Part II Study on Dispute Resolution Process in Specific Cases. Chapter III. Consumer Dispute Resolution Process

Part 2

Study on Dispute Resolution Process in Specific Cases

Chapter III

Consumer Dispute Resolution Process

III.1 Background

Most Indonesian consumers have very low awareness of their rights under the consumer protection. Individual consumer rarely considers defective products or mundane services as an issue that would end up as dispute. If they buy defective products or receive mundane services, they usually just accept them. Some may return the defective goods to the store, but they never actually take the dispute to formal machinery, such as court. Therefore, it is not surprising why consumer disputes have not been many.

Several NGOs whose concern is consumer protection has assisted consumers in exercising their rights. A notable NGO in this area is *Yayasan Lembaga Konsumen Indonesia* or The Foundation for Indonesian Consumers Institute (hereinafter abbreviated to "YLKI"). YLKI has been active in advocating consumers' rights, and in many occasions has represented consumers in their fight against producers.

III.2 Nature of Dispute

The object disputed by consumer can be divided into two categories, namely dispute on goods and dispute on services.

Goods are disputed for various reasons. There have been cases where the goods sold were simply defective. In addition, there have been cases where goods sold were found to have effect that can endanger human lives. There also have been disputes over deceptive *halal*[141] label in certain product. Moreover, there have been also disputes on product that contains substance that is not properly mentioned in the information label. There have also been disputes over product that has not given sufficient information to consumers of possible side effect.

The disputes over services arise from mundane services. The most frequent dispute involves household services, such as electricity and telephone. These services have been monopolized by State enterprises which consumers do not have alternatives to

[141] Halal food is food prepared in accordance with Islamic Syari'ah Law

choose from if they are offered with mundane services. The electricity company has been frequently complained because of its regular blackouts. The telephone company has been complained due to its limited ability in providing lines, overcharging monthly bill and mistakenly charging connections.

In addition, there have been disputes over cellular phone services. Consumers have been complaining on the blank spots. They have also accused certain provider on deceptive calculation of charges.

Moreover complaint also arises from transportation services, such as buses and trains, in particular when accidents occur.

Banking services have also been complained, due to mismatch of money withdrawn from the automated teller machine, overcharging credit cards and mistakenly deducting current or saving accounts.

YLKI recorded 798 complaints of goods and services between January to June 2000 in greater Jakarta.[142] The complaints are categorized into 10 categories, namely, complaints on electricity related matters, complaints on telephone related matters, complaints on banking services, complaints on housing related matters, complaints on electronic products, complaints on prizes offered by producer, complaints on water related matters, complaints on insurance related matters, complaints on transportation related matters and complaints on leasing services.[143]

III.3 Provisions on Dispute Settlement

The laws and regulations protecting the consumer protection have not been historically strong. One reason is the lack of comprehensive rules that provide legal protection for consumers. In the past, legal protections for the consumer have been provided in piecemeal manner. Many Acts have stipulated in broad and general term some protection for the consumers. To name few examples, there are provisions on consumer protection in the Hygiene Act of 1966,[144] the Health Act of 1992,[145] the Food

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142 Greater Jakarta consists of areas in Jakarta and some West Java area surrounding Jakarta, namely, Bekasi, Bogor and Tangerang.

143 Consumer Complaints Data 1995-2001 published by YLKI.

144 Act 2 Year 1996

145 Act 23 Year 1992.

Act of 1996[146] and the Banking Act of 1998.[147] Unfortunately, due to its broad and general term, many of these provisions are inoperative. Hence, the provisions on consumer protection in these various laws are rarely used as ground for lawsuit by consumers if they take the case to the court. The most common legal basis for consumer lawsuit is tort as provided under article 1365 of the Civil Code.

Although there had been discussions on the need of comprehensive rules to protect the well-being of consumers, it was not until 1999 did Indonesia has its first Consumer Protection Act.[148] The Act contains 15 chapters and 65 articles and some of the articles deal exclusively with dispute settlement.

