1. Introduction to the Research Handbook on 
Shareholder Inspection Rights

Randall S. Thomas, Paolo Giudici and Umakanth Varottil

1 SHAREHOLDER INSPECTION RIGHTS: RELEVANCE AND 
RATIONALE

Information asymmetry represents a key concern in corporate governance. It is common for 
insiders in a company (i.e., managers or controlling shareholders) to possess a greater level of 
information about the business and affairs of the company than outsiders (i.e., shareholders, 
especially the minority, and other stakeholders). Such an informational imbalance limits the 
ability of shareholders to engage with or monitor management on an ongoing basis, initiate 
(and succeed in) legal action for any managerial misconduct or even value their shareholding 
with a view to exiting the company (Geis 2019: 423).

The preeminent tool in dealing with such information asymmetry comprises the securities 
disclosure regime. While this is usually contained in corporate law for unlisted companies, 
disclosure norms form the bulwark of securities regulation in the case of listed companies, 
both at the time of securities offerings and listing, and thereafter on a continuous basis (Geis 
2019: 409). Although information disseminated by a company may enable shareholders to 
make investment and governance decisions on that basis, such information may prove to be 
inadequate in specific circumstances. This includes scenarios where a shareholder may seek 
to engage actively with management or even initiate legal action against insiders such as 
directors. Shareholder inspection rights are intended precisely to fill that gap. They do so by 
offering shareholders seeking information private access to specific books and records of the 
company that are otherwise not publicly available.

Conventional corporate governance discourse is replete with a discussion of mechanisms 
by which shareholders can monitor management. They range from the appointment of inde-

Randall S. Thomas, Paolo Giudici, and Umakanth Varottil - 97818006377745
Downloaded from PubFactory at 09/16/2023 06:43:39PM
via free access
tion rights, and the impact of such rights in the context of alternative business entities, such as partnerships. Methodologically, the contributions in the book range from the theoretical to the historical, doctrinal, empirical and normative approaches.

Shareholder inspection rights are founded on a number of theoretical and practical justifications (Jeffries 2011: 1099). Apart from addressing information asymmetry more generally, they are attributable to either the property theory or the agency theory. The property (or ownership) theory suggests that shares in a corporation represent property rights, which include the ability of the holders thereof to seek controlled access to private corporate information by means of inspection (Starr and Schmidt 1974: 173).\(^1\) Relatedly, the agency theory posits that corporate managements (represented by directors, officers and even controlling shareholders) act as agents of the corporation and its shareholders (Jeffries 2011: 1100; Horton 2003: 107). Accordingly, the right of the principal (i.e., outside shareholders) to inspect the books and records of the company is to ensure that the agents (i.e., insiders) act in the interests of the principal and do not prefer their own personal interests. Finally, viewed through the lens of corporate governance, shareholder inspection rights help alleviate the agency costs\(^2\) for outside shareholders of a company. Apart from imposing incentives on management to act in the interests of the company and its shareholders, the existence of shareholder inspection rights motivates company personnel to ensure the proper upkeep of the books and records of the company.

To be sure, overbroad and unrestricted shareholder inspection rights pose their own challenges. Requesting shareholders may access corporate information for unmeritorious purposes or could make inappropriate disclosures of that information, thereby causing damage to the company (Starr and Schmidt 1974: 174). Hence, statutory law and judicial pronouncements tend to impose layers of qualification to the exercise of inspection rights. This is with a view to balancing the competing interests of the shareholder seeking information to assuage its concerns against management, and the somewhat competing interests of the company and the shareholder body as a collective to prevent misuse of that information (Thomas 1996: 334).

With this background, the remainder of this chapter lays out the key findings emanating from the contributions in this book, and then engages in a jurisdiction-wise overview of the key considerations relating to shareholder inspection rights. Before embarking on the analysis, however, we seek to place emphasis on an important issue. While referring to shareholder inspection rights in corporations, we are speaking, at least in many of the jurisdictions considered in this volume, about inspection rights in two different corporate forms, with two very different sets of provisions governing them (two-law-models: EMCA 2017: 15–16). The usage in English language refers to the “public company” and the “private company”, but this does not convey the real difference between the two forms, because in almost any jurisdiction that carries those two forms, a large majority of companies that adopt the public form are, in fact, private companies or, according to another possible usage, “close companies”. Thus, the public versus private company distinction can, in many jurisdictions, be confusing. The reader may bear this in mind in relation to the discussion regarding jurisdictions such as Germany and

---
\(^1\) Note, though, that the property rights conception of a corporation is largely American, and has not been accepted in several other jurisdictions, such as under Anglo-Australian law (Bowley and Hill, Chapter 17 in this book).

\(^2\) For an analysis of agency costs or agency problems in corporate law, see Kraakman et al. (2017: 29–31).
Italy, which adopt a two-law model and where many companies have the form of the public company but are in reality private or close companies.

2 THE SHAREHOLDER INSPECTION ARCHITECTURE: A COMPARISON

A number of themes emerge from a study of several jurisdictions in this book. While there is some commonality of approach among jurisdictions in considering shareholder inspection rights, the larger story is one of divergence. This is understandable since local needs tend to drive the design and operation of the regime in each jurisdiction.

First, a major area of discussion surrounds the scope of the documents available for inspection. In all jurisdictions, shareholders have almost unrestricted access to documents such as shareholder lists, register of debenture-holders and charges and minutes of shareholders’ meeting, and financial statements to be approved at the shareholding meeting (including resolution passed). The issue on which jurisdictions display greater differences, however, concerns shareholders’ access to more sensitive books and records regarding the internal workings of the company, including accounts and correspondence (“books-and-records inspection rights”). Generally the right to inspect books and records is not available in public companies (but see Delaware in the US, where stockholders enjoy this right), whereas it can be available in private ones (e.g., Germany, Italy, where there is almost no limitation in scope). In almost any jurisdiction where inspection rights are accorded, courts have been engaged in a jurisprudential analysis of the scope of inspections rights (e.g., Korea) and the restrictions on inspection requests to protect legitimate corporate interests or avoid misuse of the right (e.g., Germany, Italy).

