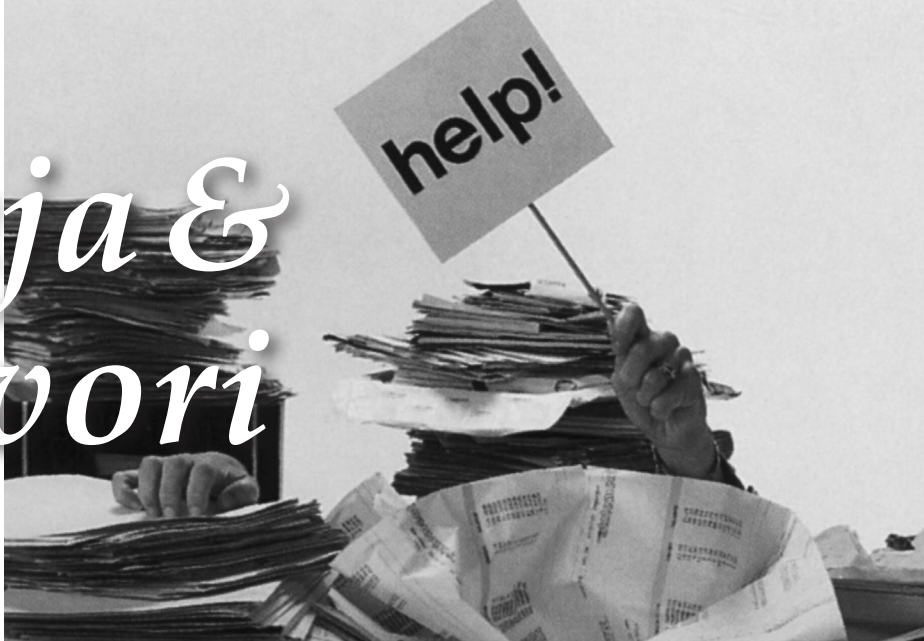


pitanja & odgovori



ŠTA JE PROMISORI NOTA I DA LI JE PRIHVATLJIVA U NAŠEM PRAVNOM SISTEMU?

Odgovara: Dragoslav Vuković, specijalista za finansijska tržišta Udruženja banaka Srbije

U praksi se javila potreba za razjašnjenje pitanja vezanih za korišćenje hartije od vrednosti pod nazivom promisori nota.

Naziv promisori nota odnosi se na dva znatno različita koncepta hartije od vrednosti iz reda menica. Njihova razlika proizilazi iz razlika pravnih sistema koji regulišu menicu. Jedan pravni sistem određen je Ženevskim konvencijama o vučenoj menici i sopstvenoj menici iz 1930. Drugi pravni sistem, anglo američki zasnovan je na Bills of Exchange Act 1882 i zakonodavstvu SAD, koji međusobno imaju određene sličnosti u pristupima regulisanju pravne materije.

Praksa korišćenja menice u pravnom prometu zahteva dobro poznavanje razlika koje postoje u načinu regulisanja vučene menice i sopstvene menice u ova dva pravna sistema.

Nacionalni zakoni u Evropi uglavnom su zasnovani na tri Ženevske konvencije iz 1930: Konvencija o jednoobraznom zakonu za trasiranu (vučenu) menicu i sopstvenu menicu, Konvencija za rešavanje sukoba zakona u vezi sa trasiranom menicom i sopstvenom menicom

i Konvencija o oporezivanju trasirane menice i sopstvene menice.

Ženevsku unifikaciju meničnog prava nisu prihvatile zemlje Komonvelta: Australija, Bocvana, Gana, Hong-Kong, Kanada, Kenija, Nigerija, Novi Zeland, Sudan, Uganda itd. U SAD su u svim država usvojene odredbe o negocijabilnim hartijama od vrednosti sadržane u Jednoobraznom trgovačkom zakoniku (Uniform Commercial Code) od 1962. godine koje se odnose i na menicu. Tako, što se tiče pozitivnog prava, postoje dva osnovna menično-pravna sistema u svetu: ženevski i anglo-američki.

Konvencija o međunarodnim trasiranim menicama i međunarodnim sopstvenim menicama UNCITRAL-a, još uvek nije operativna, pa je ovde ne razmatramo.