Provisions on consumer dispute settlement are stipulated under chapter 10 of the Consumer Protection Act. The provisions can be argued to be a replica of dispute settlement provisions under the Environmental Act of 1997. Many resemblances between the two can be concluded. The reason for such similarities is that the drafter of Consumer Protection Act had used provisions of the same found under Environmental Act as reference and replicates them almost completely. The only striking difference between the two is the Consumer Protection Act requires the government to establish dispute settlement centers referred to as *Badan Penyelesaian Sengketa Konsumen* or the Consumer Dispute Settlement Board (hereinafter abbreviated to as "BPSK").[149] Meanwhile the Environmental Act does not obligate the same, it only states that the government, or public, may establish such center.

III.3.1 BPSK as Center for Consumer Dispute Settlement

Under Article 49 paragraph 1, the government has the obligation to set up BPSK at the regency level.[150] For this purpose, the government has initially established some BPSKs, namely, in Medan, Palembang, Central Jakarta, West Jakarta, Bandung, Semarang, Yogyakarta, Surabaya, Malang and Makassar.[151] Unfortunately, even though

146 Act 7 Year 1996.
147 Act 7 Year 1992 as amended.
148 Act Number 19 Year 1999 State Gazette Number 42 Year 1999.
149 Consumer Protection Act chapter XI.
150 *Id.* art. 49 (1)..
151 Presidential Decree Number 90 Year 2001.

it has been a little over a year since its establishment, none has been in operational. The problems confronting the establishment and operational of BPSK are, at least, two folds.

First, finding capable human resources to fill the position at BPSK has been extremely challenging. To start with there are only small number of people who understand the legal concept, let alone the required skill necessary to settle dispute. The situation is worsen by the fact that there will be so many BPSKs established as Indonesia has many regencies and it is uncertain whether human resources are available.

The second problem has to do with who has the responsibility of funding BPSK. Under the Act, it is unclear whether the local or central government has the funding responsibility. If local government has to fund BPSK, it may refuse such responsibility on the ground that BPSK is more of a cost rather than profit center. The local government may also have other more important priorities than maintaining BPSK. This is because many local governments have not understood that pursuing the policy of protecting consumers is important.

On the other hand, if the central government has to fund BPSK, the budget allocated for such purpose will incredibly be huge. The central government may not be able to find and sustain the budget. Hence, the obligation to establish BPSK at the regency level may become rhetoric rather than effective provision. This exemplified poor law making in Indonesia. A provision is drafted without making thorough research on the supporting infrastructure.

Article 52 provides the duties of BPSK, which consists of thirteen duties. The first duty is to handle and settle consumer dispute through mediation conciliation or arbitration mechanism.[152] The second duty is to give consultation on consumer protection issues. Third, is to oversee standard provisions in contracts. The next duty is to report to the investigators if there are violations against the Act by the businesses. The fifth is to accept written or oral complaints from the consumers of any violations on the consumer protection. Another duty is to look into and examine consumer dispute. The seventh is to summon businesses suspected of violating on consumer protection.

[152] The drafters may not know for sure the difference between mediation, conciliation and arbitration.

To summon and present witnesses, expert witnesses and those persons who have knowledge of the businesses violating the Act, is also the duty of BPSK. BPSK has the duty to request investigator to have the presence of businesses, witnesses, or expert witnesses who are unwilling to come based on summon by BPSK. The next duty is to obtain, look into or assess letters, documents or other evidences for investigation or examination purposes. The eleventh duty is to decide whether there is injury from the consumers. The twelth duty is to inform the decision it has issued to the businesses found violating the consumer protection. The last duty is to enforce administrative sanctions on businesses that have been found violating the Act.

From the above duties, as an independent body it can be concluded that BPSK assume various roles with respect to the law enforcement of the Act.

First, BPSK can be considered as an adjudication body since it handles and settles consumer disputes, even enforcing administrative sanction.

Second, BPSK assumes the role of consultancy body as it gives consultation to consumers. The two roles can be questioned whether they are not in contradiction with each other. An institution which gives consultation at the same time acting as adjudicator can result in conflict of interest, unless different persons within the institution assume the two roles.

Third, BPSK assumes the role of monitoring body. It monitors whether there are standard clauses in contracts that violated the Consumer Protection Act. It also monitors in general whether there are violations by the businesses on the Act.

Fourth, BPSK assumes the role of the police and public prosecutor. It receives complaint of any violation to the Act, examines documents and summons those who are suspected of violating.