The above categorization is also important for another reason. The first category of documents, i.e., those generally associated with shareholder lists and shareholders’ meetings, are accessible by shareholders without resorting to a court order. These documents are considered to be essential to the exercise of rights in a corporate democracy. On the other hand, the second category, i.e., internal books and records, more often requires, at least in public companies, court intervention before shareholders can gain access to them. Courts deploy a number of different techniques in dealing with such applications. In some cases, shareholder inspection applications may be made on a stand-alone basis. In other cases, they may constitute a part of shareholder litigation that seeks another substantive remedy. The development of the “tools at hand” doctrine in Delaware is a classic example of the latter approach.

Second, the emergence of inspection rights reveals interesting trends. Among common law jurisdictions, the regime arose under general law and was only subsequently codified, usually in the company law statute. While there was a sense that common law rights provided a wide amplitude for shareholder inspection rights, the purpose of statutory encapsulation was essentially to impose checks and balances (Thomas 1996: 338). In many other jurisdictions, instead, the inception of shareholder inspection rights has entered the realm of company law through partnership law (e.g., Spain), especially through the concept of “quasi-partnership”, “incorporated partnership” or similar, related to private and close companies (e.g., Germany, Italy, Sweden). The operation of legal transplants is manifest as well. For instance, the statutory regime in Korea represents a borrowing of the equivalent legislative provision in Japan, which, in turn, originated from some US state corporate law statutes. Unsurprisingly, the UK inspec-
tion regime has heralded similar legal provisions in other common law jurisdictions such as Australia and India. The UK regime made its way into Hong Kong via Australia. The German private company regime influenced many countries of Continental Europe. Nevertheless, as the chapters indicate, there has been considerable divergence in the implementation of these statutory provisions, and their interpretation by local judiciaries.

Third, there are discernible trends in the linkages (or otherwise) between the types of corporate entities and shareholder inspection rights. In most jurisdictions (including Germany, and Italy), there are significant differences between the rights available to the shareholders of private limited companies (and their equivalents) and public limited companies (and their counterparts). Shareholder inspection rights are generally considered more acceptable in private companies with a limited number of shareholders who are more closely involved in the management of the company, whereas they are perceived to be more precarious in public, open companies with a separation between ownership and management, where a diverse set of shareholders could gain access to sensitive corporate information. This is also in the light of the fact that shareholders in private companies are locked-in with limited transfer rights and require greater engagement (i.e., “voice”), while those in public companies might at least potentially enjoy liquidity on the stock market (i.e., “exit”). However, this general, functional explanation should not be overemphasized, since in many jurisdictions (e.g., Germany, Italy) shareholders quite often adopt the public form for truly private (close) corporation. Accordingly, in those jurisdictions, shareholder inspection rights depend on the form (public/private, open/close) of the company rather than its substance. At the same time, there are jurisdictions (e.g., Netherlands and France) where the private-public distinction matters much less in the context of shareholder inspection rights.

Fourth, and following from the above, issues tend to arise on how shareholder inspection rights interact with disclosure norms under securities regulation, particularly in the case of listed companies. While the continuous disclosure regime focuses on maintaining parity of information about a company in the market, shareholder inspection rights could militate against that goal through selective disclosures to the party seeking inspection. Concerns regarding insider trading, wrongful disclosures, and use of information for unjustified purposes, all require further consideration. As the Australian chapter in this book highlights, it is necessary to construct a careful balance between the continuous disclosure regime (uniformity) and inspection rights (selectivity).

Fifth, interesting trends are recognizable in the statutory design of inspection rights. In some jurisdictions, a principal statutory provision forms the foundation of the regime, and courts develop the jurisprudence surrounding that provision. Section 220 of the Delaware General Corporation Law and Section 247A of the Australian Corporations Act are leading examples of this approach. At a comparative level, the development of the law tends to be more structured. On the other hand, jurisdictions such as India and Japan witness a statutory fragmentation whereby inspection rights are scattered across several provisions in the legislation, typically depending upon the types of documents involved, which creates a rather diffused approach towards the evolution of the law.

Sixth, some jurisdictions put up guardrails for the exercise of inspection rights with a view to preventing their misuse, while others are rather liberal. Beginning with quantitative preconditions, several legislatures (e.g., in Belgium, Japan and Korea) require that the shareholders seeking inspection hold a minimum number of shares before they can exercise the right. This is to ensure that only a group that is materially affected by corporate conduct can assuage
their concerns by seeking access to information, and that frivolous applications are weeded out. Other jurisdictions (e.g., Delaware and India) do not impose such restrictions and even a shareholder holding one share is able to seek inspection of documents.

Another form of barricade against inappropriate inspection requests is qualitative in nature. Some jurisdictions (e.g., Delaware) require that the requests must be brought for “proper purpose” before they can be entertained. In many others, even though there are no threshold requirements to be discharged on the part of the shareholder seeking inspection, the company has the opportunity (and bears the burden) to demonstrate the inappropriateness of the request which, if successful, can lead to a dismissal of the inspection request by a court (e.g., Germany).

Seventh, the findings from the different jurisdictions in this book indicate the existence of both “direct” and “indirect” inspection rights. In most cases, shareholders can seek to exercise their direct inspection rights by reviewing or making copies of the relevant documents by themselves (or their agents or advisers). In many jurisdictions (e.g., France, Netherlands, Brazil and Japan), indirect inspection rights are available, and are sometimes even prominent or exclusive, in order to enable shareholders to obtain access to books and records, both in public and in private companies. This involves shareholders approaching a court to request the appointment of a third party such as an auditor, commissioner, expert, or inspector to carry out the review of corporate information. In the case of indirect inspection, the shareholders effectively rely on a third party information intermediary to carry out the task for their benefit. Relatedly, in some jurisdictions (e.g., Belgium), the existence of an external auditor precludes the availability of shareholder inspection rights, thereby suggesting that the two mechanisms are substitutable by each other.

Eighth, in some jurisdictions (e.g., Delaware, but also Germany and Italy as far as private companies are concerned), there is a closer connection between the exercise of shareholder inspection and follow-on litigation. Such a result arises when the inspection regime is considered a mechanism to enable information extraction, for instance through the “tools at hand” doctrine to enable the resolution of a shareholder lawsuit. In other jurisdictions (such as China and Japan), the connection between inspection cases and follow-on shareholder litigation is more tenuous. This is also attributable to the fact that those jurisdictions place less reliance on private enforcement of corporate law through shareholder lawsuits.

