

## LEGAL STEPS

Property purchases in Madeira can be completed effortlessly and in absolute security, as the law covering property transactions is very specific and complete. When used effectively, this law represents a very powerful tool to protect both buyer and seller in any property transaction.

Most prospective buyers of property in Madeira wish to do so for the purpose of establishing either a holiday home or an alternative permanent residence, in the atmosphere of beauty and tranquility which this island offers. In order to ensure that this tranquility extends itself to all stages of the property purchase, we hereby provide an outline of the procedures and legal terms involved, as well as other general information to assist you in your quest for a place in the sun.

It is important to remember that the law is on your side, and a good local lawyer will further protect your interests. Contracting a lawyer to represent you is not strictly obligatory, but it goes a long way to ensuring peace of mind. The procedure is in effect 'foreign' to most buyers, and no matter how well informed you may believe you are, dealing with a completely different set of rules and procedures may be the object of unnecessary insecurity and stress. Many lawyers are English speaking, and with experience in the application of the law and local customs, will be responsible for your side of the transaction.

### 1. The Negotiation

Once you find the property of your dreams, you make your offer through your agent, who mediates in the negotiations until conditions acceptable to both yourself and the seller are established. Various details need to be established and verbally agreed upon at this stage, to form the basis of the contract, but are only valid when the contracts have been signed by all the Parties involved. Such details include purchase price of the property, payment terms, and relevant dates such as payment dates, hand-over date of the property and title transfer (Escritura) deadline.

From this stage onwards everything can be left to your local lawyer, whose responsibility is to represent you in the transaction, from beginning to end, giving you the peace of mind to enjoy the island and all it has to offer.

### 2. Property Documents

Before describing the contractual stages of the procedure, it is important to familiarize yourself with some of the terms used in describing the property. This will give you an idea of the 'big picture' and a better grasp of the logistics of the transaction.

#### 2.1. Registration Certificate (Certidão de Registo)

Every property has a unique record which contains the property's legal history. It identifies the current legal ownership and description of the property, and provides all information on any registered liens or encumbrances which may exist.

This Certificate is a public record, and is obtained from the Property Registry Office of the area in which the property is located. An updated copy is required for information purposes at the initial stages of any transaction, and is indispensable for the transfer of title (Escritura) at a later stage.

## 2.2. Caderneta Predial

Each property has a further unique certificate which relates to its insertion in the Property Matrix of the area. This is a property docket called a Caderneta Predial, and relates to the tax office registration of the property. As with the Certidão de Registo, a copy of this docket is necessary.

In cases where the property is recent, the Caderneta Predial may not have been issued yet, and can therefore be replaced with the application form for same. This is frequent in new developments, where the full procedure has not yet run its course.

## 2.3. License for Use (Licença de Habitabilidade / Utilização)

All construction, with the exception of older buildings, has to have a License for Use (Licença de Habitabilidade / Utilização) issued, which effectively confirms that the authorities have approved the property for the purposes that it is being used for. This may be residential or commercial, depending on the property in question. This license is indispensable for the title transfer to go through.

## 3. The Promise of Sale and Purchase Contract

On concluding the negotiations for the purchase of the property, the terms and conditions pertinent to the transaction are laid down in a Promise of Sale and Purchase Contract, which both parties sign. This is a private contract that precedes, and defines conditions for the actual transfer of ownership.

The signing of this contract is generally accompanied by a deposit payment, which is freely established between the parties, but is usually a minimum of 20% of purchase price). This deposit binds the parties to the extent of its value.

Normally, the deposit value is forfeit by the party who reneges on the contract. Therefore, if the purchaser reneges, he loses the deposit, and if the vendor reneges, he has to return to the purchaser double the amount received as deposit.

In promissory contracts involving property transactions, there is one article of the Civil Code that applies by default and which is worthy of mention. It is Article 830 of the Civil Code, and covers the eventuality of default by one of the parties. It stipulates that the contract may be 'specifically executed' if the party not in default wishes to have it so. This means that, notwithstanding the obligation of the party in default to lose or return double the deposit involved, the other party may choose to reject this option and have the actual contract 'forcefully carried out' by the courts. A buyer is therefore not obligated to accept that a seller cancel the contract by simply returning the deposit doubled - he may decide that he actually wants the property and a court will then 'replace' the seller in the transaction and carry it through to completion on his behalf.

A typical Promise of Sale and Purchase Contract includes:

Full legal descriptions of the vendor, the purchaser and of the property;  
Purchase price of the property and payment conditions, stating deposit amount;  
Intermediate payment amounts and dates if applicable, and final payment date;  
Completion date, i.e. date of title transfer, and conditions for hand-over of property (possession);  
Other specific clauses agreed upon by both parties.