Kod preuzimanja Ženevske konvencije zemlje potpisnice su stavile brojne rezerve, tako da se tekstovi nacionalnih zakona razlikuju, kao i zbog određenih domaćih propisa. Takođe je numeracija članova često rearanžirana. U Francuskoj i Švajcarskoj nije donet poseban zakon o menici već su izmenjene odgovarajuće

odredbe Commercial Code (Francuska) ili Code of Obligations (Švajcarska).

Pitanje koje ovde razmatramo jeste - da li je promisor nota prihvatljiva u našem pravnom sistemu?

Najpre konstatacija da se u Ženevskoj konvenciji o trasiranoj i sopstvenoj menici na engleskom jeziku naziva: "promissory note". U našem Zakonu o menici to je "sopstvena menica".

Ono što je relevantno za davanje odgovora na naše pitanje nalazi se u odgovarajućim odredbama Ženevske konvencije i u odredbama našeg Zakona o menici:

"A promissory note contains:

1. The term "promissory note" inserted in the body of the instrument and expressed in the language employed in drawing up the instrument.
2."

(Article 75)

"Sopstvena menica sadrži:

- 1) označenje da je menica, uneto u sam slog isprave na jeziku na kome je ona sastavljena;"

(Član 107. Zakona)

Nevažeca je isprava koja ne sadrži neki od sastojaka iz navedenih članova. Izuzev slučajeva u kojima važe određene zakonske prezumpcije (u pogledu dospelosti i mesta izdanja). (Art. 76 odnosno Član 108. Zakona).

Znači, "ženevska" promissory nota je sopstvena menica kada je ispisana na engleskom jeziku. Na srpskom jeziku, to je isključivo "sopstvena menica". U oba slučaja to je isprava prihvatljiva u našem pravnom sistemu. S tim što bi to bila nevažeca isprava ukoliko bi u srpskom tekstu sopstvena menica bila nazvana promisor nota, u smislu: "platićemo po ovoj promisor noti ...".

Kod nas nije pravljen formular sopstvene menice. Efekat sopstvene menice proizvodi se korišćenjem forme trasirane (vučene) menice, tako što trasant vuče menicu na sebe (mogućnost data u Article 3 Konvencije ... i Član 3 Zakona o menici).

Kada je reč o anglo-američkoj verziji promissory note, stvar je bitno različita. Tekst ove promissory note opširan je i sadrži vrlo temeljan opis osnovnog posla po kome je nastalo potraživanje koje se obezbeđuje tim instrumentom. Pri tome je bitno da imalac promissory note, koji želi da pristupi naplati (jer izdavalac promissory note nije izvršio *isplatu*), mora da dokaže da je on prethodno bio izvršio svoju obavezu iz osnovnog posla, tako da potraživanje realno postoji. Kod "ženevske" promisor note, tj. sopstvene menice, mada postoji kauza za njeno izdavanje, prevladuje njena apstraktna priroda - odvojenost od osnovnog posla, tj. samostalna obaveza.

Forme ženevskih sopstvenih menica na engleskom i nemačkom jeziku

The image shows two forms for promissory notes. The top form is in English and is titled "PROMISSORY NOTE". It contains the following fields: (1) FOR, (2) 19..., (3) AT, (4) TO, (1) THE SUM OF, (7) PAYABLE WITH, and (6). The bottom form is in German and is titled "EIGENER WECHSEL". It contains the following fields: (2) den, (1) 19..., (3) GEGEN DIESEN EIGENWECHSEL ZAHLEN WIR, (4) AN ORDER VON, (1) DEN BETRAG VON, (7) ZAHLBAR BEI, IN, and (6). Both forms have a reference number "Obr. 8029 JUR. VII - 71." at the bottom.

Forma ženevske sopstvene menice na francuskom jeziku

(2)	(1)
..... le 19..... B.P.	
(3)	
AU NOUS PAIERONS CONTRE CE BILLET A ORDRE	
(4)	
A L'ORDRE DE	
(1)	
LA SOMME DE	
.....	
(7) PAYABLE CHEZ	
.....	
.....	
(6)	
Cbr. 6025 RUB. VII - 68.	