Ninth, there is considerable diversity in the extent to which shareholder inspection rights are actually used in the different jurisdictions. Both anecdotal and (where available) empirical evidence suggest that the inspection regime is used extensively only in a handful of jurisdictions (e.g., Delaware, China, as well as in Germany and Italy with regard to private companies). In most other jurisdictions, despite the existence of an elaborate set of substantive provisions for inspection, the regime is hardly utilized. Several reasons have been ascribed to this result, including that inspection cases often tend to be settled before judgment (Australia), that courts tend not to intervene in matters of management (Belgium and Canada), and that there are excessive restrictions in the inspection regime (Japan).

After examining the broader trends, we now provide an overview of the law and practice pertaining to shareholder inspection rights in each jurisdiction. The sequence of the analysis follows the arrangement of the chapters in the book.
3 JURISDICTIONAL OVERVIEW

Part I: The United Kingdom

We begin our discussion of shareholder inspection rights in the UK with the chapter by Jonathan Hardman that examines the topic from a historical viewpoint. In this chapter, he explores the development of UK company law in three stages. The first part explores the pre-history of UK corporate law; the second explores the early formation of UK companies in the general push for separate legal personality; and the third looks at how the introduction of limited liability and the consolidation of company law led to the development of modern shareholder inspection rights. The purpose of the chapter is to show how the legal principles in these three periods coalesced into a single concept resulting in the gradual erosion of shareholder inspection rights in the development of their modern form.

After the passage of the Bubble Act, partnerships and state incorporated companies were the two business vehicles available in England. During this early period, corporations frequently restricted shareholder access to their books, ostensibly to avoid misuse of sensitive information. In terms of partnerships, courts were willing to hold that partners could gain access to the books and accounts of the partnership, although they were highly reluctant to hear the case if the entity was a going concern. Existing evidence shows that shareholder access to company books became increasingly restrictive during this time.

The Joint Stock Companies Act 1844 provided for specific shareholder inspection rights. Three categories of inspection rights existed: first, access to proceedings of directors, although this could be limited or amended by the provisions of the company’s constitution; second, access to financial matters; and third, access to the register of members. The Joint Stock Companies Act 1856 removed the statutory provision pertaining to the first two of these categories of shareholder inspection rights; however, the right to financial information has been further developed in the later years. The ability to inspect the register of members still remains, but on weaker terms than before.

Turning to the contemporary situation in the UK, Brenda Hannigan asks whether shareholder inspection rights effectively address core shareholder concerns such as investment protection, agency cost control, and the risk of oppression by a controlling shareholder. She finds that inspection rights in the UK are surprisingly insubstantial and that, for many shareholders, a significant informational deficit remains, particularly with respect to the manner in which directors are performing their duties. The result is an emphasis on securing contractual inspection rights, which in turn disadvantages minority shareholders who lack negotiating power.

Overall, she finds that shareholders have easy access to annual accounts of doubtful utility, but no access to a company’s internal books or board minutes. Derivative suits provide little effective challenge to directorial misconduct and shareholders appear to have little appetite for them in the UK. The result is little accountability. Majority oppression can be challenged through expensive and time-consuming litigation (in the form of “unfair prejudice” actions), but inspection rights currently contribute little to that process, though a failure to provide information can itself constitute unfair prejudice. Constraints on access to the register of members (allowing for companies to obtain court orders refusing access) introduced in 2007 appear unnecessary and should be removed.

With regard to the current debate about the importance of shareholder stewardship, Hannigan poses the question whether inspection rights might support more engaged active
stewardship by investors. She finds it hard to see that inspection rights would be of much relevance in the context of publicly traded companies. However, she does see a potential role for formal statutory inspection rights in reducing the volume of oppression litigation or at least allowing such cases to be filed at an earlier stage. She notes that the UK has fallen behind other common law jurisdictions in this regard and suggests that thought should be given to statutory inspection rights in private companies, either generally or specifically to assist minority shareholders in exiting the business.

Part II: Continental Europe

In the chapter on Belgium, Hans De Wulf observes that available empirical evidence indicates the scant utilization of shareholder inspection rights. This is partly attributable to the general hesitation towards judicial intervention in corporate management in Belgium. Moreover, according to Belgian law and practice, the ability to exercise shareholder inspection rights is inextricably linked to the standing to bring substantive claims such as derivative actions, which limits the incidence and scope of inspection. From a normative perspective, De Wulf argues for a decoupling of derivative actions and shareholder inspection rights (which must continue to operate on a stand-alone basis and on a wider plane).

Under the principal statutory provision, Article 7:160 of the Belgian Code of Companies and Associations (BCCA), shareholders must seek the intervention of the court to have “inspectors” appointed. There is a minimum shareholding threshold by which only shareholders holding a minimum of 1 percent shares (in public companies) and 10 percent shares (in private companies) can invoke this right. De Wulf undertakes a critical analysis of the aforementioned requirements to establish why the exercise of shareholder inspection rights constitutes a rarity in Belgium.

Belgium further grants inspection rights without resorting to the courts. First, every shareholder has a right to inspect the share register. Second, a broader right to inspect the books of the company is available where it has not appointed an external auditor. De Wulf underscores the oddity of outcomes resulting from the latter provision, as it provides leeway for attempts by companies to evade the shareholder inspection requirements. For instance, controlling shareholders can simply call a general meeting to have an auditor appointed with a view only to forestall an attempt by minority shareholders from laying their hands on corporate data that could underpin legal claims. Such “unforced” appointments of auditors are in turn regularly attacked before courts by minority shareholders who, sometimes successfully, claim that the appointment constitutes an “abuse of majority power”, since its sole intent is to rob the minority shareholders of their inspection rights.

