenija ee sovremennogo opredelenija], Business law [Predprinimatel'skoe pravo], no 4, pp. 41 – 46. Doctoral thesis by that author. Gabov A.V., 2010. 'Problems of civil law regulation of transactions on securities market' [Problemy grazhdansko-pravovogo regulirovanija otnoshenij na rynke cennyh bumag]: dissertacija ... doktora juridicheskih nauk: 12.00.03 / Moscow, 465 p.

[11] Stepanov D.I., 2002. 'Problems of theory and practice of equity securities' [Voprosy teorii i praktiki jemissionnyh cennyh bumag] / Hozjajstvo i pravo, no 3. Stepanov D.I., 2004. 'Legal remedies for the holder of the book-entry securities' [Zashhita prav vladel'ca cennyh bumag, uchityvaemyh zapis'ju na schete]. Moscow, Statut, 127 p. Stepanov D.I., 2010. 'On the theory of notion of securities in Russia and on the theory of legal concepts in general. Relevance of dogmatic reflections' [O teorii cennyh bumag v Rossii i o teorii ponjatij voobshhe. Razmyshlenija o vostrebovannosti dogmaticheskih postroenij] / Vestnik grazhdanskogo prava, no 4, pp. 58 - 96. Stepanov D.I., 2000. 'The modern Russian legal understanding of securities' [Sovremennoe rossijskoe pravoponimanie cennyh bumag] / Zhurnal rossijskogo prava, no 7.

[12] Juldashbaeva L.R. The legal nature of securities [Pravovaja priroda bezdokumentarnyh cennyh bumag] / Hozjajstvo i pravo, 1998, № 4. Juldashbaeva L.R. The legal regulation of the eqity securities transactions [Pravovoe regulirovanie oborota jemissionnyh cennyh bumag (akcij, obligacij)]. M., Statut, 1999

[13] Suhanov E.A., 2011. 'On the concept of securities' [O ponjatii cennyh bumag]. Chastnoe pravo i finansovyj rynok, no.1, pp. 1-20.

[14] Shevchenko G.N., 2009. 'Absoluteness of title to securities' [Absoljutnoe pravo na bezdokumentarnye cennye bumagi]. Pravovaja real'nost' v fokuse juridicheskoj nauki i universitetskogo prosveshhenija: materialy mezhdunarodnoj nauchno-prakticheskoj konferencii. - Vladivostok: Izd-vo Dal'nevost. un-ta, pp. 322-325; Shevchenko G.N., 2004. 'The legal regulation of securities' [Pravovoe regulirovanie cennyh bumag]. Moscow, Statut, 173 p.

[15] Trifonenkova T.Ju., 2010. 'Central depository as an element of the international financial center' [Central'nyj depozitarij kak jelement mezhdunarodnogo finansovogo centra // Finansovaja analitika: problemy i reshenija, no. 16, pp.11-17. Kirichenko D., 2016. 'Corporate actions and execution of shareholders' rights' [Korporativnye dejstvija i osushhestvlenie prav akcionerov]. Depozitarium, no. 1 (141), pp. 24-32. Nikiforov A.Ju., 2014. 'Non-documentary securities' [Bezdokumentarnye cennye bumagi] / Legal Reference System 'Consultant Plus'.

of the securities market in Russia is to a great extent oriented toward the experience of foreign countries.

Among foreign researches it is necessary to emphasize: fundamental doctrinal researches of the legal nature of paperless securities by prof. Joanna Benjamin[16], Erica Johansen[17]; prof. Matthias Lehmann[18] on the legal issues of electronic accounting and the form of securities; comparative legal studies, as well as issues and a monograph on the indirect holding by Eva Micheler[19]; monographs and articles by prof. David Donald[20] on securities settlement systems; the article by the prof. Charles Mooney[21] on certain issues in this field in the law of the United States and Japan; Wenwen Liang'[22]s work on the correlation of titles in indirect holding and on the securities holding model of China; Changmin Chang's[23] monograph on the private international regulation of securities holding.

