

Diritto di compera, prelazione and ricupera

Dr Alexander Ressos, TEP
Attorney-at-Law (Switzerland), Solicitor (Hong Kong),
Solicitor (England & Wales)

Swiss property law knows three rights that can be agreed in a contract and annotated in the land register: the right of pre-emption (*diritto di prelazione*), the right to purchase (*diritto di compera*) and the right of repurchase (*diritto di ricupera*). In the Italian text of the Code of Obligations, Art. 216(2) CO requires that "i contratti preliminari, nonché i patti di prelazione, le promesse di vendita e quelle di ricupera richiedono per la loro validità l'atto pubblico", while under Art. 216(3) a pre-emption agreement that does not fix the price is valid in written form.¹ The Italian version of the statute thus uses *promessa di vendita* where the later provisions and Swiss practice speak of *diritto di compera*, an internal inconsistency that every reader of the Italian version must know. The *diritto di compera* is an option: its holder may acquire the property by unilateral declaration within the agreed period. Its annotation under Art. 959 CC makes it effective against later acquirers.

Italian law has a comparable instrument in the option (*opzione*) under Art. 1331 c.c. and also knows the preliminary contract (*contratto preliminare*), whose transcription in the land registers has protective effects. The Italian *diritto di prelazione* is above all a statutory right of certain persons, such as tenants of commercial premises, farmers and co-heirs, while the contractual pre-emption right has only obligatory effect. A Ticinese notary who drafts a *diritto di compera* for an Italian buyer of a house in the Malcantone will therefore explain the right in terms of the Italian *opzione*. When an Italian notary drafts a *preliminare* for a Swiss buyer of an apartment in Milan, the Swiss client should understand it as a binding obligation to conclude the final contract, comparable to the Swiss *contratto preliminare*, which under Art. 216(2) CO requires a public deed when it concerns land.

1 Usufrutto and succession: *legittima*, *porzione legittima* and *patti successori*

Succession law offers true friends with different content and one institution that one legal order allows and the other forbids. The *usufrutto* is a true friend in both legal orders: Art. 745 ff. CC and Art. 978 ff. c.c. both define it as the right to use and enjoy the property of another, and in both it may be created by law or by agreement.² The regimes diverge in succession. Swiss law allows the testator to leave the surviving spouse the usufruct of the part of the estate devolving to common descendants (Art. 473 CC), which is a classic instrument for protecting the widow or widower. Italian law gives the surviving spouse full ownership rights of a share of the estate and a statutory right of habitation in the family home. An Italian family that uses a Swiss will to grant the spouse a usufruct will meet Italian forced heirship if Italian law applies to the succession.

The compulsory share is called *porzione legittima* in Swiss law and *legittima* or *quota di riserva* in Italian law. Under Art. 536 c.c. the persons entitled to a reserved share (*legittimari*) are the spouse, the children and, in the absence of children, the ascendants.³ Swiss law reduced the compulsory share of descendants to one half of their intestate share and abolished that of parents with effect from 1 January 2023. Since then, the Swiss *porzione disponibile* (freely disposable share) has been considerably larger than the Italian *quota disponibile*.⁴ Although the terms resemble each other, the quotas differ widely. An English translation as "forced share" hides the difference completely.

The most consequential divergence concerns contracts of succession. Swiss law allows the *contratto successorio* (Art. 494 ff. CC), by which a person may institute an heir or make a legacy by contract, and the renunciation of inheritance by contract (Art. 495 CC). Italian law forbids such agreements. Article 458 c.c. declares void "ogni convenzione con cui taluno dispone della propria successione", as well as any act by which a person disposes of or renounces rights in a succession not yet opened. The only exception is the *patto di famiglia* for the transfer of a business under Art. 768-bis ff. c.c.⁵ A *contratto successorio* concluded before a Ticinese notary between Italian nationals resident in Italy is therefore at risk of being void in Italy, unless the conflict rules of the European Succession Regulation or of Italian private international law give effect to the choice of Swiss law. Chapter E.V treats the conflict rules in detail. The terminological point is simple: the word *contratto successorio* has no lawful Italian equivalent. An Italian lawyer who reads it will reflexively think of a prohibited *patto successorio*.

2 Notes

1. CO, Art. 216(2)–(3), Italian text at <https://www.droit-bilingue.ch/en-it/2/22/220-216-230.html>. ↩
2. Brocardi.it, "Art. 978 Codice civile – Costituzione", <https://www.brocardi.it/codice-civile/libro-terzo/titolo-v/capo-i/sezione-i/art978.html>. Swiss Civil Code of 10 December 1907 (CC), SR 210, Art. 745 and 473; Codice civile, Art. 540(2) (right of habitation of the surviving spouse). ↩
3. Brocardi.it, "Art. 536 Codice civile – Legittimari", <https://www.brocardi.it/codice-civile/libro-secondo/titolo-i/capo-x/sezione-i/art536.html>. ↩
4. Swiss Civil Code (Law of Succession), Amendment of 18 December 2020, in force since 1 January 2023, new Art. 470(1) and 471 CC ("La porzione legittima è della metà della quota ereditaria"), AS 2021 312, Italian text at <https://www.fedlex.admin.ch/filestore/fedlex.data.admin.ch/eli/oc/2021/312/it/pdf-a/fedlex-data-admin-ch-eli-oc-2021-312-it-pdf-a.pdf>. The Italian quotas are set out in Art. 537 ff. c.c., for example Art. 537 (one half for a single child, two thirds for several children), Brocardi.it, <https://www.brocardi.it/codice-civile/libro-secondo/titolo-i/capo-x/sezione-i/art537.html>. ↩
5. Brocardi.it, "Art. 458 Codice civile" (above). ↩

For general information only. This article does not constitute legal or tax advice, does not replace advice on an individual case and creates no lawyer-client relationship. It reflects the legal position as of September 2026.

Online version: helveticaregister.com/lugano-diritto-di-compera-prelazione-and-ricupera