The shareholder inspection regime in France is very narrow. As Pierre-Henri Conac elaborates, shareholders enjoy direct inspection rights under French legislation in the manner available in other jurisdictions with regards to documents concerning shareholder meetings, and they are also able to exercise indirect inspection rights through the appointment of commissioners. Conac undertakes a detailed historical sojourn of the evolution of both inspection regimes. He finds that the direct inspection regime has remained somewhat narrow, in particular because the amount of information generally disclosed to shareholders has grown significantly. On the other hand, the indirect inspection regime has received much impetus over time, especially as the 1966 Companies Act established an investigation procedure through an expert (expertise de gestion).
Under French law, most of the direct inspection rights are connected with the information to be made available in the context of shareholders’ general meetings, while others relate to information availability during other periods. In any case, no inspection on books and records are granted to shareholders, either in public or private companies. When it comes to indirect inspection rights, several procedural requirements (including a minimum shareholding to be held by the requesting shareholders) must be complied with before an expert can be appointed. This is essentially to avoid frivolous information request actions.

Conac also calls attention to the general regime of investigation available under the Code of Civil Procedure, which supplements the specific shareholder inspection regime. Not only has the French Supreme Court permitted shareholders to rely on inspection rights under the Commercial Code as well the general investigation regime, but the latter can also be utilized by non-shareholders such as non-governmental organizations (NGOs) to achieve broader sustainability and social responsibility objectives in relation to corporations. To that extent, Conac concludes by observing that the French inspection and investigation regime is moving closer to the US pre-trial discovery process, albeit in an unorganized fashion.

Moving to Germany, Christoph Teichmann formulates its conceptual model by which the nature and extent of shareholder inspection rights therein depend on the type of entity concerned, i.e., whether it is a limited liability company (GmbH) or a public company (AG). The information rights go along with the allocation of powers between the shareholders and management in the two types of entities. In the GmbH, a small number of shareholders is closely involved in the management of affairs of the company. This is also duly reflected in the GmbH Act, which confers upon its shareholders significant information rights. On the other hand, given the large number of (possibly dispersed) shareholders in an AG, they have limited participation in management, and consequently diminished access to information regarding management.

Teichmann articulates this distinction relying upon the “voice-versus-exit” paradigm constructed by Hirschmann (1970). Since transferability of shares is restricted in a GmbH, the exercise of “voice” and, consequently, the need to obtain information are intrinsic to shareholder protection. Conversely, where liquidity and “exit” subsist in an AG, the information rights are weak and limited only to specific items that management puts forward for shareholders to consider in a general meeting.

Given this entity-oriented distinction, the shareholder in a GmbH can seek, at all times, information from the managing director on the affairs of the company, including by way of inspection. The exercise of that right is not limited to preparation for a general meeting, but is available at any time. The shareholder can demand access to the trading books (in particular accounting records) and other documents. Management can deny such information request if there is a concern that the shareholder is likely to use it for purposes unrelated to the company. When it comes to the AG, Teichmann notes that the presence of the supervisory board (Aufsichtsrat) alters the information channeling mechanism. The supervisory board effectively acts as a substitute (or, broadly, an agent) for the shareholders in seeking inspection of the records of the company, thereby limiting shareholders’ direct rights to do so. Shareholders have only the right to raise questions on specific items in the agenda for a general meeting and, if they satisfy the minimum shareholding threshold, apply to the court for the appointment of a special auditor.

The German entity-based model for shareholder inspection rights finds some resonance in Italy. As Paolo Giudici notes, the nature and scope of inspection rights vary between the
Italian public company form of società per azioni (SPA) and the private company form of società responsabilità limitata (SRL). He considers the (limited) inspection rights surrounding the SPA to be rather straightforward. Shareholders are generally entitled to inspect the shareholder book (i.e., the shareholders’ list) and the resolution book (containing a recording of shareholders’ resolutions). They can also get access to the financial statements to be approved at the shareholder meeting. As far as other books and documents are concerned, shareholders can seek the appointment of an inspector by a court to undertake the task. Statutory auditors have unlimited inspection rights, and their request to carry out an investigation is another route theoretically available to ensure information extraction from the company’s management.

The inspection rights surrounding the SRL, though, have lately given rise to some level of complexity. At the outset, the shareholders of the SRL have almost unrestricted rights to inspect the books and records of the company. This is on the assumption that the SRL is usually an entity with a closed group of shareholders, all of whom may take a keen interest in the management of the company (a sort of corporate “quasi-partnership”). However, pursuant to a series of law reforms, SRLs can now offer their shareholding to investors through crowdfunding platforms and other forms of public offers. Thus, the shareholder composition of a SRL could be different from the one that is traditionally envisaged for that type of entity. Giudici points to an important and new question whether SRLs can, therefore, limit inspection rights of shareholders in such a crowdfunded startup in order to protect the secrecy of its business affairs. He opines that this scenario might alter the majoritarian view that inspection rights cannot be subject to limitations in relation to the Italian SRL.

The regime in Spain stands in contrast to that in Germany and Italy in that the regulatory framework applies rather uniformly to the Sociedades Anónimas (SA) and Sociedades de Responsabilidad Limitada (SRL), which can be roughly translated into open corporations and closed corporations respectively. In the chapter on Spain, María Gutiérrez Urtiaga and Maribel Sáez Lacave find that shareholder inspection rights are generally limited to requesting information from managers prior to, or at the time of, a shareholders’ general meeting, and then too only to matters connected with a shareholder vote. The narrowness of inspection rights is attributable to the fact that the regulation initially developed in the context of partnerships and closed firms wherein the extensive involvement of the shareholders in the management of the firm made formal inspection rights somewhat redundant, especially as information finds its treatment as a private matter.

Despite the narrowness of the shareholder inspection regime, shareholders have access to a wide, and rather blunt, enforcement tool, which makes Spain an outlier in comparison to the other jurisdictions covered in this volume. When shareholders’ inspection rights are infringed, they are entitled to seek a nullification of the specific decision taken by the management or the shareholder body by way of a resolution in disregard of the affected shareholders’ information rights. Such a wide-ranging remedy available to shareholders motivated the Spanish legislature to introduce some curb to the exercise of that remedy by shareholders. By way of changes in 2014, shareholders now have to satisfy certain quantitative and qualitative preconditions before they can bring an action for nullification of shareholders’ resolutions. Shareholders must hold at least 1 percent ownership to enjoy standing to sue for rescission, whether based on shareholder inspection or otherwise. Moreover, courts would determine whether the outcome of a shareholders’ meeting would have been different in the absence of procedural default (the resistance rule) and whether the procedural defects were material (the relevance rule). After carrying out a doctrinal and empirical analysis of court decisions,
Urtiaga and Lacave conclude that despite the intention of the legislature to narrow the scope of inspection rights through reforms, the courts have retained with themselves some room for maneuverability.