---

[16] Benjamin J., 2000. 'Interests in securities. A proprietary law analysis of the international securities markets'. Oxford, 392 p. See also: Stevens R. and McFarlane B., 2009. 'Interests in Securities: Practical Problems and Conceptual Solutions'. In L. Gullfer and J. Payne (eds), Intermediated Securities, pp. 34-47. Zaccaria E.C. 'Proprietary rights in indirectly held securities: legal risks and future challenges' (Ph.D. thesis) The London School of Economics and Political Science.

[17] Johansson E., 2009. 'Property Rights in Investment Securities and the Doctrine of Specificity'. Springer-Verlag Berlin Heidelberg, 220 p.

[18] Lehmann, M., 2009. 'Finanzinstrumente: vom Wertpapier- und Sachenrecht zum Recht der unkörperlichen Vermögensgegenstände'. Mohr Siebeck, 558 p.

[19] Micheler E., 2007. 'Property in Securities. Comparative Study'. Cambridge studies in corporate law, 253 p. See also the research by her colleague by LSE, Ph. Paech: Paech P., 2012. 'Market needs as Paradigm: Breaking Up the Thinking on EU Securities Law'. LSE Law, Society and Economics Working Papers 11/2012. London.

[20] Donald D.C., 2013. 'Securities settlement systems. Handbook of Key Global Financial Markets, Institutions and Infrastructure'. Hong Kong, pp. 595–611. Donald D.C. 2007. 'The rise and effects of the indirect holding system: how corporate America ceded its shareholders to intermediaries'. Institute for law and finance, Johann Wolfgang Goethe-Universitaet Frankfurt, Working paper series № 68.

[21] Mooney Ch. W. Jr., 2008. 'Law and Systems for Intermediated Securities and the Relationship of Private Property Law to Securities Clearance and Settlement: United States, Japan, and the UNIDROIT Draft Convention'. IMES Discussion Paper Series 2008-E-7.

[22] Liang W., 2013.'Title and title conflicts in respect of intermediates securities under English law'. Cambridge Scholars Publishing, 220 p.

[23] Changmin Chun, 2012. 'Cross-Border Transactions of Intermediated Securities. A Comparative Analysis in Substantive Law and Private International Law'. Berlin, Heidelberg, 504 p.

It is also necessary to mention the reports of the Working Groups: UNIDROIT Study Group on harmonised substantive rules regarding securities held with an intermediary[24]; The Commission chaired by Christophe Bernasconi on the law applicable to dispositions of securities through indirect holding systems[25]. At the national level, the reports and analytical documents of the commissions should be also noted: in the EU - the Alberto Giovanni Group[26], as well as the experts of the EU Commission on Domestic Markets and Services[27]; in the UK, the Financial Services Authority; in the USA - special committees of the Congress[28] and others.

Theoretical base of the research

The present dissertation is based on examination of large amount of domestic and foreign studies. The problems considered in this dissertation were discussed in Russian literature by the following authors: M.M. Agarkov, A.V. Asoskov, V.A. Belov, A.V. Gabov, D.D. Grimm, V.V. Dolinskaya, E.N. Kabatova, E.A. Krasheninnikov, A.N. Lysenko, A.N. Latyev, D.V. Lomakin, N.O. Nersesov, A.Yu. Nikiforov, D.A. Pentsov, S.V. Sarbash, A.S. Selivanovsky, S.A. Sinitsyn, D.I. Stepanov, E.A. Sukhanov, Yu.K. Tolstoy, P.P. Tsitovich, G.N. Shevchenko, L.R. Yuldashbaeva and others. Several narrowly specialized studies that enriched the subject area of the research were conducted by: A.E. Abramova, K.R.

[24] E.g. UNIDROIT Study Group. On Harmonised Substantive Rules Regarding Securities Held With An Intermediary. Rome, December 2004, Doc.19.

[25] Bernasconi C. The Law Applicable to Dispositions of Securities through Indirect Holding Systems. Report for the Hague Conference on Private International Law, November 2001. R. Goode, H. Kanda & K. Kreuzer, with the assistance of Christophe Bernasconi. Explanatory Report on the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary (Hague Securities Convention). Hague. 2005.

[26] The Giovannini Group. Second Report on EU Clearing and Settlement Arrangements. Brussels, April 2003.

[27] European Commission - Directorate General, Internal Market and Services. Summary of the seventh meeting of the Member States working group on securities law legislation. Brussels, 24.05.2013.

