Alice will need to understand other contract and tort law principles as well to advise clients on negotiating contracts and mitigating business risks. As my law clerk she will be exposed to issues as they arise in the cases presented. For training purposes, I have identified these important issues, which have not yet been presented in the cases on the docket:

Promissory Estoppel

Promissory estoppel is an alternative to *consideration* as a basis for enforcing a promise. Promissory estoppel is sometimes called detrimental reliance.

> A promise which the promisor should reasonably expect to induce action or forbearance of a definite character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.

Restatement (Second) of Contracts § 90. Promissory estoppel applies when there is no benefit to the party making the promise (the promisor). Consideration requires a benefit to the promisor. See the Restatement (Second) of Contracts for more information

Contract Interpretation and Construction

The terms of a contract must be sufficiently specific to ascertain the parties' obligations.

> [I]t is fundamental that, in order to be binding, an agreement must be definite and certain so that the liability of the parties may be exactly fixed. Terms necessary for the required definiteness frequently include time of performance, place of performance, price or compensation, penalty provisions, and other material requirements of the agreement. 17 C.J.S. *Contracts* § 36(2) at 647-61 (1963); 17 Am.Jur.2d, *Contracts* § 75 at 413-15 (1964).

Pyeatte v. Pyeatte, 135 Ariz. 346, 350, 661 P.2d 196, 200 (App. 1982).

As reflected in her response to my invitation to come to Destination, Alice is well aware of the need to agree on essential terms.

The contract terms often must be interpreted and ambiguities in language resolved to establish the intent of the parties. "Interpretation is the process by which [courts] determine the meaning of words in a contract." *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 152, 854 P2d 1134, 1138 (1993). The circumstances surrounding the contract can help determine the intent of the parties. *Harris v. Harris*, 195 Ariz. 559, 562, 991 P.2d 262, 265 (App. 2000). As with statutes, courts interpret contracts to give effect to all terms in preference "to an interpretation which leaves a part of no effect." Restatement (Second) of Contracts § 203 and comment b ("superfluous terms"). *See Apollo Educ. Group, Inc. v. National Union Fire Ins. Co.*, 250 Ariz. 408, 411 ¶11, 480 P.3d 1225 (2021) (interpreting contract terms "in the broader context of the overall contract"). *Accord Walker v. Auto-Owners Ins. Co.*, 254 Ariz. 17, 517 P.3d 617, 620 ¶10, 621 ¶13 (Ariz. 2022) (ambiguity in an insurance policy interpreted in the context of the "transaction as a whole").

Contract interpretation ascertains the meaning of a term in the agreement. Restatement (Second) of Contracts § 200. The legal effect of the agreement is a separate determination, sometimes is referred to as construction of the contract. *Id.* comment c. For example, a contract term may be a promise, a warranty, a condition, or unenforceable.

Statute of Limitations

The statute of limitations in Arizona is one year for breach of an employment contract, A.R.S. § 12-541, three years for an oral contract, *Id.*, § 12-543, and six years for a written contract. *Id*., § 12-548.

> [P]arties are at liberty to contract and may, indeed, agree to shorten the statute of limitations from that which normally applies to claims. *See* 1A Corbin, [Contracts] § 218 at 311-12 [(1963)]; *Fireman's Fund Insurance Co. v. Sand Lake Lounge, Inc.*, 514 P.2d 223 (Alaska 1973). The general purpose of such a clause is
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> > . . . to prevent the bringing and enforcement of stale claims, involving extra danger of fraud and mistake, ... An express provision fixing a shorter limit merely hastens the enforcement; and it is not made invalid by being included from the beginning in the contract to be enforced. *If held invalid, it must be on the ground that the terms are unconscionable and that unfair advantage has been taken of a claimant whose bargaining position was inferior*.
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> [*Fireman's Fund,* 514 P.2d] at 226 (emphasis in original) (quoting from 1A Corbin, *supra*, § 218 at 311-12).