These many roles assumed by BPSK are uncommon under Indonesian legal system. BPSK has been vested with so many and wide-ranging powers. The reason behind it may be because the drafter at the time of drafting put too much emphasis on protecting the consumers that many of the provisions contravened with various legal doctrines and principles.

III.3.2 Provisions for Consumer Seeking for Relief

i) Categories of Plaintiff

There are four categories of plaintiff recognized under the Act.[153] The first category is individual consumer or his/her heir who sustained injury. The second is a group of consumers within the community who have the same interest. This is commonly referred to as community's class action.[154] The third category is NGO who has legal standing to file lawsuit. The last category is the government or its related agencies if the goods or services consumed have resulted in material injury or causing massive scale of victims.

The Act provides that, plaintiff when filing a lawsuit has to submit their claims to the District Court except for individual consumer who has the choice of settling its dispute.[155]

An individual consumer sustaining injury has the option of filing lawsuit through BPSK or court.[156] The choice of where to settle the dispute is made by the parties to a dispute on voluntary basis.[157] The Act, however, stop short in providing provisions in situation where agreement cannot be reached between the contending parties. Furthermore, the Act can be criticized because of its inconsistency with the legal doctrine that the choice of settling dispute through court does not have to be agreed by the parties. This is to say that the agreement to settle dispute only applies to out of court settlement, not settlement through the court. Settlement through court does not require agreement between the contending parties to avoid deadlock.

The community, as opposed to individual, sustaining injury filing a lawsuit has been relatively new practice under the Indonesian rules of procedure, although it has been recognized under the Consumer Protection Act. Its novelty has caused the concept being rejected by the judiciary. Most people in Indonesia, including those in the legal

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153 Consumer Protection Act art. 46 (1)

154 Class action lawsuits are a new phenomenon in Indonesia. Currently there are three other Acts which allow class action suits, namely The Environmental Act, the Forestry Act, and the Construction Service Act.

155 Consumer Protection Act art. 46 (1)

156 *Id.* art. 45 (1).

157 *Id.* 45 (2).

profession, are not accustomed to the concept of class action. Thus far, there have been quite number of cases brought to the court, but only few were accepted. Judges have opposed class action suits on the ground that such concept derives from the common law system and not from the civil law system. The first admissible class action case was in October 2001 at the Central Jakarta District Court.

Amid the wide misperception and rejection of class action lawsuits by the judiciary, the Supreme Court has issued regulation (known as the *Peraturan Mahkamah Agung* or the Supreme Court Regulation) that clarify the procedure of filing class action suits. With this regulation, the judiciary has accepted the class action concept. The regulation took effect in 26 April 2002 and became the guidance for District Court when examining class action lawsuit.

As to the right of NGO to file lawsuit as permitted under the Consumer Protection Act, the judiciary has also found this as new concept. In the past courts have rejected lawsuit filed by NGO. Many judges have difficulty accepting the idea of NGO to have legal standing to file lawsuit because the NGO is not the one, or is representing a party, who sustained injury.

In 1994, the Central Jakarta District Court became the first court who accepted NGO to have legal standing to file lawsuit. The case was on environmental dispute between an environmental NGO filing a lawsuit against company who is suspected of damaging the environment.[158]

Of course, not all NGO will have legal standing of filing lawsuit. The Consumer Protection Act recognizes this fact and places limitations. NGO initiating legal action before the court must qualify three requirements.[159] First, the NGO has to be an organization having legal personality. The second requirement is the articles of association of the NGO have to mention that the objective of its establishment is for the purpose of protecting the well-being of the consumers. The last requirement is the NGO has been involved in activities as stated in its articles of association. This last requirement in fact becomes the decisive requirement in limiting which NGO can have legal standing.

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[158] The case became a landmark case and known as the *Walhi v Inti Indorayon Utama* which will be dealt in this study later in chapter V.