In Sweden, Jan Andersson notes that the shareholder inspection regime ascribes its origin to the context of a “quasi-partnership”, whereby a shareholder in a close corporation would have inspection rights similar to that of a partner in a partnership. The principal statutory provision relating to inspection rights applies to companies with a maximum of ten shareholders, being close corporations. In such a case, each shareholder and proxy or adviser retained by such shareholder has the right to review the accounts and other documents that relate to the company’s operations, to the extent necessary for the shareholder to be able to assess the company’s financial position and results or a particular matter which is to be addressed at the general meeting. It is worth noting that the background to this special provision dates back to a legislative proposal in the 1970s concerning the introduction of a Swedish “GmbH/SARL” equivalent. The GmbH form was not introduced in the end, but the special right of review, which was part of the proposal, was adopted.

Andersson observes that not only has the shareholder inspection regime escaped serious academic attention, but also available evidence suggests that only a few cases have considered shareholders’ inspection rights, although no cases have reached the Swedish Supreme Court thus far. Hence, it remains an open question as to which documents are covered precisely within the scope of the inspection right. Andersson also finds that, due to the ambiguities persisting in the Swedish inspection regime, companies can deploy several strategies to stall information requests by minority shareholders, including by delaying the process indefinitely or supplying the shareholder seeking inspection with overabundance of information.

In the Netherlands, the Dutch Civil Code (DCC) distinguishes two types of companies, being public limited companies (naamloze vennootschappen or NV) and private limited companies (besloten vennootschappen met beperkte aansprakelijkheid or BV) although, as Christoph Van der Elst notes, the inspection and rights surrounding both types of companies are largely similar. This is because, in the case of both the NV and the BV, shareholders who are in the same position must be treated equally. Van der Elst places the discussion of inspection rights in the context of the evolution of Dutch corporate law and also the allocation of powers between the shareholders, the board of directors and the supervisory board.

Under the “large company” regime, the board of directors and the supervisory board must provide information to the shareholders’ meeting, unless a “substantial interest” of the corporation opposes such sharing. This also enables the shareholders to take an “informed” decision after considering the financial and operational situation pertaining to the company. Van der Elst also analyzes the judicial trends relating to shareholder inspection, and notes that while shareholders do not have a pervasive information right beyond the shareholders’ meeting, the lack of transparency can provide ammunition to shareholders to seek an action for mismanagement of corporate affairs.

Similar to certain other European jurisdictions, the Netherlands provides a robust “indirect” inspection regime that enables the Enterprise Chamber, upon the request of a minimum number of shareholders, to launch an investigation into the company’s affairs with a view to ascertaining any mismanagement. Similarly, Van der Elst finds that the Dutch Code of Civil Procedure too is available to shareholders seeking inspection of corporate records, although fishing expeditions are disallowed.
Part III: The Americas

In an empirical study of shareholder inspection rights under the Delaware Gen. Corporation Law, Section 220 that originally appeared in the *Business Lawyer*, James D. Cox, Kenneth J. Martin and Randall S. Thomas examine an innovative development called the “tools at hand” doctrine (Cox, Martin and Thomas 2020). In applying this doctrine, the Delaware courts have, before considering whether to grant a motion to dismiss shareholder litigation, instructed plaintiffs to use their inspection rights to gather the facts necessary for their complaint to survive the dismissal motion. These authors argue that the doctrine strikes a balanced approach between the competing claims that shareholder suits are vexatious litigation, with the alternative view that they are necessary to address and discourage managerial misconduct.

In their empirical analysis, Cox, Martin and Thomas compare the composition, outcomes, and related questions surrounding such suits in two different time periods: first, the 1981–1994 timeframe, where shareholders primarily used Section 220 to obtain stock lists; and second, the later 2004–2018 period, during which the tools at hand doctrine had been developed and widely applied to seek corporate books and records prior to filing representative shareholder litigation. Focusing primarily on the second interval, the authors find that many of the suits maintained after using the tools at hand doctrine yield outcomes favorable to plaintiffs. They further uncover evidence that books-and-records litigation has become something of a surrogate for a trial on the underlying claims in the case. Overall, they find the data supports the claim that there are net positive social benefits from Delaware’s use of the tools at hand doctrine.

On the negative side, however, the authors express concern that the potential benefits of the tools at hand doctrine will not be realized should the courts expand the Delaware Supreme Court’s decision in *California State Teachers’ Retirement System v. Alvarez*, 179 A.3d 824 (Del. 2018) (en banc). There the court held that a Delaware litigant’s action was precluded by an earlier decision in another state where the other court dismissed a hastily filed derivative suit initiated without the benefit of the tools at hand doctrine. The authors are concerned that Alvarez will discourage Delaware plaintiffs from using the tools at hand doctrine in situations where there is multistate litigation.

Cox and Thomas also update their previously discussed *Business Lawyer* article in an addendum on recent developments in the tools at hand doctrine. They analyze a number of recent important decisions by the Delaware Supreme Court interpreting the requirements of Section 220 of the Delaware Gen. Corporation Law. Overall, they find that recent litigation under the inspection statutes is focused on books-and-records requests and continues to demonstrate an effort by defendants to expand the scope of these cases. The Delaware Supreme Court has, to a certain extent, limited Section 220 cases to try and ensure that they remain summary proceedings. The Chancery Court has also been supportive of maintaining the summary nature Section 220. In what is perhaps the most important of these cases, *Pettry v. Gilead Sciences*, 2020 Del. Ch. LEXIS 347 (Del. Ch. 2020), the Chancery Court invoked its punitive powers to shift to the defendant the plaintiffs’ attorneys’ fees incurred in the litigation.

The tools at hand doctrine has spread outside of Delaware as well. Although this jurisprudence is not as developed as it is in Delaware, a number of courts have applied the doctrine arguing that shareholder inspection rights should be broadly construed and that pre-filing inspection demands should improve the quality of derivative and class action litigation. The most common use of the doctrine occurs during case consolidation proceedings where plain-
tiffs are competing for lead plaintiff status and one group touts their use of the tools at hand doctrine as evidence that they are best suited for the role. A related type of case occurs when a group of intervener plaintiffs argues that their use of the inspection statute qualifies them to unseat a group of plaintiffs whose earlier filed complaint was drafted without the benefit of an inspection using the tools at hand.