#### 4. Title Deeds (Escritura)

When the conditions set out in the Promise of Sale and Purchase Contract have been met, the document of transfer of the title deeds, the Escritura, is drawn up at a Public Notary Office, where it is signed by the parties. This Escritura is effectively the final Sale and Purchase Contract and is also often referred to as the 'promised contract' in the Promise of Sale and Purchase Contract.

The Notary Public serves as the 'witness' to the act, and is responsible for checking and certifying the legal exactness of the entire transaction, ensuring that all documents are in perfect order, that any applicable purchase taxes have been paid, and that all parties are in agreement with the terms of the transaction. As this act is in Portuguese, it is usual for foreign buyers to have a translator present.

At this time the final payment is usually made. The original Escritura document is then held by the Public Notary, and a copy is registered with the Public Records office. The purchaser requests a certified copy to prove ownership in applying for the connection of utilities, etc. The documents proving legal ownership are therefore of public record, and are not in the form of a 'title certificate' which you have to guard with your lives. At any time you can request new certified copies of your proof of ownership.

The documents necessary for celebrating the Escritura are:

Identification documents and Portuguese tax numbers of the parties involved (the tax number of a foreign purchaser is obtained prior to the act);  
Property docket (Caderneta Predial) of the property, issued by the Tax Office of the area in which the property is located;  
Registration Certificate (Certidão de Registo) issued by the Property Registry Office of the area in which the property is located;  
Habitation License (Licença de Habitabilidade) issued by the local City Council certifying that the property is licensed for use;  
Proof of payment (or exemption) of the purchase taxes (see section on Purchase Costs), issued by the respective Tax Office.

#### 5. Property Registration

The final step in the procedure is to register the purchase with the Property Registry Office (Conservatória do Registo Predial) of the area in which the property is located, and at the respective Tax Office (Repartição de Finanças).

The registration with the tax office will serve to establish your annual property rates/taxes, which are based on the property's "estimated value" (see section on

Purchase Costs), with the rate varying depending on the area in which the property is located.

## 6. Buying a Property Under Construction

The property you wish to buy may still be under construction, or even in the pre-construction stage. This often applies to apartments or townhouses in a development, but can also apply to villas that are under construction, or even plots of land in a subdivision project where the infrastructures (roads, sewage, etc.) are not yet completed.

The obvious advantage of buying at this stage is that the prices are usually well below the final finished property value. Another advantage is that the purchaser can often arrange with the seller to make some changes to the property layout and/or to the finishes, which is not possible with a ready-built property.

The procedure followed in these cases is similar to that described above for completed properties, with a few specific points worth mentioning.

### 6.1. The Contract

The transaction is formalized in the same manner as for a finished property, namely with the signing of a Promise of Sale and Purchase Contract between the parties followed by the title transfer (Escritura). As the title transfer can only be effected when the property is completed, which may be quite some time in the future, this contract is of even greater importance than for finished properties.

Some additional clauses are common, including;

Identification of the property must include a full description of the land on which the property is being developed, as well as a description of the property being built; The Construction License (Alvará de Construção) obtained from the local City Council for the construction is identified;

A copy of the plan of the specific property (villa, apartment or plot of land), and description of the finishes to be incorporated (materials, etc.) are included;

Due dates for completion of construction and for the signing of the Escritura are specified, as well as any agreed penalty clauses in the event of delays;

Payment conditions generally include the deposit and various stage payments corresponding to various stages in the construction. The conditions for these stage payments must be stipulated.

### 6.2. License of Use

When construction of a development or villa is completed, the developer applies to the local City Council to inspect the property, to ensure that it conforms to the approved plans and other statutory regulations. The result of this inspection, provided it is positive, is that the City Council issues a License of Use, or Licença de Habitabilidade (Licença de Utilização for commercial properties) for the property. Without this license the notary will not permit the Escritura to be signed.

From this point forward the procedure is identical to that for finished properties, as previously described.

## 7. Freehold Title

Properties in Portugal are generally sold with a Freehold Title. In apartment or townhouse developments, there are two further aspects worth mentioning, namely the Propriedade Horizontal and the Condominium system.

Portuguese law applicable in these areas is very complete. It is a means of creating a freehold identity for a property which is part of a bigger building, with communal ownership of land, staircases, gardens, etc.

### 7.1. Propriedade Horizontal

The Propriedade Horizontal system, literally meaning "Horizontal Property", is a legal process by means of which a freehold title is given to each specific unit in a multi-unit development. These developments have common areas, including land, staircases, gardens, etc., which belong communally to all the owners of the individual units. It is therefore necessary to have a clear definition of the extent of the freehold ownership of each specific unit, and the rights and obligations associated to the part that is of communal ownership. Each unit is therefore identified with an independent title, which defines the unit itself, as well as its rights and obligations to the property as a whole.