Zuckerman v. Transamerica Ins. Co., 133 Ariz. 139, 144, 650 P.2d 441, 446 (1982).

> Subject to some limitations, parties may generally shorten the statute of limitations by express contractual provision. *Angus Med. Co. v. Digital Equip. Corp.*, 173 Ariz. 159, 166-68, 840 P.2d 1024, 1031-33 (App. 1992) (suggesting provision shortening statute of limitations was potentially enforceable and not unconscionable); *see also Swanson [v. The Image Bank, Inc.]*, 206 Ariz. 264, [268] ¶ 12, 77 P.3d [439,] 443 [(2003)] ("Generally speaking, however, parties do have the power to determine the terms of their contractual engagements."); *Nangle v. Farmers Ins. Co. of Ariz.*, 205 Ariz. 517, ¶ 17, 73 P.3d 1252, 1255 (App. 2003) (reduction in limitation period allowed contractually); *Zuckerman v. Transamerica Ins. Co.*, 133 Ariz. 139, 143 n.5, 650 P.2d 441, 445 n.5 (1982) (same).

PNC Bank, N.A. v. Stromenger, No. 2 CA-CV 2015-0135, 2016 WL 4434310, at *7 ¶10 (Ariz. Ct. App. Aug. 22, 2016) (Memorandum Decision). *Accord Barnett v. Concentrix Solutions Corp.*, No. CV-22-00266-PHX-DJH, slip op. at 14, 2022 U.S. Dist. LEXIS 220670 (D. Ariz. Dec. 7, 2022).

The Parol Evidence Rule

An unambiguous written contract term cannot be contradicted based on prior oral negotiations. Uniform Commercial Code (U.C.C.) §2-202. “The parol evidence rule prohibits the use of extrinsic evidence to vary or contradict a written contract.” *Higginbottom v. State*, 203 Ariz. 139, 142, ¶ 12, 51 P.3d 972, 975 (App. 2002). “Where . . . an ambiguity exists on the face of the document or the language admits of differing interpretations, parol evidence is admissible to clarify and explain the document.” *Standage Ventures, Inc. v. State*, 114 Ariz. 480, 482, 562 P.2d 360, 362 (1977). The court may also admit evidence to determine the intention of the parties if “the judge . . . finds that the contract language is ‘reasonably susceptible’ to the interpretation asserted by its proponent.” *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 154, 854 P.2d 1134, 1140 (1993).

Merger

Prior writings on the same subject may be merged into a single document. All terms not included in the most recent writing are then superseded by the most recent writing. U.C.C. § 2-202.

The Statute of Frauds

Contracts regarding certain subject matter must be in writing. The most common bargain requiring a writing is a sale of goods for more than 500 U.S. dollars. U.C.C. § 2-201; A.R.S. § 44-101 (4) ("Upon a contract to sell or a sale of goods or choses in action of the value of five hundred dollars or more . . .."); see also A.R.S. § 44-101 (5) ("Upon an agreement which is not to be performed within one year from the making thereof").

Frustration of Purpose, Impossibility, and Impracticability

Frustration of purpose requires a showing that the other party's performance has become worthless. Restatement (Second) of Contracts § 265; *7200 Scottsdale Rd. Gen. Partners v. Kuhn Farm Mach., Inc*., 184 Ariz. 341, 349, 909 P.2d 408 (App. 1995) (the resulting value of leasing the premises must be "totally or nearly totally destroyed.").

Arizona law and the Restatement treat impossibility and impracticability as the single defense of impracticality of performance. See *7200 Scottsdale Rd. Gen. Partners*, 184 Ariz. at 345 n.2; Restatement (Second) of Contracts § 261 comment d. Impracticability of performance requires a showing the party has encountered a substantial impediment to their performance. *7200 Scottsdale Rd. Gen. Partners*, 184 Ariz. at 345. "Where, after a contract is made, a party's performance is made impracticable . . . his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary." *See* Restatement (Second) of Contracts § 261; *7200 Scottsdale Rd. Gen. Partners*, 184 Ariz. at 345. "Performance may be impracticable because extreme and unreasonable difficulty, expense, injury, or loss to one of the parties will be involved." Restatement (Second) of Contracts § 261 comment d.

