



Liability of contractors for defects visible before, upon or after completion: change of the law in the Netherlands

Evelien Bruggeman & Chris Jansen • ESCL Conference • October 6, 2023 • Copenhagen



Construction: what's the ordinary course of events?



Formation of contract

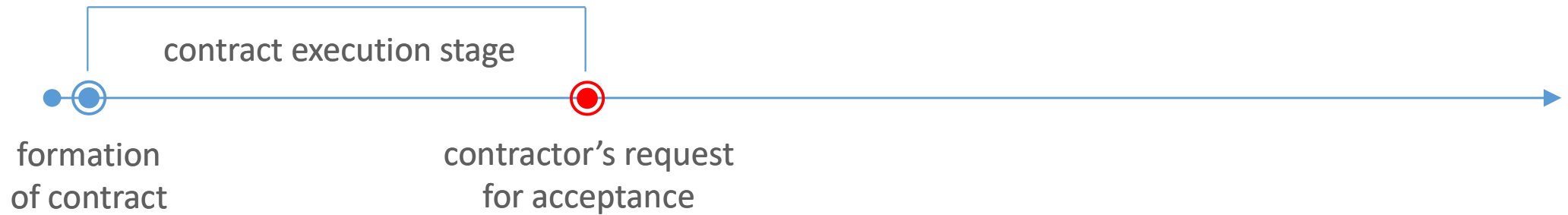


formation
of contract

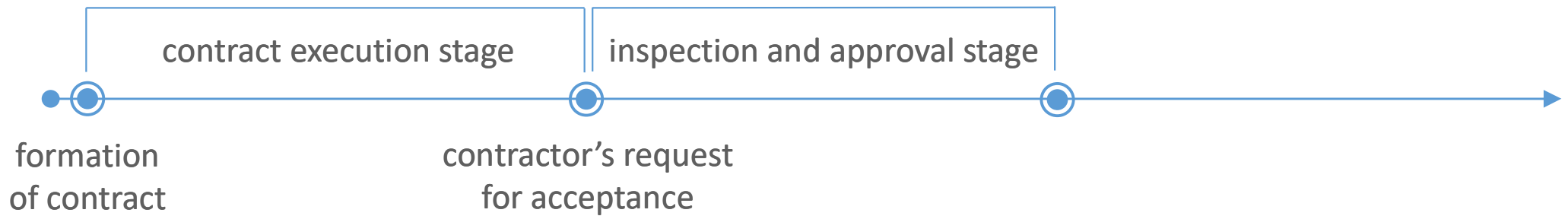
Contract execution stage



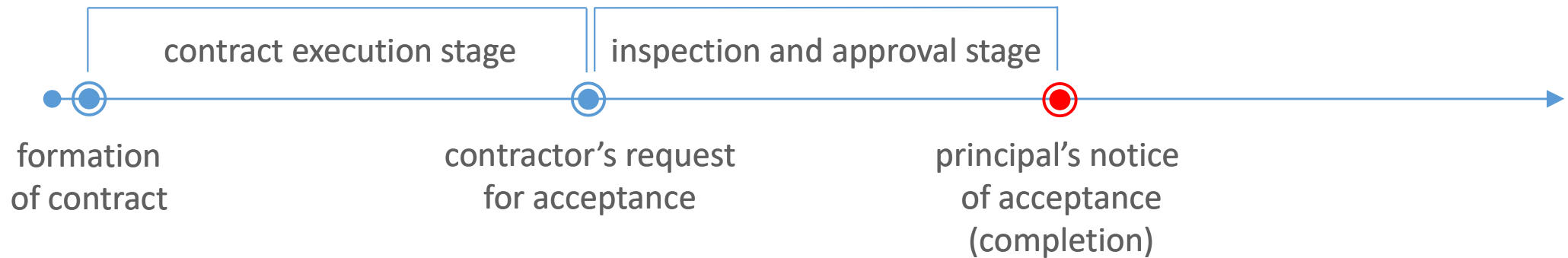
Contractor requests acceptance of the work