[28] U.S. Congress, Office of Technology Assessment, Trading Around the 1 Clock: Global Securities Markets and Information Technology--Background Paper, OTA-BP-W-66. Washington, DC: U.S. Government Printing Office, July 1990.

Adamova, E.V. Agapeeva, A. Barshchevsky, M.L. Bashkatov, I.N. Butina, I.V. Getman-Pavlova, N.Yu. Yerpyleva, M.N. Klevchenkova, E.N. Puzyreva, M. Samoylova, T.Yu. Trifonenkovaya, I.A. Frolova and others. In the foreign doctrine the problems of non-documentary securities holding were discussed in the fundamental works of the following authors: Cristophe Bernasconi, Joanna Benjamin, Changmin Chun, David C. Donald, France Drummond, Roy Goode, Ben McFarlane, Louise Gullifer, Matthias Haentjens, Erica Johansson, Herbert Kronke, Wenwen Liang, Eva Micheler, Charles Mooney, Georg Opitz, Philip Paech, Roben Steves, Luc Thevenoz, Elena Christine Zaccaria.

The empirical base of the research.

The research is based on domestic and foreign precedents and court practice in general. The materials of the court practice, analysis of the Plenum and the Presidium of the Supreme Arbitration Court and the Supreme Court of the Russian Federation decisions as well as judicial acts of the courts of lower instances. Also the study shows the practice of considering similar disputes by judicial bodies of foreign countries. In the thesis, the working and reporting documents for the development of conventions, normative acts of the European Union (Directives, Regulations) and national legislation of the respective authorities were used.

The purpose of the dissertational research and particular research tasks.

The overall purpose of the research is theoretical comprehension of models for non-documentary securities holding as well as analysis of the risks and the distribution of titles to and upon a non-documentary security.

Particular research tasks include: analysis of the prerequisites and current state of the legal regulation of non-documentary securities in domestic and foreign law; determination of factors contributing to the implementation of a particular securities holding model in the regulatory paradigm for the examined jurisdictions;

identification of the ratio of legitimizing factors and related approaches to the distribution of titles to securities(thus between intermediaries and ultimate purchasers); identification of risks of discrepancy of legal approaches in case of international holding chain.

The object of the research includes the model for non-documentary securities holding; specificity of non-documentary securities as an object holding; characteristics and distribution of title to and under non-documentary securities as well as the legal consequences of implementation of a particular holding model.

The scientific novelty of the research for the legal doctrine is that for the first time in the Russian legal literature a comprehensive analysis of models and forms of non-documentary securities holding was carried out. Understanding the ratio of titles to non-documentary securities allows to examine in more detail the legal risks that arise with the implementation of each form of securities holding.

Thus the theme of the research has a certain scientific novelty, is topical in both theoretical and in practical sense. The study of the legal nature of non-documentary securities and their holding models allows to optimize the legislative base, systematize existing regulatory acts and improve qualitatively the regulation of the securities market as a whole.

The theoretical and practical significance of the research is that the conclusions and proposals formulated in the dissertation expand the scope of literature and thus knowledge on models and forms of non-documentary securities holding; on the objective relationship between titles to and upon a non-documentary security.

Separate conclusions made in this research could be used in the subsequent theoretical analysis of the problems of non-documentary securities.

The practical benefit of the research is that the conclusions based on the analysis of the foreign regulatory practice and precedents are applicable for the similar cases in the Russian courts. The thesis proposes solutions for some legal problems that only appear in domestic practice (for example, the realization of the rights of the ultimate acquirer in the system of indirect accounting of non-documentary securities).

Methodology and methods of research.

The methods employed in the research are the following: of the formal logics (including deduction, induction, analysis and synthesis), theoretical modeling, classification, extrapolation as well as methods of comparative jurisprudence and a historical-retrospective method.

The conducted research has made it possible to formulate and substantiate the following **main propositions and conclusions to be defended:**

1. The classical formula defining the relationship between the right to (that was understood as a right to thing) and upon the security in connection to title to the material, physically existing document as a main feature of securities has undergone revision when non-documentary securities first appeared. The struggle of the latter for the status of independent object of law (but based on provisions for classic documentary securities) is accompanied by the loss of material element and a significant change in the rules of legitimation.