The submission to Propriedade Horizontal is the developer's responsibility and **MUST** be completed and a Registration Certificate obtained, before any title transfers (Escrituras) for the individual units can be signed.

A complete description of the development is drawn up and formalized, during or immediately after the construction stage, by means of an Escritura. As with the Escrituras for title transfer, this is done in the presence of a Public Notary, who approves and witnesses the act. This document is then registered in the Property Registry Office of the area in which the property is located, with each individual unit being given a specific title number.

The Escritura of Propriedade Horizontal includes precise descriptions of the individual units, the position of the unit in the building, floor areas, room divisions, parking spaces, storage spaces and any exclusive right of use of the unit, such as private garden area, etc. It also identifies the units individually in alphabetical order. All common areas to the building, including the land, are identified.

Each unit is then attributed a proportional value, the Permilagem (expressed in parts per thousand), representing its proportion of the entire building for the purpose of the Condominium of the building (see below).

### 7.2. Condominium

The Portuguese Condominium Law sets out the rules and regulations for the administration of a property set up in Propriedade Horizontal. Basically, each property owner has full rights to his unit, while a Condominium Association is set up to administer the common areas of the building. This is a body (or person) elected by all the property owners.

The Condominium Administrators are responsible for ensuring the proper maintenance, insurance, cleaning, gardening and general upkeep of the building's common areas. Each owner pays a monthly fee towards the running of the Condominium. The amount payable by each unit's owner is related to the Permilagem of the unit, i.e. related to the proportion that the unit represents in the property as a whole, towards an annual budget drawn up for the purpose. The Permilagem of the unit also determines the weight of each owner's vote at the AGM of the Condominium, where the decisions effecting the running of the Condominium are made.

Over and above the monthly costs, a reserve fund must be created and included in the annual budget. This fund is then used by the Condominium for extensive maintenance purposes, such as painting, renovations, etc., in accordance with the criteria established at the AGM. In short, the law is very complete in ensuring the ongoing upkeep and protection of your investment.

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## PURCHASE RELATED COSTS

The primary concern of most prospective property buyers is the total cost that their investment will involve. It is not sufficient to just consider the property purchase price, as this is obviously not the only cost to bear. Lack of awareness of the total required amounts can often lead to disappointments or even the inability to comply with contractual terms, with undesired consequences.

To ensure that a prospective buyer is well prepared for the purchase procedure, we provide a description of the various costs that a purchaser will incur in relation to the property, both at the purchase stage and ongoing.

### 1. Taxable Value of the Property

The purchase costs and annual property taxes are, as of 2004, based on a new updated system. The fundamental novelty is the process of establishing the 'Taxable Value' of the property, which is mentioned in the descriptions of costs below. It is therefore important to learn the principals of how this value is arrived at under the new law.

The basic problem that existed was that the older properties were still being taxed on the original 'Patrimonial Values', even though these values bore no relationship to current market prices. New properties were paying much higher taxes than older, more valuable ones, thus creating an unfair system which penalized buyers of recent properties while benefiting some of the more affluent levels of society.

The new system is based on an updated evaluation process to be applied to all properties over the span of a few years, using a set of criteria aimed at harmonizing property taxable values in the territory. The result will be the 'valor patrimonial tributavel', or Taxable Value for the property. The evaluation process differs for the various types of property, namely urban (including villas, townhouses and apartments) and rural property (land).

### 1.1. Existing Urban Property

The evaluation of existing urban properties will take into consideration as many aspects of differentiation as possible, to establish fair comparable Taxable Values in the same areas, as well as from one area or municipality to another. The variables are basically:

Gross construction area;  
Adjacent area not under construction;  
A value per square meter including land;  
Location;  
Quality and comfort levels of property;  
Characteristics of surrounding areas;  
Specific municipal zoning definitions.

### 1.2. Newly Built Urban Property

New urban properties are subject to a different form of evaluation to arrive at the Taxable Value. Here the Taxable Value is established by the authorities at the time of completion of construction and subsequent licensing of the property.

### 1.3. Rural Property

Rural (or Rustic) properties fall under yet another different system, namely on the potential annual production income of the property.

## 2. Municipal Transaction Tax (IMT)

This one-off tax, known as IMT (Imposto Municipal sobre a Transmissão Onerosa de Imóveis), was introduced in 2004 to replace the existing SISA tax system. It is payable whenever possession of a property is deemed to have changed hands, which usually occurs on the date of signing of the Escritura (Title Transfer).

The amount payable is a function of the Taxable Value or the transaction price, whichever is higher. Usually the purchase price is the higher of the two, so we will refer to this amount in the details below.