Moving to inspection rights for US alternative entities such as general partnerships, limited partnerships, limited liability partnerships and limited liability companies, as well as nonprofit and benefit corporations, Peter Molk highlights how inspection rights for such entities differ from those of traditional corporations under Delaware law and the various model acts and uniform acts. At general partnerships, partners have the right to access any records regarding the firm’s business, financial condition and other related information that is material to the partners’ ownership interests. Partnerships can restrict, but not eliminate, partners’ inspection rights. They may require that partners have a proper purpose to exercise inspection rights as well.

For limited partnerships, the general partners have broad access to any information kept by the partnership that is material to the general partners’ rights and duties. They also have rights to a list of core legal and financial documents about the company. Under Delaware law, general partners in limited partnerships have the same inspection rights as partners in general partnerships. Some Delaware courts have found an implied proper purpose requirement though. Limited partners in a limited partnership have more restricted access to information.

For limited liability companies (LLCs), Delaware law and the uniform act are modeled after their respective limited partnership statutes. This means that inspection rights for LLC members function in the same manner as in limited partnerships. Since LLCs have become the entity of choice for sophisticated privately held large-scale enterprises, as well as for small businesses, and are creatures of contract, there is the potential for problematic restrictions on inspection rights at these entities. For example, in other research, Molk and his co-author found that 6 percent of a sample of 233 LLC agreements of mostly privately held Delaware companies restricted some member inspection rights beyond the default rules provided in the Delaware legislation (Molk and Winship 2016).

Finally, nonprofits and benefit corporations are, under Delaware law, governed by Delaware’s general corporate law statutes and so provide members of nonprofits with equivalent inspection rights as investors of traditional firms. The Model Nonprofit Act provides more limited inspection rights for nonprofit members than for corporation investors, eliminating the catch-all requirement of additional information that is “just and reasonable”. As Molk points out in the chapter, legitimate questions arise over whether general corporate law inspection rights are appropriate to carry over into the nonprofit setting, which presents different tradeoffs of information access versus agency costs.

In neighboring Canada, Poonam Puri finds that the courts have tried to strike a balance between shareholders’ rights for information and the corporation’s ability to function efficiently. Puri begins by examining the historical and statutory context of Canadian inspection rights. The Canadian Business Corporations Act allows shareholders access to essential information necessary to properly vote their shares. The statute allows shareholders access to information through three main channels: by requiring the corporation to maintain certain records and giving shareholders access to them; by allowing shareholders seeking an oppression remedy to obtain any required information; and by permitting a shareholder to apply for an investigation of the corporation, including the appointment of an inspector.
Statutory length investigation orders are a critical tool for shareholders in an effective way to obtain information. These orders are granted by the court upon satisfaction of a three-part test, which, among other things, requires the court to determine if the applicant needs the information, whether there are less expensive means to acquire the information, and whether the proposed investigations costs outweigh its benefits. Inspection is considered an extraordinary remedy that is only granted in limited circumstances. If granted, an inspection is limited to the fact-finding materials relevant to the issues before the court, and not to an adjudication of matters of civil or criminal liability. After a careful reading of the cases, Puri determines that Canadian jurisprudence on shareholder inspection rights is relatively limited, with courts balancing shareholders’ and corporations’ rights by refusing to grant investigation orders when information can be obtained through less intrusive means and by placing appropriate limits on the scope of investigative orders when they are granted.

Companies in Colombia are characterized by the high degree of equity concentration in the hands of a few shareholders. Agency problems arise when majority shareholders act opportunistically to the detriment of their minority counterparts. In his chapter discussing shareholders’ inspection rights under Colombian law, Francisco Reyes Villamizar writes that they act as corporate governance devices aimed at reducing agency costs by allowing investors to scrutinize the company’s management activity and to have access to financial information. An effective legal environment for the exercise of such rights reduces information asymmetries and moral hazard on the part of agents (i.e., managers and/or controlling shareholders).

The regulation of shareholders inspection rights in Colombia is contained in forward-looking codes and statutes. According to the current rules, most of the relevant information must be disclosed to shareholders in a timely manner in advance of annual shareholder meetings. As is common in other developing jurisdictions, the enforcement of company law rules in Latin America continues to be challenging due to a lack of a sophisticated and responsive judiciary.

In the specific case of Colombia, the significant progress in this area stems largely from the work of the Superintendency of Companies. This agency has developed a significant body of case law that covers most relevant subject matters in company law. Inspection rights are included in these judicial developments. Case law at the Superintendency has evolved significantly along the last several years. Whereas the initial cases merely recognized the breach of fiduciary duties on the part of officers reluctant to provide adequate information to shareholders, the newest decisions employ an injunction, whereby the Company Law Court orders the disclosure of relevant information. Villamizar expects that this line of precedents will be followed and even enhanced in the near future.

As for Brazil, Marcelo Godke Veiga and Marcelo Vieira von Adamek initiate their chapter by setting out the rationale for shareholder inspection rights and also highlighting their limitations. The Brazilian Law of Corporations lists out, under Article 109, III, shareholder inspection as one of the “essential rights” available to shareholders under law, which cannot be limited by the company’s articles, bylaws or shareholder general meeting. Under the Brazilian inspection regime, shareholders can either directly undertake inspection of documents before and during the shareholders’ meeting or in case of litigation, or they can resort to “indirect” inspection through the appointment of members of the audit committee. Veiga and von Adamek elaborate on the role of the audit committee in carrying out inspection.

As the authors note, Brazilian corporate law also provides inspection rights that can be exercised through resort to the courts, which allows shareholders to obtain full access to corporate books and records. Here, courts play a significant balancing role: on the one hand, they guard...
against frivolous lawsuits and, on the other, they avoid placing undue evidentiary burden on plaintiff shareholders. This is especially because the production of documents is possible only when the plaintiffs have demonstrated the need and usefulness of inspection. Brazilian corporate law also contains measures to prevent the abuse of information generation, usually in the form of restrictions such as minimum shareholding requirement as well as the evidence of suspicion of misdeeds carried out by a corporate organ. Veiga and von Adamek also note that shareholders are further limited to exercising inspection rights strictly to the extent associated with the purpose for which they have sought information.