Again, the parties can use a contractual *force majeure* clause to allocate risks of performance. *Vereit Real Estate, LP. v. Fitness Int'l, LLC.,* ___ Ariz. ___, 529 P.3d 83, 87-88 ¶¶10-13 (Ariz. Ct. App. 2023) (contract provision for unforeseeable events beyond the parties' control as written did not cover loss of income due to the government mandated closures of leased fitness facilities during the COVID-19 pandemic).

Indemnity

A contractual indemnity provision protects one party from liability caused by the other party, *e.g.*, delivery of goods that infringe a patent, or goods that are defective. Indemnity results in imposing all liability on the party obligated to indemnify and does not apportion any liability on the party indemnified. A party required to indemnify the other party usually obtains insurance to cover the indemnity risk. See U.C.C. § 2-312.
Common law indemnity applies in situations where the indemnitee is (1) an employer who did not participate in or authorize an employee's tort, (2) a retailer who sells without modification a defectively manufactured product, or (3) an agent who acted on the directions of the principal and

believed the action was proper. D. Dobbs, The Law of Torts §386 at 1079 (2000). In these situations, the one receiving indemnity is not "personally at fault in any way." *Hersten v. Deloitte & Touche*, 186 Ariz. 110, 118, 919 P.2d 1381 (App. 1996).

Dispute Resolution

As an alternative (or as a prerequisite) to litigation, the parties to a contract can provide alternatives to litigation, including arbitration or mediation. *See* Uniform Arbitration Act, A.R.S. § 12-1501 *et seq*.

Choice of Forum/Law

Venue refers to where disputes must be litigated. *See* 28 U.S.C. § 1391(b) (venue is proper anywhere "a substantial part of the events ... giving rise to the claim occurred."). The parties to a contract can select any forum with jurisdiction over the parties.

> When the parties have agreed to a valid forum-selection clause, a district court should ordinarily transfer the case to the forum specified in that clause.

Atl. Marine Constr. Co. v. U.S. Dist. Court for the W. Dist. of Tex., 571 U.S. 49, 62, 134 S. Ct. 568 (2013)

To resolve what law applies courts look first to the contract, if any. If the contract selects the law of Destination, then Destination Court of Arbitration looks first to existing precedent (prior Decisions), then U.S. law, then Arizona law, then the Uniform Commercial Code, then the Restatements of the Law.

"In Arizona, courts follow the Restatement [(Second) of Conflict of Laws (1971)] to determine which state's law applies in a contract action." *Cardon v. Cotton Lane Holdings, Inc.*, 173 Ariz. 203, 207, 841 P.2d 198, 202 (1992).

The Restatement (Second) of Conflict of Laws § 187 states in pertinent part:

> (1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.

Which issues can be resolved by explicit contract provisions depends in part on public policy.

> Section 187(1) places few limitations on parties' right to contract. Examples of issues that parties may not determine by explicit agreement include questions involving capacity, formalities, and validity. Restatement [(Second) of Conflict of Laws] § 187 cmt. d. Thus, parties cannot vest themselves with capacity to contract by so stating in an agreement, nor can they dispense with the formal legal elements of a valid contract. *See id*. Generally speaking, however, parties do have the power to determine the terms of their contractual engagements. Restatement § 187 cmt. c. We find this to be particularly true in this case where parties of relatively equal bargaining power, both represented by counsel, selected the law of the state to govern their contract.

Swanson v. Image Bank, 206 Ariz. 264, 267-68, 77 P.3d 439 (2003).