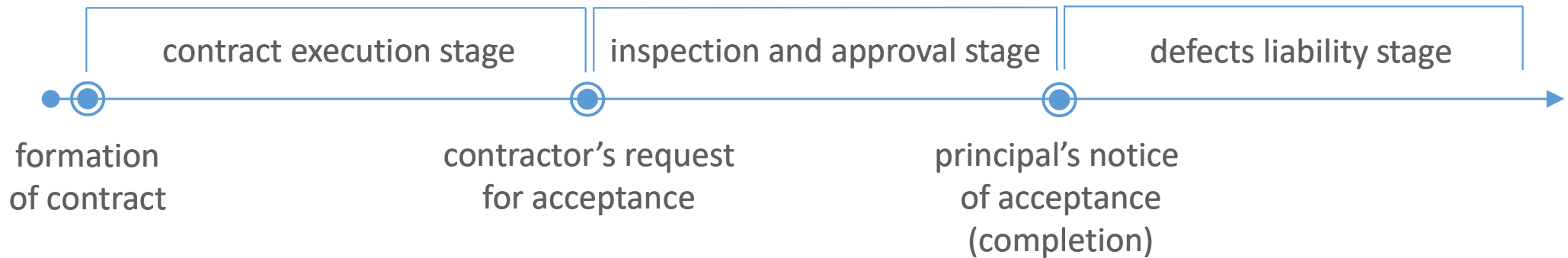
Principal inspects work



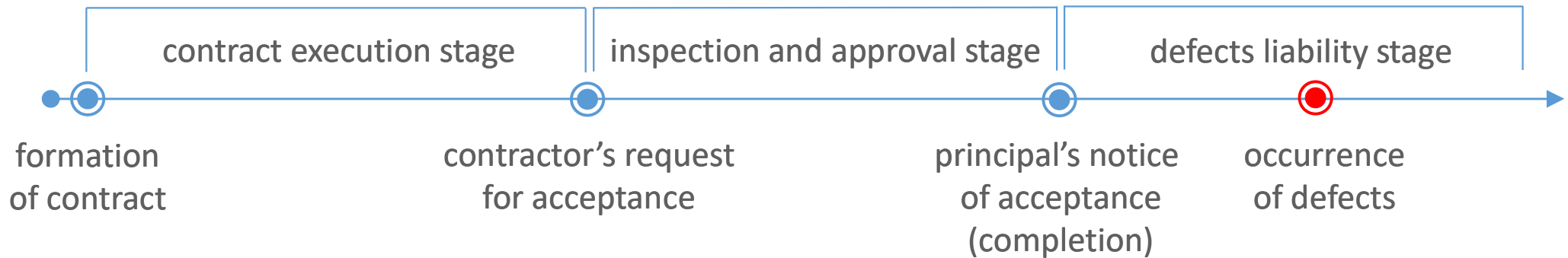
Date of completion: principal accepts work



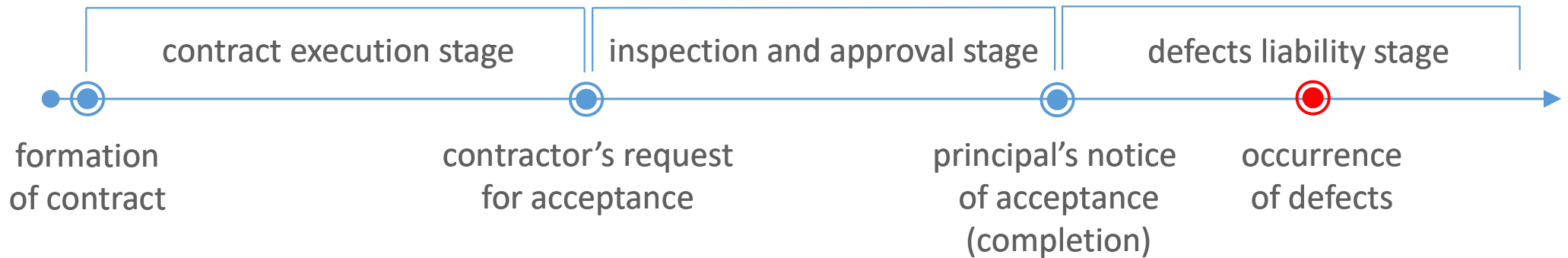
Date of completion: start of defects liability period