[159] *Id.* art. 46 (1) (c)

The requirement depends greatly on the interpretation of the court. To date, except for YLKI, there are no other NGOs having legal standing.

ii) Out of Court Settlement

Individual consumer as said earlier, may settle their dispute with producer outside the court. The objectives, are "… to achieve agreement in the form and size of compensation and for certain measures to be undertaken to ensure consumer will not sustain the same injury."[160]

The Act confirms the legal doctrine adhered under Indonesian legal system that settlement on private dispute will not set aside criminal offences. Article 45 paragraph 3 provides that settlement of private dispute shall not negate any criminal responsibility should there be any criminal offence.[161]

An out of court settlement, does not necessarily negate the possibility of court settlement. Paragraph 4 of article 45 provides that once the parties to a dispute have agreed outside court settlement, a fresh lawsuit to the court would still be possible. However, the Act provides requirement on such admissibility. The requirement is one of the parties has to declare that out of court settlement is unsuccessful.

Unfortunately, this provision is somewhat confusing. To start with there is no exclusive jurisdiction once parties have agreed to out of court settlement. Second, it is uncommon for one of the parties to a dispute to declare that their resolution is unsuccessful. It is questionable whether such arbitrary decision becomes sufficient ground to declare that out of court settlement is unsuccessful. In short, the out of court settlement will be overshadowed by one party declaring the settlement as unsuccessful and the dispute has to go to court. This, of course, will discourage parties to settle their dispute outside the court, as there is no incentive.

The Act provides that BPSK when handling a case has to establish a panel.[162] The members of the panel should be at least three persons and each representing the element of government, the consumers and the businesses.[163]

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160 *Id.* art. 47.
161 *Id.* art. 45 (3).
162 *Id.* art. 54 (1).
163 *Id.* art. 54 (2).

The decision from the panel will be final and binding.[164] The Act seems to give the same legal effect of BPSK panel's decision with arbitration's decision, in the sense that decision may not be appealed. However, the decision of the panel can be objected (*keberatan*) to a court.[165] The word 'objection' under this Act seems to have different meaning from appeal. This conclusion is made because under the elucidation of Article 53 paragraph 3 it is stated that the panel's decision cannot be appealed.[166] This confusion again showed how poor the Act was drafted. It was drafted without realizing there are contradictions, or at least vagueness, between the articles.

The panel examining a case must issue its decision within 21 working days after a lawsuit is accepted.[167] At the latest 7 days after the panel issues decision, the businesses that are found guilty must take whatever action as provided under the decision.[168] Parties in dispute may submit objection to the District Court within 14 days after decision of the panel is made.[169] The District Court has 21 working days to issue its decision.[170] If not satisfied with the District Court decision, the parties can further object the decision to the Supreme Court within 14 days after decision is issued by the District Court.[171] The Supreme Court has 30 days to issue its decision.[172]

The hierarchy of objection by the parties pursuing their case at BPSK is similar to the hierarchy of appeal at any regular court. This means out of court resolution will not give any incentive to the parties in dispute. Furthermore, the time limit imposed by the Act at each stage can be questioned whether it will bind strictly the District or Supreme Court. This is because there is no sanction imposed if the District or Supreme Court does not adhere to the time limitation. In reality, it would be difficult for the District, or the Supreme Court to speed up consumer dispute against other disputes they handle.

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164 *Id.* art. 54 (3).
165 *Id.* art. 56 (2).
166 *Id.* elucidation of art. 53 (3).
167 *Id.* art. 55.
168 *Id.*art. 56 (1).
169 *Id.* art. 56 (2).
170 *Id.* art. 58 (1).
171 *Id.* art. 58 (2).
172 *Id.* art. 58 (3).

The settlement of dispute through formal institution, BPSK or court, does not set aside the possibility for parties to settle amicably.[173] Parties, at any time or stage, may conclude amicable settlement.

A point needs to be noted in the dispute settlement provisions of the Act is the treatment of private law matter into the criminal law with regard to non-observance of enforceable decision. The Act provides that if businesses were found guilty and it did not observe the decision within the time prescribed, such non-observance will become a criminal act. [174] In such event, BPSK may request investigator to begin its investigation.[175] Furthermore, the Act provides that the decision of BPSK if not observed, will be sufficient preliminary evidence to start investigation.[176]

This provision has converted private dispute to become public initiated dispute (criminal case). This conversion is a phenomena of several Acts promulgated in 1999, such as the Antimonopoly Act.[177]

III.4 Consumer Dispute Resolution in Practice

III.4.1 Court Mechanism

Settlement through court by individual consumer has been rare. If consumer individual pursue court it usually involves substantial lawsuit and initiated by consumer who belongs to middle-upper class.

