

# Analysis of Notary Intervention in Financial Leasing

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**Abstract:** Characteristics of the financial leasing industry, the rapid development of the industry has also laid a variety of risks. The main risks include contractual risk, performance risk and legal risk. The role of notary in the financial leasing industry can not only maintain the stability of the financial leasing industry, but also broaden the new business of the notary industry. This paper combines the characteristics of financial leasing and explains the necessity of notary's involvement in financial leasing.

**Keywords:** Notary; Financial leasing; Legal risk

As a way of financing, financial leasing has alleviated the problem of insufficient funds in the development of society and enterprises to a certain extent since it was introduced into China in the early 1980s. However, with the rapid development of financial leasing industry, it also gives birth to the urgent need to prevent and solve disputes.

## 1. The current situation of notary in the field of financial leasing

According to Article 735 of the Civil Code of China, "A financial lease contract is a contract in which the lessor purchases the leased object from the seller according to the lessee's choice of the seller and the leased object, provides it to the lessee for use, and the lessee pays the rent." It can be seen that financial leasing belongs to the leasing mode with the dual attributes of financing and financing, and usually there are more than two contracts, involving at least three subjects: the buyer, seller and lessee. The lessee has the right to choose the equipment, manufacturer and supplier of the financial lease, and the lessor needs to purchase according to the lessee's choice, so the ownership and use of the equipment are separated, and during the lease term, the equipment belongs to the lessor, and the lessee only enjoys the right to use the equipment. At the same time, both parties can agree on the ownership of the equipment after the lease term expires, and can choose to transfer the ownership to the lessee or not. In this case, the lessee is suspicious to invest less capital in the early stage to obtain the right to use the equipment, and the lessor can obtain profit by collecting rent, so as to achieve the purpose of selling the equipment.

## 2. Risk Analysis of Financial Leasing

### 2.1 Contracting Risk

The practice of financial leasing is based on the conclusion of a contract, and the conclusion of a financial leasing contract will in turn give rise to risks in two aspects. One is the risk of validity when contracting; the other is the risk of the contract content itself.

### 2.2 Risk of performance

First of all, from the perspective of the lessor, it can be said that the lessor bears most of the risks in the transaction process. Since the lessor itself has no demand for the use of the leased property, it naturally does not know enough about the quality, structure and value of the leased property, and usually does not have the ability to store and declare the leased property. Secondly, from the seller's perspective, the seller usually needs to deliver the leased goods to the lessee after signing the contract of sale and purchase of goods or the contract of supply, and also undertakes the obligation to provide after-sales service to the lessee. Due to the special nature of the financial lease, the responsibility to be borne by the seller often exceeds that of the seller in an ordinary sale and purchase contract. The main risk of the seller comes from the leased goods required to be provided and prepared in the financial lease contract and delivered to the lessee on time. If the seller fails to fulfill the delivery agreement on time or provide unqualified leased goods, it will cause a double impact on the lessee and the lessor, further expanding the liability and having more serious consequences. Therefore, the lessee and the lessor will inevitably make stricter requirements for the seller's goods in the financial lease contract, resulting in a further increase in the risks to be borne by the seller in the process of the financial lease transaction. Finally, from the perspective of the lessee, the repayment of rent is a long process for the lessee, so the transaction cycle of the financial lease is also relatively long, but with the use of the leased property, most of its value will be consumed faster in use, and under normal circumstances the lessee cannot propose to cancel the contract because of the depreciation of the value of the leased property.