The disappearance of the material element compelled the legislator to make choice between the two regulatory models. The first model allows an attempt to restore the connection between titles to and upon security in several ways. Those are the preservation of the ‘property element’ under a certain holding concept (immobilization in some jurisdictions presupposes the preservation of the property regulatory regime applied to non-documentary securities). The entitlement of the

ultimate purchaser in the form of control in respect of a non-documentary security also gives the legal relationship between the ultimate acquirer and the issuer a 'reflected effect'. In the framework of such a model (the approach of Great Britain, Germany) a non-documentary security even held by the intermediary grants a special right to an object having the features of absolute rights.

2. The final disappearance of the title to security as a specific object (the second model – 'pure dematerialization') leads to certain difficulties with the localization of rights 'upon security' and potentially to the multiplication of such rights at all levels of holding chain. There arises the necessity to distinguish the title (and exclude the 'reflected effect') to a non-documentary security between all intermediate participants of the holding chain and the ultimate purchasers. In order not to reduce and simplify a non-documentary security to a simple model of a contractual claim under the account agreement (that could be equal among all the participants in chain) dematerialization implies the concept of securities as sui generis rights that are not identical with the title to security and the claim under securities account contract.

The application of this model also allows to refrain from the uncertain qualification of the legal nature of securities as the object held. In systems of 'pure dematerialization' non-documentary securities can be held and accounted for as rights arising from the account under the relevant contract (the US model), but may under certain circumstances acquire against third parties.

3. Analysis of common practices used in foreign holding systems shows that the form of non-documentary securities holding correlates with the legal nature of the object held and significantly changes it. The two main existing holding systems are direct (e.g. using distributed registers with the names of ultimate purchasers) or transparent (the existence of intermediaries with a 'consulting role' that do not influence the title of the ultimate purchaser); and also intermediated (when there is a hierarchy of intermediaries and their titles). The criterion for distinguishing the

mentioned system is the presence of intermediaries in the holding chain; the influence they cause on the title of the ultimate acquirer. Thus, the distribution of the titles upon a security in the ‘holding chain’ as well as the legitimation is different.

4. It is established that the legal consequences caused by the mismatch of titles and general approach to legitimation in the holding chain produces grounds for the distinguishing securities to those held directly (when the holding and legitimation position coincide) and indirectly (the status of the legitimated person may belong either to intermediary or to the ultimate purchaser).

In the case when the issuer's register for indirectly held securities is a source for legitimation, the essence of the rights of the ultimate purchaser (client under the securities account agreement) varies. In particular, the sphere of ultimate purchaser’s control may be limited to the contractual claims to the intermediary, than he should not be considered as the holder in terms of title to a non-documentary security.

Being a private law category the title to a non-documentary security cannot be fulfilled by the evidence of the de facto holding of the ultimate purchaser. The issuer is often (in Russian and foreign practice) obliged to analyze the accounting chain under the public law (tax, AML/CTF) requirements. However, such interaction between the issuer and the ultimate purchaser lacks the legally binding status and thus does not affect the title of the ultimate purchaser upon a non-documentary security.

5. The indirect holding is a legal phenomenon that allows to employ the uniform procedure to holding and transfer of the titles to and upon property (in both documentary and non-documentary form). At the same time, the legal status and title of the ultimate purchaser of intermediated securities are significantly different from those in transparent systems and direct holding systems.

Depending on forms of securities holding a respective combination of titles to and upon a non-documentary security differs. At the same time, the common terminology and regulation ignores the mentioned difference.

Introduction of separate terms for non-documentary securities held with or without the intermediary (with a change in the title of the purchaser). Such a decision is common in foreign practice (Swiss Bucheffekten, account / intermediated securities in certain EU Directives, American book-entry securities). In certain acts of the Bank of Russia, a special type of indirectly held securities those held by a depository are called depository securities[29]. The introduction of this or similar terms applied only to indirectly held securities rather than generic term could draw the line between those two significantly different types of securities.

6. The Russian model of non-documentary securities holding is generally a combination of direct (opening of the holder's accounts with the registrar) and indirect (with depository as an intermediary) holding. The market infrastructure reform, inter alia, caused the uncertainty in the legislation regarding the status of the entitled person (legitimation).

