Fundamental Mistake: mistake must make the contract 'fundamentally' different

Art. 4:103 paragraph (1) on Fundamental Mistake as to Facts or Law\textsuperscript{91} has much in common with its Dutch counterpart, Art. 6:228 paragraph (1):

'A party may avoid a contract for mistake of fact or law existing when the contract was concluded if:

a. 1. the mistake was caused by Information given by the other party; or

and

b. the other Party knew or ought to have known that the mistaken Party, had it known the truth, would not have entered the contract or would have done so only on fundamentally different terms'

The content and set-up of this Paragraph are quite similar to Art. 6:228 Paragraph (1) of the Dutch Civil Code.\textsuperscript{92} So are the Comments on them:

- 'Even if the Party which gave the Information reasonably believed it to be true, it chose to give the Information; and it cannot complain if the recipient is allowed to avoid the contract (...)'.\textsuperscript{93}

- '(...) the fact the Information was false justifies the avoidance when this information caused the recipient to conclude the contract, even if the party which gave the information reasonably believed it to be true'.\textsuperscript{94}

Yet some differences may also be noted, some of which are important:

1. Art. 4:103 PECL paragraph (1) makes explicit that mistake may not only be with regard to facts but also with regard to law - 'A party may avoid a contract for mistake of fact or law (...)', whereas this information is not to be found in Art. 6:228 of the Civil Code but has to be gathered from Dutch judicial decisions and legal literature.\textsuperscript{95}

2. Art. 4:103 PECL paragraph (1) provides under (b) a combination of the requirements for Fundamental Mistake
'Causality' and 'Recognizeability' - the other party knew or ought to have known that the mistaken party, had it known the truth, would not have entered the contract or would have done so only on fundamentally different terms - which in my opinion is more informative as to their mutual relationship than Art. 6:228 of the Dutch Civil Code, where these requirements have been scattered all over paragraph (1).

3. The main difference lies, however, in its definition of the requirement for 'Causality' in Art. 4:103 paragraph (1) under (b) that the mistaken party, had it known the truth, 'would not have entered the contract or would have done so only on fundamentally different terms.' According to the Comment to this Article this requirement as just defined, from which this Article derives its name 'Fundamental Mistake', should not be taken lightheartedly: '(...) the Principles require that a mistake should be as to something fundamental, not just material (...) a mistake as to something which is material but not fundamental will not give rise to a right of avoidance under Article 4:103.' This warning is accompanied by the following Illustration: 'A, a developer, buys a plot of land for £ 5 million, relying \textit{inter alia} on a statement by the seller that the land is not subject to any rights in favour of third parties. Later A finds that there is a right of way running across part of the site. This is not serious enough to constitute a mistake within Art. 4:103 (...)'

The Dutch requirement for avoidance that 'the contract would not have been entered into, had the mistaken party known the truth' (Art. 6:228 of the Civil Code) is on the contrary easy to meet: The contract' is the contract that actually has been concluded. It is therefore not a requirement for avoidance that the mistaken party, had it known the truth, would not have entered a similar contract; it is sufficient that it would not have concluded the contract on the same terms. Therefore, this requirement for avoidance only serves to prevent parties from abusing the right to avoid.

As the PECL-requirement for avoidance of a 'Fundamental' mistake not just incidentally, but categorically prevents the far-going consequences of avoidance from being applied in cases of non-fundamental mistake, it is in my opinion better than its Dutch counterpart.

4. Art. 4:103 PECL differs from Art. 6:228 of the Civil Code in that it does not make explicit a party may not avoid a contract if the mistake was based on a fact (or law) which at the time of the conclusion of the contract was still exclusively in the future. This is in my opinion merely a matter of presentation, as may be gathered from the following part of the Comment on Art. 6:111 PECL: 'If unknown to either party circumstances which make the contract excessively onerous for one of them already existed at that date (i.e. the date the contract was made; GdV), the rules on mistake will apply, see Articles 4:103 and 4:105.'