Part IV: Asia and Australia

Commencing with Australia, Tim Bowley and Jennifer Hill note that, historically, common law provided little assistance to shareholders in seeking access to corporate records. However, that dispensation was to change in 1985 through legislative reforms, which introduced a statutory regime for shareholder inspection rights. Bowley and Hill are quick to clarify that the statute (currently Section 247A of the Corporations Act 2001 (Cth)), does not grant an “inspection right” per se, but it only confers upon shareholders the right to approach the court for an order authorizing an inspection. In this regard, the Australian courts enjoy considerable discretion in filtering well-intentioned inspection requests from frivolous ones. Interestingly, Section 247A has been the harbinger of law reform in parts of Asia, especially in Hong Kong where its inspection regime has been modeled on Section 247A.

After analyzing the jurisprudence emanating from Section 247A, Bowley and Hill argue that the statutory scheme constitutes a significant improvement over the erstwhile common law regime. Nevertheless, and despite the statutory recognition of court-ordered inspection, there are only an insignificant number of inspection-related cases in Australia: the study revealed only 15 applications under Section 247A between 2017 and 2019, of which nine were successful. According to the authors, this result is not attributable to the quality of the statutory regime governing shareholder inspection, but rather because a number of inspection-related cases tend to be settled before judgment, or are part of applications for broader remedies (without specific reported findings in the final judgment).

As for listed companies, Bowley and Hill highlight the tension between the continuous disclosure regime that compels companies to make disclosure of price sensitive information to all market participants (with a view to creating a level playing field) and shareholder inspection rights which provide individual shareholders with selective information. Although the Australian judiciary is yet to resolve this tension satisfactorily, the authors find merit in the co-existence of the continuous disclosure and shareholder inspection regimes.

It is possible to trace the inspection regime in the People’s Republic of China (PRC) to the 1993 PRC Company Law. Since then, the regime has undergone significant overhaul, including through the 2005 PRC Company Law and the fourth judicial interpretation on the 2005 PRC Company Law promulgated by the Supreme People’s Court in 2017. In his chapter, Robin Hui Huang finds that the shareholder inspection rights are regulated according to company type. The precise regime varies between LLCs, i.e., close corporations, and joint stock companies (JSCs), i.e., publicly held corporation. Such a dual regime is similar to European jurisdictions such as Germany and Italy.

Huang states that while there are no statutory restrictions (such as minimum shareholding or holding period) for the exercise of inspection rights, there is a distinction when it comes to
the types of information sought. On the one hand, documents such as company bylaws and minutes of shareholders’ meetings are available to shareholders of LLCs and JSCs, while access to accounting books of the company is available only to shareholders of LLCs. Huang notes that access to the first category of materials is rather liberal, while it is restrictive for the second category. The Chinese shareholder inspection regime also seeks to strike a balance between protecting the legitimate use of such rights and preventing their abuse by opportunistic shareholders.

Furthermore, Huang tests the efficacy of the inspection regime in China by utilizing the empirical methodology through an analysis of a sample of 193 cases between 2012 and 2017. He finds that there has been a fair amount of use of shareholder inspection rights, especially in recent years. However, compared to jurisdictions such as Delaware, inspection actions have not resulted in a significant number of follow-on legal claims by shareholders such as derivative actions. Huang concludes his empirical analysis by finding that inspection rights have generally played a useful role in China in mitigating the information asymmetry between management and shareholders, and in facilitating greater shareholder engagement.

In his chapter on shareholder inspection rights in Hong Kong, David C. Donald observes that the jurisdiction imported the Australian variant of the Delaware inspection right. At the same time, the motivation for transparency in Hong Kong is unique, in that it is driven by the desire to succeed in the regulatory competition among international financial centers (IFCs). A conscious build-up of law and regulation plays an important role in international rankings that help maintain an IFC’s position internationally. Hence, Donald finds, the disclosure and inspection requirements for both public as well as private companies under the Hong Kong Companies Ordinance are more extensive than its counterparts in Delaware and Australia.

The principal provision is Section 740 of the Companies Ordinance, which is borrowed from Section 247A of the Australian Corporations Act, with some modifications. Under this provision, five or more members of the company, or members constituting at least 2.5 percent of the voting rights, may request in “good faith” and for a “proper purpose” to inspect “records or documents”. In his chapter, Donald goes on to undertake an analysis of key decisions of the Hong Kong courts in interpreting this provision, with the courts often taking differing paths in the endeavor.

Donald’s findings, arising from the positions adopted by the Hong Kong courts, suggest a support of shareholders’ rights and transparency, which is consistent with Hong Kong’s status as an IFC. He concludes by noting that the transplanted statutory provision in Hong Kong has largely been adopted to meet Western expectations to maintain its international status, but that its use has been rather haphazard. The result is that shareholders tend to resort to the inspection provision instead of pursuing full blown shareholder remedies such as derivative actions or unfair prejudice claims.

Moving to India, Umakanth Varottil and Neha Joshi find that the shareholder inspection regime is both wide and narrow. It is wide because there are no threshold requirements for seeking inspection, such as a minimum shareholding or the existence of “proper purpose”. However, the scope of inspection is rather circumscribed because shareholders have access only to documents such as various registers (of members, of charges, and the like). Books of accounts and other books and paper are available for inspection only by directors to enable them to discharge their duties, and they are not accessible by shareholders.

Varottil and Joshi find that, unlike jurisdictions such as Delaware and Australia, Indian corporate law suffers from fragmentation. The shareholder inspection provisions are scattered
all over the Companies Act 2013, as the legislation contains different lists of documents accessible by different sets of stakeholders (such as shareholders, debenture-holders and directors). Such fragmentation, consequently, translates into judicial pronouncements as well. The authors also find that, given the concentration of shareholdings in Indian companies, shareholder inspection is more closely connected with oppression (and unfair prejudice) actions, and not with derivative actions and class actions, which are associated more closely with companies carrying dispersed shareholdings. To that extent, Indian courts invoked their inherent powers to expand the scope of shareholder inspection rights as a tool to enable the resolution of corporate disputes involving oppression.

