How can liability regimes adapt to new fuels and new cargoes?

The green transition presents us with a regulatory challenge that has received too little attention so far: current liability and compensation regimes are not really catering for new fuels and new cargoes. So how can we close the gaps?

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Industries across the board are seeking to reduce their carbon footprint and embrace more sustainable practices. As part of this, there is a huge effort within our industry to decarbonise, using alternative fuels such as biofuel, LNG, LPG, ammonia, methanol, and hydrogen.

Until now there has been much focus on operational risks associated with the use of alternative fuels. This includes increased explosivity, flammability, and corrosivity. However, the green transition also presents us with a separate challenge, which has received less attention so far: the potential barriers in the legal and regulatory frameworks which will come sharply into focus if there is an accident.

Fit for future?

If anything, historic maritime disasters like the *Torrey Canyon* spill in 1967, have taught us that we should look at liability and compensation regimes early and with a degree of realism to ensure society is not caught off-guard. With our combined experience, this is perhaps where the insurance industry can really contribute to the transition.

Currently, existing international liability and compensation regimes do not fully cater to the changes that the use of alternative fuels will bring.

For example, an ammonia fuel spill would not fall under the International Convention on Civil Liability for Bunker Oil Pollution Damage (Bunkers Convention), potentially resulting in a non-uniform approach to jurisdiction and liability. Similarly, an ammonia cargo incident would not fall under the International Convention on Civil Liability for Oil Pollution Damage (CLC). Uncertainties may also exist in the carriage of CO2 as part of Carbon Capture and Storage (CCS) projects, which may be treated as a pollutant, with corresponding penalties or fines.

Uncertainty

A multitude of questions will arise depending on what happens, where it happens, and the values involved, many of which may end up as barriers for would be claimants. How will such claims be regulated, will there be scope for limitation of liability, and would there be a right of direct action against the insurers.

In the absence of a uniform international liability, compensation and limitation framework, shipowners, managers, charterers, individual crew, and the insurers may be at the mercy of local actions. Increased concerns about seafarer criminalisation (even where international conventions exist, ‘wrongful’ criminalisation does still occur) may emerge, creating another disincentive to go to sea.

Uniformity

When alternative fuels and CO2 are being carried as a cargo, the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS), may resolve some of these issues. However, HNS is not yet in force, and until then, there is no international uniformity to liability and compensation for the carriage of alternative fuels and CO2 as cargoes. This creates uncertainties for potential victims and their insurers, who may face increased risks and costs, due to the potential inability of existing regulations to provide protections.

The situation is even less clear in the case of bunkers. The rules for using alternative fuels as bunkers might require a separate protocol to HNS, a protocol to the Bunkers Convention, or a whole new convention specifically for alternative fuels. Relevant considerations for the appropriate legislative vehicle include states' preparedness to reopen the Bunkers Convention, the ability to conclude a protocol to HNS before it comes into force, and whether a multi-tier fund structure is needed for alternative fuels as bunkers (perhaps unnecessary because bunkers are usually carried in smaller quantities compared to cargoes).

Need for solutions

Until then, what we are left with are the existing international protective funds, designed to respond at the highest levels to pollution claims resulting from an oil spill, without any similar mechanism in place to respond to a spill of alternative fuels, which are themselves so central to a green transition. Somewhat perversely, victims of accidents involving an oil spill may therefore enjoy better protections than victims of an alternative fuels spill.

In summary, while the use of alternative fuels will no doubt help to reduce the industry's carbon footprint, there are not only safety and practical hurdles to overcome. Stakeholders must also come together to find solutions to urgent, in relative terms, legal and regulatory challenges.

A version of this article has also been published by IUMI.