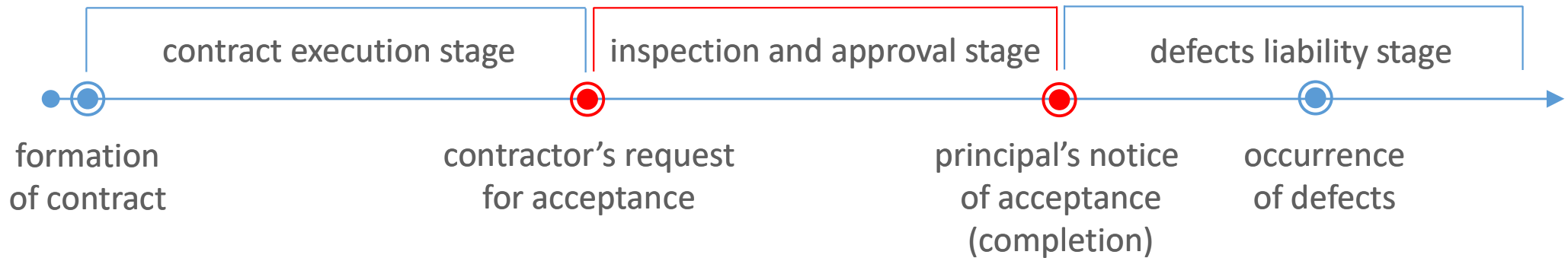
Let's assume: defects occur during defects liability period



How is this case being dealt with under Dutch Civil Code?



What if defects could have been detected prior to completion?



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 - the specific rule is based, however, on a rule of general contract law (Book 6 DCC)
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 - The creditor can no longer rely on a defect in performance if he has not protested to the debtor on the matter within a reasonable time after he discovered or reasonably should have discovered the defect

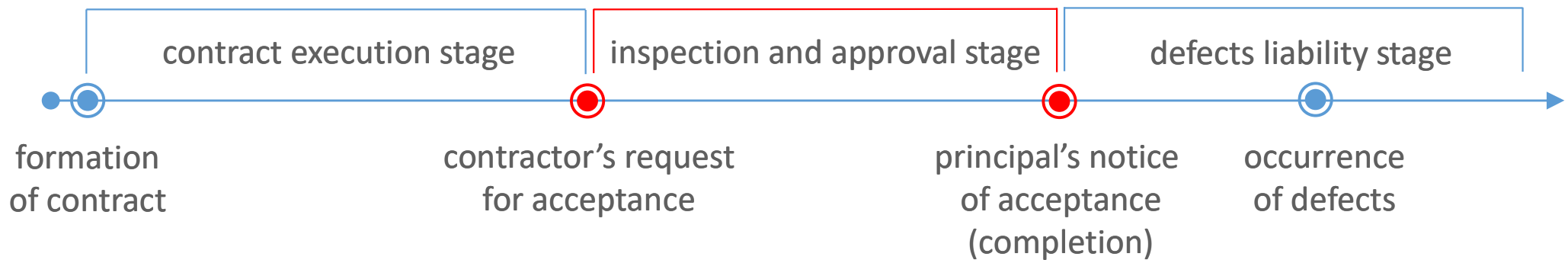
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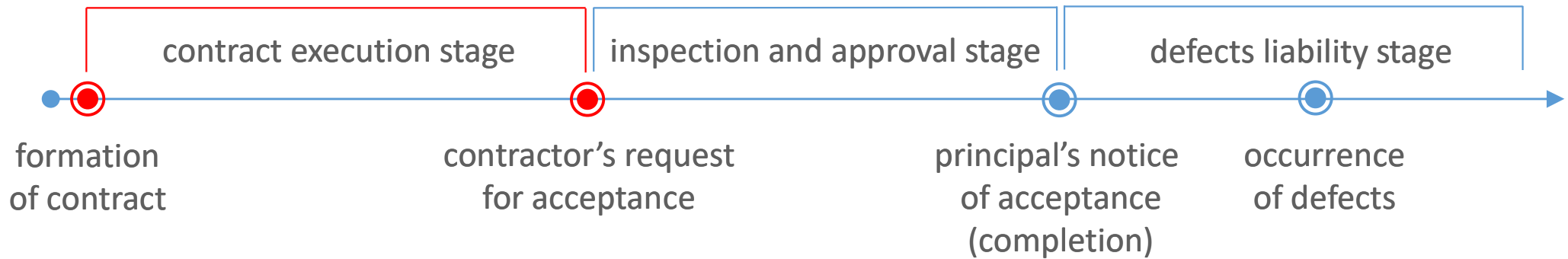
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 - the specific rule imposes a duty upon the principal to inspect prior to completion
 - no ‘deconstruction’ required: normal external visual inspection and tests suffice