Forma anglo-američkog tipa promissory note

PROMISSORY NOTE

U.S. \$731,692 , 1978

FOR VALUE RECEIVED, Yugoslav Export and Credit Bank Group (the "Borrower") by this promissory note (the "Note") unconditionally promises to pay to the order of Manufacturers Hanover Trust Company (the "Bank") at its office located at 350 Park Avenue, New York, New York 10022, United States of America, the principal sum of Seven Hundred and Thirty One Thousand, Six Hundred and Ninety Two Dollars (U.S. \$731,692) in lawful money of the United States of America in eight installments on the dates and in the amounts as follows:

<u>Date</u>	<u>Amount</u>
	U.S. \$91,461.50
	91,461.50
	91,461.50
	91,461.50
	91,461.50
	91,461.50
	91,461.50
	91,461.50

and to pay interest in like money at said office on the unpaid principal amount hereof from the date hereof until maturity (whether as stated, by acceleration or otherwise) at the rate per annum 1½% above the commercial lending rate of the Bank from time to time generally in effect in New York on unsecured loans for 90 days to its most responsible and substantial corporate borrowers, and thereafter at the rate per annum 2% above such commercial lending rate. Each change in such commercial lending rate shall cause a corresponding change in such interest rate effective as of the opening of business on the day on which such change in such commercial lending rate occurs. Interest shall be computed on the basis of a year of 360 days for the actual number of days elapsed and shall be payable on each _____ and _____ after the date hereof and upon payment in full hereof.

This Note is one of the Notes referred to in the Loan Agreement, dated as of December 16, 1977, between the Borrower and the Bank and is entitled to the benefits thereof and may be prepaid in whole or in part as provided therein.

Upon the occurrence of any of the Events of Default specified in said Loan Agreement, all amounts then remaining unpaid on this Note may be declared to be immediately due and payable as provided in said Loan Agreement.

YUGOSLAV EXPORT AND CREDIT BANK GROUP

By: _____
Title: _____

Forma anglo-američkog tipa promissory note

PROMISSORY NOTE

\$9,000,000 October 8, 1996

FOR VALUE RECEIVED, BIOPURE CORPORATION, a Delaware corporation (the "Debtor"), hereby promises to pay to the order of PHARMACIA & UPJOHN, INC., a Delaware corporation (the "Creditor"), at the Creditor's principal office at 7000 Portage Road, Kalamazoo, Michigan 49001, or at such other place as the holder hereof may designate, in immediately available funds in lawful money of the United States of America, the amount of NINE MILLION DOLLARS (\$9,000,000), together with interest thereon at the prime rate of interest publicly announced from time to time by The Chase Manhattan Bank, or its successor or survivor, fluctuating and changing automatically as such prime rate does.

The principal amount of this Promissory Note (the "Note") shall be paid in eighteen (18) consecutive equal quarterly installments of \$500,000 each, commencing on July 1, 1997 and continuing on the first day of each October, January, April and July thereafter up to and including October 1, 2001 (the "Maturity Date"). Interest on the unpaid principal amount hereof shall be paid on the first day of each quarter, commencing on April 1, 1997 and continuing on the first day of each July, October, January and April thereafter. Any remaining unpaid principal balance of this Note, together with all accrued unpaid interest, shall be due and payable in full on the Maturity Date.

From and after the occurrence of an Event of Default (defined below), the unpaid principal amount hereof shall bear interest at a rate equal to two percent (2%) in excess of the interest rate which otherwise would be applicable under this Note (the "Default Rate").

The Debtor may prepay this Note in whole or in part at any time from time to time without premium or penalty.

The Debtor shall be required to prepay this Note upon the occurrence of a Mandatory Prepayment Event (defined below) in an amount equal to all proceeds received by the Debtor in connection with the Mandatory Prepayment Event. For purposes of this Note, "Mandatory Prepayment Event" shall mean

each of the following events:

- (i) Debtor's receipt of any financing or additional capital in a single or series of related transactions in excess of \$50,000,000, including but not limited to bank loans and any investments (in the form of equity, debt or otherwise) made by any new or existing shareholder of Debtor or by a new or existing investment, research or development partner; or
- (ii) An initial public offering by Debtor.

Any partial prepayments of the Note shall be applied first to all accrued but unpaid interest at the time of such partial prepayment, and then to installments of principal in inverse order of their maturity.

