

Manuale di diritto commerciale – Buonocore

Introduzione

Il diritto commerciale nel sistema del diritto privato

Il nostro sistema giuridico che va sotto il nome di "diritto privato" disciplina rapporti nei quali i soggetti si presentano in una condizione di parità anche qualora si tratti di soggetti che in realtà sono dotati di poteri autoritari (es. Stato, enti pubblici). Si pone l'interrogativo se il diritto commerciale non si ponga come un microsistema dotato di caratteri diversi: è il vecchio problema della c.d. autonomia del diritto commerciale che è riemersa all'attenzione degli studiosi successivamente all'unificazione dei codici di diritto privato. L'unificazione dei codici non ha soppresso l'autonomia del diritto commerciale bensì se ha spostato il fulcro dai singoli atti in quanto pertinenti alla tipologia indicata nel codice del commercio all'attività commerciale nel suo complesso. E' quindi l'attività a costituire la ratio di una disciplina peculiare che si articola in quattro aspetti fondamentali:

- un sistema di pubblicità generale (registro delle imprese)
- una documentazione delle operazioni economiche compiute (scritture contabili)
- la possibilità, in caso di crisi economica irreversibile, che l'aggressione del patrimonio responsabile ad opera di iniziative scoordinate di singoli creditori si sostituisca una gestione liquidativa sotto controllo giudiziario
- la considerazione dei creditori come massa portatrice di un interesse collettivo

Ulteriore caratteristica della disciplina dell'attività d'impresa è che questa, pur retta dal principio di libertà sia nell'organizzazione che nell'esercizio dell'attività, subisce una serie di condizionamenti dovuti al fatto che si svolge nell'ambito di un "mercato". Tuttavia il codice unificato non composti che la regolazione dei singoli atti e rapporti dell'imprenditore sia del tutto appiattita su quella riferibile ai privati, soprattutto se si tiene conto che l'attività d'impresa comporta la formazione di contratti non contemplati dal codice dunque si comprende come si sia parlato di *contratti di impresa* come di una categoria negoziale autonoma nell'ambito del codice civile. Tutte queste considerazioni fanno sì che si possa considerare il diritto commerciale come autonomo nell'ambito del sistema giuridico privatistico.

Parte prima – L'IMPRENDITORE

Capitolo I – L'imprenditore in generale

1. Il codice civile (ART. 2082 C.C.) qualifica imprenditore *"chi esercita professionalmente un'attività economica organizzata al fine della produzione o dello scambio di beni o di servizi"*. Alla figura dell'impresa e dell'imprenditore può essere collegata la norma dell'ART. 41 COST. che sancisce la libertà di iniziativa economica e la finalizzazione di questa all'utilità sociale ma inoltre pone:

- la *libera iniziativa economica* che si compone di quattro libertà:
 - libertà di intraprendere l'attività d'impresa
 - di svolgerla senza condizionamenti
 - di cessarla senza interferenze
 - libertà di concorrenza
- l'attività economica non può svolgersi in contrasto con l'utilità sociale e in modo da recare danno alla sicurezza, libertà e dignità della persona umana: dunque sono previsti questi quali limiti alla libertà economica

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KJ Lindholm-Leary



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