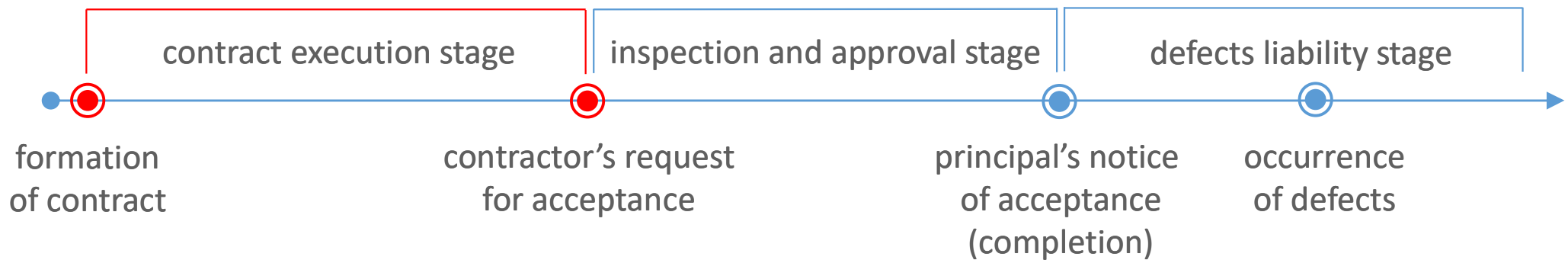
Principal has a duty to inspect during this stage...



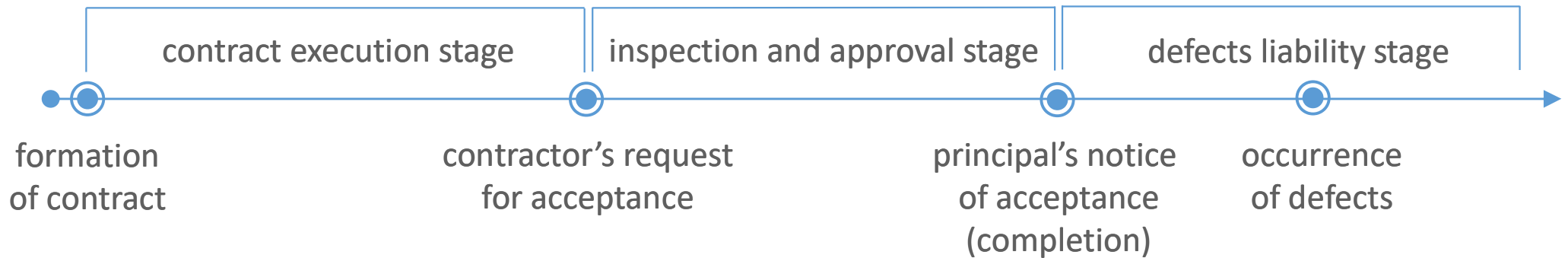
...but not during this stage



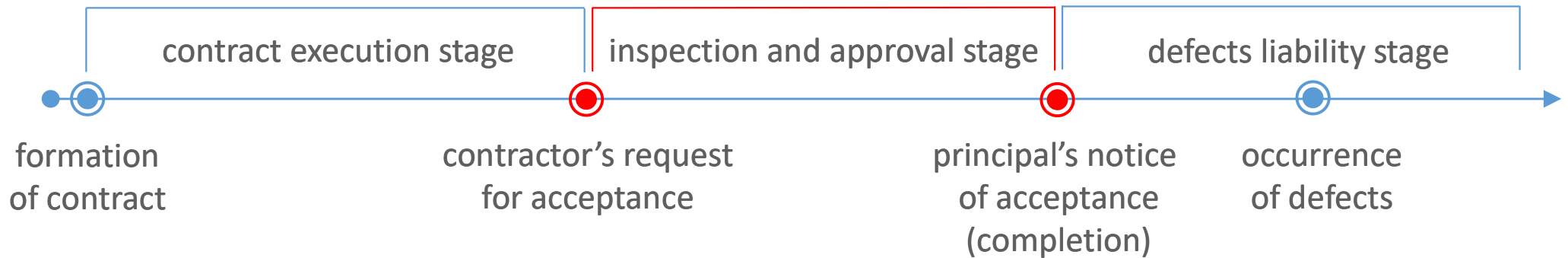
However, principal must notify defects actually discovered



So what's going to change as of January 1st, 2024?