Definitions of key terms remain unchanged despite the sufficient change of the content (for example, the definition of the term owner in proprietary sense that does not remove the uncertainty in legitimation upon security); sometimes terms are misused. The proposed changes in the legislation do not eliminate this problem. So it is proposed for the purpose of indirect holding to draw a final clarification of the terms and definitions of the person entitled upon a security (who is now referred to as the ‘owner’, ‘the person exercising the rights upon securities’, etc.) and entitled to security (nominee holder and etc.).

[29] Instruction of the Bank of Russia of 15 June 2015 N 3680-U On the requirements for the procedure and form of providing the information about owners of securities and other persons exercising rights upon securities, as well as the number of securities held by such persons by the foreign organizations acting in the interests of other persons (Registered with the Ministry of Justice of Russia on 27 July 201, N 38193).

7. It is established that the level of legal certainty in the cross-border non-documentary securities holding is insufficient.

The Russian branch legislation refers holding and transfer procedures to the law of the (foreign) intermediary. The discrepancy of the conceptual understanding of a non-documentary security, the effects of accounting and holding as a result may differ. In particular, a foreign nominal holder and ultimate purchaser may in certain cases have a different title to a non-documentary security of the Russian issuer, as opposed to those whose applicable law is Russian. The introduction of general regulation in Russian Civil Code is proposed. The general effect of public law methods (extraterritoriality) is considered as a very positive. It is presumed such methods can give rise to much more transparent holding of securities and can be connected with private law status of legitimated person.

Reliability and approbation of the results of the dissertation.

The research was conducted at the Department of Civil and Business Law of the National Research University "Higher School of Economics". Separate provisions of the research and conclusions found in the main propositions and conclusions to be defended are reflected in the following articles (published in journals recommended by the Higher Attestation Commission of the Ministry of Education and Science of the Russian Federation): E.V. Obukhova. Indirect holding of non-documentary securities. Conflict of laws / Zakon. 2016, N8. P. 62-71; E.V. Obukhova. Jurisdiction risks in securities transactions / Zakon. 2017, N7. P. 146-160; E.V. Obukhova. Specific characteristics of entitlement to indirectly held securities / Zakon. 2018, N2. P. 163-175.

The reliability of the research results is ensured by the use of normative and legal acts of the Russian Federation, acts of law enforcement and domestic civil doctrine, as well as relevant sources of law of foreign countries.

Approbation of the research results took place in discussions when giving seminars at the Higher School of Economics (bachelor programs of the Faculty of Law), in reports on conferences.

The structure of the research is predetermined by its subject, purpose and tasks and consists of an introduction (the general characteristic of the work); four chapters with eleven paragraphs; conclusion and references.

BRIEF SUMMARY OF THE RESEARCH

The **Introduction** reflects the above mentioned relevance and novelty of the research topic, as well as statement of the subject and subject, research tasks and methodology of the research are determined. Also the theoretical and practical significance of the dissertation research is disclosed, approbation of the research results is evidenced.

In the **first chapter** 'Non-documentary securities as an object of holding' research for the purpose of comprehensive study and disclosure of the optimal set of general and private methods for regulating the book-entry of securities, an excursion to the theory of non-documentary securities as a subject of regulation is undertaken. Appeal to historical and foreign experience is necessary since the diversity of non-documentary securities holding models (which is observed both in the regulatory practice of Russia and foreign countries) is, among other things, consistent with the definition of the concept of a non-documentary security as objects of law. A proper understanding of the legal nature of a non-documentary security often allows to explain the application of certain models and forms of accounting[30].

[30] The architecture of market regulation is largely determined by economic and political factors (for example, the tendency to the model with central counterparty as depository or the model excluding direct holding is determined by economic reasons, as well as the political will) that are beyond the scope of this study.

In **the first paragraph** 'Characteristics of certificated and non-documentary securities' the following ideas are observed: features of certified securities which essentially influenced the legal model of non-documentary securities holding; applicability of certain features (such as documentary form and necessity of presentation) of certified securities for non-documentary securities holding. The evolution of holding of property rights (the shift of the scientific paradigm from the 'reification' of rights to the non-documentary securities holding) and a review of the related discussions on the nature of the object of law is considered. Analysis of the potential applicability of documentary form and the necessity of presentation as general properties of securities shows that for non-documentary securities such properties are missing. The cases of existence (even by legal fiction) of documentary form elements in non-documentary securities as objects of rights are found in the foreign and former domestic regulation.