### 2.1. IMT Rate

The tax rate applicable is dependent on the type of property in question. An approximate form of calculation follows:

Urban property for residential use (villas & apartments) - ranges from 0% to a maximum of 6% of Taxable Value or the transaction price, whichever is higher, using a sliding scale which changes annually. The table below gives the current formula for calculating the IMT tax payable on these properties.

#### Purchase Price Tax Calculation

Up to €100,000 Exempt

€100,000 to €137,500 (Price x 2%) - €2,000

€137,500 to €187,500 (Price x 5%) - €6,125

€187,500 to €312,500 (Price x 7%) - €9,875

€312,500 to €625,000 (Price x 8%) - €13,000

Greater than €25,000 Price x 6%

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Urban properties not destined for residential use such as office spaces and other commercial property - taxed at the rate of 6.5% of purchase price.

Rural (rustic) property – taxed at the rate of 5% of purchase price.

Urban land plot for construction - 6.5% of purchase price.

If the purchaser is domiciled in 'tax haven' territories, the rate is fixed without exemption, at 15% of the purchase price.

### 3. Notary Fees

These are the fees payable at the Public Notary for drawing up and witnessing the signing of the Escritura (Title Transfer), and are due on the date of the signing. The total fee is made up of two parts, namely the actual Notary fee, and a Stamp Duty on the transaction. If you are purchasing the property with a mortgage, the mortgage contract with the Bank is also formalized before the Notary and another fee is payable. There are also some small extra costs related to the number of copies of the document you request, etc.

Notary Fee: Fixed value of €175 regardless of the type of property.

Mortgage Escritura Fee: Fixed value of €142 (only if you are buying with a mortgage).

Stamp Duty: 0.8% of purchase price.

Stamp Duty on mortgage: 0.6% of purchase price (only if you are buying with a mortgage).

Extras: Usually does not exceed €100.

### 4. Lawyer's Fees

Vary according to value of property and complexity of transaction. These fees range from 1% to 3% of the purchase price and are normally payable in two parts, one at the beginning of the transaction, and the remainder upon completion. The lawyer can also handle connection of utilities, etc. when the transaction is complete.

### 5. Registration

The final step in the procedure is to register the purchase with the Land Registry Office (Conservatória do Registo Predial) of the area in which the property is located, and at the Tax Office (Repartição de Finanças).

The registration with the tax office will serve to establish your annual property rates/taxes, which are based on the property's 'Taxable Value' (see section below).

The costs are as follows:

Registration of purchase: Fixed value of €25.

Registration of mortgage: Fixed value of €135 (only if you are buying with a mortgage).

Extras: Usually does not exceed €100.

### 6. Municipal Property Tax (IMI)



This annual municipal tax, known as IMI (Imposto Municipal sobre Imóveis), was introduced in 2004 to replace the existing municipal annual tax system, which was obsolete and in many aspects, unfair.

The applicable tax rate is defined (and may be adjusted annually) by the City Council, according to a set of limits depending on the type of property concerned. There is an exception, however, in cases of ownership by foreign persons or companies domiciled in 'tax havens'. Here a more punitive rate is applied, in view of the potential tax evasion on sale of such properties by means of share transfers.

The rates are:

Urban property (existing) - between 0.4% and 0.8% of Taxable Value

Urban property (new) - between 0.2% and 0.5% of Taxable Value

Rural property – set at 0.8% of Taxable Value

Properties owned by persons or companies domiciled in foreign 'tax havens' - set at 5% of Taxable Value

The payment of the IMI tax is due during the year following that for which it applies. It is payable as follows:

If the tax amount is less than €10, no payment is due.

If the amount is greater than €250, it may be paid in two installments, in April and September.

If the amount is less than €250, it is due in April.

#### 7. Banking and Transfer of Funds

The best way to effect any payments is to open an account with a local bank when you first decide to go ahead with a purchase. This is a very simple procedure, and only nominal amounts are necessary to open the account initially. Many local banks have offices in other European capitals. All use corresponding banks in most countries.

As non-residents, you have the option to open either a normal or an offshore account. The offshore option allows you tax-free interest on fixed deposits, as well as multi-currency accounts.

The transfer of funds is then simplified. You can request a SWIFT transfer from your bank (in your country) to your local account, and money should arrive in a few days. This obviously assumes that your own country does not have exchange controls.

Most banks now have an Internet Banking facility, which is really convenient. From anywhere in the world, you can consult your account, order money transfers, make payments, etc. This is especially convenient for payment of utilities and services when you have completed the transaction. Another way to make the payments is to use your lawyer's client account.

#### 8. Wills

To avoid undue complications with international probates, a local will should be filed for the property owned in Portugal. This is a very simple procedure, and is handled by the lawyer.