## 3. The necessity of notary intervention in financial leasing

In terms of financial leasing contract, notary public can notarize the contract of financial leasing for all parties, examine the authenticity and legality of the content of the contract, and witness and prove the signing, establishment and entry into force of the financial leasing contract. According to Article 69 of the Civil Procedure Law of the People's Republic of China, "Legal facts and

documents notarized through statutory procedures shall be used by the people's court as the basis for determining the facts, except where there is sufficient evidence to the contrary to overturn the notarized proof." It can be seen that the notarized certificate of the financial lease contract issued after the legal notarization procedure is undeniable and cannot be changed at will, and cannot be revoked or changed at will except through the legal procedure. This certainty enhances the higher evidential effectiveness of the notarized contract compared with other contracts, and when disputes occur, the people's court shall take it as the basis for determining the facts if there is no evidence to the contrary to overturn it.<sup>[1]</sup>

In terms of fund supervision, the parties to the financial lease contract can apply for a notary public for the withdrawal of funds. The funds of the lessor and lessee of the financial lease can then be transferred not directly into the account of the other party, but directly into the special account of the notary public for the withdrawal of funds after the notary public has applied for the withdrawal of funds, and the funds in the account will be uniformly supervised by the notary public. On the one hand, this special fund can be separated from its own funds, and on the other hand, it avoids private access and misappropriation of the special fund by the parties to the financial lease. With the credibility of the notary institution, it can make up for the credit deficiency of the parties to the financial leasing contract and strengthen the confidence in the performance between the parties. In addition, the special funds are deposited in the notary's special account for withdrawal and deposit, which undoubtedly adds a security lock to the funds. Therefore, the involvement of notaries in financial leasing and the use of notary public to assume the responsibility of security examination and safety of funds can constitute a new trend in the future development of the financial leasing industry and the notary public industry.<sup>[2]</sup>

In terms of giving enforcement effect, a very important feature of financial leasing disputes lies in the delayed payment or non-payment of rent. Since the leased property in a financial lease is usually a movable property, its value will be depreciated at an accelerated rate with the use of the lessee, and whether the rent can be collected in time is directly related to the immediate interests of the lessor. In the event of a dispute, if the lessor chooses to settle the dispute through such a lengthy procedure as litigation, it will often be difficult for the lessor to obtain timely relief even if it wins the case due to the strict litigation procedure, thus expanding its loss. Therefore, financial leasing is a special mode that requires efficient and timely dispute resolution. According to Article 37 of the Notarial Law of the People's Republic of China, "For a notarized creditor's instrument with the content of payment and containing the debtor's willingness to accept the promise of enforcement, if the debtor fails to perform or performs improperly, the creditor may apply to the people's court with jurisdiction for enforcement in accordance with the law." It can be seen that notary, as a kind of prior preventive relief, can, on the one hand, involve notaries in contract review to avoid disputes caused by misunderstandings or errors of meaning as far as possible; on the other hand, it can realize power relief for financial institutions involved in financial leasing more quickly after disputes occur. In July 2017, the Supreme People's Court, the Ministry of Justice and the CBRC jointly issued the Notice of the Supreme People's Court, the Ministry of Justice and the CBRC on Giving Full Play to the Enforcement Effect of Notary Public Certificates to Serve the Risk Prevention and Control of Banks' Financial Claims, which clarifies that notary publics can give enforcement effect to the debt instruments of "financial leasing contracts". The financial institutions involved in the financial leasing can apply for the enforcement certificate directly without going through the lengthy litigation procedure to realize the right relief more quickly.<sup>[3]</sup>

#### **4. Conclusion**

It can be seen that, for the financial leasing industry, the intervention of notary not only makes it easier for the parties to sort out their respective legal issues, but also is a powerful guarantee for the prevention of disputes beforehand, the efficient resolution of disputes and the trust of all parties in mediation. At the same time, it is also conducive to promoting and enhancing the positive role of notary public in the financial field.

#### **References:**

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[1] See CHEN GM and WANG DX(2009), "On the Nature of Notary Public Power-An Understanding Based on the Background of Socialization of Government Functions", Journal of Henan Provincial Academy of Political and Legal Management Cadres, No.3.

[2] See CHENG SY:(2012). "From Third Party Payment to Notary Intervention in E-Commerce", China Notary, No.2.

[3] See WANG B(2017). "Research on the Application of Notary Public in the Emerging Financial Field," Beijing University Press.