In the **second paragraph** ‘Non-documentary securities holding and entitlement upon the security’ the specifics of entitlement to and upon non-documentary securities are examined. The mentioned specificity is considered further as a theoretical ground for the differentiation of titles to uncertificated securities. In comparison with the classic securities (in documentary form), the approval of title upon a non-documentary security (legitimation) has undergone an essential change. The issuer's register may have an additional ‘legitimating’ role for the registered securities in documentary form. For non-documentary book-entry securities the register has a main constitutive value.

This ‘shift to registers’ in connection with non-documentary form causes certain practical and theoretical problems for entitlement to non-documentary securities especially when the intermediary is registered in the issuer's register. The broad terminology, sometimes overlapping and contradicting norms of the Russian legislation leads to the arbitrary extension of the status of entitled persons (ultimate purchasers of securities), which are not recordered in the issuer's register.

The main legal risks of indirect holding are: the absence of the ultimate purchaser's name in the register (in certain cases); a disproportion in the remedies for the clients and intermediaries.

In the **third paragraph** 'Legal regulation of non-documentary securities holding from the view of property law: limits and consequences of application' the legal consequences of the property law mechanisms to the regulation of non-documentary securities are discussed. The foreign and former domestic practice of regulation using the means of property law predetermines the necessity of analysis of the 'property (material) elements of non-documentary object' that may influence the bookkeeping process. Non-documentary securities are independent objects of law (sui generis) but in some jurisdictions those are regulated along with property regime of securities in documentary form. The title to securities to some extent predetermines the holding model and the distribution of title upon a non-documentary security.

The approaches to non-documentary securities regulation discussed in the third paragraph are structured as follows: trust model with the recognition of the ultimate purchaser as beneficiary; the joint ownership of a pool of securities; security entitlement as a right against a counterparty under a securities account agreement; other options by mixture of 'property, obligations and other types of rights'. The employment of each of the models entails the respective distribution of rights to and upon a security as an object. It is worth noting that with partial or complete disappearance of the 'material property element' in non-documentary securities the idea of localization of security has undergone a significant change (especially in case of cross-border holding).

The **second paragraph** 'Immobilization' is devoted to the respective holding model retaining the maximum preservation of a 'property element' using a global certificate or other security in documentary form subsequently shifting to non-documentary securities. Immobilization, being a form of transition to uncertificated

securities, also changes the entitlement - the entitled holder is usually determined by means of a record on the depo account.

In the **third paragraph** 'Dematerialization' it is established that the respective model allows refrain from the defining the security as object of rights and shift the question to the relations between the intermediary and the client. The essential difference between the dematerialization and immobilization is that in the latter model sometimes a very indirect, but existing connection between the title and certificate as a thing under the immobilization is used as a legal tool to protect the rights of investors. As for dematerialized non-documentary securities the relation of the title to security and security certificate that is essential for the concept of securities collapses. In some jurisdictions (France, the USA etc.) dematerialization reduces the right to a non-documentary security to the contractual claim under the securities account contract between the intermediary and the client. At the same time, the absence of the relations between the issuer and the ultimate purchaser entails the impossibility to establish an ultimate purchaser that may affect the rights of the issuer and bona fide ultimate purchasers.

In the **fourth paragraph** 'Holding models with a mixed approach' legal approaches to regulation of securities holding that are not subject to the previously are considered. The USA model is considered in this paragraph as an example of shift from dematerialization and immobilization to forms of holding (indirect / direct). The European Union practice is inserted in this paragraph because of the specific normative effect of its regulations and directives on the market infrastructure. In the Russian Federation, immobilization and dematerialization models are applied to different types of securities[31] so its regulatory model is considered here also.