**Non-fundamental Mistake: liability of the party who was careless in giving Incorrect Information for the loss caused to the other party by its mistake**

When a mistake is not fundamental, so that the contract may not be avoided for 'Fundamental Mistake' (Art. 4:103), the mistaken party may sometimes recover damages in virtue of the Articles 4:106 (Incorrect Information) and 4:117 (Damages) which may be summed up as follows: a party which has concluded a contract relying on incorrect information given it by the other party may recover damages limited to the loss caused to it by the mistake even if the information does not give rise to a fundamental mistake under Art. 4:103, unless the party which gave the information had reason to believe that the information was correct.

An Illustration to this rule: 'A, a developer, buys a plot of land for £ 5 million, relying \textit{inter alia} on a statement by the seller that the land is not subject to any rights in favour of third parties. Later A finds that there is a right of way running across part of the site. This is not serious enough to constitute a mistake within Art. 4:103 but it still will cost £ 10.000 to divert the path. A has a claim under Article 4:106.'

When, however, the party which gave the information 'had reason to believe that the information was correct' (Art. 4:106), the other party is prevented from claiming damages in virtue of the Articles 4:106 and 4:117 PECL. As has been noted before, this situation does not in itself prevent it from avoiding the contract under Art. 4:103, but then, as also has been noted before, it may only do so on the basis of 'fundamental' mistake under this Article.
See for a comparison of the European Principles and Dutch contract law on this subject M.M. van Rossum, *Het leerstuk van de fundamental mistake van de Principles of European Contract Law (PECL) en de Nederlandse dwalingsleer, Nederlands Tijdschrift voor Burgerlijk Recht* 2000, p. 455 ff.

92 See for some reservations with respect to the identity of common mistake as mentioned in Art. 4:103 Paragraph (1) under (a) (iii) PECL and in Art. 6:228 Paragraph (1) under (c) of the Civil Code M.M. van Rossum, o.c., p. 457 ff.

93 O. Lando and H. Beale (eds), Comment to Art. 4:103 under D, o.c., p. 231.


96 See Asser-Hartkamp, o.c., nr 196, Asser-Schut-Hijma, o.c., nr 228 and M.M. van Rossum, o.c., p. 456.

97 O. Lando and H. Beale (eds), Comment to Art. 4:103 under C, l.c.

98 'A liberal approach on the question of the other party's knowledge is that of Dutch BW 6:228 (1). This requires that the contract was entered into under the influence of error and would not have been entered had there been a correct assessment of the facts' (O. Lando and H. Beale (eds), Notes to Art. 4:103 under 3), o.c., p. 237). See for a different approach to the effect that this Dutch requirement for Causality equates the requirement of the European Principles for a 'Fundamental' Mistake M.M. van Rossum, o.c., p. 456.

99 *Parlementaire Geschiedenis van het nieuwe Burgerlijk Wetboek, Boek 6*, Deventer 1981, p. 901. See for a rare exception to this rule in the field of insurance law the decision of the Dutch Supreme Court of 19 May 1978, *Nederlandse Jurisprudentie* 1978, 607 (*Hotel Wilhelmina*).

100 See the decision of the Dutch Supreme Court of 17 March 1921, *Nederlandse Jurisprudentie* 1921, p. 675 ff. When the value of the performance received by the avoiding party has meanwhile diminished or when the value of the performance rendered by itself has increased and it is likely it would not have been chosen for avoidance had this change in value not occurred, the avoiding party is by virtue of Art. 6:278 of the Civil Code obliged to reestablish the original relative values of the performances by way of a supplementary payment.

101 M.M. van Rossum has some midsgivings in this respect (o.c., p. 459).

102 See O. Lando and H. Beate (eds), Comment to Art. 6:111 under B, o.c., p. 325.

103 See for a comparison of the European Principles and Dutch law on this subject Jac. Hijma, o.c., p. 454 and M.M. van Rossum, o.c., p. 458.

104 O. Lando and H. Beate (eds), Illustration 6) to the Comment to Art. 4:117 under C, o.c., p. 283.

105 See O. Lando and H. Beate (eds), Comment to Art. 4:103 under D, o.c., p. 232.

**Referring Principles:**

IV.7.3 - Right to avoid the contract for mistake in fact or law