To give an example, a case arises between Anny R. Gultom as plaintiff who lost her car while parked and under the supervision of the defendant, PT. Securindo Packatama Indonesia, a company providing car park services. The case was registered at the Central Jakarta District Court on 15 December 2000 and the court issued its verdict on 26 June 2001. [178] The plaintiff blamed the defendant for not providing expected services causing her car to be stolen. The plaintiff requested the court for the defendant to pay compensation for her lost car and stress she had experienced.

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173 *Id.* Elucidation of Article 45 (2).

174 Enforcement effect means the decision is not being appealed and it can be enforced by the court of law.

175 Consumer Protection Act art. 56 (4)

176 *Id*. art. 56 (5)

177 **See**: Antimonopoly Act Article 44 par 4 and 5

178 Civil Case Number 551/PDT.G/2000/PN.JKT.PST

The court ruled in favor of the plaintiff and the defendant has to pay compensation for damages. The award covers two compensation of damages. The first compensation was awarded on her stolen car, which the court decides the plaintiff will get seventy five percent what is being requested. The second compensation was awarded on the stress she had experienced for ten percent of what is being requested. The defendant did not accept the ruling and appeal to the High Court.

There are several things to be noted on the case. First, the plaintiff did not use the Consumer Protection Act as the basis for compensation from the defendant. The plaintiff used the Civil Code as the basis for the lawsuit.

The second thing to be noted is the plaintiff and defendant belong to the middle-upper class. Hence both of them may have some familiarity to court mechanism to resolve dispute.

The third thing, is court mechanism was selected after negotiation between the two ends in failure. This is to reconfirm that in Indonesia parties to a dispute will not pursue court settlement, prior to any negotiation.

The fourth thing is the duration of the case is relatively fast. It took a little over 6 months for the court, from the registration until verdict is issued, to complete the process.

The fifth is it is common for the losing party to not accept the verdict of the court and for that reason submit appeal to the High Court. This indicates one out of two things. First, the court is considered unable to do its function of delivering justice. The second, the losing parties just cannot accept losing a case. Many Indonesians went to court not prepared to loose a case.

Another case of consumer dispute that went to court is a case involving a price increase of liquefied petroleum gas (LPG) between consumers represented by certain class of consumers and the producer of LPG, Pertamina, a state owned enterprise.

The consumers are divided into several classes of plaintiff based on regency in greater Jakarta area, namely, the Central, South, North, East and West Jakarta, Bekasi, Bogor, Tangerang and Depok. The consumers filing the lawsuit are not all laymen, such as housewives, but also NGO activists. Attorneys representing the consumers come from various NGOs, such as YLKI, Indonesian Center for Environmental Law (ICEL), the

Legal Aid Institute (LBH), Association of Legal and Human Rights Assistance (PBHI). The case was registered at the Central Jakarta District Court on 15 December 2000.[179]

The basis for the lawsuit is the defendant's arbitrary decision to increase 40% of the price of LPG without any prior notice. There are four legal grounds used as the basis for the lawsuit. First is the Consumer Protection Act, second the Pertamina Act of 1971, the third Antimonopoly Act of 1999 and fourth tort under the Civil Code.

In examining the case, the court has to consider first whether the lawsuit initiated by community based on class action is acceptable. In this respect, the court decided that the class action is admissible on the ground of Article 46 of the Consumer Protection Act.

The court then decided on the substance of dispute, which are two folds. First whether the defendant has the right to increase the price of LPG without any prior notice; and second whether the plaintiffs entitle to receive compensation.

The court in its decision ruled that the defendant has committed tort by increasing the price of LPG arbitrarily without any prior notice. Furthermore, the court declared the decree issued by Pertamina to increase the price is invalid, and therefore instructed the defendant to lift the decree. In addition, the court ruled that plaintiffs entitle to compensation. The court also instructed for the establishment of a committee to pay compensation that consists of three representatives from the plaintiffs and two from the defendant.

Looking at the case, the issue in dispute will not be court-worthy if filed by an individual consumer. The plaintiff has to be massive. The plaintiff in this type of case is not represented by commercial attorneys, but by various NGOs. In the absence of NGO this type of case, again, will not be court-worthy.