However, the application of a mixed approach to holding models requires appropriate market investigation as well as an analysis of the potential risks of

[31] For example, the Federal Law of 22 April 1996 N 39-FZ On Securities Markets requires obligatory dematerialization for shares while global certificates may be immobilized.

application of both holding models. For example, Russian market perceives a mixed holding model but does not establish clear rules. Decline of the issuer's involvement in the securities holding process (especially with the shift to entitlement by the issuer's register) the concept of joint and several liability of the issuer and the registrar remains unchanged.

The third chapter 'Forms of non-documentary securities holding' of the thesis is devoted to the legal aspects of indirect and direct holding of non-documentary securities.

The notion of the legitimated person as well as rights of ultimate purchasers and financial intermediaries are the key issues that determine the distribution of title to such securities. Distribution of title to the ultimate purchaser or to the nominee holder has generated two main accounting systems: a direct (including transparent) system and an indirect system.

In the **first paragraph** 'Indirect holding' the specifics of the title to a non-documentary security is examined. The distribution of rights of ultimate purchasers and financial intermediaries that hold securities on accounts is a key issue of this paragraph.

It is established that minimization to certain extent of risks of different legitimation of the ultimate purchaser and other holding chain participants is possible by the usage of segregated accounts (as a technical solution).

The difference between the two holding systems is so significant that intermediated non-documentary securities have even acquired a separate generic name in certain jurisdictions. The analysis of recent changes in the legislative procedure for maintaining registers of persons entitled to non-documentary securities are also examined. The attempt to define the balance of titles attached to indirectly held securities as well as methods to minimize the risks that are raised by indirect holding is made.

It has been proposed to clarify the norms and definitions of domestic legislation that determine persons entitled and legitimated to securities, as well as the specifics of the formation of issuers' registers.

The **second paragraph** 'Direct holding and Transparent systems' discloses a direct holding model when the ultimate purchaser's name is directly registered in the issuer's register, as well as the applicability and risks associated with using such a form of accounting.

Direct holding is a rare phenomenon (employed in Brazil, China, and some Scandinavian countries). However nowadays it is obtaining new significance thanks to technologies as a distributed registers. Technology eliminates doubts in the title of the ultimate purchaser but still embody some risks. The inability to access the account by any means other than entering the password of the system participant excludes the restoration of access to the account. Participation in direct holding systems with equal access to information also requires high professional knowledge from unqualified investors. Processing large amounts of information usually requires the involvement of specialists, which (again) are intermediaries - professional participants.

The **fourth chapter** of the 'Cross-border holding of non-documentary securities: conflict of laws' specifics of the legal regulation of cross-border securities holding in connection with different jurisdictional approaches (e.g. localization of non-documentary securities by lex rei sitae rule, PRACA -relevant account or the PRIMA -relevant intermediary methods).

In the **first paragraph** 'Conflict of law problems' it is established that the level of legal certainty in the cross-border non-documentary securities holding is insufficient. The introduction of general regulation in Russian Civil Code is proposed. That measure could minimize the choice of law problems arising in relations in the system of non-documentary securities holding.

In the **second paragraph** 'Cross-border holding from the substantive law point of view', certain jurisdictional approaches are observed (extraterritoriality of the

jurisdiction related to some elements of persons involved in cross-border holding). Serious risks arise not only because of differences in the treatment of securities and the choice-of law rules but given extraterritorial application of foreign public law. More specifically, an element of public law in the securities regulation sometimes precludes party autonomy and paves the way for extraterritoriality of public law in legal relations between the parties. The effects of extraterritoriality sometimes apply to Russian companies doing business abroad. The example of the USA regulation as of the most highly demanded country thus often involved in the securities holding chain risks of cross-border holding (extraterritoriality risks) is analyzed.

The Conclusion contains the main results of the research, recommendations and proposals for the further development of the theme.

The main conclusions found in the main propositions and conclusions to be defended are reflected in the following articles (published in journals recommended by the Higher Attestation Commission of the Ministry of Education and Science of the Russian Federation):

1. E.V. Obukhova. Indirect holding of non-documentary securities. Conflict of laws / Zakon. 2016, N8. P. 62-71;

2. E.V. Obukhova. Jurisdiction risks in securities transactions / Zakon. 2017, N7. P. 146-160;

3. E.V. Obukhova. Specific characteristics of entitlement to indirectly held securities / Zakon. 2018, N2. P. 163-175.