Due to the limited scope of documents accessible through exercise of inspection rights, the diffusion of legal provisions, and their prescriptive nature, the analysis by Varottil and Joshi reveals that the Indian shareholder inspection regime is restrictive and suffers from rigidity, thereby raising doubts as to its efficacy as a minority protection tool. They conclude with some suggestions for legislative reforms to expand the scope of shareholder inspection in India together with the introduction of measures to guard against the misuse of these rights by recalcitrant shareholders.

As in the case of India, Japan too adopts a multi-pronged approach towards shareholder inspection. In his chapter, Gen Goto notes three different methods for the exercise of the right. The first the director inspection right that enables shareholders to seek to inspect or copy various documents. Here too, there are different threshold requirements for the different types of documents being sought, including a minimum ownership condition (of up to 3 percent of the outstanding shares in the company). The remaining two methods are indirect. The second type involves shareholders applying to the court for the appointment of an inspector to investigate various matters. This route is suitable for use by minority shareholders. The third involves the shareholders’ meeting exercising the power to appoint an inspector to investigate certain documents and materials submitted to shareholders’ meetings. Each of these tracks is further subdivided based on the object of the inspection with differing requirements for each. The distinction between direct and indirect inspection rights is similar to some European jurisdictions such as France and the Netherlands.

Goto further discusses the interpretation of these rights available under the Japanese Companies Act by the courts. He also undertakes an empirical analysis of the cases on inspection rights in Japan during the period between 2011 and 2020. Overall, the number of inspection cases is rather small, although there has been a gradual increase over time. Interestingly, the data gathered by Goto also suggest that there are more cases involving court-appointed inspectors (i.e., indirect inspection) as compared to shareholders’ inspection of books (i.e., direct inspection). The trends also suggest that inspection request do not necessarily trail the backbone of follow-up lawsuits such as derivative actions. The chapter concludes with Goto’s inference that the small number of cases involving inspection rights might be an indication that the regime is overly restrictive. Although there seems to be no reform proposal to ease the pre-conditions for seeking inspection, Goto foresees greater traction in this area of the law given the resurgence of shareholder activism and institutional shareholder stewardship in Japan.

The Japanese shareholder inspection regime has had an influence over neighboring Korea. As Kon Sik Kim notes, the provision relating to inspection in the Korean Commercial Code (KCC) was modeled on the erstwhile Japanese Commercial Code, which was in turn influenced by US law. In his chapter, Kim not only analyzes Korean law on inspection rights, but
Introduction

The principal statutory provision in Korea is Section 466 of the KCC, which stipulates that shareholders holding 3 percent or more of the total number of issues shares in a company can demand to inspect its books and records of account. The shareholding threshold, which displays similarity with Japan, is intended to authorize only shareholders with substantial economic stake to gain access to corporate documents. Moreover, there is some level of ambiguity in the scope of access, as it is limited by the expression “books and records of account”, which is subject to judicial interpretation. Kim argues that the scope of inspection should be interpreted as broadly as possible. Different from Delaware law, the company cannot reject a shareholder request unless it can establish its impropriety. These measures help create a balance between the interests of the requesting shareholder on the one hand and that of the company and the shareholder body as a whole on the other.

Relying on statistical information, Kim finds that the shareholder inspection rights in Korea are not extensively used, as only 17 court decisions can be retrieved from the relevant database as on 24 May 2021. This is attributable to a number of reasons. First, given the concentration of shareholding in Korean companies, minority shareholder engagement is limited. Second, shareholder lawsuits such as derivative actions and class actions are few and far between. These reduce the dependence on the inspection mechanism. While Kim suggests some measures by which the inspection mechanism can be reshaped to enhance its usage, he is not optimistic given the strong family control over Korean companies and the possible backlash against shareholder activism, particularly if initiated by foreign investors such as hedge funds.

Finally, Dan Puchniak and Samantha Tang present an important puzzle in the context of shareholder inspection rights in Singapore. Although Singapore has displayed its allure towards international rankings in corporate governance and has a high rate of compliance with global norms, with specific and limited exceptions, Singapore does not offer shareholders access to books and records by way of inspection. Puchniak and Tang discuss the sparse case law in the field that recognizes the need for legal reform, which does not appear to be forthcoming. There does not appear to be any policy momentum towards the enhancement of shareholder inspection rights in Singapore.

The authors then go on to rationalize the peculiarity of the Singapore situation by offering two explanations. The first is a demand-side explanation, which suggests that the controlling shareholder-oriented corporate landscape generates limited demand for more enhanced shareholder information rights. While the controlling shareholders can use mechanisms (formal and informal) to obtain corporate information, minority shareholders suffer from collective action problems to be able to exert their voice. Second, through their supply-side explanation, Puchniak and Tang argue that because shareholders inspection rights have yet to be recognized as a significant criterion for global corporate governance, the government in Singapore has not found the need for law reform to send a strong signal globally to demonstrate the robustness of its governance norms. Added to this is the fact that the Singapore government, through its holding company Temasek, is the largest controlling shareholder in Singapore, and may not possess sufficient incentive to enhance information rights in government-linked companies.

Viewed in the light of these factors, Singapore’s restrictive regime regarding shareholder inspection rights is understandable. At the same time, Puchniak and Tang conclude by observing that the increasing global attention towards shareholder inspection rights as well as
the gradually emerging shareholder engagement in Singapore could initiate further reforms towards enlargement of the currently narrow shareholder inspection rights.

4 CONCLUSION

As will be evident from the chapters in this book, shareholder inspection rights constitute a relatively underexplored area of the law, particularly from a comparative perspective. It represents an important tool in the hands of the shareholders, which is exercisable in certain circumstances involving greater shareholder monitoring or for private enforcement of corporate law. While there are some common strands among jurisdictions, there is a great deal of variation in the details. Some jurisdictions witness extensive use of the mechanism, while in most other jurisdictions the law in the book is yet to be translated into action. However, given the likelihood of greater shareholder engagement in companies, due to the likely expansion of institutional investor stewardship and even shareholder activism in several parts of the world, shareholder inspection rights may turn out to be more crucial that they are currently perceived to be.

REFERENCES