The payment of the obligations of the Debtor hereunder is secured by certain collateral (the "Collateral") as provided in (i) the Security Agreement between the Debtor and the Creditor dated as of the date hereof (the "Security Agreement") and (ii) certain Mortgages between the Debtor and the Creditor dated as of the date hereof (the "Mortgages").

So long as this Note remains unpaid, the Debtor shall do all of the following (collectively, the "Affirmative Covenants"):

- (i) Deliver to the Creditor, within forty-five (45) days after the end of each fiscal quarter, consolidated financial statements of the Debtor certified as correct by the Debtor's Chief Financial Officer;
- (ii) Deliver to the Creditor, within ninety (90) days after the end of each fiscal year, audited consolidated financial statements of the Debtor reported on by an independent certified public accounting firm of recognized national standing;
- (iii) Deliver to the Creditor, as soon as practicable after the end of each calendar month and in any event within thirty (30) days thereafter, unaudited consolidated financial statements of the Debtor certified as correct by the Debtor's Chief Financial Officer;
- (iv) Permit the Creditor or any person designated by the Creditor to visit and inspect Debtor's properties and assets, to examine the books and financial records of Debtor, and to discuss the affairs, finances and accounts of Debtor with its executive

officers all at such times and as often as the Creditor may reasonably request;

- (v) Comply in all material respects with all applicable laws, rules, regulations and orders (including without limitation all federal, state and local laws relating to pollution, reclamation or protection of the environment), such compliance to include, without limitation, paying all taxes, assessments and governmental charges imposed upon Debtor or Debtor's assets or properties;
- (vi) Preserve and keep in full force and effect its corporate existence and such of its rights, franchises, licenses, patents, trademarks and other intellectual property as are necessary to Debtor's Hemopure business;
- (vii) Maintain casualty insurance coverage on its property and assets and other insurance against other risks, including public liability, in such amounts and such types as are ordinarily carried by similar companies, or as may be required by the Security Agreement and the Mortgages;
- (viii) Keep complete and accurate books and records with respect to its business;
- (ix) Preserve, protect, keep and maintain all of its property and assets in good operating condition, repair and working order and make all necessary repairs thereto and replacement of parts thereof so that the value and operating efficiency thereof shall at all times be maintained and preserved;
- (x) Comply with all agreements, indentures and mortgages to which it is a party or by which any of its assets is bound;
- (xi) Notify the Creditor of the institution by any person or entity against the Debtor of any action, suit or proceeding or any governmental investigation or any arbitration that could have a material adverse effect on the Debtor promptly following Debtor's receipt of knowledge thereof; and
- (xii) Notify the Creditor of Debtor's receipt of any governmental notice of a violation of any federal, state or local environmental law, standard or regulation that could have a material adverse effect on the Debtor promptly following Debtor's receipt of knowledge thereof;

So long as this Note remains unpaid, the Debtor shall not do any of the following without the consent of the Creditor, which will not be unreasonably withheld (collectively the "Negative Covenants"):

- (i) Substantially change its business;
- (ii) Pay any dividends or make any other distribution of capital;
- (iii) Guarantee or otherwise in any way become or be responsible for indebtedness or obligations of any other person, contingently or otherwise;
- (iv) Permit any of its assets to be subject to any judgments, attachments or levies the aggregate amount of which exceeds \$50,000;
- (v) Create, establish or otherwise form any new employee benefit plans or significantly revise any existing employee benefit plans;
- (vi) Purchase or otherwise acquire or hold any investments except that the Debtor may make and own (a) investments in certificates of deposit or time deposits having maturities in each case not exceeding one year from the date of issuance thereof and issued by any FDIC-insured commercial bank incorporated in the United States or any state thereof having a combined capital and surplus of not less than \$500,000,000; (b) investments in marketable direct obligations issued or unconditionally guaranteed by the United States of America or issued by any agency thereof and backed by the full faith and credit of the United States of America, in each case maturing within one year from the date of issuance or acquisition thereof; (c) investments in commercial paper issued by a corporation incorporated in the United States or any state thereof maturing no more than one year from the date of issuance thereof and, at the time of acquisition, having a rating of A-1 (or better) by Standard & Poor's Corporation or P-1 (or better) by Moody's Investors Service, Inc.; (d) investments in money market mutual funds all of the assets of which are invested in cash or investments described in clauses (a), (b) and (c) of this paragraph (vi) and (e) investments owned on the date hereof and funding obligations, if any, in connection therewith;