III.4.2 ADR Mechanism

In the out of court dispute settlement, YLKI has been frequently asked by consumer to be mediator. YLKI has become the center to solve consumer dispute, as BPSK has yet take effect.

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[179] Civil Case Number 550/PDT.G/2000/PN. JKT. PST.

In one case involving metal object in a sausage, Mrs. Shokoofeh Darwis as claimant came to YLKI and lodged a complaint against the producer, PT. Pure Foods Suba Indah as respondent.

The case started when claimant bought sausages produced by respondent. The claimant then prepared the sausages for her son to eat. While eating and swallowing one of the sausage, for some reason the sausage had injured the son's throat. At this point, claimant was not sure what was the cause of her son's throat injury. They went to the doctor and soon found out that the sausage contained metal object causing the injured throat.[180]

Based on what had happened to her son, the claimant came to YLKI to make complaint to respondent and asked YLKI's assistance to mediate the case. Immediately after receiving the complaint YLKI summon respondent for mediation. In the mediation process, YLKI acted as mediator by appointing one of its staffs, Muhammad Ihsan. At the first session of mediation process, apart from the disputed parties, the staff from the Indonesian Association of Food and Beverages Businesses attended the hearing.

The mediation process consisted of three formal meetings and one informal meeting. The informal meeting between the claimant and respondent was carried out at the claimant's place. The purpose of the informal meeting was to examine claimant's son by respondent's medical doctor.

After three formal sessions of mediation, the mediation ended up in failure mainly because the parties could not reach compromise on the size of compensation. The claimant demanded IDR 250 million for compensation, meanwhile the respondent only agreed to compensate IDR 2 million, in addition to replacement of the contaminated products. The claimant then states that she will pursue lawsuit against the respondent in court.

Based on the report made by the mediator, the source of failure of the mediation was the unwillingness of the parties to come to a compromise on the size of compensation. In addition, the report stated that the demand from the consumer was

[180] This case is based on report made by Muhammad Ihsan of YLKI who acted as mediator/conciliator in Mrs. Shokoofeh Darwis dated 18 May 2001.

unrealistic. The report further, suggested that consumer should be advised beforehand on realistic compensation before entering negotiation.

Another case that had attracted the public and the media is the Ajinomoto controversy, which occurred in late 2000. Ajinomoto is a trade name of monosodium glutamate (MSG) product that is popular seasoning among every household in Indonesia. An Indonesian established, but owned by Japanese company, PT. Ajinomoto Indonesia, manufactures Ajinomoto.

The controversy surfaced when the Food and Drug Analysis Body of the Council of Religious Ulemas (LPPOM MUI) said it had found evidence that pig products had been used in the manufacture of Ajinomoto. Later, a senior company official admitted the manufacturer had used bactosoytone, extracted from pork, in place of polypeptone, which is extracted from beef, as a medium to cultivate bacteria that produces enzymes needed in the production of MSG. However, the pork enzyme used in the production was merely a catalyst that disappeared during processing and the final product was entirely pork-free. But, this explanation was rejected by many religious leaders.

The controversy became politicized as majority of Indonesian are Muslims and the then President, Abdurrahman Wahid, openly said the MSG is halal irrespective of bactosoytone being used.[181] The statement is made to avert the risk of losing thousands of employment opportunities of investment capital.

In addition, the legal issues had become public initiated dispute (criminal case).[182] Some senior officials from the company are detained for questions. However, due to insufficient evidence, they were released and the case was never submitted to the prosecutor for criminal trial.

In the private dispute, YLKI initiated a lawsuit based on class action to PT. Ajinomoto. The lawsuit, however, died down after it has not attracted public attention similar to the faith of many controversial cases in Indonesia.

Currently, the controversy has never been discussed in the public. The company, however, made a public apology soon after the incident. In addition, the manufacturer

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181 http://www.tempo.co.id/harian/fokus/56/2,1,21,id.html access on 31 January 2003.

182 http://www.tempo.co.id/harian/fokus/56/2,1,28,id.html access on 31 January 2003.

had pulled out its controversial products. Now Ajinomoto has received halal certification from the MUI for MSG derived from a soybean enzyme.