As explained: principal has a duty to inspect during this stage



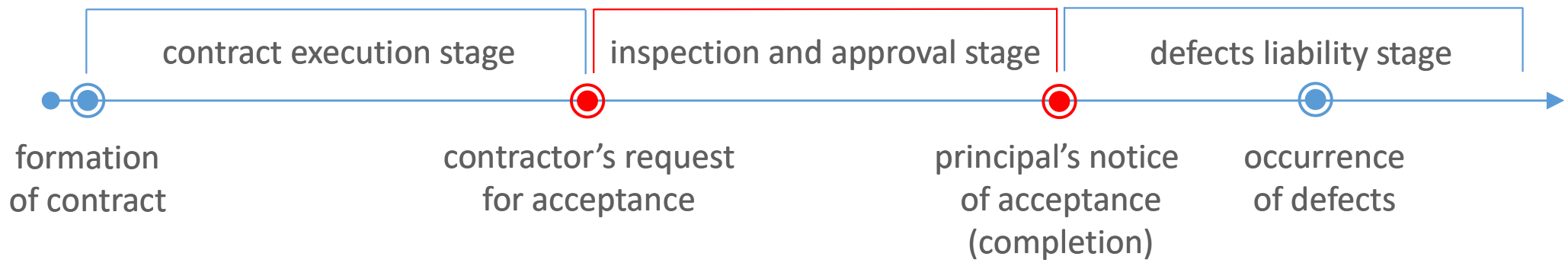
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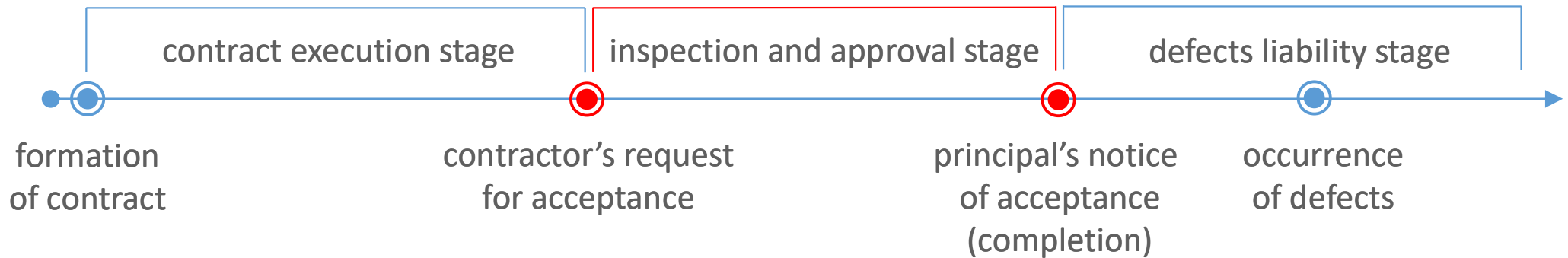
New provision: Art. 7:758 (4) Dutch Civil Code

- (3) The contractor is released from liability for defects the principal should reasonably have discovered at the time of completion.
- (4) In derogation of paragraph 3, in case of building contracts the contractor is liable for defects not found upon completion of the work, unless these defects cannot be attributed to the contractor. (...)

Principal will no longer have a duty to inspect during this stage



However, principal must notify defects actually discovered



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 - Quality assurance in construction Act 2019

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 - the purpose of this new provision is to improve construction quality by strengthening the contractual position of consumer and professional principals
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 - this also explains the (semi-)mandatory character of the new provision
 - with this new provision, Dutch law and the law of other European legal systems will be more aligned
 - compare also Art. IV.C. – 3:106 (2) DCFR

Problems we have pointed out...

How to distinguish building works from ordinary work?

- (3) The contractor is released from liability for defects the principal should reasonably have discovered at the time of completion.
 - **contracts for the supply of work and materials**
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 - **building and construction contracts**

How to prove that principal actually discovered defects?

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What if the contract derogates from this rule?

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How to derogate in case principal is a professional?

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How to amend standard forms of contract?

- Lack of clarity on the foregoing issues is currently complicating the amendment of national standard forms of contract that do not comply with the new provision of Art. 7:758 (4) DCC
 - Uniform Administrative Conditions for the Execution of Works and Technical Installation Works 2012
 - Uniform Administrative Conditions for Integrated Contracts 2005



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