- (vii) Repurchase any securities issued by Debtor that are held by existing shareholders;
- (viii) Enter into any agreement or other contractual relationship with (a) any person owning securities, directly or indirectly, representing 5% of the voting power of the Debtor, (b) any affiliate of the Debtor, (c) any officer, employee or director of the Debtor, or (d) any other entity in which the Debtor maintains an equity interest, unless, in each case, any such agreement or contractual relationship contains terms that are no less favorable to Debtor than the terms Debtor could obtain in a similar agreement between the Debtor and an unaffiliated third party;
- (ix) Increase the fiscal year 1997 and 1998 remuneration paid to directors or the Chief Executive Officer of the Debtor above the remuneration (excluding finder's fees and other extraordinary payments) paid to such directors and Chief Executive Officer in the fiscal year ended October 31, 1996; or
- (x) Make any loans or other advances or pay any finders fees to any of Debtor's officers, employees, directors, stockholders or affiliates or any other entity in which the Debtor maintains an equity interest.

Upon an Event of Default (as defined below) hereunder, upon Debtor's receipt of notice from the Creditor, the principal sum hereunder and all interest then accrued shall be immediately due and payable; provided, however, that upon an Event of Default described in subsections (v) through (vii) below, the principal sum hereunder and all interest then accrued shall be immediately due and payable without notice to or demand on Debtor. An "Event of Default" shall mean:

- (i) the failure by Debtor to make any payment of principal or interest when due hereunder;
- (ii) the failure by Debtor to make any other payment, including a mandatory prepayment, required hereby and such failure continues for thirty (30) days;
- (iii) the failure by Debtor to observe or perform as and when required any of the terms, conditions or covenants in the Security Agreement, in the Mortgages or in this Note (including but not limited to the Affirmative Covenants and the Negative Covenants) and such failure continues for thirty (30) days

- after Debtor's receipt of notice thereof;
- (iv) any representation or warranty made by Debtor herein, in the Security Agreement, in the Mortgages or in any exhibit, schedule, report or certificate delivered pursuant hereto or thereto shall prove to have been false, misleading or incorrect in any material respect when made;
- (v) the admission in writing by Debtor of its inability to pay its debts as they become due;
- (vi) the making by Debtor of a general assignment for the benefit of creditors;
- (vii) the institution by or against Debtor of any proceedings seeking the appointment of a trustee, receiver, custodian or liquidator for itself, or for the Collateral or any part thereof, or for a substantial part of its other property, or seeking its liquidation, reorganization, dissolution or winding-up or the composition or readjustment of its debts, or seeking similar relief under any law relating to bankruptcy, insolvency, reorganization, winding-up or composition or adjustment of debts; provided, however, if any such proceedings are instituted against Debtor, such proceedings shall have remained undismissed, or an order, judgment or decree approving or ordering any of the foregoing shall be entered and continue unstayed and in effect, for a period of 60 or more days; or
- (viii) the failure by Debtor to pay when due any principal of or interest on indebtedness, other than the debt evidenced by this Note, aggregating \$250,000 or more, or the occurrence of any event specified in any note, agreement, indenture or other document evidencing or relating to such debt, if the effect of such non-payment or event is to permit, with the giving of notice or passage of time or both, the holders thereof to terminate or suspend any commitment to lend money to Debtor or to cause or declare any portion of any borrowings thereunder to become due and payable prior to the date on which it would otherwise become due and payable.

This Note may be assigned by the Creditor at any time.

In addition to and not in limitation of the

foregoing, Debtor further agrees, subject only to any limitation imposed by applicable law, to pay all expenses, including attorneys' fees and legal expenses, incurred by the holder of this Note in endeavoring to collect any amounts payable hereunder which are not paid when due.

Presentment for payment, demand, protest, dishonor and notice of dishonor are hereby waived.

This Note shall be governed by and construed and enforced in accordance with the laws of the State of New York.

BIOPURE CORPORATION

Attest:

/s/ Maria S. Gawryl
Title: V. P. -Research
and Development

By: /s/ Brian A. Lajoie
Title: V. P. -Finance



Promissory note izdata u mestu Edgewood, Teksas 1919. godine